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Policy Impoundments: Budgetary Execution and National Security Strategy

The impoundment of appropriated funds has a storied and contentious history, and since the congressional battles of the 1970s has mostly been a dormant power. Nonetheless, it has long precedent in the presidential execution of foreign policy, with a newly acquired relevance owing to the institutional globalization of regulatory laws and international trade.

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1. Impoundments in general

Impoundment refers to the presidential practice of refusing to spend (declining to obligate) congressionally appropriated funds, typically over constitutional concerns, perceptions of congressional overreach in the executive's handling of foreign affairs, or even domestic policy considerations. The latter is sometimes justified on procedural grounds of economy and efficient spending, itself a statutory obligation under the Antideficiency Act – the main authority for the OMB's apportionment process. For most of American history, impoundment was an informally tolerated executive prerogative that was exercised on an infrequent basis. This changed in the 1970s amidst the intense showdowns between Nixon and Congress, which led to the passage of the Impoundment Control Act of 1974 (ICA). The act's legacy is itself disputed, since some commentators claim it definitively curtailed impoundment as a presidential power, while others interpret it as merely circumscribing said power within statutory guidelines. Whenever modern resources such as the GAO Red Book of federal appropriations law refer to impoundment, it is always in reference to the *statutory* impoundment procedures regulated by the ICA. The question of an *executive* impoundment power existing on a constitutional and extra-statutory basis, as occasionally asserted before the ICA, has largely remained dormant since 1974 with the issue seldom discussed. Thus, the Red Book defines impoundment as follows:

> While an agency's basic mission is to carry out its programs with the funds Congress has appropriated, there is also the possibility that, for a variety of reasons, the full amount appropriated by Congress will not be expended or obligated by the administration. Under the Impoundment Control Act of 1974, an impoundment is an action or inaction by an officer or employee of the United States that delays or precludes the obligation or expenditure of budget authority provided by Congress. 2 U.S.C. §§ 682(1), 683.

The ICA defines two procedures: *deferrals* and *rescissions,* both of which involve the transmission of special messages to Congress:

There are two types of impoundment actions: deferrals and rescission proposals. **In a deferral, an agency temporarily withholds or delays funds from obligation or expenditure.** The President is required to submit a special message to Congress reporting any deferral of budget authority. Deferrals are authorized only to provide for contingencies, to achieve savings made possible by changes in requirements or greater efficiency of operations, or as otherwise specifically provided by law. A deferral may not be proposed for a period beyond the end of the fiscal year in which the special message reporting it is transmitted, although, for multiple year funds, nothing prevents a new deferral message covering the same funds in the following fiscal year. 2 U.S.C. §§ 682(1), 684.57 **A rescission involves the cancellation of budget authority previously provided by Congress (before that authority would otherwise expire), and can be accomplished only through legislation.** See, e.g., B-322906, July 19, 2012 (update of statistical data concerning rescissions proposed and enacted since the passage of the Impoundment Control Act of 1974 through fiscal year 2011); GAO, Impoundment Control Act: Use and Impact of Rescission Procedures, GAO-10-320T (Washington, D.C.: Dec. 16, 2009) (testimony containing useful charts and reflections on the use of rescissions as a budget tool). The President must advise Congress of any proposed rescissions, again in a special message. The President is authorized to withhold budget authority that is the subject of a rescission proposal for a period of 45 days of continuous session following receipt of the proposal. Unless Congress acts to approve the proposed rescission within that time, the budget authority must be made available for obligation. 2 U.S.C. §§ 682(3), 683, 688.

"Impoundment" therefore does not denote any specific procedural measure, but is a historical umbrella term for a variety of presidential assertions of power in withholding budgetary execution authority. Prior to the ICA, the following were occasionally cited as sources of authority: section 1512(c) of the Antideficiency Act permitting the establishment of reserve funds, the need to maintain the debt ceiling, and particularly during the 1970s stagflation crisis the stabilization and control of price inflation. These sources are now of historical interest only, and statutory impoundment today is equivalent to ICA deferrals and rescissions. On a technical level, they are generally implemented via apportionment footnotes by the OMB.

What follows is a list of historical cases of impoundment actions.[1]

1 Taken from the appendix of: Christian I. Bale, *Checking the Purse: The President's Limited Impoundment Power*, 70 Duke L.J. 607-658 (2020) Available at: https://scholarship.law.duke.edu/dlj/vol70/iss3/3

List of historical impoundments

Year	President	Impoundment
1801	Thomas Jefferson	*Several navy yards
1802	Thomas Jefferson	*Gunboats
1809	James Madison	*Reduction of gunboat crews
1838	Andrew Jackson	Contract claim for mail delivery services
1840	Martin Van Buren	Refusal to pay widow's claim under Navy pension fund
1860	James Buchanan	Post offices and other public buildings
1876	Ulysses S. Grant	River and harbor improvements
1916	Woodrow Wilson	Mediation and arbitration to end World War I
1921	Warren G. Harding	Issued a Bureau of the Budget circular treating all appropriations as ceilings and requiring each executive deparment to determine the portion of its appropriation deemed essential for carrying out its mission
1931	Herbert Hoover	Achieved a ten percent cut in government expenditures during the Great Depression by ordering administrators to create a budget reserve
1938	Franklin Roosevelt	*Reserve Officers' Training Corps units
1940–1943	Franklin Roosevelt	Various public works projects
1946	Harry Truman	The Kings River Project in California's Central Valley Basin
1946–1947	Harry Truman	*Half of the National Guard's appropriation
1949	Harry Truman	*Air Force-related spending
1949	Harry Truman	*Ten Air Force groups above the president's request
1949	Harry Truman	*Aircraft carrier USS United States

1949 Harry Truman *Aircraft carrier USS Forrestal

1950 Harry Truman Deferring civil programs that did not contribute to the Korean War effort

1956 Dwight Eisenhower *Marine Corps personnel

1956 Dwight Eisenhower *20 superfort bombers

1958 Dwight Eisenhower *Army Nike-Zeus antimissile system

1959 Dwight Eisenhower *Army modernization

1959 Dwight Eisenhower *Regulus submarines

1959 Dwight Eisenhower *Hound Dog missile program

1959 Dwight Eisenhower *Minuteman program

1959 Dwight Eisenhower *KC-135 tankers

1959 Dwight Eisenhower *Strategic airlift aircraft

1960 Dwight Eisenhower *Marine Corps personnel strength

1960 Dwight Eisenhower *Advance procurement for nuclear-powered carrier

1960 Dwight Eisenhower *National Guard construction

1960 Dwight Eisenhower *Aircraft for air defense

1961 Dwight Eisenhower *Army reserve construction

1961 John F. Kennedy *B-70 Strategic Bomber

1965 Lyndon Johnson Small watershed projects

1965–1966 Lyndon Johnson *DLGN-36 (nuclear-powered guided missile ship)304

1966 Lyndon Johnson Agriculture appropriation

1966 Lyndon Johnson Highway trust fund appropriation

1966 Lyndon Johnson Low-cost housing funding

1966 Lyndon Johnson Appropriation for the Department of Health, Education, and Welfare

1966 Lyndon Johnson Education funds for the Elementary and Secondary Education Act

1966 Lyndon Johnson Construction of a national aquarium

1967 Lyndon Johnson Federal aid to highway construction projects

1968 Richard Nixon Contract authority issued to the Federal-aid Highway Program

1969 Richard Nixon Directed all departments and agencies to reduce spending by $3.5 billion to stay within his budget target

1971 Richard Nixon Highway funding

1971 Richard Nixon Urban community development programs

1971 Richard Nixon Funds for a federal drug rehabilitation program

1971 Richard Nixon Funds to complete the Cross-Florida Barge Canal

1972 Richard Nixon Grants for water treatment systems

1972 Richard Nixon Water Bank Program

1972 Richard Nixon Farmers Home Administration Emergency Disaster Loan Program

1972 Richard Nixon Funds to help states control water pollution

1973 Richard Nixon Rural Environmental Assistance Program

1973 Richard Nixon Low-rent public housing construction subsidies

1973 Richard Nixon Model cities and urban renewal programs

1973 Richard Nixon Funds to support the Indian Education Act

1977 Jimmy Carter *B-1 Bomber

1978 Jimmy Carter *Minuteman III missile program

1989 George H.W. Bush *Navy V-22 Osprey helicopter

1991 George H.W. Bush *Navy A-12 Stealth aircraft

2005 George W. Bush Cancellation of budget authority for twelve domestic programs

2019 Donald Trump Military assistance to Ukraine

2019 Donald Trump Funding from various defense appropriation accounts transferred for border wall construction

As can be seen from the list above, impoundment has a solid precedent in the vetoing of appropriations for weapons systems. Additionally, the passage of the ICA did curb the rate of statutory impoundments: they were virtually never used during the Bush II and Obama administrations.

One must also distinguish impoundment actions from *transfers* and *reprogramming* of funds. Transfer is the shifting of funds between appropriations. Reprogramming "is the application of appropriations within a particular account to purposes, or in amounts, other than those justified in the budget submissions or otherwise considered or indicated by congressional committees in connection with the enactment of appropriation legislation." A transfer shifts budget authority from one appropriation to another. In contrast, a reprogramming shifts funds within a single appropriation. While transfers generally require statutory authorization, reprogramming authority is implicit in every lump-sum appropriation. The Trump administration notably used both in order to carry out immigration enforcement priorities.[2]

2. Internationalization of agency action/globalization of administrative law

Due to the proliferation of international tribunals and soft law agreements, the boundary between domestic and foreign affairs has become increasingly porous. Modern states are ensnared in a web of "global administrative law." The United States is a voluntary member of, among others, the UN Security Council, the World Trade Organization, the International Court of Justice, and *de facto* delegates both Article I legislative powers and Article II treaty powers to international bodies. Such

2 "The Trump administration used transfers and reprogramming to support its policy goals well before its large-scale reliance on that strategy to begin construction on a border wall in 2019. For example, in the summer of 2018, the Trump administration used these tools to support its immigration policies, shifting hundreds of millions of dollars from other Homeland Security programs to Immigrations and Customs Enforcement (ICE), and from other HHS programs to its Unaccompanied Alien Children program. The administration also used these tools that summer to accomplish foreign aid priorities, moving hundreds of millions of dollars away from the West Bank and Gaza and away from civilian support in Syria. Although Democrats in Congress decried these actions, Congress did not take action to stop them."

(Pasachoff, Eloise, *The President's Budget Powers in the Trump Era* (June 3, 2020). Executive Policymaking: The Role of OMB in the Presidency (eds. Bose & Rudalevige), Forthcoming, Available at SSRN: https://ssrn.com/abstract=3664707 or http://dx.doi.org/10.2139/ssrn.3664707)

delegations historically have greater toleration in case law than their domestic counterparts. This is not to say that the international order has become any less state-centric. States remain the ultimate arbiters, executors and actors in world politics. What *has* changed is that states increasingly avail themselves of international agreements and appeal to international norms in order to contest power on a much wider basis than traditional bilateralism. This provides numerous advantages – witness the increasing subordination of world trade to national security objectives, in the form of financial sanctions and vetoes over mergers and acquisitions (CFIUS). Violations of international rules and norms become potent justifications for geostrategic competition and expansion, and states can take the moral high ground in presenting themselves as upholders of these norms.

Even in simple cases, domestic legislation by state governments can have incidental effects on foreign affairs. One example comes from the Supreme Court case in *Clark v. Allen, 331 U.S. 503 (1947)* concerning a California statute dealing with the rights of nonresident aliens to inherit bequests of property from the will of a California resident. The statute imposed a reciprocity requirement: such inheritances would only be permitted if the foreign government likewise permitted the same. The plaintiffs argued that this was an encroachment on federal power to regulate foreign affairs. But the Court rejected such an argument as overinterpreting. In a sense, any piece of legislation that affects aliens can be said to have "treaty-like" qualities, but that is only an incidental aspect of it affecting aliens.

Things are further complicated by the United States' membership in various intergovernmental organizations such as the UN Security Council, the International Court of Justice, World Trade Organization, International Criminal Court, etc. Numerous OLC memos have continually defended the executive's ability to enforce a UN security resolution without congressional authorization, in order to fulfill international treaty obligations. Some scholars thus speak of a "structural delegation" of congressional war powers, analogous to domestic delegations to administrative agencies.[3] For instance,

3 Bradley, Curtis. (2003). International Delegations, the Structural Constitution, and Non-Self-Execution. Faculty Scholarship. 55. 10.2139/ssrn.369020.

The U.N. Participation Act states that the President shall appoint an ambassador to the United Nations and that this ambassador "shall represent the United States in the Security Council of the United Nations … and shall perform such other functions in connection with the participation of the United States in the United Nations as the President may, from time to time, direct." It also provides that U.S. representatives in the United Nations "shall, at all times, act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President." The President's constitutional power to appoint aides and envoys thus gives him substantial control over the content of customary international law through participation in multilateral treaties and organizations. This has special significance given that the law of nations is constitutionally incorporated into the law of the land.

Nearly all international agreements today take the form of executive agreements as opposed to treaties with senatorial advice and consent, the latter comprising only about 6% of all international agreements entered into by the United States from 1990 to 2012. As a result, "close to 94% of binding international agreements made by the United States are made without meaningful interbranch deliberation and are thus vehicles for unilateral presidential lawmaking."[4]

Agencies increasingly use sanctions, penalties, investigations and other adversarial measures against foreign states or persons so as to uphold international human and labor rights. These measures have been dubbed *rights-based sanctions.*[5] They are unique insofar as they combine domestic trade, national security and international objectives into a single unit, vividly illustrating the permeable boundaries between domestic and foreign policy. Treasury's Office of Foreign Assets Control (OFAC) and the Office of the United States Trade Representative (USTR) are the two main agencies carrying out this framework. The "worker-centric" trade policy of the Biden administration features the USTR freezing assets of companies for violating International Labor Organization (ILO) standards. The International

4 Curtis A. Bradley & Jack L. Goldsmith, Presidential Control Over International Law, 131 Harvard Law Review 1201-1297 (2018)

5 LeClercq, Desiree, Rights-Based Sanctions Procedures (February 1, 2023). 75 Administrative Law Review Vol. 1, Available at SSRN: https://ssrn.com/abstract=4441008

Emergency Economic Powers Act (IEEPA) from which OFAC's sanctioning authority is derived, is now routinely invoked to declare national emergencies and address "human and civil rights abuses, slavery, denial of religious freedom, political repression, public corruption, and the undermining of democratic processes." The Magnitsky Act is a famous example.

The text of the United States-Mexico-Canada Agreement explicitly binds the parties to ILO labor conventions: "The Parties affirm their obligations as members of the ILO, including those stated in the ILO Declaration on Rights at Work and the ILO Declaration on Social Justice for a Fair Globalization (2008)." As described by LeClercq[6]:

> If USTR decides it has a "good faith basis" to believe that a facility infringes on workers' associational and bargaining rights, it may request the government of the allegedly malfeasant facility to review the working conditions. Concurrently, and without a hearing or finding, the United States may "delay final settlement of customs accounts related to entries of goods from the" suspected factory. Effectively, this provision allows USTR to impose immediate financial costs on facilities in Mexico while allegations remain outstanding.
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> Given that this mechanism exists only between the United States and Mexico, perpetrators will almost necessarily consist of facilities in Mexico. If Mexico declines to conduct the review, USTR may request the formation of a "Rapid Response Labor Panel." Otherwise, Mexico must signal its willingness to investigate within forty-five days.
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> On the heels of the Administration's announcement of its new worker-centered trade policy, USTR quickly initiated several enforcement

6 Ibid.

> actions against auto factories in Mexico. Those enforcement activities starkly contrast with USTR's historical refusal to invoke state-to-state dispute settlement for labor rights. While USTR's enforcement actions arguably demonstrate the agency's newfound commitment to deter exploitative labor conditions, they also suggest that fair and transparent procedures are critical to perceptions of legitimacy and predictability.

Domestic regulations themselves increasingly incorporate or justify their own execution with reference to international conventions and standards.[7] This has become something of an officially recommended policy since the passage of "Executive Order 13609—Promoting International Regulatory Cooperation" in 2012. Some of these are de facto industry standards, and do not pose significant legal conundrums. Often they are accepted so as to signal a credible commitment to "playing by the rules." Others have more serious constitutional implications. In general, administrative agencies have wide latitude to include international factors into their rulemaking, due to the deferentialism of many administrative law doctrines, especially as it regards to foreign affairs. As a rough calculation: between 1939 and 2012, the United States entered more than 1000 treaties, 17,000 congressional-executive agreements, and approximately 1000 or so sole executive agreements. Hence there are many sources to choose from, and many binding obligations that can provide reasons to enact or revise agency rules. As an example, Biden's 2021 Executive Order 13,990 on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" requires that the cost-benefit analyses of greenhouse gas emissions take into account *global* damages.

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7 Jason Marisam cites some examples from the Obama administration alone: "The Environmental Protection Agency (EPA) recently proposed strict limits on greenhouse gas emissions from new coal plants in part because doing so would "demonstrate global leadership" on climate change and signal to China a U.S. commitment to the collaborative development of carbon capture technology. The Department of the Treasury and the Federal Reserve Board established capital ratio standards for banks that were "measured in a manner consistent with the international leverage ratio" set by a group of international regulators known as the Basel Committee. The Food and Drug Administration (FDA) has proposed "requiring that dates on medical device labels conform to a standard format consistent with international standards and international practice" in order to streamline U.S. and international medical device labels. The Department of Labor has proposed that the labeling of hazardous chemicals in workplaces must "conform with" a recommended classification system set by the United Nations."
(Jason Marisam, The Internationalization of Agency Actions, 83 Fordham L. Rev. 1909 (2015). Available at: https://ir.lawnet.fordham.edu/flr/vol83/iss4/10)

There are several mutually reinforcing factors that encourage agencies to regulate based on international concerns[8]:

- The *State Farm* and *Chevron* deference doctrines generally permit agencies to include any "policy-relevant factor" even when the statute is silent or vague, provided there is no unambiguous prohibition;
- The *Charming Betsy* canon of interpretation, which states that "where fairly possible, a United States Statute is to be construed so as not to conflict with international law or with an international agreement of the United States." This intersects with the doctrine of the executive as "sole organ" in international affairs. Taken together this means that agency rules are deferred to as legitimate attempts to harmonize domestic and foreign law, wherever this is invoked;
- Section 553(a)(1) of the Administrative Procedure Act (APA) carves out an exception from the APA's rulemaking requirements "to the extent that there is involved . . . a military or foreign affairs function of the United States." A similar exception exists for the APA's adjudication requirements. This is the famous "APA foreign affairs exemption," which permits exemption from notice-and-comment rulemaking procedures in these areas;
- Agency action requiring the President's ultimate approval is not reviewable under the APA, since the President is not an agency.

These doctrines stand in contrast to traditional case law about treaties, the incorporation of which into domestic law requires congressional authorization through an enabling statute that implements causes of action (unless there is clear textual evidence that the treaties are self-executing). But since the vast majority of international agreements are not treaties, and since from an administrative law perspective various international obligations are simply policy-relevant factors like all others, agencies have great leeway to "internationalize" their regulatory rulemaking.

8 See also: Chachko, Elena, Toward Regulatory Isolationism? The International Elements of Agency Power (May 10, 2023). Harvard Public Law Working Paper Forthcoming, UC Davis Law Review, Vol. 57, No. 1, 2023, Available at SSRN: https://ssrn.com/abstract=4443801

Finally, the boundary-crossing between domestic and foreign law exists not only within the executive branch of the federal government, but across other branches and even state governments. Congressional delegations (CODELs) engage in their own legislative diplomacy, usually with the consent of the executive branch, and inspite of Logan Act requirements.[9] Examples of this include interparliamentary exchanges under the House Democracy Partnership. State governments have also been entering into international partnerships at increasing rates since the 1970s in an example of "foreign affairs federalism." Among other things, state governments "have entered into compacts and agreements with foreign countries; adopted international standards on matters such as climate change, even when the federal government has declined to do so; established offices in foreign countries; sent representatives to foreign countries; offered economic incentives to attract businesses from those countries; barred purchases from those countries with "Buy American" statutes; established countless "sister city" relationships with foreign cities; adopted statements of policy, often based on local referenda, about international issues; given teeth to some of those policies with, for example, economic sanctions and trade bans; enacted laws and adopted police practices to discourage illegal immigration; acted to protect their citizens' data and privacy on the Internet."[10]

What this amounts to in practice is that the executive no longer possesses a monopoly on international diplomacy, and while the "sole organ" in principle, is increasingly the chief organ in a plural system. Consequently, there is a stronger case to be made that the more aggressive use of budgetary execution for national security purposes will not upset the constitutional balance, but in fact re-equilibrate it.

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9 Ryan M. Scoville, Legislative Diplomacy, 112 Mich. L. Rev. 331 (2013). Available at: https://repository.law.umich.edu/mlr/vol112/iss3/1

10 Sloane, Robert D. and Glennon, Michael J., "Foreign Affairs Federalism: The Myth of National Exclusivity" (2016). Books. 27.https://scholarship.law.bu.edu/books/27

3. Foreign affairs and inherent powers in the realm of budgetary execution

With respect to the question of an *executive* impoundment power (as opposed to the statutory impoundment process specified in the Impoundment Control Act of 1974), one must ask if there are any inherent powers of the presidency that would provide justification? Inherent powers are ubiquitous in the judicial branch and widely exercised in pretrial case management. For the executive branch, the problem is murkier and less understood. Even the semantics are not agreed upon: some scholars speak of a "completion power" the President has to carry out the full intent of congressional legislation even without specific authorization in the text itself. Much of the case law about "inherent" executive power dates to the 19th century, in connection with the fiduciary duties over management of public land. Such cases are *In re Neagle, 135 U.S. 1 (1890)* and *United States v. San Jacinto Tin Co., 125 U.S. 273 (1888).* Their applicability to impoundment and budgetary execution is bound to be vague and tenuous. Instead, a more durable basis can be found in the positive obligations that underlie the Commander-in-Chief Clause. There is no question that the United States collectively has proprietary interests like any private law corporation: *Like any private person or corporation, the United States normally is entitled to the profits from, and must bear the losses of, business operations which it conducts.*[11] The executive is thus an "agent" of the public domain: *The power of Congress over the public domain is not only that of a legislative domain, but also that of a proprietor, and it may deal with it as an individual owner may deal with his property, and may grant powers to the Executive as an owner might grant powers to an agent, either expressly or by implication.*[12] However, these proclamations have historically been limited to alienations of interior land. Even so, they may point to a broader principle of custodianship or stewardship that could call for special use of budgetary apportionments in concrete circumstances.

One useful analytical framework for the President's fiscal powers is that provided by Zachary Price (2018) concerning the distinction between resource-dependent and resource-independent powers.[13] The

11 United States v. Pewee Coal Co., Inc., 341 U.S. 114 (1951)
12 United States v. Midwest Oil Co., 236 U.S. 459 (1915)
13 Zachary S. Price, Funding Restrictions and Separation of Powers, 71 Vanderbilt Law Review 357 (2018) Available at: https://scholarship.law.vanderbilt.edu/vlr/vol71/iss2/1

latter comprise the powers to veto legislation, grant clemency, appoint and remove officers, and issue lawful commands to the military. They are *resource-independent* precisely because they do not logically require the appropriation of funds to be exercised – they exist as institutional prerequisites prior to the material execution of any specific laws. A similar thesis was famously presented by J. Gregory Sidak in the 1980s, positing a "minimum obligational authority" by which the presidency can obligate funds from Treasury without congressional appropriation in order to fulfill fiduciary duties of faithful execution – in the event of gridlock during the appropriations process.[14]

Bale makes the case for a limited national security impoundment power possessed by the President based on the President's status as sole organ of foreign policy, a view confirmed by *Zivotofsky ex rel. Zivotofsky v. Kerry,* in which the Court held that the Reception Clause provided the President with exclusive authority to determine the sovereign status of foreign countries. Consequently, any attempt by Congress to impose appropriation riders that attempt to dictate either diplomatic relations or the operational conduct of war would be lawfully impoundable on a constitutional basis. There is, indeed, ample historical precedent of presidents impounding appropriations for weapons systems deemed to be wasteful, inefficient or uneconomical.

A 2021 OMB letter by Mark Paoletta[15] touched the until-then dormant impoundment issue in some depth. The immediate controversy concerned the deferral of foreign aid to Ukraine. Paoletta adduces several historical glosses for a pre-ICA executive impoundment power, having to do with cost-effective spending. FDR is quoted as saying in 1942 that "the mere fact that Congress, by the appropriation process, has made available specified sums for the various programs and functions of the Government is not a mandate that such funds must be fully expended. Such a premise would take from the Chief Executive every incentive for good management and the practice of common sense economy." That same year, the House Committee on Appropriations issued a report that stated, "Appropriation of a

14 J. Gregory Sidak, The President's Power of the Purse, 1989 Duke Law Journal 1162-1253 (1989) Available at: https://scholarship.law.duke.edu/dlj/vol38/iss5/2

15 https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/Response-to-House-Budget-Committee-Investigation.pdf

given amount for a particular activity constitutes only a ceiling upon the amount which should be expected for that activity," adding that the person in the Executive Branch responsible for spending an appropriated sum is obligated to render "all necessary service with the smallest amount possible within the ceiling figure fixed by Congress." These arguments were rejected by GAO. However, such contention between executive and legislative agencies is a normal part of constitutional construction as a coordinate-branch process, and GAO's pronouncements are advisory in nature rather than strictly legally binding, since they are not legislation passed through bicameralism and presentment.

Given that many Article II powers – the veto, pardon, recommendation, requesting of opinions, reception of ambassadors, appointment, removal, military command – are resource-independent and hence do not require appropriation of funds to be effectuated, one logical implication with ample precedent is that any congressional funding conditions which aim to restrict these powers (such as through appropriation riders) are presumptively unconstitutional, and the executive may construe spending bills in such a way as to not give effect to unconstitutional requirements. An OLC memorandum from 2009 recounts that[16]:

> Consistent with these principles, Congress may by statute affirm the President's authority to determine whether, how, when, and through whom to engage in foreign diplomacy. But when Congress takes the unusual step of purporting to impose statutory restrictions on this well recognized authority, the Executive Branch has resisted. For example, Congress enacted an appropriations rider in 1913, providing that "[h]ereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so." Act of Mar. 4, 1913, ch. 149, 37 Stat. 913 (1913) (codified at 22 U.S.C. § 262 (2006)). The Executive has not acted in accord with that requirement, see Henry M. Wriston, American Participation in International Conferences, 20 Am. J. Int'l L. 33, 40 (1926) (observing that "there is not a single case [since 1913] where the

16 Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 2009 WL 2810454, at *9 (O.L.C. June 1, 2009) [https://www.justice.gov/sites/default/files/olc/opinions/2009/06/31/section7054.pdf]

> President secured from Congress authorization to accept an invitation to a conference of a political or diplomatic character," and that "since 1917 the whole practice of requesting Congress for authority to accept invitations to any sort of international conference has virtually fallen into disuse"), and the measure is now a "known dead letter," Louis Henkin, Foreign Affairs and the United States Constitution 118 (2d ed. 1996). Indeed, when first informed of the provision's existence (more than three years after its enactment), President Wilson reportedly termed it "utterly futile." Wriston at 39. Wilson's dismissive characterization accorded with the view, expressed in a leading treatise of the day, that the President "cannot be compelled by a resolution of either house or of both houses of Congress to exercise" his constitutional powers with respect to "instituting negotiations." Samuel B. Crandall, Treaties: Their Making and Enforcement 74 (2d ed. 1916)
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> For example, we concluded that it would be unconstitutional for Congress to adopt joint resolutions mandating that the President enter negotiations to modify the rules of the World Trade Organization. See id. Relatedly, we determined that a legislative provision purporting to prevent the State Department from expending appropriated funds on delegates to an international conference unless legislative representatives were included in the delegation was an "impermissibl[e] interfere[nce]" with the President's "constitutional responsibility to represent the United States abroad and thus to choose the individuals through whom the Nation's foreign affairs are conducted." 14 Op. O.L.C. at 38, 41. And the Executive Branch has objected numerous times on constitutional grounds to legislative provisions purporting to preclude any U.S. government employee from negotiating with (or recognizing) the Palestine Liberation Organization ("PLO") or its representatives until the PLO had met certain conditions.

If there is no opportunity to construe the bill so that the unconstitutional provision is "severed" away, and if it passes over a veto, it stands to reason that a national security impoundment may be employed (that or the funds reprogrammed). Bale concedes such a power, though in the very narrow domains of "appropriations for weapons systems, uniformed military personnel, and military construction" (what

he calls “WPC impoundments”), whereas our analysis would permit it as a last resort for any infringement on a resource-independent Article II power. Perhaps the strongest advocate for a non-statutory national security impoundment power is Roy E. Brownell II. Among other things, Brownell makes the analogical case that just as the President can unilaterally abrogate treaties (famously dismissed as a “political question” in *Goldwater v. Carter*), which require a two-thirds Senate vote to be enacted into law, then the impoundment of an appropriation in a spending bill by the same token should not count as a violation of presentment.[17] That the historical gloss provides limited examples is more an indication that impasses were resolved by other means, not that impoundment is categorically out of the table.

It is also generally agreed that Congress cannot legislate on the operational level of war, since this detracts from presidential authority both as commander-in-chief and in conduct of diplomacy (c.f. Walter Dellinger, OLC).[18]

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17 Brownell II, Roy E. “The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure to Seek Acknowledgement of "National Security Rescission."” American University Law Review 47, no.5 (June 1998): 1273-1353.

18 “Moreover, in seeking to impair the President’s ability to deploy U.S. Armed Forces under U.N. operational and tactical command in U.N. operations in which the United States may otherwise lawfully participate, Congress is impermissibly undermining the President’s constitutional authority with respect to the conduct of diplomacy. See, e.g., Department of Navy v. Egan, 484 U.S. 518, 529 (1988) (the Supreme Court has “ recognized ‘the generally accepted view that foreign policy was the province and responsibility of the Executive’”) (quoting Haig v. Agee, 453 U.S. 280, 293-94 (1981)); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 705-06 n.18 (1976) (“ [T]he conduct of [foreign policy] is committed primarily to the Executive Branch.”); United States v. Louisiana, 363 U.S. 1, 35 (1960) (the President is “ the constitutional representative of the United States in its dealings with foreign nations”); Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att’y Gen. 484, 486 (1940) (Jackson, Att’y Gen.) (the Constitution “ vests in the President as a part of the Executive function” “ control of foreign relations”). United Nations peacekeeping missions involve multilateral arrangements that require delicate and complex accommodations of a variety of interests and concerns, including those of the nations that provide troops or resources, and those of the nation or nations in which the operation takes place. The success of the mission may depend, to a considerable extent, on the nationality of the commanding officers, or on the degree to which the operation is perceived as a U.N. activity (rather than that of a single nation or bloc of nations). Given that the United States may lawfully participate in such U.N. operations, we believe that Congress would be acting unconstitutionally if it were to tie the President’s hands in negotiating agreements with respect to command structures for those operations.” (https://biotech.law.lsu.edu/blaw/olc/hr3308.htm)

4. The Appropriations Clause and the self-funded agency problem

While the Appropriations Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," there is significant dispute over whether this means that congressional spending authority *must* be given in the form of discretionary funds through an appropriations act. In practice, many agencies are self-funded, i.e. they have a delegated spending authority to finance themselves from user fees or from requests made to the Federal Reserve Board. (For much of the 19th century, federal officers and employees were compensated by fees and bounties and not through regular salaries – dating back to the English common law principle of *quantum meruit*.) This amounts to a delegation of spending power. In line with the Roberts Court's trend to a stricter reading of the until-then largely dormant nondelegation doctrine, the Fifth Circuit ruled in *Seila Law LLC v. Consumer Financial Protection Bureau* that the CFPB's Bureau Fund violates the Appropriations Clause, which the court interpreted as imposing an affirmative obligation upon Congress to structure its grants of spending authority as fixed-period appropriations.

Although Congress does relinquish some of its power when authorizing a self-funded agency, it still retains other means of oversight: committee hearings, reports to the Comptroller General, semi-annual audits by the Office of the Inspector General for each agency, and so on. Crucially, however, self-funding is *also* a way of exempting an agency from the executive budgeting process of OMB apportionments. It can therefore be argued that such funding arrangements create similar political advantages as "independent executive agencies" with for-cause removal protections (themselves of dubious constitutionality) in terms of tipping the scale to the legislative in the tug of war between the branches. This contrasts to the view expressed by other critics of the CFPB who see it as a "unification of purse and sword in the executive." The combination of self-funding and agency independence would hence be a double bind.

Even if most self-funded agencies are financial regulators, the aforementioned discussion of rights-based sanctions and the increasing involvement of financial regulatory bodies into the foreign policy

domains means that such agencies cannot be seen simply as administering impartial technical standards. Rather, they have a role in the administrative national security nexus enabled by authorities like NEA, IEEPA, AEDPA and CAATSA. If Congress can insulate spending from OMB review, then non-statutory policy impoundments against wasteful spending would serve as a proportionate rebalancing of power. Otherwise such funding arrangements would amount to a de facto global appropriation rider and have incidental effects on Article II powers.

5. Foreign affairs rationale for policy impoundments

A non-statutory policy impoundment power would straightforwardly interact with existing doctrines of prosecutorial discretion in executive branch law enforcement. Just as presidential administrations routinely hand out deferrals during immigration enforcement cases for reasons of case load management, and just as DoJ may decline to defend laws that the executive has detailed grounds to regard as unconstitutional (a famous example being the Obama administration's refusal to defend DOMA), so too the wide variety of international obligations entered into by the United States that must be harmonized with domestic law can also create openings for appropriated funds to be deferred, rescinded or reprogrammed if strategic objectives outlined in National Security Council directives or other foreign policy instruments require an accommodation of some balance of treaty, recommendation and faithful execution powers amidst conflicting legal obligations. While the paradigmatic areas would be foreign aid, weapons systems and the like, the impoundment of funds for programs generally considered "domestic" may also arise in situations where they're entangled. Many of these conflicts will naturally emerge due to the large number of statutorily imposed obligations on the president to take action on the basis of his own findings and determinations. Obligations must be prioritized when they are numerous.

(For instance, the Bush II administration reallocated resources in the DoJ Civil Rights Division away from employment discrimination prosecutions toward human trafficking cases under the Trafficking Victims Protection Act (TVPA): *When the Bush administration assumed power, the political appointees*

within the Justice Department, and particularly within the Civil Rights Division, made a conscious effort to prioritize human trafficking prosecutions. The enactment of the TVPA, and the expanded authority the Section obtained as a result of it, facilitated the new emphasis. Reflecting that emphasis is: a ramped-up, trafficking-centered public relations initiative; the dedication of new resources to anti-trafficking efforts; and an increased number of trafficking (mostly sex trafficking) prosecutions. While still being well-served, the Section's core enforcement mission—the prosecution of official misconduct and hate crimes— has not enjoyed a similar boost, despite an increase in the number of Section attorneys.)[19]

As a matter of fact, presidential administrations routinely impose substantive policy considerations into what are traditionally regarded as merely "procedural" domains. A prominent example is Biden's Executive Order 13985 -- "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," which explicitly instructs the The Director of the Office of Management and Budget (OMB) to "study methods for assessing whether agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals." This EO has subsequently been incorporated into OMB Circular A-11 under the guidelines for the President's Management Agenda (PMA). Agencies are instructed to prepare "equity action plans" as follows: *As agencies develop and execute the President's Budget, their Strategic Plans, Learning Agendas, Performance Plans, Evaluation Plans, CX Action Plans, and other agency planning and performance efforts outlined in this guidance, they should, whenever possible, prioritize advancing racial and economic equity in their proposals; consult and meaningfully involve underserved communities, community-based organizations, and civil rights organizations; consider how their organizational and decision-making processes may not account for certain perspectives; and incorporate leading practices for ongoing equity assessment and affirming efforts within public sector organization.* Thus, technical considerations of performance management and assessment are by no means insulated from public policy agendas.

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19 2007 report by the Center for American Progress: https://search.issuelab.org/resource/the-erosion-of-rights-declining-civil-rights-enforcement-under-the-bush-administration.html

The Biden Administration's *Interim National Security Strategic Guidance* perceptively remark that "our policies must reflect a basic truth: in today's world, economic security is national security." As a result: mergers, acquisitions and foreign investment are vetted ever more stringently by CFIUS (Committee on Foreign Investment in the United States).[20] Analogously to the sanctions process, one can hypothesize the impoundment of certain grants programs of which offending corporate beneficiaries are disproportionately represented, or if the grant in question has to be temporarily deferred over emerging risks that could obsolete its intent.

20 "In 2019, CFIUS ordered the unwinding of a deal in which Beijing-based Kunlun Technology had purchased a 60% stake in American dating app Grindr. Although CFIUS does not publicly explain its decisions, reports speculated that the U.S. government's action rested on concerns that the Chinese government could access sensitive personal data shared via the app, especially information pertaining to U.S. government officials. Social media apps implicate national security too: The Trump Administration sought to ban TikTok and other Chinese-owned apps due to national security worries, and concerns about TikTok in particular have continued in the Biden Administration. FBI Director Christopher Wray testified to Congress in November 2022 that TikTok poses national security risks due to "the possibility that the Chinese government could use it to control data collection on millions of users or control the recommendation algorithm,which could be used for influence operations . . . , or to control software on millions of devices." [Kristen Eichensehr & Cathy Hwang, National Security Creep in Corporate Transactions, 123 Columbia Law Review, (2023).]