Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

Congressional Hearings on Impoundment (1973)[1]

During President Richard Nixon's first term of office, the White House and Congress were increasingly at odds over the power of the president to "impound," or refuse to spend, appropriated funds. When Congress appropriates funds from the federal treasury, the executive branch is tasked with the actual withdrawal and expenditure of those funds for the designated purpose. Presidents have sometimes claimed the authority to "impound" appropriated funds, either by delaying the expenditures of those available funds or by refusing to spend the funds. Nixon made much more expansive use of the impoundment power than other presidents had done, using it as a general tool for budget-cutting and targeting a wide range of domestic spending projects that the president thought wasteful.

In response to the president's actions, Congress held a series of hearings investigating what the Nixon administration had done and considering possible legislative responses that might curtail presidential impoundments. One proposal, which was structured much like the War Powers Act that Congress considered would have allowed presidential impoundments to take effect for a short period of time but required the president to report any impoundments and allow Congress to overturn the presidential action without the necessity of passing a statute. The Impoundment Control Act of 1974, part of a larger budget reform measure, gave the president a 45-day window to win support for any impoundment actions; otherwise, the funds were required to be spent. The administration objected to this "legislative veto" provision, and in INS v. Chadha *(1983) the U.S. Supreme Court indicated that legislative vetoes were unconstitutional. In 1973, both the House and the Senate held hearings on proposals to rein in the president. Deputy Attorney General Joseph Sneed, the former dean of Duke Law School, testified on behalf of the administration. Sneed was appointed to the Ninth Circuit Court of Appeals a few months later.*

Representatives Claude Pepper and John Culver preferred a statute that prohibited presidential impoundments without prior approval from Congress. Senator Sam Ervin preferred a statute that allowed temporary presidential impoundments unless Congress authorized their extension. Representative George Mahon preferred a statute that allowed presidential impoundments to continue unless they were vetoed by Congress. The Impoundment Control Act that passed most resembled the Ervin proposal.

Does that statue endorse a presidential prerogative to impound funds? Are there any constitutional limits on the congressional power to require presidents to spend all appropriated funds? Do presidents have any constitutional authority to withhold appropriated funds, or does the power to impound depend entirely on statutory language? Can a president, for example, refuse to contract for the construction of a new battleship on the grounds that a peace agreement had been negotiated after the congressional appropriation? Can the president refuse to purchase a weapon system that Congress wants if the president believes that the weapon system is flawed?

[1] Excerpt taken from *Impoundment of Funds by the President: Hearings before the Senate Ad Hoc Subcommittee on Impoundment of Funds*, 93rd Cong., 1st sess. (1973); *Impoundment Reporting and Review: Hearings before the House Committee on Rules*, 93rd Cong., 1st sess. (1973).

Mr. SNEED . . . . The practice of impounding funds, through various techniques and for various reasons, reaches back as far as President Jefferson, who declined to spend an appropriation for gunboats in 1803. As he stated in his annual message to the Congress: "The favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary. . . ."

A general statutory basis for impounding was first enacted in the Anti-Deficiency Act of 1905. Formal administrative procedures for impounding were first established during the Harding Administration, following enactment of the Budget and Accounting Ac of 1921.

. . . . Such a long-continued Executive practice, in which Congress has generally acquiesced, carries with it a strong presumption of legality.

The Constitution does not speak directly to the matter of impounding funds. The phenomena of massive government spending, mounting public debt, and heavy involvement of the national government in the management of an interdependent industrial and service economy were unknown to the Framers. Until very recently, the judicially-developed doctrines of sovereign immunity, standing, justiciability and political question have largely foreclosed judicial consideration of impounding questions.

Impounding disputes, when they have arisen, have traditionally been resolved in the political arena, and for good reason. It has long been recognized that – "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief: and we are quite satisfied that such a power was never intended to be given to them. *Decatur v. Paulding* (1840)."

Decisions to impound inevitably involve policy judgments concerning changing national needs and highly technical predictions about their effect upon the economy. Significant impounding actions can rarely be taken to alleviate one problem without aggravating another. These "trade-offs" involve delicate adjustments peculiarly within the competence and constitutional authority of the Executive branch. . . .

In addition to impounding actions taken for reasons of economy in a particular program or pursuant to express statutory authority, it is my view that the President has substantial latitude to refuse to spend or to defer spending for general fiscal reasons, such as control of inflation. . . .

Authority to pursue such goals flows not merely from Congressional intent . . . but, more fundamentally, from the dilemma in which modern Presidents have frequently been placed by the Congress. Despite the statutory policy and fiscal necessity to protect purchasing power by avoiding intolerable inflation, the structure of Congress does not enable it to assume the executive responsibility for achieving this end. The harsh reality is that time and time again Congress has passed swollen appropriation acts and failed to levy the taxes necessary to avoid inflation. . . . No President has been willing to accept the full consequences of this chronic tendency of Congress. . . .

Although the Congress has been keenly aware of Executive impounding actions for many years, there have been only a very few federal statutes in which the Congress has expressed an unequivocal intention to mandate spending for a particular program. This history compels the conclusion that if the Congress wishes to mandate full spending for a particular program, it must do so in unmistakably clear terms. . . .

. . . . As a general proposition, . . . Congress has the primary responsibility for establishing general national policy, at least in the domestic area, and the power of the purse to implement those politics. . . .

. . . . A Congress that wishes to spend more than current levels of taxation justify and in excess of a President's wishes cannot discharge its responsibilities by mandating expenditures only. To remain faithful to its own commitment to restrain inflation, [Congress] must concurrently increase taxes. If it chooses not to remain faithful to that commitment, the President must serve the commitment by impounding. . . .

. . . . Even if it be concluded, however, . . . that Congress can mandate spending if it explicitly expresses an intention to override the Anti-Deficiency Act and all other direct and indirect statutory sources of Presidential spending control, it is clear that any such mandate is subject to at least two

important qualifications. The President has substantial authority to control spending in the areas of national defense and foreign relations. Such authority flows from the President's constitutional role as Commander-in-Chief of the Armed forces and from his relatively broad constitutional authority in the field of foreign affairs. See, e.g., *United States v. Curtiss-Wright Export Corp*. (1936). In those areas, Congressional directives to spend may intrude impermissibly into matters reserved by the Constitution to the President. . . .

Senator ERVIN (Democrat, North Carolina) . . . . [When the Constitution] says the President shall take care that the laws be faithfully executed, doesn't it mean he shall take care to see that the laws are carried out, or enforced, or carried and made effective according to their terms?

Mr. SNEED. Senator, he has a responsibility under the Constitution . . . to see that the laws are faithfully executed. He has, however, at all times, to consider all the laws, and . . . that he was confronted in the 1973 budget issues with laws consisting of appropriation acts, laws consisting of the 1946 Full Employment Act, laws consisting of the debt ceiling, laws consisting of the Economic Stabilization Act. Above and beyond that, he was looked to in part by Congress and certainly by the public as one having a very profound responsibility for price stability.

Now, when we put all that together the problem is how best to faithfully execute the laws.

. . . .

There is nothing in the statement, Senator, that in any way suggests that the administration does not recognize that the appropriation power lies exclusively in the hands of Congress. We simply do not believe that a part of that power embraces a prohibition against impoundment. Unless Congress appropriates money, there is not money to spend. If Congress appropriates money, it is available to spend.

Our contention, of course, is that it need not be.

. . . .

When one focuses upon one specific law and says, since it mandates expenditure then we must spend, that in turn, given the necessity to control, requires adjustments in other areas, perhaps even in defense and foreign affairs. So to concede the point [that the president is obliged to spend if Congress mandates expenditures in a particular statute] seems to us would inevitably lead to a collision with the President's powers of national defense and foreign affairs.

. . . .

[W]hen we get down to . . . situations in which all of the statutory justifications for impounding were stripped away and we have simply a question of whether there is any constitutional power on the part of the President to impound and Congress has said you must spend it, it is our contention that he may refuse to spend and that the collision in that case between the Congress and the President is a political question that is not justiciable.

. . . .

Rep. PEPPER (Democrat, Florida) . . . . I don't think it is necessary for anyone to labor further the point that, within the confines and intent of the Constitution, the Executive, any Executive, does not have the power to terminate legislation enacted duly by the Congress or to fail to carry out the laws, including appropriation laws duly enacted by Congress.

. . . .

Surely the constitutional framers and founders never contemplated anything like that. They thought they had prevented any Executive from attempting such action by putting in the Constitution the language the President "shall take care that the laws be faithfully executed."

Now they could have said the President shall see to it that the laws are executed. But they saw some reason to add additional language in there "shall take care," shall be careful, shall be alert, shall be concerned, shall be sure, shall take care that the laws, not be executed, but be faithfully executed.

A faithful servant is the one who well carries out the wishes and the will of his employer.

. . . .

The only argument I have ever heard asserted to the contrary is that other Presidents have done the same thing. Well, that's not the way to amend the Constitution of the United States by violating it. I don't care how many Presidents have violated it.

. . . .

So it does seem to me appropriate that the Congress shall take account of the seriousness of this question and shall proceed in some proper way to assert the proper prerogative of the Congress under the language of the Constitution which said all, not just some, or part of, but all legislative power shall be vested in the Congress of the United States.

. . . . [I]f Congress is going to vie with the Executive in the forum of public opinion, I think we have got to answer that argument [that Congress spends without restraint] by action showing we are not an irresponsible body financially.

It would take a very rich father to be able to afford, if he had several children, each one of the children spending all the money he wanted to spend or she wanted to spend.

Yet, to a great degree we have allowed all of the committees of the Congress to spend the amount of money that they respectfully thought we should spend and the sum total many times has been in excess of the budget, perhaps maybe in excess of what the Congress, if it had taken an overall look at it, would have preferred to spend.

So I think we in action have got to deprive the President of that argument in insisting upon the preservation of our constitutional prerogative, to be the representative of the people in the enactment of their laws, including the appropriation of their money.

. . . .

Rep. CULVER (Democrat, Iowa) . . . . Impounding of funds by the President confronts Congress with a substantial constitutional challenge. During the course of these hearings, it often has been emphasized that there is no explicit constitutional provision authorizing the impounding action being taken by President Nixon. However, I am concerned that too many Members of Congress do not fully grasp the significance of this fact.

. . . .

Throughout our history, the resolution of differences in the area of appropriations and spending between the President and the Congress have been well accommodated in the public interest by limited statutory authority and the exercise between the two branches of Government of commonsense based upon mutual courtesy, civility, and respect.

It is only now in a relatively few areas that we see the claim made by the Executive for authority in policy areas that exceed prior practice and understandings and raises necessarily the issue of constitutional powers. The issue is how to deal with this new and excessive claim of authority in a way which will be insure that it remains a temporary political aberration to be politically resolved, and not a provocation for action which results in long-term harm to our system of Government and the shared constitutional powers upon which it rests.

. . . . It is imperative that Congress in a rush to judgment not concede by explicit legislation any impoundment authority to the President which he does not already clearly possess. . . .

The real issue involved in this controversy is which branch of Government ought to determine the priorities of Federal spending. The President by using impoundment to curtail and terminate Federal programs created by Congress has encroached upon the constitutional authority of Congress to be principal arbiter of spending priorities.

The President has simply arrogated a power belonging to Congress and that, in its simplest terms, is the challenge. . . .

It seems to me of all the impoundments that the President has ordered, some 209, there are only about 9 horror stories out of the 209. Out of the 209 of them, no one in this room would have any real difficulty with 200 of them. They would be very justifiable in terms of historical Presidential practice or certainly comfortable under the broad authority granted in the Antideficiency Act of 1905.

. . . .

I think it is in that category that we have to concern ourselves. That is why I think it is very dangerous that we don't overreach what we try to deal with, that is, this particular problem.

. . . .

Over the years starting with the famous Jefferson case, we have seen Presidents who take steps to prevent wasteful spending in programs where circumstances have changed and presented a difficult set of facts. I think Congress in its wisdom has tolerated the accumulation by the executive almost through common law practice under our Constitution, particularly, in the national defense area so as to have a degree of flexibility in this area.

Rep. DELANEY (Democrat, New York) . . . . [W]e don't want to be made to look ridiculous.

If we were to force the President to spend, maybe there would not be the need by the time the legislation was passed. I don't think we can put a harness on him in any way.

There is no such thing as deficiency in war. . . . So, there has to be a little bit of faith there. . . .

Rep. CULVER. I think the imbalance that has been created here is not attributable solely to the usurpation of power by the President. I think that much of this can be attributed to a steady erosion of and concession of power by the Congress for years and years. However, and more importantly, this has been caused by our own institutional limitations and failures and disabilities.

. . . . [W]e must . . . strengthen[] our own constitutional mechanisms to perform our mission more effectively and to deny the executive the current criticism that we are not doing our job properly.