120. The Impoundment Crisis of 2025

The Trump administration's Monday spending freeze is likely to provoke a crisis over the constitutionality of "impoundment"—one that the justices could well have to resolve *very* soon.

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Welcome back to “One First,” a weekly newsletter that aims to make the U.S. Supreme Court more accessible to all of us.

Although the regular weekly issue dropped earlier this morning, it seemed worth putting out an extra post tonight in light of Monday afternoon’s stunning news, first broken by Marisa Kabas, that the Trump administration is apparently freezing nearly *all* federal grants and loans, domestically and internationally—hitting the pause button on what may potentially amount to hundreds of billions of dollars of money appropriated by Congress for a dizzying array of specific, pre-ordained purposes.

The move was announced in a cryptic and thinly reasoned two-page memo that went out over the signature of Matthew J. Vaeth, the acting director of the White House Office of Management and Budget. And the consequences are potentially cataclysmic—for virtually all foreign aid (including the distribution of HIV drugs in poor countries); for medical and other scientific research in the United States; for tons of different pools of support for educational institutions; and for virtually every other entity that receives federal financial assistance. (The memo *excludes* funds paid *directly* to individuals, like Social Security or other benefits—although it offers no principled basis for the distinction.)

The freeze *purports* to be temporary—and only “to the extent permissible” by law, whatever *that* means. Thus, the Vaeth memo directs all agencies that

administer affected funds to submit detailed lists of projects suspended under the new order by February 10. Those agencies in turn must assign "responsibility and oversight" to tracking the federal spending to a senior political appointee, not a career official. But there is no guarantee that the spigot will be turned back on in two weeks; and in the interim, the withholding of so much money will almost certainly cause irreparable harm to at least some of the affected parties even *if* it's fully restored at the end of the "pause." Thus, even if this measure *is* a stopgap (and that's debatable at best), it's one that is likely to cause numerous crises all its own.

Even as the Trump administration has embarked upon a flurry of controversial initiatives over the past week, I've been reluctant to swing at every pitch. But this action belongs in a category unto itself. In essence, the Trump administration is claiming the unilateral power to at least temporarily "impound" tens of billions of dollars of appropriated funds—in direct conflict with Congress's constitutional power of the purse, and in even more flagrant violation of the Impoundment Control Act of 1974 (ICA).

When, not if, recipients of the frozen funds sue to challenge agencies' compliance with the Vaeth memo, it's a virtual certainty that the Trump administration will argue that the ICA is unconstitutional and that the President has inherent constitutional authority to impound. That argument is a loser, but it's a good bet that it's going to be up to the Supreme Court to say so—and probably a heck of a lot sooner than we might have predicted as recently as yesterday.

A Brief Overview of Impoundment

The question of whether a President can refuse to spend—to "impound"—funds Congress has appropriated for a designated purpose is one that has come up every so often in American history, albeit not on this scale. Sometimes, Congress passes statutes that give at least *some* spending discretion to the President. But absent such authorization, the prevailing

consensus has long been that Congress's power of the purse (the Spending Clause is the *very first* enumerated regulatory power that the Constitution confers upon the legislature) brings with it broad power to specify the purposes for which appropriated funds are to be spent—and that a broad presidential impoundment power would be inconsistent with that constitutional authority. If the President can accomplish Congress's intended goal by spending *less* money, that's one thing. But simply refusing to spend the appropriated funds because the President is *opposed* to why Congress appropriated the money in the first place is something else, altogether.

Even the Justice Department's Office of Legal Counsel, which tends to err on the side of the President in these kinds of separation-of-powers disputes, concluded in 1988 that the overwhelming weight of authority "is against such a broad power in the face of an express congressional directive to spend." As OLC explained,

> There is no textual source in the Constitution for any inherent authority to impound. It has been argued that the President has such authority because the specific decision whether or not to spend appropriated funds constitutes the execution of the laws, and Article II, Section 1 of the Constitution vests the "executive Power" in the President alone. The execution of any law, however, is by definition an executive function, and it seems an "anomalous proposition" that because the President is charged with the execution of the laws he may also disregard the direction of Congress and decline to execute them. Similarly, reliance upon the President's obligation to "take Care that the Laws be faithfully executed," Article II, Section 3, to give the President the authority to impound funds in order to protect the national fisc, creates the anomalous result that the President would be declining to execute the laws under the claim of faithfully executing them. Moreover, if accepted, arguments in favor of an inherent impoundment power, carried to their logical conclusion, would render congressional directions to spend merely advisory.

Thus, even *without* the Impoundment Control Act, the kind of across-the-board impoundment the OMB memo is effectuating, *even temporarily*, should pretty plainly be unconstitutional.

But the Impoundment Control Act appears to resolve the illegality of this move beyond dispute. Enacted in response to an unprecedented volume of impoundment efforts by President Nixon, the Act creates a procedural framework within which the President can *attempt* to impound certain appropriated funds. Specifically, the ICA creates a fast-track procedure for Congress to consider a President's request (a "special message") to rescind funds he identifies for reasons he specifies.

Under the statute, the President may defer spending those funds for up to 45 days *following* such a request (which, it should be noted, he *hasn't made yet*). But if Congress does not approve the President's rescission request within 45 days of receiving it, then the funds *must* be spent. What's more, the ICA specifically *exempts* certain appropriated funds from even the ICA's impoundment procedure—those that are "required" or "mandated" to be spent by the relevant statute. At least some of *those* funds are necessarily encompassed within the pools of funds frozen by the Vaeth memo.

Ironically, as the GAO has long explained, adherence *to* the ICA is thus the only legal way *for* a President to impound appropriated funds. President Trump clearly hasn't followed that procedure here (again, for much of the funds at issue, he couldn't). But that pathway hasn't stopped those who have been clamoring for President Trump to take this kind of action from arguing that the ICA is unconstitutional—by purporting to *limit* the circumstances in which the President can otherwise exercise a unilateral, constitutional impoundment power (that no one else believes exists). Again, there may be contexts in which the President *can* impound modest chunks of appropriated funds—but only because (and pursuant to how) Congress has authorized it under the ICA. And there's just no argument that that's what has happened (or that that *could* happen) here.

Impoundment and This Supreme Court

It stands to reason that, unless this directive is quickly rescinded (and perhaps not even then), there will quickly be lawsuits by those who were entitled to the frozen federal funds *challenging* agencies' compliance with the Vaeth memo on both constitutional and statutory grounds. (Even relatively narrower views of Article III standing would look favorably upon plaintiffs who had been relying upon frozen federal funds.)

Such lawsuits would almost certainly move quickly—perhaps generating some kind of injunctive relief in which lower courts order the relevant agency officials (that is, the officials responsible for disbursement of the specific funds withheld from the plaintiffs) to cease withholding appropriated funds. Those rulings, in turn, would likely provoke Trump's Justice Department into seeking emergency relief from intermediate appeals courts—and, eventually, from the Supreme Court itself.

It's too soon to say, at this juncture, exactly which case will get to the justices first. But the longer the Vaeth memo stays on the books, the more likely it is that *some* dispute arising out of it will reach the Court *very* quickly. Indeed, I wrote shortly after the election that this Supreme Court term could very well end up being dominated by emergency litigation involving Trump administration policies. I had thought, until yesterday, that the birthright citizenship executive order would get there first. But given that *that* lawless nonsense isn't supposed to go into effect until next month (and has already been blocked by a lower court in the interim), impoundment may well beat it to One First Street.

More than just getting there first, the impoundment issue also presents an even more fundamental question about the structure of our government—one that goes beyond even the enormous moral and practical implications of the birthright citizenship issue. If presidents can impound appropriated funds at any time and for any reason, then there's not much point to having a

legislature.

That's also why I'm not as skeptical of this Court being hostile to a broad claim of presidential impoundment power as I suspect many readers are—even after the broad embrace of Article II power in last summer's presidential immunity ruling. For as much as this Court has embraced the "unitary executive" theory of executive power, impoundment has *never* been a central feature of that school of thought—as reflected in, among lots of other places, the OLC opinion referenced above. It's one thing to believe that the President must have unitary control of the executive branch; it's quite another to believe that such control extends to the right to refuse to spend any and all money Congress appropriates. (One can see at least some view of the significance and breadth of Congress's appropriations power in last term's ruling in the CFPB funding case—which Justice Thomas wrote, and from which only Justices Alito and Gorsuch dissented.)

And even for judges and justices who might be somewhat more sympathetic to *nuanced* impoundment claims, the Vaeth memo … ain't it. Instead of a carefully calibrated argument against the compulsory nature of a specific appropriation, the Vaeth memo is a clumsy ("Marxist"?!?) broadsword. Perhaps it's so transparently harmful, preposterous, and unlawful that we'll see the administration walk it back in the coming days. If not, it stands to reason that the Supreme Court will have to settle the matter within the next few weeks—and that even *this* Court is likely to oblige.

Thanks for reading this special, out-of-sequence issue of "One First." If you've enjoyed it, I hope you'll consider subscribing for our regular coverage—including Monday's free issue and Thursday's bonus content for paid subscribers: