The President's Constitutional Power of Impoundment

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Since the Founding, it has been understood that Article II vests the President with authority to decline to spend the full amount of an appropriated fund. This commonsense power, known as impoundment, was exercised for most of this nation's history. In 1974, however, at the height of the Watergate scandal, Congress enacted the Impoundment Control Act, which purports to divest the President of his constitutional impoundment authority. This measure reverses an understanding of the Constitution's allocation of executive and congressional spending authority dating to the Founding. The ICA is unconstitutional.

I. The President's Article II Impoundment Authority.

A. Article II vests the power of impoundment in the President.

Article II of the "Constitution vests the entirety of the executive power in the President" of the United States.[1] "This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity."[2] "The President's duties are of 'unrivaled gravity and breadth.'"[3] The President "must 'take Care that the Laws be faithfully executed,' and he bears responsibility for the actions of the many departments and agencies within the Executive Branch."[4] The President exercises many authorities that are derived "from the Constitution itself."[5] When he exercises such powers, his authority is "conclusive and preclusive," meaning that "he may act even when the measures he takes are 'incompatible with the expressed or implied will of Congress.'"[6] "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his "conclusive and preclusive" constitutional authority."[7]

The power of impoundment is one such executive power vested in the President alone by Article II of the Constitution. As discussed below, this power stems from the President's conclusive and preclusive authorities the Court sets out in the *Trump v. United States* opinion. Through impoundment, the President can decline to spend the entire amount of an appropriation. Just as the President has discretion to not enforce every criminal law to the fullest extent,[8] the President may make judgments on the extent to which to expend appropriations. Impoundment is simply another word for the President's Article II authority to implement spending measures enacted by Congress in a responsible manner. As explained at length elsewhere,[9] this power has long been understood to inhere in the executive power vested by Article II, and therefore, it is not constitutionally proper for Congress to seek to abridge this constitutionally vested authority under the Necessary and Proper Clause. The impoundment power is committed to the President's discretion by the Constitution.

Executive Vesting Clause. The impoundment power is executive in nature and thereby vested in the President by Article II's vesting of "[t]he executive Power" in the President.[10] It allows the President to act with energy and unity in the implementation of programs enacted by Congress.[11] And it allows the President to respond to unforeseen circumstances that render the full expenditure of an appropriation inexpedient or impossible. Just like "the actual conduct of foreign negotiations," "the arrangement of the army and navy, [and] the direction of the operations of war," the "application and disbursement of the public moneys in conformity to the general appropriations of the legislature" is executive in nature and those carrying out such functions "ought to be considered as the assistants or deputies of the chief magistrate."[12]

The impoundment power is closely akin to the President's enforcement discretion, which is undisputably executive in nature.[13] Like the President's enforcement discretion, impoundment allows the President to set priorities and control the implementation of federal programs. Indeed, the impoundment power is a key tool in controlling agency resource allocation. The President is the only officer who can "command a view" of the entirety of the federal government and ensure that programs are being implemented in a reasonable, nonredundant manner that furthers the national interest.[14] Congress passes statutes episodically, and often with conflicting purposes and demands. It is left to the President and his subordinates to harmonize their execution in a coherent manner. The President is also far better equipped than Congress to manage the day-to-day expenditure of funds and can act

quickly to remedy programmatic waste. Simply put, as with the President's constitutional enforcement discretion, impoundment is the power to ensure that the constellation of congressional funding measures are implemented in a lawful and reasonable manner that ensures good governance.

Impoundment is also a longstanding aspect of the President's Article II power to manage and control the Executive Branch.[15] Impoundment allows the President to impose fiscal discipline upon executive officers as they carry out congressionally authorized programs. Indeed, there is a long history and tradition of Presidents employing impoundment to control Executive Branch expenditures and promote economy and efficiency in government.[16] Impoundment is also a key tool, like the removal power, for the President to oversee and control his subordinates.

Take Care Clause. The impoundment authority also stems from the President's duty to take care that the laws are faithfully executed.[17] It aids the President in ensuring that his subordinates faithfully execute the authorities vested by statute and by the Constitution. For instance, it allows the President to ensure that his officers and agencies prioritize enforcement actions in conformity with statutory and administrative goals. And it allows the President to ensure that his officers are faithfully implementing Administration foreign and defense policy.[18]

Beyond acting as a mechanism to control the Executive Branch, the impoundment power ensures that the President can exercise his duty to take care that conflicting laws can be reasonably implemented. Statutes often contain provisions that conflict with other provisions in previous laws and even in the very same law. For example, on the one hand the Anti-Deficiency Act prohibits the Executive Branch from expending a greater amount than has been appropriated for the year.[19] On the other hand, Congress sometimes mandates that the full sum of an appropriation be spent within a specified time period. But expending sums in such a manner creates a significant risk of spending beyond the specified appropriation and risks requiring the Executive Branch to enter into obligations beyond an appropriation—the core thing the Anti-Deficiency Act seeks to prevent. Under the Take Care Clause, it is the President's duty to exercise judgment in how to reconcile such conflicting or competing statutory commands. Spending funds to ensure that the Executive Branch complies with an appropriation law only to violate the Anti-Deficiency Act is a tension that is addressed through the President's impoundment authority. Similarly, impoundment may be necessary to ensure compliance with statutory debt limits. These are just a couple examples of the

common need for an impoundment to reconcile conflicting or competing statutory commands.

Faithful execution also requires that the President make determinations about the constitutionality of laws. The President has the power, arguably the duty, to decline to enforce a law that is unconstitutional.[20] Just as the President could decline to execute a statute that criminalized an activity when conducted by people of one race but not another, the President could decline to expend an appropriation that was unconstitutionally allocated on the basis of race.[21] The President's Take Care duty runs first to the Constitution—if an appropriation violates the Constitution, the President may impound it.

The President's duty to take care that the laws are faithfully executed also includes an obligation to seek to achieve an appropriation's ends in the most efficient and responsible manner possible. If Congress appropriates $1 billion to achieve an objective and the President can fully accomplish the objective for $750 million, the Take Care Clause does not force him to waste a $250 million of the taxpayer's money. The opposite is true—the Take Care Clause requires the President to attempt in good faith to accomplish the ends of an appropriation in the most efficient manner achievable. And faithful execution will often require the President to pause a program to evaluate whether funds are being expended in a most efficient and effective manner.[22] But the ICA, as interpreted by the Government Accountability Office, prohibits such pauses.

The Take Care Clause exists to ensure that the President requires his branch to faithfully and responsibly implement the Constitution and laws enacted thereunder. Under GAO's interpretation, the Take Care Clause would require the President to spend every dime of a $1 billion appropriation, even if he could accomplish the program for half that, or he violates his Take Care duties. But such interpretations of the Take Care Clause are not based in its ordinary meaning. As Attorney General Judson Harmon explained in 1896, just because an appropriation is worded with mandatory language does not mean that the Executive is "bound to expend the full amount if the work can be done for less."[23]

Commander in Chief Clause. The Commander in Chief Clause independently empowers the President to impound spending related to the armed forces and national security.[24] Managing defense acquisitions and force structure is a key element of the President's authority to command the

Nation's armed forces.[25] As President Truman explained, impoundment is essential to "preserving the elements of a unified strategic concept among the military services."[26] President Kennedy similarly recognized that the President's power as Commander in Chief required executive flexibility in the implementation of military funding programs.[27] This is in line with practice going back to the Founding. Since at least President Jefferson, Presidents have employed impoundment to effectuate their power as Commander in Chief.[28]

The Commander in Chief Clause empowers the President to manage the military's day-to-day operational readiness and operations. The responsibility for military readiness ultimately falls upon the President. Impoundment is a key tool to ensuring that the U.S. military expends its congressionally appropriated funds in the most efficient manner to ensure that it is always in the highest state of readiness. Especially when dealing with the defense industry, the President must be able to act from a strong bargaining position lest programmatic costs spiral, resulting in fewer funds available and impaired military readiness. If defense contractors knew that the President must spend a specified amount on a contract, they would have no incentive to bargain and no incentive to work efficiently. This exact situation has prevailed for decades, resulting in programmatic delays and a crisis in military readiness.

Impoundment is also necessary to the President's Commander in Chief authority over the military procurement process. As Justice Scalia explained, "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function [that] often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness."[29] The Commander in Chief Clause places discretion in the President to make such tradeoffs. Simply put, if Congress appropriates a million dollars to buy a tank, and the President can get the same tank produced for half the price, the President need not buy one tank for the price of two.

In practice, this has meant that if the President determines that a congressionally mandated arms configuration harms national security, he has the authority to set it aside. For example, President Truman impounded appropriated funds for 10 full Air Force groups on the basis of "the need to maintain a balance between national security and a sound economy ... and the President's authority as Commander-in-Chief."[30]

President Kennedy similarly invoked the Commander-in-Chief Clause to justify impounding $180 million of a $380 million appropriation for additional strategic bombers that Kennedy deemed unnecessary in light of developments in ICBM technology.[31] The Constitution vests the President with responsibility for our military readiness and impoundment is a key tool to execute this duty.

Foreign Affairs Power & Reception Clause. The President may also impound funds pursuant to his constitutionally based foreign affairs powers.[32] International relations are marked by ever-changing circumstances requiring flexibility, secrecy, and dispatch in pursuing the national interest.[33] Those circumstances might require impoundment. For example, the President might effectively threaten to withhold funds from international organizations as a bargaining chip to achieve foreign policy interests. Or it might be revealed that a country receiving American foreign aid sponsored an attack on a U.S.-ally, and the President would be justified in refusing to obligate previously appropriated funds to that nation. Perhaps a U.S. ally is toppled in a coup, and the President might withhold appropriated foreign aid to the new government or condition the delivery of aid on the new government's actions. The President can also impound funds appropriated if he believes disbursing those funds would threaten U.S. or allied national security or foreign policy interests. These are key tools in the promulgation and execution of foreign policy.

Such authority has a long historical pedigree going back to the first years of the Republic. The Washington Administration debated whether the U.S. should continue paying its debts to the French revolutionary government. During these debates, neither President Washington nor Secretary of State Jefferson questioned whether the President lacked the power to withhold such funds.[34] Similarly, President Truman treated a congressional directive to loan $62.5 million to Franco's Spain as merely advisory because a mandate "would be unconstitutional."[35] He eventually loaned the money in response to electoral pressure from the 1950 midterms.[36]

The Constitution directly empowers the President with the authority to make foreign policy. The financial dimension of U.S. foreign policy is of overriding importance. Threatening to impound appropriated foreign aid funds is a key tool in the President's foreign policy powers and has often been used by Presidents to cajole foreign adversaries and allies to adhere to U.S. foreign policy goals. Just as the President can move an aircraft carrier group

to attempt to achieve strategic goals, he can withhold foreign aid to achieve the same end.

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In sum, the impoundment power is a core part of the executive power vested by Article II, section 1. It also is a necessary incident to the President's Take Care duty, Commander in Chief power, and foreign affairs authority. It allows the president to respond to emergencies and ensure the faithful execution of the laws and good government. And it allows the President to ensure fact-based and reasonable policy for implementing the myriad federal programs on the books.[37]

B. Centuries of established understanding and practice support the President's impoundment authority.

Opponents of the impoundment power often insinuate that it was invented by President Richard Nixon in the late 1960s.[38] Nothing could be further from the truth. As we have explained at length elsewhere,[39] the Nation's history and traditions support the impoundment power. From at least the Jefferson Administration, Presidents have robustly employed impoundment for reasons ranging from foreign affairs,[40] Executive Branch management,[41] good governance,[42] economy and efficiency,[43] policy,[44] and much else.[45] This practice was acknowledged as executive in nature and applauded by legislators. Any attempt to question it was quickly rebutted by legislative majorities.[46] Moreover, Executive Branch agencies have long honored informal congressional requests to withhold appropriated funds for various reasons.[47]

The assertion that historical impoundments were only made when the appropriation was permissive is also factually inaccurate—Presidents have long asserted a constitutionally grounded power to impound funds for mandatorily worded appropriations.[48] And when Congress disagreed with Presidential impoundments, those disagreements were resolved not through the courts, but through "the hurly-burly, the give-and-take of the political process between the legislative and the executive."[49] Although "'[p]ast practice does not, by itself, create power,'" "a governmental practice" like impoundment that "has been open, widespread, and unchallenged since the early days of the Republic," is deeply probative of the power vested in the President by Article II.[50] The unbroken understanding and practice of impoundment up to the ICA is overwhelming evidence that this authority is vested in the President by Article II.

C. The Impoundment Control Act is Unconstitutional.

The Impoundment Control Act of 1974 unconstitutionally infringes on the President's Article II impoundment power. In its current form, the ICA requires the President to notify Congress whenever the Executive Branch withholds budget authority. The Act sets out two forms of impoundments: temporary deferral of budget authority, meaning a delay in the obligation of funds; and proposed rescission of budget authority, which would be a permanent spending reduction. The Act allows deferrals only "to provide for contingencies," "to achieve savings made possible by or through changes in requirements or greater efficiency of operations," or "as specifically provided by law."[51] When the President intends to defer, the Act requires him to submit a special message and does not allow the deferral to extend beyond the end of the fiscal year.[52] If the President wishes to rescind (permanently impound) appropriated funds, he must submit the details of the potential rescission to Congress for consideration and may then withhold the funds for 45 days of continuous congressional session.[53] These provisions have been interpreted by GAO to mean that agencies cannot even pause spending to determine the best uses of appropriated funds, even if the appropriation measure does not so restrict the Executive's traditional spending discretion. Under this interpretation, then, the ICA is a norm-breaking reversal of centuries of understanding of the appropriations power.[54]

As we explain at length elsewhere,[55] the power of appropriation has always been understood to be the power to place a ceiling on executive spending, not a floor. This was the understanding of the term at the Founding and is reflected in the text of the Appropriations Clause, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[56] Reflecting this understanding, until the ICA, appropriations were always viewed as permissive, not mandatory. As a structural matter, this understanding complemented the longstanding executive understanding that Article II authorized the President to decline to spend the full amount of appropriated funds.

Congress cannot rely on the Appropriations Clause or any amorphous "power of the purse" to infringe on the President's constitutionally vested and long recognized impoundment power. Doing so is not constitutionally proper

and cannot be reconciled with the original understanding of the Constitution and centuries of understanding, history, and tradition.

The Supreme Court has not yet had occasion to squarely confront the substantive impoundment provisions of the ICA or the impoundment authority more generally. In *Train v. City of New York*, the Court held that the Federal Water Pollution Control Act Amendments of 1972 did not leave the Administrator of the EPA with discretion to refuse to allocate funds amongst States for municipal sewer grant programs. Significantly, the question presented was narrow and the Court noted that under the statutory regime, the Administrator could sometimes "refus[e] to obligate the[] total amounts" under the statutory scheme.[57] The opinion is thus confined to the particular statutory scheme at issue and does not address the President's constitutional impoundment power. The government also declined to make constitutional arguments and confined itself to arguing that the statute granted it discretion.

In *Clinton v. City of New York*, the Court held unconstitutional the Line Item Veto Act, which gave the President the power to "cancel in whole" "provisions that have been signed into law."[58] The Court held that this provision violated the Presentment Clause because it authorized the President to "amend or repeal properly enacted statutes."[59] The Court specifically distinguished this from the President's "traditional authority to decline to spend appropriated funds" because the Line Item Veto Act granted "the President the unilateral power to change the text of duly enacted statutes."[60] Justice Scalia dissented on the ground that the Act did not grant the President power to change the text of the law, but instead reflected longstanding congressional lump-sum appropriation practices.[61]

Accordingly, *Train* and *Clinton* have no bearing on the President's constitutional impoundment authority. *Train* involved a statute that the Court read as channeling impoundment authority, not foreclosing it, and did not involve any constitutional question or holding. *Clinton* recognized the President's traditional impoundment authority and distinguished it based on the text of the legislation under review.

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The President's impoundment authority is vested by the Constitution and is not subject to Congressional abrogation. This power is backed by centuries of history and tradition and is evident from the text and structure

of the Constitution. The ICA represented a norm-breaking overreaction in the wake of Watergate, like many other unconstitutional intrusions on the Executive enacted in this period. The President would be well within his constitutional authority to resist this unconstitutional statute and reassert his Article II power of impoundment.

II. Defenders of the ICA ignore the Constitution and distort our Nation's history and traditions.

Defenders of the ICA and restrictions on the traditional executive impoundment power ignore and misrepresent history and rely on a knee-jerk congressional supremacist view of the Constitution. They also rely on slippery slope arguments about unlimited executive power of the type the Court rejected in *United States v. Trump*. And they ignore that they are really arguing for unlimited congressional power and a return to the type of parliamentary supremacy the Founders rebelled against.[62]

To the extent critics attempt to rely on the Constitution at all, they try to force Congress's authority to curtail and even prohibit the President's impoundment authority into several ill-fitting clauses.

First, some have argued that the Take Care Clause forecloses a Presidential impoundment power. For example, GAO has asserted that "[u]nder the Constitution, Congress enacts laws, and the President must take care to faithfully execute the terms of those laws, including appropriations acts."[63] But this argument merely begs the question. GAO surely cannot be arguing that the President must take care that unconstitutional laws are executed. The President's Take Care obligation runs first to the Constitution and then to constitutional laws enacted by Congress. The President has no duty to enforce laws that violate the Constitution. But it is not surprising that GAO would make this congressional supremacist argument, as GAO is a component of Congress.

One critic asserts that the historical instances of impoundment all involved permissive appropriations and thus amounted to merely a "practical gloss on the statutes in place at the time, not on the Constitution itself."[64] That is not true. Presidents long premised their impoundment on the Constitution itself rather than mere statutory construction. As Attorney General Ramsay Clark explained, "[t]he duty of the President to see that the laws are faithfully executed, under Article II, section 3 of the Constitution, does not require that funds made available must be fully expended."[65]

Moreover, Presidents have long impounded funds that were appropriated using mandatory language.[66]

GAO asserts that impounding funds is the equivalent of the line-item veto that the Court held unconstitutional in *Clinton v. City of New York*.[67] But declining to spend the full amount of an appropriated sum is not an exercise of legislative power. As discussed above, the problem with the Line Item Veto Act was that it allowed the President to strike text from a statute. Just as the President is not altering or amending the text of a statute when he declines to prosecute a violation of the Clean Water Act, he is not deleting text from a statute when he declines to spend the full amount of an appropriation.

The Take Care duty also requires the President to balance competing statutory obligations. Sometimes the faithful execution of one law will require the President to impound funds. As noted above, the Anti-Deficiency Act exemplifies how other general statutory duties can conflict with the blanket ban on impoundments in the ICA.

Charles Dawes, the first Director of the Bureau of the Budget, vigorously monitored agency spending and eliminated as much waste as possible, urging agencies to complete its work for less than the full appropriation.[68] Dawes correctly believed that the President's Take Care duties did not require agencies to unnecessarily spend every last dime in carrying out a program. As President Franklin Roosevelt explained, such a requirement "would take from the Chief Executive every incentive for good management and the practice of commonsense economy."[69]

Second, opponents of the impoundment power invoke Congress's "power of the purse," by which they appear to mean the Appropriations Clause. But the Appropriations Clause does not confer an authority to Congress to require the full expenditure of funds. Rather, the text merely prohibits the President from spending more than the funds Congress appropriated. As we explain at length elsewhere, this was a response to a very specific debate in English constitutional history surrounding whether the King could spend money absent a parliamentary appropriation.[70]

Some believe Congress holds an unenumerated "power of the purse," and that the Constitution grants Congress a plenary "power to control government funds."[71] Such a power would not fit the history of fights over the public fisc and the logic behind the Appropriations Clause. Besides, even when the Constitution vests a plenary power within one branch, that power

extends only so far as to not conflict with another branch's plenary power. Just as Congress's power to "define and punish … Offences against the Law of Nations" does not empower Congress to direct the Executive to bring or drop particular prosecutions, and Congress's power to declare war does not empower Congress to direct the President to bomb a particular city, even the most aggressive interpretation of Congress's power of the purse does not allow Congress to infringe upon the President's constitutionally vested impoundment power.

Third, GAO has pointed to the Necessary and Proper Clause to defend the ICA's constitutionality. This argument raises another question: For the exercise of which enumerated power is the ICA "necessary and proper?" Contrary to GAO's sloppy representation, the Constitution does not vest "all legislative powers in Congress."[72] Rather, it vests a very specific and limited enumerated set of legislative powers in Congress and then authorizes Congress to make laws "necessary and proper for carrying into Execution" those powers and other powers the Constitution vests in other branches.[73] GAO cannot point to any of Congress's enumerated powers that the ICA is necessary to execute. One could imagine how the Anti-Deficiency Act is necessary to enforce the Appropriations Clause's prohibition on executive overspending. But Congress has no source of enumerated power to prohibit executive underspending. And the Necessary and Proper Clause cannot serve as an independent font of authority—it must be tied to one of Congress' enumerated powers. Contrary to GAO's reliance on it, the Necessary and Proper Clause affirmatively prohibits laws like the ICA. It is not constitutionally "proper" to infringe upon another branch's constitutionally vested powers.[74] Because the ICA violates the separation of powers for the reasons extensively discussed above, it also violates the Necessary and Proper Clause.

The Rehnquist Memorandum is worth special attention because it is so often cited by opponents of any Presidential impoundment power. In 1969, then-Assistant Attorney General William Rehnquist drafted a memorandum for the Office of Legal Counsel arguing that "the President has a constitutional power to decline to spend appropriated funds ... is supported by neither reason nor precedent."[75] But this memorandum does not engage whatsoever in the robust history and tradition of executive impoundment or previous DOJ opinions[76] and is based solely in *ipse dixit* and an assumption of congressional supremacy that is on display throughout Rehnquist's jurisprudence, most famously in *Morrison v. Olson*.[77]

The Rehnquist Memorandum is also grounded in a flawed understanding of the Supreme Court's 1838 holding in *Kendall v. United States ex rel. Stokes*.[78] As we explain at length elsewhere, *Kendall* did not involve an impoundment.[79] Instead, it involved a contract claim against the Federal Government within Congress's general claims adjudicatory authority.[80] For this reason, no one at the time thought *Kendall* had anything to do with the spending power—it was a routine claims adjudication that imposed ministerial obligations on the Postmaster General to deliver sums owed on a claim already adjudicated.[81] Any doubt about the reach of *Kendall* was dispelled just two years later when the Court upheld an Executive impoundment in *Decatur v. Paulding*.[82] The Court there rejected a broad reading of *Kendall* to apply to impoundments and held that the Executive has broad, unreviewable, authority to determine how much of a fund appropriated by Congress ought to be paid out. *Decatur*, not *Kendall*, controls.

Even the Rehnquist Memorandum, however, leaves open that impoundment may be appropriate when "the President is faced with conflicting statutory demands" or if "a congressional directive to spend were to interfere with the President's authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander in Chief of the Armed Forces and his authority over foreign affairs."[83] Rehnquist also believes that there is a domestic impoundment power for the President to reconcile the vast array of annual appropriations.[84] And he also thinks there is an impoundment power for areas "confided by the Constitution to by the Constitution to [the President's] substantive direction and control."[85] Rehnquist gives the examples of his Commander in Chief and foreign affairs authorities, but the President has many core authorities beyond those two areas.[86] Thus, unlike modern opponents of the impoundment power, even one of the most maximalist defenders of congressional power did not categorically foreclose a constitutionally grounded impoundment power in the domestic and foreign affairs spheres.

III. The ICA's Enforcement Mechanism Is Unconstitutional.

The ICA relies on a constitutionally monstrous mechanism for its enforcement. It vests enforcement authority in the Comptroller General, head of the Government Accountability Office, a component of the legislative branch. This arrangement is flagrantly unconstitutional for several reasons. For one, the Comptroller is appointed for a 15-year term and is removable only by Congress. For this reason, in *Bowsher v. Synar*, the Supreme Court

held that it was unconstitutional for Congress to assign executive functions to the Comptroller.[87] Yet the ICA expressly tasks the Comptroller with the executive function of enforcing the Act's provisions by audits.[88] It also vests the Comptroller with the quintessentially executive power to sue to enforce the faithful execution of the ICA.[89] The enforcement of the law is "the very essence of executive power."[90] Therefore, because the Comptroller is a legislative officer and removable only by Congress, he cannot exercise executive power.

The Comptroller General also cannot exercise the executive functions conferred by the ICA because he is unconstitutionally appointed. The ICA provides that the Comptroller General must be selected by the President from a list of three individuals chosen by a commission composed of legislative officers.[91] But the Appointments Clause guarantees that it is the President's "sole duty to point out the man who" will occupy an office, subject to the advice and consent of the Senate and that this power entrusted to "his judgment alone."[92] Because the Constitution grants "no role whatsoever … either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment," the Comptroller General's appointment mechanism is clearly unconstitutional.[93]

The ICA's enforcement mechanism is also unconstitutional because it purports to vest a legislative official with standing to sue the President. In 1987, President Reagan explained in a signing statement to an earlier ICA amendment that the conferral of standing on a legislative official, "the Comptroller General[,] to sue the Executive branch … is unconstitutional."[94] The Supreme Court affirmed such reasoning in *Raines v. Byrd*, where it rebuffed such attempts to confer standing on individual legislatures to sue on the basis of injury to official legislative powers, explaining that such lawsuits are antithetical to the American system of separated powers.[95]

The ICA's enforcement mechanism also raises serious questions under the Nondelegation Doctrine. It vests the unaccountable Comptroller with standardless discretion to determine what is and is not an impoundment and, based on this determination, authorizes this presidential appointee to sue the President. The lack of an intelligible principle for determining what constitutes an impoundment has been amply demonstrated by GAO's application of brazenly different standards to different presidents.[96]

Finally, GAO's approach to the ICA raises serious separation of powers issues. GAO has taken the position that the President's motive for a deferral

is probative, often dispositive, of the President's compliance with the ICA.[97] Such examinations into the President's intent for carrying out an official act is forbidden by the constitutional separation of powers and would require serious intrusions on executive privilege.[98]

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The Impoundment Control Act is an unconstitutional usurpation of the President's longstanding executive impoundment power. This power is grounded in the text and structure of the Constitution and supported by centuries of history and practice. Opponents of the impoundment power have no answer to the numerous instances of Executive impoundments throughout our history, including of funds appropriated using mandatory language. They also have no answer for the constitutional basis of presidential impoundments throughout history. Presidents cited not just statutory flexibility, but the Constitution itself as the source of the impoundment power. Reflecting a disregard for the separation of powers, Congress enacted a flagrantly unconstitutional mechanism to enforce the ICA—creating an Independent Counsel-like amalgam of constitutional violations in the person of the Comptroller General, a legislative official tasked with exercising executive power. The ICA was an unenforceable, unconstitutional nullity the day it was enacted.

Endnotes

1. *Trump v. United States*, 144 S. Ct. 2312, 2335 (2024) (citing U.S. Const. art. II, § 2).
2. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).
3. *Trump*, 144 S. Ct. at 2327.
4. *Id.* (citation omitted).
5. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).
6. *Id.* (quoting *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring)).
7. *Id.* at 2329.
8. *United States v. Texas*, 599 U.S. 670, 678-79 (2023); *see also CREW v. FEC*, 993 F.3d 880, 888 (D.C. Cir. 2021) (citing *inter alia Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *In re Aiken County*, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013) (Kavanaugh, J.)).
9. M. Paoletta & D. Shapiro, *The History of Impoundments Before the Impoundment Control Act of 1974*, Ctr. for Renewing Am. (June 24, 2024), https://americarenewing.com/wp-content/uploads/2024/06/The-History-of-Impoundments-Before-the-ICA.pdf.
10. U.S. Const. art. II, § 1.
11. The Federalist No. 72, at 435-36 (A. Hamilton) (Clinton Rossiter ed. 1961); *see also, e.g.*, D. Ginsburg & S. Menashi, *Nondelegation and the Unitary Executive*, 12 U. Pa. J. Const. L. 251 (2010).
12. The Federalist No. 72, at 435-36 (A. Hamilton) (Clinton Rossiter ed. 1961).
13. *Cf. TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021) ("[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch."); *CREW*, 993 F.3d at 887-88 (citation omitted) ("The vesting of all executive power in the President as well as his constitutional obligation to 'take Care that the Laws be faithfully executed,' has been understood to leave enforcement and nonenforcement decisions exclusively with the Executive Branch.").
14. Jefferson's First Inaugural Address, 33 Papers of Thomas Jefferson 148-52 (Barbara B. Oberg, ed. 2007) (Mar. 4, 1801).
15. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789) ("As Madison stated on the floor of the First Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'").
16. *See, e.g.*, Paoletta & Shapiro, supra note 9, at 13.

17. *See Free Enter. Fund*, 561 U.S. at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."); *cf. Trump*, 144 S. Ct. at 2335 (noting that take care authority is one of the President's exclusive powers).
18. *See generally* C. Bale, *Checking the Purse: The President's Limited Impoundment Power*, 70 Duke L.J. 607 (2020) (collecting examples).
19. 31 U.S.C. § 1341. OMB must also apportion an appropriation so that it does not run out. 31 U.S.C. §§ 1512, 1513.
20. *See generally* S. Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 Va. L. Rev. 1613 (2008).
21. For example, President Grant impounded based on constitutional concerns. Paoletta & Shapiro, supra note 9, at 11.
22. *See, e.g.*, *id.* at 9 (describing President Madison's cost-saving impoundment); *id.* at 13 (describing efficiency-forcing impoundments of Charles Dawes).
23. *Appropriation—Contracts*, 21 Ops. Att'y Gen. 414, 414, 415 (1896); *see also* R. Clark, *Federal-Aid Highway Act of 1956—Power of the President to Impound Funds*, 42 U.S. Op. Atty. Gen. 347, 351 (1967).
24. U.S. Const. art. II, § 2, cl. 1.
25. *See* Federalist No. 72, at 436 (A. Hamilton) (Clinton Rossiter ed. 1961) ("the arrangement of the army and navy" is an executive power).
26. Paoletta & Shapiro, supra note 9, at 16 (quoting L. Fisher, Presidential Spending Power 163 (1975)).
27. *Id.* at 17-18.
28. *See generally id.*; Bale, supra note 18.
29. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511 (1988).
30. Paoletta & Shapiro, supra note 9, at 15-16 (quoting Fisher, supra note 26, at 163).
31. Paoletta & Shapiro, supra note 9, at 17.
32. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 14-15 (2015) (detailing those powers); *see also id.* at 33-41 (Thomas, J., concurring in part & dissenting in part) (same).
33. *See generally* A. Hamilton, Pacificus No. 1, *in* The Letters of Pacificus and Helvidius (1845); S. Prakash & M. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231 (2001).
34. The Complete Anas of Thomas Jefferson 101-02 (F. Sawvel, ed. 1900).
35. Paoletta & Shapiro, supra note 9, at 15 (quoting Fisher, supra note 25, at 305 n.34).
36. Fisher, supra note 26, at 305 n.34.
37. Significantly, the President's motive for a particular impoundment is completely irrelevant. In the exercise of the President's core Article II powers,

it is not for courts or Congress to peer behind the President's motive for the exercise of such a power. Executive Branch decisions "are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others)." *Dep't of Com. v. New York*, 588 U.S. 752, 781 (2019). "[I]t would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government" if "[i]n exercising the functions of his office," the President was "under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry." *Trump*, 144 S. Ct. at 2334-35 (quoting *Fitzgerald*, 457 U.S. at 745).

38. *See, e.g.*, W. Ford & W. Hoagland, *Trump and His Allies Are Completely Wrong About Impoundments*, The Hill (July 13, 2024), https://thehill.com/opinion/white-house/4768497-trump-and-his-allies-are-completely-wrong-about-impoundments/.

39. *See generally* Paoletta & Shapiro, supra note 9.

40. *Id.* at 8-9, 13.

41. *Id.* at 13.

42. *Id.* at 15-16.

43. *Id.* at 13-18.

44. *Id.* at 11-12, 13-18.

45. *See generally* Paoletta & Shapiro, supra note 9.

46. *Id.* at 12, 15-16, 18.

47. *See generally* Letter from M. Paoletta, OMB General Counsel, to T. Armstrong, GAO General Counsel, re: B-331564, Withholding of Ukraine Security Assistance 8-9 (Dec. 11, 2019), *available at* https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/01/response_to_gao_re_b-331564.pdf.

48. *See, e.g.*, Paoletta & Shapiro, supra note 9, at 12.

49. Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess. 87 (1975) (statement of A. Scalia, Assistant Attorney General, Office of Legal Counsel) [hereinafter Executive Privilege Hearing]; *accord* Paoletta & Shapiro, supra note 9, at 12, 15-16, 18.

50. *See NLRB v. Noel Canning*, 573 U.S. 513, 573, 572 (2014) (Scalia, J., concurring in the judgment); *accord Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *Youngstown*, 343 U.S. at 610-11 (Jackson, J., concurring)) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned ... may be treated as a gloss on 'Executive Power' vested in the President."); *see also Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 442 (2024)

("'Long settled and established practice' may have 'great weight' in interpreting constitutional provisions about the operation of government." (quoting *Chiafalo v. Washington*, 591 U.S. 578, 592-93 (2020))).
51. 2 U.S.C. § 684(b).
52. *Id.* § 684(a).
53. *Id.* § 683(b).
54. R. Vought & M. Paoletta, *Letter to J. Yarmuth* (Jan. 19, 2021), https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/Response-to-House-Budget-Committee-Investigation.pdf.
55. Paoletta & Shapiro, supra note 9, at 1-8.
56. U.S. Const. art. I, § 9, cl. 7.
57. *Train v. City of New York*, 420 U.S. 35, 43 (1975).
58. *Clinton v. City of New York*, 524 U.S. 417, 436 (1998).
59. *Id.* at 442.
60. *Id.* at 446.
61. *Id.* at 467 (Scalia, J., concurring and dissenting in part).
62. *Cf. Zivotofsky*, 576 U.S. at 55 (Thomas, J., concurring in part and dissenting in part) (arguing against "creating a supreme legislative body more reminiscent of the Parliament in England than the Congress in America").
63. Letter from T. Armstrong, GAO General Counsel, to Comms. on Appropriations, re: B330330.1, Impoundment Control Act—Withholding of Funds through Their Date of Expiration at 9 (Dec. 10, 2018), *available at* https://www.gao.gov/assets/b-330330.1.pdf [hereinafter GAO Letter].
64. Z. Price, *The President Has No Constitutional Power of Impoundment*, Yale J. Reg. Notice & Comment (July 18, 2024), https://www.yalejreg.com/nc/the-president-has-no-constitutional-power-of-impoundment-by-zachary-s-price/.
65. 42 U.S. Op. Atty. Gen. at 351.
66. *See, e.g.*, Paoletta & Shapiro, supra note 9, at 12.
67. GAO Letter 2, 11.
68. Paoletta & Shapiro, supra note 9, at 13.
69. *Id.* at 15 (quoting Fisher, supra note 26, at 149).
70. Paoletta & Shapiro, supra note 9, at 2-4.
71. *See* Price, *supra* note 64.
72. GAO Letter 2.
73. U.S. Const. art. I, § 8, cl. 18.
74. *See* G. Lawson & P. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 333-34 (1993).

75. *Presidential Auth. to Impound Funds Appropriated for Assistance to Federally Impacted Schs.*, 1 Op. O.L.C. 303 (1969).
76. *See, e.g.*, 42 U.S. Op. Atty. Gen. at 351. In 1937, Attorney General Homer Cummings opined that the President may not have sweeping constitutional impoundment authority. *Presidential Authority to Direct Departments and Agencies to Withhold Expenditures from Appropriations Made*, 1 Op. O.L.C. Supp. 12, 16 (1937). However, like the Rehnquist Memorandum, the Cummings Memorandum did not engage with the robust history of impoundment, was grounded in a flawed and discredited understanding of the President's control of Executive officers, misreads previous Attorney General opinions on the separate issue of transfers, and misinterprets the Supreme Court's holding in *Kendall*. And even Cummings left open that "Even in the absence of legislative authority, it is, of course, entirely legal for you in an endeavor to accomplish the desired ends to request or direct the heads of the departments and agencies to attempt to effect such savings as may be possible without violation of or interference with the proper performance of any duty prescribed by law." *Id.* Regardless, the Cummings Memorandum appears to have been ignored by President Franklin Roosevelt. *See* Paoletta & Shapiro, supra note 9, at 14-15.

In 1988, the Office of Legal Counsel issued a memo questioning whether there is an inherent impoundment power. *The President's Veto Power*, 12 Op. O.L.C. 128. However, this Memorandum follows the Rehnquist Memorandum in its mistaken reading of *Kendall*, admits that it had "not independently reviewed the circumstances surrounding each" historical impoundment, and recognized that "there may be instances in which [the President] may impound even in the face of a congressional mandate to spend" such as when Congress attempts to compel expenditure "for an unconstitutional purpose or in violation of specific provisions of the Constitution" or "infringe[s] upon his constitutional responsibilities as Commander-in-Chief or his duties in the area of foreign affairs." *Id.* at 168 & n.56. The Memorandum also noted that "when a congressional directive to spend conflicts with another congressional directive not to spend—as, for example, where Congress has established a debt ceiling that would be violated if the expenditure were made—the President must determine which statute controls in accordance with ordinary principles of statutory construction and, accordingly, in making that determination may conclude that appropriated funds not be spent." *Id.*

77. *See* 487 U.S. 654 (1988); *see also* J. Bybee & T. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 Stan. L. Rev. 1735 (2006). It is well-recognized in the legal community and in the

modern Supreme Court that Justice Scalia's dissent is correct. *Cf. Trump*, 144 S. Ct. at 2334 (citing Justice Scalia's dissent).

78. 37 U.S. (12 Pet.) 524 (1838).

79. Paoletta & Shapiro, supra note 9, at 10-11.

80. *Kendall*, 37 U.S. at 618; see also M. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 Tulane L. Rev. 265, 327 & n.211 (2001) (citing Land Tax Act, 12 Geo. 3, c. 70, § 19 (1772)) (noting that instances of mandatory spending in Great Britain "generally involved funds to be provided to various types of creditors").

81. Bale, supra note 18, at 619 n.73 ("Scholars, however, read this decision narrowly as only applying to the payment of claims for services pursuant to a ministerial duty."); *see also* 22 Op. Att'y Gen. 295 (1900) (noting ministerial nature of paying previously adjudicated claims).

82. 39 U.S. (14 Pet.) 497 (1840).

83. 1 Op. O.L.C. at 310-11.

84. *Id.* at 311.

85. *Id.* at 310-11.

86. *E.g.*, *Trump*, 144 S. Ct. at 2312.

87. 478 U.S. 714 (1986).

88. 31 U.S.C. § 712.

89. 2 U.S.C. § 687. It is also doubtful that Congress itself would have standing to sue, *cf. Mahoney v. Carnahan*, 45 F.4th 215 (D.C. Cir. 2022) (Rao, J., dissenting), and whether Congress can confer jurisdiction on Article III courts over this quintessentially political question resolved throughout history in "the hurly-burly, the give-and-take of the political process between the legislative and the executive." Executive Privilege Hearing 87.

90. *Trump*, 144 S. Ct. at 2340.

91. 31 U.S.C. § 703.

92. The Federalist No. 76, at 456-57 (A. Hamilton) (Clinton Rossiter ed. 1961); *see also* J. McGinnis, *The Appointments Clause*, Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/2/essays/91/appointments-clause (noting that Chief Justice Marshall, Justice Story, President Monroe, President Jackson, and Chief Justice Taft shared Hamilton's view that Congress cannot place qualifications on the President's appointing power).

93. *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 483 (1989).

94. Statement on Signing H.R.J. Res. 324 into Law, 23 Weekly Comp. Press Doc. 1091 (Oct. 5, 1987).

95. 521 U.S. 811 (1997).

96. *Compare* GAO, B-331564 (Jan. 16, 2020) (finding President Trump violated ICA by withholding funds to Ukraine), *with* GAO, B-335747 (Apr. 22, 2024) (finding President Biden did not violate the ICA by withholding funds for border wall).

97. *See* Letter from R. Vought, OMB Director, & M. Paoletta, OMB General Counsel, to Thomas Armstrong, GAO General Counsel, & H. Budget Comm. Regarding Impoundment (Jan. 19, 2021) (noting GAO's searching review into Executive Branch intent and flagging that the ICA "invites impermissible third-party scrutiny into executive branch decision-making") (cleaned up), *available at* https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/Response-to-House-Budget-Committee-Investigation.pdf.

98. *See Trump*, 144 S. Ct. at 2333-34.