COMPETITIVE ENTERPRISE INSTITUTE

OnPOINT

The Constitutionality of Presidential Impoundment

How the courts could decide the brewing fight over spending restraint

By Devin Watkins

February 26, 2025 | No. 299

President Trump wants to cut federal spending, but the Impoundment Control Act of 1974[1] stands in his way. The law prohibits the president from reducing spending that Congress has required via the appropriations process. When running for office, Trump said he would "do everything I can to challenge the Impoundment Control Act in court, and if necessary, get Congress to overturn it."[2] Now, his administration is directly challenging the constitutionality of the law.

President Trump issued various executive orders limiting spending, such as a 90-day pause on foreign aid. Some of these executive orders may be trying to spark challenges to the Impoundment Control Act.

Is he right? It's complicated. Courts can only rule on the specific disputes of the parties, so it depends on what precisely the Trump administration argues in court and how impoundment is challenged. If Trump intends to limit his challenge to only the exercise of executive power it is unconstitutional. But if he argues that Congress can never force the executive branch to spend money, the Impoundment Control Act will be upheld. Even if constitutional, that doesn't mean the statute applies to all spending. It may not apply to some of the grants covered in the Trump executive orders.

The courts are already weighing in. Judge John McConnell on January 31, 2025 issued a temporary restraining order to block an Office of Management and Budget (OMB) memo that suspended some federal government payments the administration wanted to stop.[3] The Trump administration then withdrew that memo. But the judge argued that withdrawal might only be a pretext, so he expanded the restraining order to include unnamed agencies and third parties, seemingly aimed at preventing executive agencies from cutting existing spending projects.

How impoundment started

Presidential impoundment of funds appropriated by Congress dates to President Thomas Jefferson. In his Third Annual Address, Jefferson stated: "The sum of fifty thousand dollars appropriated by Congress for providing gun-boats, remains unexpended."[4] Here is the appropriation in question:

> *"That the President of the United States be, and he is hereby authorized and empowered to cause to be built, a number not exceeding fifteen gun boats, to be armed, manned and fitted out, and employed for such purposes as in his opinion the public service may require; and that a sum not exceeding fifty thousand dollars be, and hereby is appropriated for this purpose out of any monies in the treasury of the United States not otherwise appropriated."*[5]

[1] Title X of the Congressional Budget and Impoundment Control Act of 1974, P.L. 93-344, 88 Stat. 297, codified at 2 U.S.C. Ch. 17B.

[2] Donald Trump, "Agenda47: Using Impoundment to Cut Waste, Stop Inflation, and Crush the Deep State," (June 20, 2023), https://www.donaldjtrump.com/agenda47/agenda47-using-impoundment-to-cut-waste-stop-inflation-and-crush-the-deep-state.

[3] *New York et al. v. Trump,* No. 25-cv-39-JJM-PAS (D.R.I.), ECF No. 50 (Jan. 31, 2025).

[4] Thomas Jefferson, Third Annual Message (October 17, 1803) *reproduced at* The American Presidency Project, UC Santa Barbara (last accessed February 6, 2024), https://www.presidency.ucsb.edu/documents/third-annual-message.

[5] An Act to provide an additional armament for the protection of the seamen and commerce of the United States, Act of Feb. 28, 1803, ch. 11, § 3, 2 Stat. 206.

In this case, President Jefferson opted not to spend money that had been appropriated. But, importantly, the appropriation by Congress said it was only "authorized and empowered" the president to spend the money. The statute stipulated spending on "a number not exceeding" fifteen gunboats. Since zero does not exceed fifteen, Jefferson's discretion remained within the law.

Three decades later, the Supreme Court weighed in on Congress's power to require spending in *Kendall v. U.S. ex rel. Stokes* (1838).[6] William B. Stokes had entered into a contract with Postmaster General William Barry to transport the mail. After Barry died and was replaced, new Postmaster General Amos Kendall refused to pay the terms of the contract.

The upshot was that Congress passed a statute signed into law by President Jackson that explicitly required Kendall to pay $162,727 under the contract. Despite the statute, the postmaster general only paid Stokes $122,101 and refused to pay any more. Stokes sought a court order to force Kendall to disburse the funds that Congress appropriated, and the Supreme Court upheld that order.

But that does not fully resolve when the executive branch can decline to spend money required by an Act of Congress, because the Supreme Court noted:

> *We do not think the proceeding in this case interferes, in any respect whatever, with the rights and duties of the executive; or that it involves any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the postmaster general in the discharge of his official duty, partaking, in any respect, of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control.*[7]

In short, the Supreme Court recognized the authority of Congress to require the executive to spend money.

Yet in subsequent cases, such as *Decatur v. Paulding* (1840),[8] the Court recognized that there is executive discretion whether appropriated money should be disbursed and refused to force the executive to pay such appropriated funds.

In practice, presidents throughout American history have refused to spend appropriated money for a variety of reasons. This history demonstrates that, at least when not contrary to law, the president can refuse to spend money that had been appropriated.

Controlling impoundment

In the modern era, questions about impoundment also arose during President Nixon's administration when Nixon refused to spend money that had been appropriated in a variety of ways. For instance, in *Train v. City of New York* (1975),[9] concerning the Federal Water Pollution Control Act Amendments of 1972. Nixon vetoed the bill, but Congress overrode his veto. After the bill became law, Nixon ordered the administrator of the Environmental Protection Agency to allot only $2 billion of the $5 billion appropriated. However, the statute stated that the appropriated funds "shall be allotted by the Administrator," and the Supreme Court upheld a declaratory judgment that required the administrator to spend the money.

Meanwhile, the Impoundment Control Act of 1974 was enacted, today's bone of contention. The law purports to limit the president's discretion over spending. Yet there are questions about its scope and constitutionality and the Supreme Court has never had a case on the Impoundment Control Act.

The Impoundment Control Act not only requires the president to spend the money that Congress appropriates but also creates a special process whereby the president can ask Congress to rescind the money that has been appropriated. The law further requires the president to not block spending if Congress doesn't act on the president's request within 45 days. The Impoundment Control Act also requires that delays or deferrals of spending only occur to "provide for contingencies" to "achieve savings" and "as specifically provided by law."

There are significant exceptions. First, there are some uncontroversial exceptions:

1. It is not always possible to spend the funds. Sometimes other statutes require trigger points before the spending can occur. Every president has delayed funds for these reasons. This is called a "programmatic delay" and is not considered a deferral under the Impoundment Control Act.
2. The Impoundment Control Act does not repeal other statutes that provide executive discretion in the spending of funds. Most important would be the Anti-Deficiency Act,[10] which provides the authority of OMB to apportion such money between months, calendar quarters, seasons, other time periods, activities, functions, projects, or objects "as the official considers appropriate."[11] This means, for instance, that within one month, the spending may stop because that money is being held for future months within the appropriated time period.

6 37 U.S. 524 (1838).
7 *Id.* at 610.
8 39 U.S. 497 (1840).
9 420 U.S. 35 (1975).
10 31 U.S.C. § 1512.
11 31 U.S.C. § 1512(b).

3. Some statutes are ambiguous as to what they fund or how much they fund, and the president must exercise discretion to faithfully execute the law and to decide which of the possible interpretations is best.
4. The president is also obligated to follow the law, not the statutes, so when the president believes a statute is unconstitutional, he has a higher duty to the Constitution than to any appropriations statute and could decline to spend such money until ordered by a court.

Impoundment and the Constitution

It is also clear that when Congress provides an appropriation for a core executive function, it doesn't have the authority to control the president in such circumstances. Each branch of government (executive, judicial, and legislative) cannot order another how to use its powers. So, as applied to such core executive powers, the Impoundment Control Act would be unconstitutional.

Going all the way back to *Kendall v. U.S. ex rel. Stokes* (1838), the Supreme Court noted Congress's limits in this area if it were to "seek to direct or control the postmaster general in the discharge of his official duty, partaking, in any respect, of an executive character."[12]

The clearest example would be if Congress were to appropriate money for the prosecution of an individual or group. It is a core executive power to decide whether to bring criminal charges, so the decision to decline such charges would be a core executive power that Congress cannot mandate.

This limitation would also likely apply to the movement of troops due to the president's commander-in-chief authority. If Congress appropriated money for troops in Country X, it cannot require the movement of the military against the orders of the president as commander-in-chief. Congress can limit military spending, but it cannot force the president to exercise executive power in the manner that Congress wishes.

Another core executive power is the ability to hire and fire executive branch employees. When Congress appropriates money for an agency, that agency obviously cannot exceed the funding levels set by Congress. But can Congress require the president to hire people he does not wish to hire? That runs headlong into core executive powers, similar to military troop movements, that Congress cannot use the power of the purse to mandate.

A drastic possibility

Theoretically, this last power means that the president could end spending by simply firing every officer of the United States at that agency. Under the Constitution, officers of the United States hold high level positions created by Congress and exercise the sovereign power of the United States. While the appropriation would still be available to be spent, there would be no officer left at the agency who could spend the money. It appears that President Trump chose this path at USAID.

While the above challenges concern as-applied challenges to compelling executive power, more controversially, President Trump may bring a facial challenge to the statute—meaning a challenge to all applications of the statute rather than just appropriations for executive functions. Such a challenge would claim that the Impoundment Control Act wrongly controls executive discretion.

Power of the purse?

Congress obviously has the power to require that specific funds be spent in the manner that Congress wants or Congress can provide for executive discretion to determine how those funds are spent. But can Congress both provide for executive discretion in appropriations and mandate how the executive is to exercise that discretion?

Consider a case regarding Congress's authority to enact similar controls over the judiciary in *United States v. Klein* (1871).[13] After the war, a law was passed to use the profits from the sale of seized property to compensate its owners, which, at the time, did not include the confederates as they lacked property rights. President Lincoln issued a pardon to everyone who had fought for the Confederate army that included restoration of property rights.

The Court decided that those who had been pardoned could receive the proceeds of the sale. Congress responded by passing a statute requiring that acceptance of a pardon was evidence that a person was ineligible, stripping the Supreme Court of jurisdiction, and requiring that the Supreme Court "shall dismiss the [case] for want of jurisdiction."

In *Klein*, the Supreme Court rejected that Congress had the authority to invade judicial discretion in particular cases. While Congress can control what kinds of cases a court can hear, it can't use that authority to control the decision-making of such courts. Nor could it limit the effect of the presidential pardon.

[12] *Kendall*, 37 U.S. at 610.

[13] 80 U.S. 128 (1871).

It is possible that the Trump administration could argue that the Impoundment Control Act does not require public money to be spent but instead treads on executive decision-making. The statute allows delays and non-payment of money in a variety of circumstances, but not if the executive has certain reasons for such delays or recissions.

This is similar to *Zivotofsky v. Kerry* (2015),[14] where Congress tried to control the president's decision to recognize Jerusalem as under the sovereign control of Israel. In that case, the Constitution left the decision to the president. While in appropriation cases, it may be the statute that leaves discretion to the executive branch, once it is no longer a ministerial decision and without discretion by the executive branch, then Congress' authority to control the executive maybe more limited.

It is possible to argue that Congress is limited in its control of executive discretion to demonstrate why the Impoundment Control Act is unconstitutional. However, the argument is unlikely to be successful.

Conclusion

These are important issues to the balance of power between the executive branch and the legislative branch. The Impoundment Control Act may not force the president to spend money the Congress has given the president discretion over. But, while President Trump could argue that all of the Impoundment Control Act is unconstitutional, he is unlikely to be successful unless he limits such claims to executive powers that only he controls.

About the author

Devin Watkins is an attorney at the Competitive Enterprise Institute. Watkins has filed dozens of briefs before the United States Supreme Court. Last term he represented the Moores before the Supreme Court on the meaning of income in the Sixteenth Amendment. He is a member of the D.C Bar, the Fifth Circuit Bar, the D.C. Circuit Bar, the Supreme Court Bar.

Prior to working at the CEI, he worked as an attorney at the Cato Institute and the Institute for Justice. Watkins holds a Juris Doctor cum laude from the Antonin Scalia Law School, where he was the development editor on the Mason Law Review.

Prior to his legal career, Watkins was a senior software developer at Intel and WebMD. He graduated with a Bachelor of Science in Computer Science from Stevens Institute of Technology.

[14] 576 U.S. 1 (2015).

The Competitive Enterprise Institute promotes the institutions of liberty and works to remove government-created barriers to economic freedom, innovation, and prosperity through timely analysis, effective advocacy, inclusive coalition building, and strategic litigation.

COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW, 7th Floor
Washington, DC 20005
202-331-1010