

Appropriations Presidentialism

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Since the start of the second Trump Administration, the Executive Branch has attempted to change how federal spending works by asserting unilateral, centralized authority to condition, delay, cancel, or otherwise disrupt federal obligations and expenditures without regard to longstanding legal understandings and norms. This appropriations presidentialism is unprecedented in scope and degree, and it threatens to weaken a key congressional check on executive policy, while also disrupting the settled expectations of civil servants, contractors, grantees, program beneficiaries, and others who were counting on continued federal funding for certain programs or activities. Those injured by these executive actions are understandably turning to courts for redress. But while courts have an important role to play in maintaining checks and balances, excessive judicial oversight of federal spending risks further shifting control away from Congress and exacerbating the potential for disruption of funding recipients' expectations.

This Essay documents this new appropriations presidentialism and offers preliminary reflections on appropriate responses. Noting that many important threshold questions about the role of courts in this area are unsettled, the Essay urges courts addressing spending disputes to proceed with caution and due attention to the complex tradeoffs that attend judicial intervention in this area. In addition, it urges courts to attend carefully to the specifics of the appropriations and authorizing laws that govern individual programs and activities, even in the face of sweeping executive claims of blanket authority. And finally, it stresses that there is ultimately no substitute for senators' and representatives' energy and attention when it comes to maintaining Congress's constitutional authority over the public purse.

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INTRODUCTION

Federal spending has historically been a domain of congressional soft power. Disputes about such spending have been resolved primarily not by courts but through a dynamic interaction between the Legislative and Executive Branches. The appropriations law governing those interactions consists of a distinctive set of written rules and unwritten norms largely policed by the political branches, not the courts.¹ The result has been a unique area of the administrative state—what one of us has called “Congress’s domain”²—in which Congress is not absent but ever-active, with even minorities in both chambers of Congress having a part to play in the day-to-day administration of time-limited spending statutes.³

As part of a larger trend toward broad assertions of executive power, a trend toward unilateral executive action with respect to spending has emerged, yielding several blockbuster court cases in recent years.⁴ One such decision was *House v. Burwell*,⁵ which arose out of the Obama Administration’s expenditure of funds on Affordable Care Act cost-sharing reduction payments despite what courts found to be an absence of appropriations.⁶ Legal controversies about spending during the first Trump Administration included challenges to spending on border wall construction,⁷ presidentially ordered grant conditions threatening funding for sanctuary cities,⁸ and the delay of military aid for Ukraine that gave rise to President Trump’s first impeachment.⁹ This trend continued in the Biden Administration, with fights over presidentially ordered delays in wall construction¹⁰ and student loan forgiveness,¹¹ among other things.

Those cases now look like the first drops over a dam about to burst. Revealing that some of its sweeping campaign promises were quite serious, the new Trump

¹ See, e.g., Eloise Pasachoff, *The President’s Budget Powers in the Trump Era*, in EXECUTIVE POLICYMAKING: SERVING PRESIDENT AND PRESIDENCY: THE ROLE OF THE OMB IN THE PRESIDENCY 69, 88–89 (Meena Bose & Andrew Rudalevige eds., Brookings Institution Press 2020).

² Matthew B. Lawrence, *Congress’s Domain: Appropriations, Time, and Chevron*, 70 DUKE L.J. 1057 (2021).

³ See Jonathan S. Gould, *A Republic of Spending*, 123 MICH. L. REV. 209, 215 (2024) (“[S]pending represents an important exception, a central function of government over which Congress still exercises significant power.”); Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 368 (2018) (discussing Congress’s “ongoing leverage over executive policy” due to time-limited appropriations).

⁴ See generally Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075 (2021) (surveying cases involving unilateral executive action with respect to spending).

⁵ U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016).

⁶ *Id.* at 174–75; see also Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1735 (2016) (arguing that the Obama Administration’s expenditure of funds on cost-sharing reduction payments “sets a troubling precedent for future battles over the appropriations power”).

⁷ See, e.g., *Sierra Club v. Trump*, 963 F.3d 874, 879–80 (9th Cir. 2020) (challenging the Trump Administration’s use of redirected federal funds for border wall construction).

⁸ See *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1232–33 (9th Cir. 2018) (describing President Trump’s sanctuary city policy in his first administration).

⁹ See U.S. GOV’T ACCOUNTABILITY OFF., B-331564, OFFICE OF MANAGEMENT & BUDGET—WITHHOLDING OF UKRAINE SECURITY ASSISTANCE (2020); Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (1st Sess. 2019).

¹⁰ See *Tex. Gen. Land Office v. Biden*, 619 F. Supp. 3d 673, 680–81 (S.D. Tex. 2022).

¹¹ See *Biden v. Nebraska*, 600 U.S. 477, 482–83, 488 (2023).

Administration has asserted broad unilateral authority to defy congressional control over federal spending.¹² Specifically, in its first few months, the Administration issued executive orders forbidding payments related to abortion;¹³ climate change;¹⁴ diversity, equity, and inclusion (DEI);¹⁵ education;¹⁶ and transgender health care.¹⁷ It directed that decisions about payments related to these issues be shifted from civil servants and agency officials to political appointees.¹⁸ And it paused foreign aid spending;¹⁹ imposed conditions on grants and spending programs related to these issues;²⁰ threatened to rescind hundreds of millions to billions of dollars in funding for individual universities;²¹ attempted a blanket freeze on agency expenditures and obligations;²² cut staff at multiple

¹² See, e.g., Donald J. Trump, *Agenda47: Using Impoundment to Cut Waste, Stop Inflation, and Crush the Deep State*, NEVER SURRENDER, INC. (June 20, 2023), <https://www.donaldjtrump.com/agenda47/agenda47-using-impoundment-to-cut-waste-stop-inflation-and-crush-the-deep-state> [https://perma.cc/TH8J-UHUQ] (announcing Trump's plan to challenge statutory limits on impoundments) [hereinafter *Agenda47*]; Zachary Price, *A Primer on the Impoundment Control Act*, LAWFARE (Jan. 28, 2025, 1:50 PM), <https://www.lawfaremedia.org/article/a-primer-on-the-impoundment-control-act> [https://perma.cc/9HVS-H5XS] (describing an impoundment as "an executive refusal to spend funds appropriated by Congress").

¹³ See *Fact Sheet: President Donald J. Trump Enforces Overwhelmingly Popular Demand to Stop Taxpayer Funding of Abortion*, THE WHITE HOUSE (Jan. 25, 2025), <https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-enforces-overwhelmingly-popular-demand-to-stop-taxpayer-funding-of-abortion/> [https://perma.cc/7577-KMHL].

¹⁴ See generally Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 29, 2025).

¹⁵ See *Fact Sheet: President Donald J. Trump Protects Civil Rights and Merit-Based Opportunity by Ending Illegal DEI*, THE WHITE HOUSE (Jan. 22, 2025), <https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-protects-civil-rights-and-merit-based-opportunity-by-ending-illegal-dei/> [https://perma.cc/A7GM-SPK2].

¹⁶ See Exec. Order No. 14190, 90 Fed. Reg. 8853 (Feb. 3, 2025).

¹⁷ See Exec. Order No. 14187, 90 Fed. Reg. 8771 (Feb. 3, 2025).

¹⁸ Exec. Order No. 14222, 90 Fed. Reg. 11095 (Mar. 3, 2025); see also Andrew Duchren, *Treasury Installs Musk Ally to Oversee Its Payment System*, N.Y. TIMES (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/us/politics/treasury-musk-doge-payment-system.html> ("The Treasury Department installed an ally of Elon Musk in a key position overseeing the nation's payment system, replacing a career civil servant who had resisted granting Mr. Musk's cost-cutting team access to payments data.").

¹⁹ See Exec. Order No. 14169, 90 Fed. Reg. 8619 (Jan. 20, 2025).

²⁰ See, e.g., David A. Fahrenthold, et. al., *Many Groups Promised Federal Aid Still Have No Funds and No Answers*, N.Y. TIMES (Feb. 12, 2025), <https://www.nytimes.com/2025/02/12/us/politics/trump-federal-aid-freeze.html>; Wesley Muller, *Trump Unplugs Federal Funding for Louisiana EV Charging Stations*, LA. ILLUMINATOR (Feb. 7, 2025, 3:20 PM), <https://lailluminator.com/2025/02/07/trump-unplugs-federal-funding-for-louisiana-ev-charging-stations/>.

²¹ See, e.g., Harriet Engelke & Spencer Davis, *NIH Cancels \$250 Million in Grants to Columbia as Part of \$400 Million Trump Administration Cut*, COLUM. DAILY SPECTATOR (Mar. 11, 2025, 3:14 PM), <https://www.columbiaspectator.com/news/2025/03/11/nih-cancels-250-million-in-grants-to-columbia-as-part-of-400-million-trump-administration-cut/> [https://perma.cc/P9NY-XZX9]; Dhruv T. Patel & Grace E. Yoon, *Trump Administration Freezes More Than \$2 Billion in Federal Funding to Harvard*, THE HARV. CRIMSON (Apr. 15, 2025, 8:35 PM), <https://www.thecrimson.com/article/2025/4/15/funding-freeze-april-trump/> [https://perma.cc/4UEM-JQWP].

²² Memorandum for the Heads of Executive Departments and Agencies, *Re: Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs* (Jan. 27, 2025),

agencies and offered government-wide incentives for staff departures;²³ and given access to Treasury payment systems to employees of the newly minted Department of Government Efficiency (DOGE).²⁴ Those harmed by these disruptions have naturally turned to the courts for help, and courts have obliged with nationwide orders as sweeping as the executive actions that prompted them.²⁵

This Essay documents this new appropriations presidentialism—the new threat of unilateral, centralized executive disruption in federal spending—and highlights its challenges for affected parties, for administrative law, and for separation of powers. In Part I, we describe Congress’s traditional constitutional power over spending. We emphasize that Congress’s influence over executive action has often operated through “soft power” mechanisms of informal influence and encouragement, but that these soft power tools operate against the backdrop of a congressional “hard power” authority to direct expenditures, deny funding altogether, and impose conditions and restraints by law. In Part II, we situate the new Administration’s actions historically, characterizing them as a dramatic, destabilizing expansion of a preexisting trend toward unilateral executive control over spending. In Part III, we survey the thicket of challenging threshold questions that courts will confront as parties injured by appropriations presidentialism invite judicial intervention. In Part IV, we conclude with three high-level recommendations for courts and Congress about how to protect the power of the purse.

I. CONGRESS’S APPROPRIATIONS POWER

The power of the purse—that is, control over government spending—is one of Congress’s central constitutional powers. Before turning to novel executive actions that threaten that authority, we begin with some basic background on this power’s importance and how it has operated in practice in recent decades. Section A situates “discretionary” spending within the spectrum of resources on which people and institutions rely. Section B explains why Congress has historically provided key appropriations for only one year at a time (or for some other limited period) despite the risk of disruption that this choice creates. Section C then explains how the role of Congress has made discretionary spending more reliable in practice than its formal legal impermanence would suggest.

A. THE SPECTRUM OF FRAGILITY

The resources on which people and institutions rely fall along a spectrum from more entrenched (meaning more stable and less at risk through the political process) to

<https://www.whitehouse.gov/wp-content/uploads/2025/03/M-25-13-Temporary-Pause-to-Review-Agency-Grant-Loan-and-Other-Financial-Assistance-Programs.pdf> [https://perma.cc/TLW8-Z28B].

²³ Nick Bednar, *Breaking Down OPM’s ‘Fork in the Road’ Email to Federal Workers*, LAWFARE (Jan. 30, 2025, 2:25 PM), <https://www.lawfaremedia.org/article/breaking-down-opm-s--fork-in-the-road--email-to-federal-workers> [https://perma.cc/6UFV-Z9EU].

²⁴ See Kim Zetter, *Court Documents Shed New Light on DOGE Access and Activity at Treasury Department*, ZERO DAY (Feb. 13, 2025), <https://www.zetter-zeroday.com/court-documents-shed-new-light-on-doge-access-and-activity-at-treasury-department/> [https://perma.cc/3F9V-EWZ7].

²⁵ See *infra* Section III.A.

more fragile (meaning less stable and more at risk through the political process).²⁶ At the most entrenched end of this continuum are resources protected as real or personal property by state law. Not only is such property—peoples’ private homes, vehicles, financial assets, and the like—guaranteed by state law, but various federal constitutional provisions impede states from changing their laws to abolish these guarantees.²⁷

Slightly less entrenched, but still very sticky, are resources conferred by government programs that amount to “new property” entitlements, such as Social Security income, Medicare benefits, and unemployment insurance.²⁸ Funding for such benefits at the federal level typically comes from a permanent appropriation, meaning a law that allows payments from the U.S. Treasury on an ongoing basis, unless and until Congress enacts new legislation—a prospect that is generally unlikely given the difficulties of the lawmaking process.²⁹

At the least entrenched end of the continuum, more legally fragile than entrenched, are resources obtained through so-called “discretionary” spending—that is, spending that Congress has discretion to enact or revise each year during the annual appropriations cycle. Congress appropriates funds for this kind of spending for only a single fiscal year or some other fixed period. Because these appropriations are time-limited, the legal default rule is the opposite from new property entitlements: rather than continuing absent new legislation, this spending would cease if Congress failed to enact a new appropriation each year (or at the end of some other period).³⁰

About thirty percent of federal spending currently falls in this “discretionary” category, a share that has been declining over time as costs for entitlement programs and

²⁶ See, e.g., Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 408 (2015) (defining entrenchment); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666–67 (2002) (offering a definition of entrenchment).

²⁷ See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 960–90 (2000) (describing and analyzing the doctrinal preconditions to labeling an interest property for purposes of takings, procedural due process, and substantive due process).

²⁸ Charles Reich coined the term “new property” for such assets in a classic article. See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). The Supreme Court accepted this logic by identifying certain types of government benefits as “property” within the meaning of the Due Process Clauses’ prohibition on deprivation of property without due process. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

²⁹ See Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 20, 23 (2020) (discussing). Technically the permanent appropriation for Medicare Part A, a portion of Medicare Part C, and Social Security draws from a trust fund that may become insolvent if spending exceeds revenues and no correction is enacted. See Matthew B. Lawrence, *Medicare “Bankruptcy,”* 63 B.C. L. REV. 1657, 1668 (2022) (describing trust fund).

³⁰ Congress sometimes appropriates “no-year funds,” a fixed amount that is available for an indefinite period, “to remain available until expended.” U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-463SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 2, 9 (4th ed. 2016 revision) (discussing classifications of budget authority based on duration). In addition, Congress or an agency may create a commitment to spend that persists even if Congress does not appropriate funds to honor that commitment in a given year. Complicated questions arise in these cases if Congress, in fact, fails to appropriate funds to honor the commitment, including the possibility that compensation may be available through the permanent Judgment Fund appropriation. See generally Lawrence, *Disappropriation*, *supra* note 29.

interest on government debt increase.³¹ Nearly half of discretionary spending goes to defense programs and contracts, including salaries for military personnel, contracts for military equipment and weapons, and the cost of military operations.³² The other half includes not only agency budgets for internal operations and regulatory activities but also a wide range of grants and benefits for third parties.³³ All this discretionary spending could in principle terminate when the time-limited appropriations for it expire.

B. WHY HAVE ANNUAL APPROPRIATIONS?

Why would Congress allow so much uncertainty to surround not only the government's most basic operations but also many important functions and programs? Even apart from government employees' salaries, beneficiaries ranging from state transportation agencies and scientific researchers to military contractors and impoverished families and children may all be counting on certain annually funded programs continuing from year to year. Why would Congress not protect such parties' reliance interests?

As the Supreme Court recently underscored, whether to fund government operations and programs permanently or on a time-limited basis is a choice, one that Congress can normally make however it likes.³⁴ As a general matter, the Constitution gives Congress the "power of the purse," meaning the power to control government spending through legislation.³⁵ It does so by forbidding any withdrawal of money from "the Treasury" except "in Consequence of Appropriations made by Law," and more generally by "vest[ing]" all the federal government's "legislative powers" in Congress and then obligating the President to "take Care that the Laws," including spending laws, "be faithfully executed."³⁶

Congress's choice, however, to provide only time-limited appropriations not only creates the legal fragility discussed in the last section, but also advances important

³¹ *Understanding the Federal Budget*, PETER G. PETERSON FOUND, <https://www.pgpf.org/federal-budget-guide/> [https://perma.cc/Z5DX-NVA2] (last visited July 5, 2025) ("In 2024, discretionary spending was just 27 percent of the budget. Over the next decade, it is projected to decrease to a historically low level relative to the size of the national economy.").

³² *Id.* ("Defense spending represents nearly half of total discretionary spending."); see also Greg Ip, *Cutting the Deficit Is Easy—It's Just Unpopular*, WALL ST. J. (Dec. 26, 2024, 5:30 AM), <https://www.wsj.com/politics/policy/how-to-cut-deficit-budget-trump-doge-11e287c6>; *Budget Basics: National Defense*, PETER G. PETERSON FOUND. (May 2, 2024), <https://www.pgpf.org/article/budget-explainer-national-defense/> [https://perma.cc/9DMX-HAQU].

³³ See *Policy Basics: Non-Defense Discretionary Programs*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 19, 2024), <https://www.cbpp.org/research/federal-budget/non-defense-discretionary-programs> (describing non-defense discretionary spending, which "cover[s] a wide variety of policy priorities such as education, public health, scientific research, infrastructure, national parks and forests, environmental protection, and some low-income assistance, as well as many basic government operations including law enforcement, courts, and tax collection," as well as "many programs related to national security, including foreign aid, homeland security, and health care and services for veterans").

³⁴ See *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. 416, 426 (2024) ("[W]e conclude that appropriations need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause.").

³⁵ See, e.g., Price, *supra* note 3, at 360.

³⁶ U.S. CONST. art. I, §§ 1, 9 cl. 7; *id.* art. II, § 3.

separation of powers values. Historically, Congress adopted the practice of time-limited appropriations from the British Parliament, which employed it to provide an ongoing check on royal authority.³⁷ Today, it continues to serve much the same purpose in the U.S. context. Although the modern “imperial” presidency holds broad statutory and constitutional authorities with respect to both domestic and foreign affairs,³⁸ time-limited appropriations give Congress an ongoing say in how those powers are exercised. As one of us has put it, “[t]hrough the ingenious practice, begun with the very first Congress, of appropriating funds only one year at a time, Congress has ensured that presidents must always come back every year seeking money just to keep the government’s lights on.”³⁹ As a result, Congress may check unilateral executive policies and actions by denying funds for them, imposing conditions and constraints, or holding other presidentially desired funds hostage.⁴⁰

Recognizing this power’s importance, Congress has sought to reinforce it over the course of American history. It has done so in part by enacting a series of statutes that establish a general legal framework governing federal spending: for example, the Purpose Statute allows use of appropriations only for the specific “purposes” for which they were provided; the Antideficiency Act forbids spending or even obligating (that is, committing to spend) funds without a supporting appropriation; and the Impoundment Control Act allows presidents to cancel or delay appropriated spending only if they follow prescribed procedures that often require new legislation from Congress.⁴¹

Beyond these legal requirements, Congress has established an institutional infrastructure to make them effective. Inside the Executive Branch, the Office of Management and Budget (OMB) develops executive budgets and oversees executive spending, helping ensure compliance not only with presidential policies but also with statutory dictates.⁴² Within the Legislative Branch, the Congressional Budget Office (CBO) provides objective analysis to aid legislative budgeting and economic policy, while the Government Accountability Office (GAO) monitors agency spending, issues legal opinions and reports, and makes recommendations to Congress about programmatic improvements.⁴³

³⁷ See Price, *supra* note 3, at 366–67; JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 45–46 (2017).

³⁸ See generally ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (2004 ed.).

³⁹ Price, *supra* note 3, at 367–68.

⁴⁰ See *id.* at 368–69.

⁴¹ Eloise Pasachoff, *Modernizing the Power of the Purse Statutes*, 92 G.W. L. REV. 359, 362 n.17 (2024).

⁴² For an overview of OMB’s functions and historical evolution, see James P. Pfiffner, *OMB, the Presidency, and the Federal Budget*, in EXECUTIVE POLICYMAKING: THE ROLE OF THE OMB IN THE PRESIDENCY 11, 11 (Meena Bose & Andrew Rudalevige eds. 2020). See also generally Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016) (evaluating how OMB has employed statutory authorities that centralize the executive budget process).

⁴³ For background on the development of these institutions and their importance, see, for example, Zachary S. Price, *Effectuating Congress’s Power of the Purse* (unpublished draft) (on file with author); see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-463SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 1, 9–22 (4th ed. 2016 revision) (discussing GAO’s history and functions); JOHN DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION 175 (2021) (discussing origins of the CBO).

One of us is at work on a book documenting how effective this structure has been in maintaining executive agencies' accountability to Congress notwithstanding the considerable policy authority delegated to agencies over time.⁴⁴ Across dozens of interviews with civil servants working on budget and appropriations at OMB and a wide variety of agencies, as well as with staff members on appropriations committees in both the House and Senate, a consistent picture has emerged: officials in Congress and the Executive Branch engage in regular, year-round communication regarding agencies' implementation of their appropriations.⁴⁵ Although these communications sometimes stem from consultation requirements in appropriations laws, Congress's influence over agencies through the appropriations process is often more in the nature of "soft power": it stems from informal, iterative interactions and relationships rather than hard legal requirements.⁴⁶ GAO plays an important ongoing role, too, as agencies often reach out for advice on complying with appropriations provisions, members of Congress ask for opinions on agencies' compliance, and GAO investigates agencies' actions on its own initiative before reporting its conclusions to agencies and Congress.⁴⁷

In short, through the process of annual appropriations, reinforced by a set of framework statutes and associated institutions and relationships that render it effective, Congress has strengthened its constitutional power of the purse and assured itself an ongoing role in overseeing agency operations, notwithstanding broad statutory delegations of authority to the Executive Branch.

C. DE FACTO STABILITY DESPITE DE JURE FRAGILITY

Even as annual appropriations and the soft power relationships they foster have ensured agency accountability to Congress, congressional control over spending has also tempered the legal fragility of federal funding. Most representatives and senators retain their seats across election cycles, and many have historically had long-term interests in

⁴⁴ See generally Eloise Pasachoff, *All the President's Money?: Executive Branch Spending in the Age of Presidential Control* (unpublished work-in-progress) (on file with author).

⁴⁵ See, e.g., Interview by Eloise Pasachoff with OMB official (May 1, 2024) (describing regular "de facto oversight from the legislative branch in the sense that all your repeat players are on appropriations"); Interview by Eloise Pasachoff with agency official (May 13, 2024) (describing "constant communication" with appropriations staff because "otherwise your budget would be significantly changed and all cut and you can't do your job"); Interview by Eloise Pasachoff with appropriations staffer (May 30, 2024) (responding to a question about whether the appropriations committee sees appropriations as a lever for oversight with "sure, it's huge," and explaining "very direct oversight" between subcommittees and their agencies, especially over earmarks); Interview by Eloise Pasachoff with agency official (June 25, 2024) (describing "close relationship" with appropriations subcommittee, including through site visits); Interview by Eloise Pasachoff with agency official (August 5, 2024) (describing appropriations committee oversight mechanisms as including "calling and asking for check-ins every week").

⁴⁶ In international relations, "[s]oft power is the ability to have other nations support or acquiesce in your policies without being induced by either military or economic pressure or rewards—that is, by resorting to hard power." Curtis A. Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, 4 DUKE J. CONST. L. & PUB. POL'Y 57, 73 (2009) (citing JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2005)).

⁴⁷ Eloise Pasachoff, Craig Schulman, & Angelene Superable, *GAO's Role in Appropriations Oversight*, BROOKINGS INST. (June 18, 2025), <https://www.brookings.edu/articles/gaos-role-in-appropriations-oversight/> [https://perma.cc/E4JU-NNR2].

preserving key government activities and programs. Moreover, even as members come and go and control of the chambers flips, the core composition of congressional committees often remains relatively stable. As a result, despite their de jure fragility, agency budgets and discretionary spending programs have remained relatively stable in practice from year to year and even administration to administration.⁴⁸

Spending by the U.S. Agency for International Development (USAID) during the first Trump Administration provides a useful illustration. As a candidate in 2016, President Trump proposed cutting such spending,⁴⁹ and his first proposed budget to Congress in 2017 formalized these proposals.⁵⁰ The proposal met bipartisan pushback,⁵¹ and Congress ultimately funded foreign aid programs at levels comparable to past legislation.⁵²

In 2018 and 2019, the Administration then attempted a unilateral cancellation of foreign aid spending. It sought to do so by proposing a “rescission”—that is, new legislation to eliminate the spending—close to the end of the fiscal year. Because the Impoundment Control Act allows the President to put spending on hold for a forty-five-day period while Congress considers a rescission proposal, the Administration hoped to delay this spending through the end of the fiscal year, at which point the appropriation for it would expire.⁵³ Again, however, bipartisan pushback compelled the Administration to drop its plans.⁵⁴ Overall, the first Trump Administration ended up implementing

⁴⁸ See D. Andrew Austin, DISCRETIONARY BUDGET AUTHORITY BY SUBFUNCTION: AN OVERVIEW, CONG. RSCH. SERV., R41726 (updated Mar. 21, 2024) (demonstrating general stability, with modest rather than dramatic increases or decreases over time, in federal funding as a percentage of GDP across functional budget categories); Matthew Calabrese, *The Filibuster, Appropriations, and Administrative Capacity: Why the Filibuster Should be Preserved for Appropriations*, 16 GOV’T L. REV. 90, 98 (2022–23) (offering a “case study on the filibuster’s effect during the Trump and Biden Administrations in delivering consistent funding for politically divisive programs related to climate change”).

⁴⁹ Ben Quinn, *Will Trump Honour Pledge to ‘Stop Sending Aid to Countries that Hate Us’?*, THE GUARDIAN (Nov. 13, 2016, 4:00 AM), <https://www.theguardian.com/global-development/2016/nov/13/will-trump-presidency-honour-pledge-stop-sending-foreign-aid-to-countries-that-hate-us-usaid> [https://perma.cc/MKG9-FULR].

⁵⁰ See Nurith Aizenman, *Trump’s Proposed Budget Would Cut \$2.2 Billion From Global Health Spending*, NPR (May 25, 2017, 3:13 PM) <https://www.npr.org/sections/goatsandsoda/2017/05/25/529873431/trumps-proposed-budget-would-cut-2-2-billion-from-global-health-spending> [https://perma.cc/2UXZ-5L42].

⁵¹ See Associated Press, *US Senator Pushes Back Against Trump’s Proposed Foreign Aid Cuts*, VOA NEWS (Apr. 14, 2017, 6:48 PM) <https://www.voanews.com/a/senator-pushes-back-against-trump-proposed-foreign-aid-cuts/3810891.html> [https://perma.cc/RE9G-5W6V]; Press Release: Engel Floor Remarks on Foreign Aid Budget Cuts, DEMOCRATS HOUSE FOREIGN AFFS. COMM. (Apr. 5, 2017), <https://democrats-foreignaffairs.house.gov/2017/4/engel-floor-remarks-foreign-aid-budget-cuts>.

⁵² See Drew Desilver, *What the Data Says About U.S. Foreign Aid*, PEW RSCH. CTR. (Feb. 6, 2025), <https://www.pewresearch.org/short-reads/2025/02/06/what-the-data-says-about-us-foreign-aid/> [https://perma.cc/FM3W-H4LW] (showing relatively consistent trend in funding for foreign aid between Obama Administration and first Trump Administration).

⁵³ See Pasachoff, *supra* note 1, at 77.

⁵⁴ See *id.* at 77, 89.

foreign aid programs largely as funded by Congress, notwithstanding its objections to this spending.⁵⁵

In sum, as one of us has observed, “in a world of broad delegations and expansive executive authority, Congress’s power of the purse is the single feature of our system that most effectively guarantees an ongoing political constraint on the president’s authority to set policy unilaterally.”⁵⁶ It may not be surprising, then, that presidents seem to be aiming to conquer the spending domain as well.

II. EXECUTIVE INTRUSIONS

As the examples discussed in the introduction demonstrate, the past several presidents have all taken significant unilateral actions intruding on Congress’s control over federal spending.⁵⁷ Additional actions of this sort in the Obama, first Trump, and Biden Administrations have been well documented, and in the interest of space we will not elaborate upon them here.⁵⁸

Even if these actions by recent presidents constitute a general trend (which itself reflects a still more general trend toward unilateral executive governance), the second Trump Administration has advanced even broader claims to unilateral executive control over spending. Section A addresses the early actions of the second Trump Administration and Section B reflects on the costs of rising appropriations presidentialism for funding beneficiaries, private planning and government capacity, and constitutional checks and balances.

⁵⁵ See, e.g., Clarke Hallum, *A Glimpse of President Trump’s Foreign Aid Policy So Far*, THE BORDEN PROJECT (Aug. 24, 2018), <https://bordenproject.org/president-trumps-foreign-aid-policy/> [https://perma.cc/P5B9-456A]; Michael Igoe, *Disrupt and Compete: How Trump Changed US Foreign Aid*, DEVEX (Aug. 21, 2020) <https://www.devex.com/news/disrupt-and-compete-how-trump-changed-us-foreign-aid-97955> [https://perma.cc/R4B8-DBNC].

⁵⁶ Price, *supra* note 3, at 369.

⁵⁷ See *supra* notes 6–11 and accompanying text.

⁵⁸ For further examples, see PHILIP A. WALLACH, *TO THE EDGE: LEGALITY, LEGITIMACY, AND THE RESPONSES TO THE 2008 FINANCIAL CRISIS* 50–52, 74–76 (2015) (discussing creative legal theories for offering loans and guarantees during the 2008 financial crisis); SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* 55–56, 230 (2020) (discussing debatable interpretation employed to aid auto manufacturers in 2008–2009 even though “there was no appropriation, no congressionally sanctioned funding”); Bagley, *supra* note 6, at 1729–35 (discussing the Obama Administration’s debatable use of a permanent appropriation to provide certain health insurance subsidies for which Congress provided no annual appropriation); Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1695–1701 (2017) (discussing the Obama Administration’s “leverag[ing] [of] statutory ambiguity” to provide student loan forgiveness); Pasachoff, *supra* note 1, at 77, 79 (discussing efforts in the first Trump Administration to interpret impoundment restrictions and transfer and reprogramming authorities flexibly); Eloise Pasachoff, *Executive Branch Control of Federal Grants: Policy, Pork, and Punishment*, 83 OHIO ST. L.J. 1113, 1130–33 (2022) (discussing the first Trump Administration’s policy choices in grant-making); see also Price, *supra* note 43 (discussing the general trend toward unilateral presidential control over spending).

A. THE SECOND TRUMP ADMINISTRATION

Presidents' recent assertions of power over spending are consistent with a broader trend toward aggressive unilateral policy making by presidents and executive agencies.⁵⁹ Within that context, Congress's power of the purse has actually provided one of the most effective checks on the Executive Branch: congressional opposition through the appropriations process has succeeded in limiting, altering, or even stymieing some executive initiatives.⁶⁰ In its first few months, however, President Trump's second Administration has not only doubled down on the broader trend toward aggressive assertions of executive power, but also undertaken a concerted expansion in appropriations-related unilateralism.

The new Administration, for example, has attempted to add new conditions to existing federal grants through executive orders relating to culture war issues like gender, DEI, and climate.⁶¹ In doing so, moreover, it has threatened to cut off funds immediately based on any alleged noncompliance; in some instances, it has actually followed through on this threat, pausing or terminating existing grants without reference to agencies' prescribed internal processes for such funding changes.⁶² The Administration has also "clawed back" grant funding it opposed on policy grounds based on claims of fraud,⁶³ and it has apparently paused grant, loan, and contract spending in many areas across multiple agencies, in some cases even after courts issued temporary restraining orders rejecting an OMB directive that ordered a government-wide pause of such spending.⁶⁴ It

⁵⁹ On this dynamic in general, see, for example, Nolan McCarty, *Polarization, Congressional Dysfunction, and Constitutional Change*, 50 IND. L. REV. 223, 242 (2016); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 686–87 (2014); Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 398–400 (2009).

⁶⁰ See *supra* notes 49–55 and accompanying text; see also Price, *supra* note 3, at 431, 443–45 (describing presidential compliance with funding restrictions on military deployments and law enforcement); WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 121, 123, 133–34 (2003) (observing that "[w]hen their actions require funding, presidents must pay special attention to Congress" and that "by the time [an agency or program sought by the President] has made it through the appropriations process, chances are it looks quite a bit different from what [the President] originally envisioned").

⁶¹ See *supra* notes 13–19 and accompanying text (collecting sources).

⁶² See, e.g., Sharon Otterman & Liam Stack, *White House Cancels \$400 Million in Grants and Contracts to Columbia*, N.Y. TIMES (Mar. 8, 2025), <https://www.nytimes.com/2025/03/07/nyregion/trump-administration-columbia-grants-cancelled-antisemitism.html>; Eugene Volokh et al., *A Statement from Constitutional Law Scholars on Columbia*, N.Y. REVIEW OF BOOKS (Mar. 20, 2025), <https://www.nybooks.com/online/2025/03/20/a-statement-from-constitutional-law-scholars-on-columbia/> [https://perma.cc/RWG3-65R2]; cf. Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 252–53, 280–84, 333 (2014) (describing agency procedures for enforcing substantive grant conditions and noting that agencies rarely took action against violations of such conditions).

⁶³ See Michael Casey & Jake Offenhartz, *FEMA Yanks Back \$80 Million that New York City Meant to Cover Hotel Costs for Migrants*, ASSOCIATED PRESS (Feb. 12, 2025, 5:23 PM), <https://apnews.com/article/fema-migrant-hotels-new-york-musk-immigration-a41f36b2bfde0bb78a5859bceec8dfb72>.

⁶⁴ *New York v. Trump*, No. 25-cv-39, slip op. at 18 n.6 (D.R.I. Mar. 6, 2025) (describing "various funding disruptions that occurred after the Court's TRO"),

announced new lower rates for indirect costs associated with certain federal research grants, effectively retracting large sums from universities and research labs despite an appropriations rider apparently preventing such rate reductions.⁶⁵ And it directed each agency head to review all existing grants and contracts (with some exceptions relating to defense, intelligence-gathering, and immigration) and to identify potential funding modifications and terminations that would either reduce overall government spending or advance the President's priorities.⁶⁶

At the same time, within the Executive Branch, the Administration has undertaken both cuts and affirmative spending that may be unlawful. In terms of cuts, the Administration has issued stop-work orders and terminated staff, grants, and contracts at multiple agencies, notwithstanding appropriations providing continued funding and authorizing statutes mandating agency activities.⁶⁷ To the extent that these actions amount to canceling appropriated spending without seeking and obtaining new legislation from Congress or following statutory procedures for a reduction in force, they could be characterized as unlawful rescissions in violation of the Impoundment Control Act.⁶⁸ By way of unauthorized spending, the Administration has sought to induce departures by offering buyouts to almost the entire civil service. These offers, however, could violate the Antideficiency Act's prohibition on any "obligation" of funds without an existing appropriation: although appropriations in effect at the time of these offers were due to expire in mid-March 2025, the buyout offers reportedly promised payments through September 30.⁶⁹

In another unilateral action, the Administration has employed OMB's "apportionment" power aggressively to shape policy within the Executive Branch. To help prevent agencies from exceeding their annual appropriations, the Antideficiency Act requires "apportionment" of funds, meaning a planned allocation of the annual

https://storage.courtlistener.com/recap/gov.uscourts.rid.58912/gov.uscourts.rid.58912.161.0_2.pdf [https://perma.cc/SE7F-PLFF].

⁶⁵ See NAT'L INSTS. OF HEALTH, SUPPLEMENTAL GUIDANCE TO THE 2024 NIH GRANTS POLICY STATEMENT: INDIRECT COST RATES, NOT-OD-25-068 (Feb. 7, 2025); cf. Eloise Pasachoff, *Federal Grant Rules and Realities in the Intergovernmental Administrative State: Compliance, Performance, and Politics*, 37 YALE J. REG. 573, 589 (2020) (discussing indirect cost rate and negotiations).

⁶⁶ Exec. Order No. 14222, *supra* note 18, at 11095–96.

⁶⁷ See, e.g., Fatma Tanis, *Nearly 400 USAID Contract Employees Laid Off in Wake of Trump's 'Stop Work' Order*, NPR (Jan. 28, 2025, 7:03 PM), <https://www.npr.org/sections/goats-and-soda/2025/01/28/g-s1-45132/usaaid-contract-employees-layoffs-trump> [https://perma.cc/5S9V-7T7D]; Rebecca Carballo & Juan Perez Jr., *DOGE Announces \$881 Million in Cuts for Education Department Contracts*, POLITICO (Feb. 10, 2025, 9:56 PM), <https://www.politico.com/news/2025/02/10/education-department-pauses-research-contracts-00203494>; Hugh Son, *CFPB Heads of Supervision and Enforcement Announce Resignations After Stop-Work Order*, CNBC (Feb. 11, 2025, 12:32 PM), <https://www.cnbc.com/2025/02/11/cfpb-leaders-announce-resignations-after-stop-work-order.html> [https://perma.cc/VRH8-C9VM].

⁶⁸ See Nick Bednar, *A Primer on Reductions in Force*, LAWFARE (Feb. 20, 2025, 9:58 AM), <https://www.lawfaremedia.org/article/a-primer-on-reductions-in-force> [https://perma.cc/8C8W-89D7].

⁶⁹ David A. Super, *Many Trump Administration Personnel Actions Are Unlawful*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 14, 2025), <https://www.cbpp.org/research/federal-budget/many-trump-administration-personnel-actions-are-unlawful>; Nick Bednar, *Will Employees Who Resign Have a Remedy?*, LAWFARE (Feb. 4, 2025, 1:00 PM), <https://www.lawfaremedia.org/article/will-employees-who-resign-have-a-remedy> [https://perma.cc/7FR3-HA4B].

appropriation over the course of the fiscal year so as to avoid running short, and it also requires OMB to sign off on each agency's "plan to use budgetary resources."⁷⁰ In its early weeks, the Administration employed this OMB authority to effectuate a ninety-day pause on foreign aid called for in one of President Trump's first-day executive orders;⁷¹ required independent agencies to accept adjustments in their apportionments "to advance the President's policies and priorities;"⁷² and stopped publicizing agency funding apportionments, despite a statutory mandate to do so.⁷³ Finally, the White House has also gained access to the Treasury Department's payment system, a system that historically has been used merely to effectuate payments once agencies have signed off on them rather than to implement presidential policy goals.⁷⁴

Despite building on earlier examples, these actions represent a dramatic escalation in presidential attempts to gain unilateral control over spending. They are broader than prior unilateral actions insofar as they target entire industries (e.g., universities), sectors (e.g., foreign aid), agencies (e.g., USAID), processes (e.g., apportionment), and workforces (e.g., all civil servants). They are also more expansive insofar as they target every moment in the flow of federal funding, from the initial stage of OMB apportionment through clawing back funds after supposedly final disbursement.

In the final days of the first Trump Administration, unnamed senior officials referred to "the [P]resident's authority to spend money at any time and in any manner that he determines appropriate."⁷⁵ During the interregnum between Trump's two terms, Trump himself pledged "to restore executive branch impoundment authority to cut waste, stop inflation, and crush the Deep State,"⁷⁶ while his former OMB General Counsel (who has returned to that role) advanced arguments that the President holds constitutional authority to decline to spend appropriated funds.⁷⁷ Russell Vought, the current and former head of OMB, argued that OMB must be "aggressive in wielding the [apportionment]

⁷⁰ OFF. OF MGMT. & BUDGET, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 120.1, CIRCULAR NO. A-11 (2024); 31 U.S.C. § 1512 (requiring apportionments).

⁷¹ Exec. Order No. 14169, *supra* note 19.

⁷² Exec. Order No. 14215, 90 Fed. Reg. 10447, 10448 (Feb. 18, 2025).

⁷³ Paul M. Krawzak, *White House Scraps Public Spending Database*, ROLL CALL (Mar. 24, 2025, 2:50 PM), <https://rollicall.com/2025/03/24/white-house-scraps-public-spending-database/> [https://perma.cc/Y2GJ-275G].

⁷⁴ See Hurubie Meko, *Federal Judge Banishes Musk's DOGE Aides from Treasury Dept. Systems*, N.Y. TIMES (Feb. 21, 2025), <https://www.nytimes.com/2025/02/21/nyregion/sdny-doge-elon-musk-treasury-injunction.html>. For a fascinating description of the use of Treasury's payment system as a tool of executive power along with a creative proposal for how Congress might respond, see Rohan Grey, *Digitizing the Fisc 1* (Mar. 11, 2025) (unpublished manuscript) (permission to cite), <https://rohangrey.net/files/Grey-DigitalFisc-Draft-Mar11.pdf?ref=crisesnotes.com> [https://perma.cc/Q6YM-EXE9].

⁷⁵ Emily Cochrane & Annie Karni, *Administration Threatened Veto over Ukraine Aid in Spending Package*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/us/politics/veto-threatened-veto-ukraine-aid.html>.

⁷⁶ See *Agenda47*, *supra* note 12.

⁷⁷ Mark Paoletta, Daniel Shapiro, & Brandon Stras, *The History of Impoundments Before the Impoundment Control Act of 1974*, CTR. FOR RENEWING AM. (June 24, 2024), <https://americarenewing.com/the-history-of-impoundments-before-the-impoundment-control-act-of-1974/> [https://perma.cc/G7LJ-9QR9]; Mark Paoletta & Daniel Shapiro, *The President's Constitutional Power of Impoundment*, CTR. FOR RENEWING AM. (Sept. 10, 2024), <https://americarenewing.com/the-presidents-constitutional-power-of-impoundment/> [https://perma.cc/9WJR-3X5B].

tool on behalf of the President's agenda."⁷⁸ Through the actions just described in the early days of his second term, President Trump has appeared to be implementing this agenda.

B. COSTS OF APPROPRIATIONS PRESIDENTIALISM

Many of the Administration's actions now face court challenges.⁷⁹ We will turn shortly to questions about how Congress, the courts, and other actors might respond. It bears emphasis, however, that unilateral presidential control over spending could disrupt not only particular programs and government functions, but also the arrangements and understandings that ensure agencies' responsiveness to Congress through the annual appropriations process, not to mention the de facto stability in spending from year to year that that process has often helped guarantee. Instead of the current de facto stability despite de jure fragility, those who depend on federal spending—whether they are government employees, agencies, or outside funding recipients—could face perpetual insecurity due to potential unilateral executive withdrawal or cancellation of funds. And while that insecurity would likely be most pronounced during presidential transitions like the one from Biden to Trump, it could continue at other times as well, given the risk of a sudden shift in executive policy.

This fragility can cause real harm to people and institutions. To begin with, when the Executive Branch imposes delays and cancellations, the immediate recipients of federal funding risk losing expected sources of support. Accordingly, a large and varied group—including everyone from federal employees, families requiring food assistance, and veterans seeking healthcare to defense contractors working on weapons systems,⁸⁰ cybersecurity firms improving port security,⁸¹ and university researchers pursuing medical and scientific discoveries⁸²—may face budgetary uncertainty due to such actions. And in the second Trump administration, that precarity has prompted layoffs and

⁷⁸ Russ Vought, *Executive Office of the President of the United States*, in *MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROJECT* 43, 45 (Paul Dans & Steven Groves eds., 2023).

⁷⁹ *Litigation Tracker: Legal Challenges to Trump Administration Actions*, JUST SEC., <https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/> [https://perma.cc/M5R2-SR29] (last visited July 10, 2025).

⁸⁰ See Taylor Brokesh, *Department of Defense Will Not Pause Defense Contracts Amid Federal Grant Freeze*, 13NEWS NOW (Jan. 28, 2025, 6:54 PM), <https://www.13newsnow.com/article/news/national/military-news/department-of-defense-omb-memo-contracts-federal-spending-freeze/291-77438b2a-4384-4d25-9fc5-997136a524ff> [https://perma.cc/M9WA-YAC8] (Department of Defense); Sandra Erwin, *DoD Says Contracts Continue Amid Confusion over White House Order*, SPACENEWS (Jan. 28, 2025), <https://spacenews.com/dod-says-contracts-continue-amid-confusion-over-white-house-order/> [https://perma.cc/2CR4-74LT] (Army contracts).

⁸¹ See Chris Riotta, *How Trump's Funding Freeze Threatens U.S. Port Cybersecurity*, BANK INFO SEC. (Feb. 11, 2025), <https://www.bankinfosecurity.com/how-trumps-funding-freeze-threatens-us-port-cybersecurity-a-27499> [https://perma.cc/ZLS9-XP98] (cybersecurity at ports).

⁸² See, e.g., Kathryn Palmer, *Trump Orders Disrupt Academic Research*, INSIDE HIGHER ED. (Feb. 3, 2025), <https://www.insidehighered.com/news/government/science-research-policy/2025/02/03/how-trumps-executive-orders-are-disrupting> [https://perma.cc/BGF9-BBYM].

cancellations;⁸³ permanent funding terminations would of course cause still more dramatic losses.

The disruption, however, could go well beyond such immediate harms. For one thing, the increased instability in spending complicates long-range planning for both private parties and the government itself. Just consider the challenges of operating complex regulatory programs, planning long-term research, maintaining consistent medical care, or developing novel military technologies without any protection against executive officials suddenly pulling the plug, even in the face of statutory support.⁸⁴ This increased long-term uncertainty, moreover, would be built into the structure of federal spending going forward: Congress could not prevent it through laws directing expenditure because presidents might defy such laws, and the Executive Branch, for its part, could never completely tie its own hands. Thus, what Justice Gorsuch has said of deference to agency statutory interpretations could be said of appropriations presidentialism: it “engenders constant uncertainty and convulsive change even when the statute at issue itself remains unchanged,” posing “antireliance harms” that are not “distributed equally.”⁸⁵ The uncertainty could even mean that the government must pay higher costs to compensate employees and providers for the risks of termination—an ironic result from efforts ostensibly aimed at efficiency.⁸⁶

In addition—and most importantly from a separation of powers perspective—unilateral executive authority over spending would compromise a key source of congressional policy leverage. As explained in Part I, executive agencies at present appear more accountable to Congress due to their dependence on annual appropriations, yet these soft power linkages could wither if the appropriations process undergirding them became less meaningful. Indeed, the change might even impair Congress’s overall capacity by exacerbating the already challenging dynamics of internal congressional negotiation. In part because obtaining agreement between the two parties or even within

⁸³ See, e.g., Eric White, *Trump Administration Contracting Freeze Puts Vendors out of Business*, FED. NEWS NETWORK (Mar. 28, 2025, 12:56 PM), <https://federalnewsnetwork.com/federal-newscast/2025/03/trump-administration-contracting-freeze-puts-vendors-out-of-business/> [https://perma.cc/475U-FUZ6] (“The Trump [A]dministration’s contracting freeze has caused several contractors to go out of business.”).

⁸⁴ For discussion of this problem in general, see, for example, JESSICA TOLLESTRUP, OVERVIEW OF FUNDING MECHANISMS IN THE FEDERAL BUDGET PROCESS, AND SELECTED EXAMPLES, R44582, CONG. RSCH. SERV. (2021); Darrell Curren, *Government Contracting in the Shadow of the October 2013 Federal Government Shutdown*, 44 PUB. CONT. L.J. 349, 350 (2015); I-Tung Yang, *Impact of Budget Uncertainty on Project Time-Cost Tradeoff*, 52 IEEE TRANSACTIONS ENG’G MGMT. 167, 167–68 (2005).

⁸⁵ *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 438 (2024) (Gorsuch, J., concurring) (rejecting such deference).

⁸⁶ Insofar as appropriations presidentialism indeed causes such cost increases and resulting inefficiencies, it could amount in practice to a form of “structural deregulation.” Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 587 (2021). For judicial acknowledgement of cost increases due to uncertainty in related contexts, see, for example, *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 191–92 (2012) (“If the Government could be trusted to fulfill its promise to pay only when more pressing fiscal needs did not arise . . . contracting would become more cumbersome and expensive for the Government, and willing partners more scarce.”); *Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 741 (Fed. Cir. 2018) (denying petition for rehearing *en banc*) (Newman & Wallach, JJ., dissenting) (“The government’s access to private sector products and services is undermined if non-payment is readily achieved after performance[.]”).

them is often difficult due to factionalism and partisan polarization, Congress has come to rely increasingly on “omnibus” bills and other large spending packages to provide new annual appropriations.⁸⁷ But enactment of such legislation often depends on combining different senators’ and representatives’ priorities together in one package, and a unilateral presidential power to ignore or cancel specific provisions or spending items could make such “logrolling” impossible. If the President could later alter the bargain by negating provisions they favored, why would senators or representatives ever vote for a package including provisions they dislike?⁸⁸

While entrenched practices and expectations sometimes warrant disruption, these potential costs—to individual beneficiaries, to private planning and government efficiency, and even to constitutional checks and balances—appear considerable. The question, then, is what responses might be appropriate, and in particular how courts should address the wave of litigation that has predictably greeted the Trump Administration’s innovations. As the next Part illustrates, these questions raise complexities of their own.

III. COURTS ENTER THE FRAY

The ongoing, unprecedented executive disruption of spending has prompted an equally unprecedented wave of court challenges seeking to restore stability. Any future waves of executive unilateralism surrounding the implementation of executive orders, government shutdowns, or a debt ceiling impasse could generate still more legal challenges.⁸⁹ Appropriations-related litigation, however, raises a host of challenging and unresolved legal issues, and adjudication is not always well suited to maintaining appropriate constraints on unilateral executive action in this area. In this Part, we briefly survey the landscape of recent appropriations-related litigation in Section A and then highlight the host of unresolved doctrinal issues in this area in Section B.

A. EXECUTIVE UNILATERALISM MEETS JUDICIAL ANTAGONISM

Historically, relatively few spending-related disputes reached courts; one scholar even observed a few years ago that appropriations-related questions had been all but “ignored.”⁹⁰ That was so in part because of the primacy of the congressional soft power mechanisms discussed earlier; in effect, the House and Senate, not the courts, served as

⁸⁷ Drew Desilver, *Congress Has Long Struggled to Pass Spending Bills on Time*, PEW RSCH. CTR. (Sept. 13, 2023), <https://www.pewresearch.org/short-reads/2023/09/13/congress-has-long-struggled-to-pass-spending-bills-on-time/> [https://perma.cc/X2FG-NR57] (“[O]mnibus bills have become much more frequent in the past two decades. In all but two fiscal years since 2007, in fact, all or nearly all of the regular appropriations bills were combined into such after-deadline package deals.”).

⁸⁸ For empirical evidence that the omnibus process gives members from both parties a meaningful opportunity to include key priorities in the legislation, see Molly E. Reynolds & Peter C. Hanson, *Just How Unorthodox? Assessing Lawmaking on Omnibus Spending Bills*, 21 THE FORUM, 2023, at 12–13 (2023). For a discussion of how fiscal constraints and routine use of omnibus appropriations legislation affect policymaking and congressional oversight, see Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1832–34 (2015).

⁸⁹ See Lawrence, *Disappropriation*, *supra* note 29, at 5, 37, 43, 84; Pasachoff, *supra* note 1, at 82–86.

⁹⁰ See Metzger, *supra* note 4, at 1103.

the main overseers of executive compliance.⁹¹ The paucity of cases, however, was also a function of threshold barriers to administrative litigation—keys that must be turned to unlock courthouse doors—that hold particular bite in spending-related disputes.

Recent executive boundary-pushing has nonetheless drawn courts into this unfamiliar territory.⁹² In turn, the second Trump Administration’s still broader unilateral initiatives have prompted an even larger wave of litigation. As of this writing, at least sixty spending-related disputes have reached federal courts.⁹³ In some cases, litigants in these cases have obtained sweeping forms of emergency relief, including temporary restraining orders dictating the processes and allowable scope of agency spending decisions nationwide.⁹⁴ To the extent the new Administration continues its appropriations presidentialism, this wave of litigation seems certain to continue, inviting courts further into this relatively uncharted terrain.

B. HARD QUESTIONS ON THE HORIZON

Given the centrality of judicial review to modern administrative law, this turn to the courts is only natural. Yet precisely because litigation in this area has historically been limited, the resulting cases will inevitably present a host of difficult and unresolved threshold questions.⁹⁵

These threshold questions may even be harder in many cases than the ultimate questions on the merits. At least, a question that has caught the lion’s share of media attention—namely, whether the President has an inherent constitutional authority to

⁹¹ See *infra* Part I (explaining the ways in which the annual appropriations process, and the institutions and relationships supporting it, have traditionally functioned as the primary source of oversight over executive branch spending).

⁹² See, e.g., *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 168 (D.D.C. 2016) (challenge to ACA subsidies); *U.S. House of Representatives v. Mnuchin*, 969 F.3d 353, 358 (D.C. Cir. 2020) (challenge to wall spending); *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1232–35 (9th Cir. 2018) (challenge to sanctuary cities conditions); *Pol’y & Res., LLC v. U.S. Dep’t of Health & Hum. Servs.*, 313 F. Supp. 3d 62, 67–68 (D.D.C. 2018) (challenge to termination of Teen Pregnancy Prevention Program grants); *Biden v. Nebraska*, 600 U.S. 477, 482–483, 494 (2023) (challenge to student debt relief); *Gen. Land Off. v. Biden*, 71 F.4th 264, 268–69 (5th Cir. 2023) (challenge to delay in wall spending).

⁹³ For a continuously-updated list, see *Litigation Tracker: Legal Challenges to Trump Administration Actions*, *supra* note 79. A small sample of these cases as of this writing includes, for example, Complaint for Declaratory and Injunctive Relief at 1, *Nat’l Treasury Emps. Union v. Vought*, No. 25-cv-381 (D.D.C. Feb. 9, 2025) (challenge to suspension of Consumer Financial Protection Bureau funding); Complaint for Declaratory and Injunctive Relief at 2, *Commonwealth v. Nat’l Inst. of Health*, No. 25-cv-10338 (D. Mass. Feb. 10, 2025) (challenge to reduction in indirect costs for federal research grants); Complaint for Declaratory and Injunctive Relief at 7–8, *Amica Ctr. for Immigrant Rts. v. U.S. Dep’t of Just.*, No. 25-cv-00298 (D.D.C. Jan. 31, 2025) (challenge to stop work order related to immigration); Complaint for Damages, Injunctive, Mandamus, and Declaratory Relief at 2, *3, Elec. Priv. Info. Ctr. v. Off. Pers. Mgmt.*, No. 25-cv-00255 (E.D. Va. Feb. 10, 2025) (challenge to DOGE access to Treasury payment systems).

⁹⁴ See, e.g., *New York v. Trump*, No. 25-cv-00039, slip op. at 12, 20, 43–45 (D.R.I. Mar. 6, 2025) (funding freeze); *U.S. Dep’t of State v. AIDS Vaccine Advoc. Coal.*, 145 S. Ct. 753 (2025) (foreign aid).

⁹⁵ For discussion of key appropriations-related doctrinal issues and thoughtful proposals for resolving them, see Metzger, *supra* note 4, at 1136–38, 1150–52.

violate laws that direct obligation or expenditure⁹⁶—is neither difficult nor unresolved. The idea that the President might hold a general inherent authority to ignore spending mandates is textually and historically unsound, at least outside of certain narrow infringements on specific executive powers; courts and even Executive Branch lawyers have accordingly rejected it.⁹⁷ The Administration, indeed, has not even squarely made this constitutional argument in court to our knowledge; it has instead asserted an array of alternative procedural and merits defenses that span the full gamut of administrative law questions.⁹⁸ At any rate, key threshold questions (as well as a few merits-related ones) that do remain open and potentially difficult include the following:

Who can sue? When an agency spends money on a purpose (like building a border wall or opening national parks during a shutdown) that allegedly violates statutory restrictions, questions can arise about who, if anyone, may sue. The D.C. Circuit has held that the House of Representatives as a body has standing to defend Congress’s power of the purse,⁹⁹ but the Supreme Court vacated this decision as moot,¹⁰⁰ and the Supreme Court itself has generally been skeptical about theories of legislative standing.¹⁰¹ When individuals and states sue, questions arise not only about whether they hold a sufficient injury to satisfy Article III standing, but also about whether they fall within the “zone of interests” protected by the relevant statute.¹⁰²

What causes of action may be available? When a litigant wishes to challenge a particular agency spending decision as violating a provision in an annual appropriations

⁹⁶ See, e.g., Greg Rosalsky, *Can President Trump Ignore Congress’ Spending Laws? The Debate over ‘Impoundment,’* NPR (Feb. 18, 2025, 5:00 AM), <https://www.npr.org/sections/planet-money/2025/02/18/g-s1-49220/trump-ignore-congress-spending-laws-impoundment> [https://perma.cc/48LV-WGKT].

⁹⁷ See Zachary S. Price, *Trumpian Impoundments in Historical Perspective*, 78 STAN. L. REV. ONLINE (forthcoming 2025); Zachary S. Price, *The President Has No Constitutional Power of Impoundment*, Notice & Comment, YALE J. REG. (July 18, 2024), <https://www.yalejreg.com/nc/the-president-has-no-constitutional-power-of-impoundment-by-zachary-s-price/> [https://perma.cc/Z6ML-ZRVZ]; MICHAEL ANGELONI ET AL., THE MYTH OF PRESIDENTIAL IMPOUNDMENT POWER 2, 5–9 (Protect Democracy Mar. 2025), https://protectdemocracy.org/wp-content/uploads/2025/03/The-Myth-of-Presidential-Impoundment-Power_1.pdf [https://perma.cc/83U3-24B4]; Pasachoff, *supra* note 41, at 384–88. For an argument that Congress cannot control “resource-independent” executive authorities such as the pardon power through appropriations, see Price, *supra* note 3, at 389.

⁹⁸ See, e.g., *Widakuswara v. Lake*, No. 25-5144, 2025 U.S. App. LEXIS 11036, at *11 (D.C. Cir. May 3, 2025) (Government argued that compelling grant disbursement is “quintessentially contractual” relief cognizable, if at all, exclusively in the Court of Federal Claims under the Tucker Act); *Commonwealth v. Kennedy*, No. 25-10814-WGY, 2025 U.S. Dist. LEXIS 90135, at *32-33 (D. Mass. May 12, 2025) (Government argued that funding decisions were “unreviewable” under 5 U.S.C. § 701(a)(2), relying on *Lincoln v. Vigil*); *Climate United Fund v. Citibank, N.A.*, No. 25-cv-698, 2025 U.S. Dist. LEXIS 49249, at *19 (D.D.C. Mar. 18, 2025) (Government argued that the plaintiffs’ request for injunctive relief was moot because the EPA had already terminated the grant); *U.S. Conf. of Cath. Bishops v. U.S. Dep’t. of State*, No. 1:25-cv-00465, 2025 U.S. Dist. LEXIS 43971, at *14, *19 (D.D.C. Mar. 11, 2025) (Government opposed the injunction on the ground that ordering payment of withheld grant funds would be specific performance outside the APA’s waiver and within exclusive Tucker Act jurisdiction).

⁹⁹ See *U.S. House of Representatives v. Mnuchin*, 969 F.3d 353, 354 (D.C. Cir. 2020).

¹⁰⁰ See *Yellen v. U.S. House of Representatives*, 142 S. Ct. 332, 332 (2021).

¹⁰¹ See generally Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 113 MICH. L. REV. 339, 342, 348–58 (2015) (discussing case law).

¹⁰² See, e.g., *California v. Trump*, 963 F.3d 926, 941 (9th Cir. 2020).

law (as opposed to a provision in an underlying authorizing law), it is not always clear what cause of action might exist.¹⁰³ Does the Administrative Procedure Act provide a cause of action, and, if it does, how does the zone of interest test apply in this context?¹⁰⁴ Alternatively, is there a non-statutory constitutional cause of action, or perhaps an equitable cause of action to challenge ultra vires spending or non-spending? Some lower courts have grappled with these questions, but the Supreme Court has not weighed in, except to question in passing whether a cause of action existed in a ruling denying a stay pending appeal.¹⁰⁵

What agency decisions can be reviewed? While section 706 of the Administrative Procedure Act allows judicial review of agency actions, the statute excepts review when, among other things, the action is “committed to agency discretion by law.”¹⁰⁶ Courts have interpreted this exception as precluding judicial review when there is “no law to apply,” meaning that courts lack “judicially manageable standards” to review the challenged action.¹⁰⁷ In one important application of this exception, the Supreme Court has held that the allocation of lump sum appropriations is presumptively exempt from review.¹⁰⁸ This holding (which one of us has urged the Court to limit or abrogate¹⁰⁹) leaves open many difficult questions of application and operation, including when an appropriation counts as “lump sum,” whether it applies to the imposition of grant conditions and other general policies regarding funds distribution, and when, if ever, “judicially manageable standards” may be present (created by the appropriation, authorizing statute, regulation, or other sources) to guide review.¹¹⁰

When can an agency decision be reviewed? Administrative litigation also requires threading a needle of timing constraints: the challenged agency action must be “final”¹¹¹

¹⁰³ See, e.g., JAMES V. SATURNO, AUTHORIZATIONS AND THE APPROPRIATIONS PROCESS, R46497, CONG. RSCH. SERV. (2023) (describing a “two-step process” in which authorizing legislation “to establish or continue federal agencies, programs, policies, projects, or activities” generally precedes appropriations legislation “that provides funding for these purposes”).

¹⁰⁴ Compare, e.g., *Sierra Club v. Trump*, 963 F.3d 874, 893–95 (9th Cir. 2020), with *id.* at 904–09 (Collins, J., dissenting).

¹⁰⁵ See *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (“[T]he Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary’s compliance with Section 8005” of the Department of Defense Appropriations Act.).

¹⁰⁶ 5 U.S.C. § 701(a)(2).

¹⁰⁷ *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). For a fuller discussion of the doctrine, see Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 691–92 (1990).

¹⁰⁸ *Lincoln v. Vigil*, 508 U.S. 182, 183 (1993).

¹⁰⁹ See Matthew B. Lawrence, *Second-Class Administrative Law: Lincoln v. Vigil’s Puzzling Presumption of Unreviewability*, 101 WASH. U. L. REV. 1029, 1029–30 (2024).

¹¹⁰ See generally *id.* (comprehensively surveying lower court opinions grappling with these questions). For an illustrative recent case rejecting the government’s invocation of *Vigil* as a barrier to suit on the ground that a case involved already-obligated funds, see *Woonasquatucket River Watershed Council v. U.S. Dep’t of Agric.*, No. 25-cv-00097, 2025 U.S. Dist. LEXIS 71378, at *44–45 (D.R.I. Apr. 15, 2025).

¹¹¹ See, e.g., *Rattlesnake Coal. v. U.S. Env’t Prot. Agency*, 509 F.3d 1095, 1103–04 (9th Cir. 2007) (dismissing spending claim for lack of finality).

and the dispute must be “ripe,”¹¹² but it also cannot be “moot.”¹¹³ These doctrines carry particular bite with respect to spending disputes involving time-limited appropriations and ongoing activities. At what point, for example, does an agency’s delay in either expending or obligating funds amount to a “final agency action” that may be challenged in court?¹¹⁴ And what if the litigation begins while an appropriation is in effect but ends only after it expires? May courts still order relief or is the dispute then moot?¹¹⁵ Some lower courts have addressed these questions but the Supreme Court has not.¹¹⁶

Where can suit proceed? Spending cases generally play out in one of two judicial fora: the Court of Federal Claims, an Article I court with limited jurisdiction, hears suits for money damages,¹¹⁷ while regular Article III courts hear suits for injunctive relief such as orders forcing the government to make payments or invalidating spending-related agency actions.¹¹⁸ The interaction between these two fora is complex. Federal district courts’ authority to hear APA claims depends on the absence of an adequate alternative remedy, and a damages action in the Court of Federal Claims could in principle constitute such a remedy.¹¹⁹ Yet litigants suing in the Court of Federal Claims can seek only money damages, not equitable remedies such as an injunction requiring or forbidding government action.¹²⁰ Furthermore, that court only has jurisdiction to afford damages when the statute at issue is “money mandating,” a standard subject to conflicting interpretations in lower courts.¹²¹

¹¹² See, e.g., *City of Houston v. Dep’t of Hous. & Urb. Dev.*, 24 F.3d 1421, 1426–31 (D.C. Cir. 1994) (asserting claim regarding reduction in Community Development Block Grant moot as to years preceding suit because appropriation had lapsed and asserted challenge to policy of reducing grants was unripe).

¹¹³ See, e.g., *Promundo-US v. U.S. Dep’t of Health & Hum. Servs.*, No. 18-CV-2261, 2019 U.S. Dist. LEXIS 119677, at *23 (D.D.C. July 18, 2019) (dismissing spending case as moot).

¹¹⁴ Cf. *Am. Hosp. Ass’n v. Azar*, No. 14-851, 2018 U.S. Dist. LEXIS 186853, at *1–2, *13 (D.D.C. 2018) (mandating deadline after years of litigation around agency delay).

¹¹⁵ See, e.g., *City of Houston*, 24 F.3d at 1426 (quoting *W. Va. Ass’n of Cmty. Health Ctrs., Inc. v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984)); see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 5-83–5-86 (2004) (discussing the *Costle* doctrine, from *National Association of Regional Councils v. Costle*, 564 F.2d 583, 589 (D.C. Cir. 1977), which provides that “[e]quity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities”).

¹¹⁶ See, e.g., *Cnty. of Suffolk v. Sebelius*, 605 F.3d 135, 142 (2d Cir. 2010) (deeming case moot because “irrespective of the status of these appropriations when the action was commenced, [the government] had exhausted them by the time the proceedings were remanded”); *City of Houston*, 24 F.3d at 1426 (holding “that this case was mooted by the expiration of the relevant appropriation”); *Rodriguez v. Carson*, 401 F. Supp. 3d 465, 470 (S.D.N.Y. 2019) (holding that case was not moot when the government had obligated the funds plaintiffs were seeking but had not yet expended them).

¹¹⁷ See JONATHAN D. SHAFFER & DANIEL H. RAMISH, *FEDERAL GRANT PRACTICE* § 49:11, Westlaw (2024 ed.).

¹¹⁸ See *id.* at § 49:12; Lawrence, *Medicare “Bankruptcy,” supra* note 29, at 1695–99 (differentiating Court of Federal Claims and U.S. District Court tracks for spending disputes).

¹¹⁹ See 5 U.S.C. § 704.

¹²⁰ See *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988) (“The Claims Court does not have the general equitable powers of a district court to grant prospective relief.”).

¹²¹ See Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. L.J. 83, 93 (2013) (discussing interaction

Given the limitations on Court of Federal Claims jurisdiction, the leading manual on federal grant practice explains that “[t]he APA is the most frequently used legal authority for grant-related litigation.”¹²² The Supreme Court, however, recently highlighted the uncertainty surrounding this issue. In a per curiam decision staying pending appeal a district court order that barred the Department of Education from terminating certain grants and mandated payment of past-due grant obligations, the Court observed, albeit without definitively resolving the issue, that “the Government is likely to succeed in showing the District Court lacked jurisdiction to order the payment of money under the APA.”¹²³ How broadly this tentative observation applies remains an open question.¹²⁴

Further issues: Beyond these non-merits threshold questions, other unsettled issues loom on the merits, too, including questions about government authority to triage funding in the event of a shortfall,¹²⁵ such as when the “debt ceiling” precludes further borrowing to cover expenditures,¹²⁶ as well as questions about executive authority to determine which programs may operate and incur obligations during a government shutdown.¹²⁷

We could go on, but this list suffices to highlight the extent of unresolved and potentially difficult questions that courts will confront in the current wave of spending-related litigation. If advocates have their way, all the threshold questions we identified will be resolved in favor of judicial review, and courts confronting actions that appear to constitute executive power grabs will be tempted to oblige and expand the judicial role in this area to match expanded executive unilateralism. We turn in the last Part, however, to some observations about when and whether indulging that impulse would be wise.

between Tucker Act claims and APA claims); *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 324 (2000) (internal citations omitted) (“Rarely has the Court determined whether a statute can fairly be interpreted as mandating compensation by the Federal Government. . . . Likely this is because so-called money-mandating provisions are uncommon, . . . and because Congress has at its disposal several blueprints for conditioning and limiting obligations. . . .”); SHAFFER & RAMISH, *supra* note 117, at § 49:1 (explaining that “the decisional law in this area has not been a model of clarity and consistency”).

¹²² SHAFFER & RAMISH, *supra* note 117, at § 49:12.

¹²³ *Dep’t of Educ. v. California*, No. 24A910, slip op. at 1–2 (U.S. Apr. 4, 2025).

¹²⁴ For a discussion of “ways to assert award-termination challenges in district court” even after this preliminary decision, see Daniel Jacobson & John Lewis, *Overcoming the Tucker Act After Department of Education v. California*, LAWFARE (Apr. 17, 2025, 9:48 AM), <https://www.lawfaremedia.org/article/overcoming-the-tucker-act-after-department-of-education-v.-california> [https://perma.cc/Q2FP-HEM3].

¹²⁵ See Lawrence, *Medicare “Bankruptcy,”* *supra* note 29, at 1686–89 (discussing caselaw on triage authority).

¹²⁶ See Jonathan Nicholson, *DOGE’s Treasury Access Could Let GOP Off the Debt Limit Hook*, YAHOO NEWS (Feb. 6, 2025, 8:56 PM), <https://ca.news.yahoo.com/doge-treasury-access-could-let-015602670.html> [https://perma.cc/HF3Z-Q7SV] (describing theory of a small group of Republicans that Treasury could use debt ceiling as justification to “prioritize” payments); Conor Clarke, *The Debt Limit*, 101 WASH. U. L. REV. 1417, 1461 (2024) (“When there is a conflict between spending and the limit, there are also strong statutory arguments that it is the spending, and not the limit, that should yield.”).

¹²⁷ See Lawrence, *Disappropriation*, *supra* note 29, at 41–43 (describing precedents).

IV. WHITHER THE LAW OF SPENDING?

As discussed in Parts I, II, and III, while Congress is the key branch when it comes to spending, the Executive Branch is making a play for broader unilateral authority. Litigants, in turn, are inviting courts to play the role of Congress's champion, defending its prerogatives against an executive assault. Yet doing so will take courts into a thicket of hard threshold questions, even before they get to the merits. What is more, to the extent litigation adds to the uncertainty surrounding spending and involves courts taking over spending choices, it could compound the very problems of systemic instability and weakened checks and balances that it aims to combat. So how should courts and other institutions respond?

The stakes of this question are large given spending's importance to contemporary checks and balances. Yet precisely because those checks and balances have historically operated mainly through congressional soft power, full judicialization of appropriations law cannot be a complete answer. Courts have an important role to play here, as in other areas of administrative law. As in those other areas, too, however, there are also necessarily important limits on the judicial role.

We have each separately addressed some key issues in other work cited throughout this Essay, though we may not ourselves agree on every particular.¹²⁸ In any

¹²⁸ See, e.g., Matthew B. Lawrence, *Subordination and Separation of Powers*, 120 YALE L. J. 78, 163–66 (2021) (questioning the use of historical gloss as an interpretive tool in separation of powers cases); Lawrence, *supra* note 2, at 1063 (arguing that courts should defer to executive interpretations of annual appropriations but not permanent appropriations); Lawrence, *Disappropriation*, *supra* note 29, at 4–8 (advocating an interpretative presumption against “disappropriation,” meaning congressional “fail[ure] to appropriate funds necessary for the government to honor permanent, statutory payment commitments”); Lawrence, *supra* note 109, at 1034 (arguing that “the *Vigil* presumption should be erased from the administrative law canon”); Matthew B. Lawrence, *Fiscal Waivers and State “Innovation” in Health Care*, 62 WM. & MARY L. REV. 1477, 1482 (2021) (“endors[ing] fiscal waivers in theory for their distinctive ability to circumvent the tyranny of the budget but call[ing] for close scrutiny of their use to influence state policy choices in practice”); Pasachoff, *supra* note 41, at 416–17 n.382, 419 n.398 (discussing open doctrinal questions about standing for GAO and for Congress); Pasachoff, *supra* note 1, at 88–89 (arguing that “[g]iven the unceasing nature of the executive budget process and the slow pace of litigation,” as well as justiciability issues, “there is no way for courts reliably to police executive budget decisions”); Pasachoff, *supra* note 58, at 1141–42, 1167–71, 1190–93 (discussing different kinds of difficulties courts have in reaching and evaluating the merits of grant disputes at different stages of the grant lifecycle); Pasachoff, *supra* note 62, at 260, 330–32 (arguing that “courts ought to resist any effort to impose a special federalism version of hard-look review on agencies’ funding cut-off decisions”); Pasachoff, *supra* note 65, at 603–04, 610 (explaining how evolution of Supreme Court doctrine around both private rights of action and the substantive requirements of desegregation helped limit judicial involvement in oversight of federal grants); Pasachoff, *supra* note 42, at 2243–44, 2271–87 (describing the basically sound constitutional and statutory footing supporting OMB’s budget work and arguing for increased internal accountability measures by the President and OMB itself and improved external oversight by Congress and civil society, rather than involvement of courts); Price, *supra* note 43, at 29, 35–36, 46, 49 (addressing proper interpretation of historical examples of unilateral executive spending and non-spending); Price, *Trumpian Impoundments*, *supra* note 97 (rejecting any general presidential impoundment authority under Article II); Price, *No Constitutional Power of Impoundment*, *supra* note 97 (same); Zachary S. Price, *Reliance on Executive Constitutional Interpretation*, 100 B.U. L. REV. 197, 207 (2020) (assessing potential defenses relating to reliance on internal legal guidance in a subsequent Antideficiency Act prosecution); Price, *supra* note 3, at 389–95 (evaluating Executive Branch

event, we will not attempt here to resolve the many open questions in this area. Instead, we offer three general observations that follow from our earlier discussion: first, courts should proceed with appropriate caution; second, they must be precise about the law in each particular dispute; and finally, Congress ultimately must act to preserve its authority.

A. COURTS MUST BE CAUTIOUS

First, courts must proceed with a degree of caution. In principle, courts developed many of the threshold doctrines discussed in the last part to limit their role in cases that would tax courts' institutional competence or otherwise present separation-of-powers difficulties, such as by intruding upon congressional or executive prerogatives. Even if such doctrines warrant modification or reconsideration, the problems they were developed to address remain salient in many appropriations-related matters. Because the congressional soft power tools we described earlier are often better suited to policing executive appropriations compliance, a key goal of judicial review should be to reinforce congressional power. From that point of view, however, judicial intervention could prove counterproductive if it ended up causing congressional power to atrophy.

This risk does not seem fanciful: in many areas, ranging from subpoena enforcement to war powers to regulatory policy, representatives and senators have seemed eager to allow other actors, particularly presidents and executive agencies, to make the hard calls and bear the political responsibility. Given congressional appropriations' centrality to contemporary checks and balances, allowing this trend to infect that area, too, could carry serious costs that courts should aim to minimize.

Furthermore, integrating spending questions into the broader patterns of contemporary administrative litigation could compound the problems of instability and disruption for which we faulted executive interventions earlier. In a familiar pattern, major executive actions today typically prompt immediate court challenges, often in carefully selected jurisdictions, seeking sweeping injunctions to halt policies across the board, at least temporarily.¹²⁹ It is one thing, though, to put a regulation or policy on hold

authority to disregard statutory funding limitations and conditions on constitutional grounds); Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 265–67 (2016) (advocating a “relatively narrow understanding” of agencies’ authority to grant conditional waivers so as to ensure that agencies act “to effectuate statutory objectives” and not “to impose a fundamentally different regulatory regime as a condition of waiving the regime Congress imposed”).

¹²⁹ Although in recent years parties typically sought “universal” or “nationwide” injunctions barring an executive rule or policy across the board, the Supreme Court held in *Trump v. CASA, Inc.*, No. 24A884, 2025 U.S. LEXIS 2501, at *11–12 (June 27, 2025), just before this Essay went to press, that federal courts lack authority to issue such injunctions. Following *CASA*, the government has begun to request that lower courts dissolve such injunctions in pending spending challenges. See, e.g., Letter from Sean R. Janda, App. Staff, U.S. Dep’t of Justice, Civ. Div., to Clifton Cislak, Clerk of Ct., U.S. Ct. of App. D.C. Cir. (July 3, 2025), <https://storage.courtlistener.com/recap/gov.uscourts.cadc.41906/gov.uscourts.cadc.41906.01208754.190.0.pdf> [<https://perma.cc/574Q-J62T>] (arguing that CASA “demonstrate[s] the error of the district court’s injunction, which requires defendants to make available for obligation all foreign assistance funds appropriated by the Further Consolidated Appropriations Act of 2024 without regard to whether plaintiffs may receive each segment of funds.”). Plaintiffs, however, may still obtain broad injunctions “to the extent that [they] are . . . necessary to provide complete relief to each plaintiff with standing

while courts sort out its lawfulness. Halting spending under time-limited appropriations, or for that matter halting a pause in spending under such appropriations, presents more complicated tradeoffs, as even a short delay may lead to lost opportunities or programmatic disruptions that cannot easily be corrected later.¹³⁰

None of this is to say that courts should steer clear from spending disputes altogether. On the contrary, these problems of judicial manageability, congressional displacement, and programmatic disruption will not be present in every case, nor should they always preclude a judicial role even when they are present. In some cases judicial intervention may be essential to preserving legislative power. Our point is simply that courts must attend carefully to the tradeoffs and limitations that properly bound their role in this area. They must aim to ensure, in other words, that their interventions serve ultimately to preserve checks and balances and a productive tension between the branches, rather than simply expanding courts' own role relative to the Executive Branch.¹³¹ Congress ultimately has the power of the purse, and effectuating that power should be courts' goal.

B. COURTS MUST BE PRECISE

As a second, related observation, if courts do reach the merits of spending-related disputes, we urge them to attend carefully to the specifics of each controversy. Appropriations law involves a complicated interplay of authorizing statutes, general framework statutes like the Antideficiency Act, Impoundment Control Act, and Purpose Statute, and specific appropriations laws. Legal understandings, entrenched practices, and political expectations, moreover, may have developed within the political branches regarding what spending is allowed or forbidden. Sorting out the right answer on any given question may thus be complicated, and courts should be leery of disrupting operative understandings with implications far beyond the immediate case at issue.

We stress this point because the second Trump Administration's early actions have often painted with a broad brush, imposing blanket pauses or asserting sweeping across-the-board powers. Courts have understandably responded in kind in some cases,

to sue." *CASA*, 2025 WL 1773631 2025 U.S. LEXIS 2501, at *35. Accordingly, although *CASA* may make completely halting the government's spending policies more difficult, class actions and even some individual actions may still support broad relief, and in any event litigants will continue confronting courts with challenges to spending delays and terminations. For some initial commentary on *CASA*'s impact, see, for example, David Marcus, *The Class Action after Trump v. CASA*, 73 UCLA L. REV. DISCOURSE ____ (forthcoming 2025); Harold Hongju Koh et al., *After CASA: The Administrative Procedure Act Option for Challenging the Birthright Citizenship and Other Illegal Executive Actions*, JUST SEC. (June 30, 2025), <https://www.justsecurity.org/115917/trump-casa-administrative-procedure-universal-injunctions/> [<https://perma.cc/5LVP-BYCE>].

¹³⁰ In a recent per curiam ruling, the Supreme Court seemed attentive to concerns about judicial interference with ongoing program administration. Despite declining to stay a district court's temporary restraining order that blocked implementation of a Trump administration freeze on certain foreign aid, the Court nonetheless ordered the district court to "clarify what obligations the Government must fulfill to ensure compliance with the temporary restraining order, with due regard for the feasibility of any compliance timelines." *U.S. Dep't of State v. AIDS Vaccine Advoc. Coal.*, 145 S. Ct. 753, 753 (2025).

¹³¹ As Metzger has observed more generally about appropriations questions, "[t]he challenge is to construct a doctrinal approach that . . . reinforce[s] political branch regulation of appropriations." Metzger, *supra* note 4, at 1172.

issuing broad orders that repudiate the administration's own broad theories. But the law in this area, again, is complex, and theories that are valid for one appropriation or program may be quite invalid in another. With respect to the funding pauses, for example, the Administration's apparent theory that it may impose a "programmatic delay" on spending in accordance with GAO's own precedent may in fact be valid for some spending, though we strongly doubt it can justify delaying spending across the full universe of spending affected by the Administration's blanket pauses.¹³²

Likewise, some provisions in the President's executive orders purport to impose novel conditions on a huge range of grants and contracts, and such conditions could be lawful in some instances even if they are invalid in others. For some spending, in other words, the conditions may fall within valid executive authority or accord with the statutory goals underlying the spending, whereas in others they may not. Similarly, whether litigants hold a legal entitlement to funds may depend importantly on whether a funding "pause" or denial blocked payment of money that was previously "obligated" in the sense of creating a binding payment obligation or instead only promised in some less formal sense. While the Administration's own claims with respect to all these questions appear overbroad in our view, failing to attend to such specifics could lead courts into precisely the same pitfall.

Relatedly, in addressing the difficult looming questions we flagged earlier, courts should be attentive to the nature of the challenged agency action. One of us has noted the usefulness of distinguishing between whether an agency action involves the "policy" (analogous to rulemaking), "pork" (analogous to adjudication), or "punishment" (analogous to enforcement) stages of grant administration.¹³³ Other factors that may individually or in combination impact the appropriate resolution of a particular case may include the questions of whether the challenged decision is made chronologically before or after grants are disbursed, whether the challenged decision applies across-the-board to multiple grants or individually to a particular grant, whether the challenged decision involves a delay or cancellation, whether the alleged injury stems from spending or from failure to spend, and the nature of any executive authority arguably impeded by a statutory condition.¹³⁴

The stakes here could once again be high. In their effort to check executive overreach, courts could end up overreaching themselves, substituting the nuances of complicated statutory regimes for generalized assertions. And (though we take no position here on any specific controversy) if initial, sweeping emergency rulings prove overbroad and are later scaled back on appeal, that correction could contribute to declining public trust in courts or even play into the hands of those hoping to undermine existing norms of compliance with court orders.

¹³² See Price, *supra* note 12 (observing that "[s]orting out whether the [A]dministration's position [that it is undertaking lawful programmatic delays] is plausible, or whether the delays are instead unlawful policy deferrals, will depend on canvassing the legal requirements and practical exigencies applicable to the huge range of programs affected by" the Administration's blanket funding pauses).

¹³³ See Pasachoff, *supra* note 58, at 1114–17.

¹³⁴ See *id.* at 1138–40, 1187, 1191–93; *cf., e.g.*, Lawrence, *supra* note 109, at 1076–78 (noting cases involving fine-grained distinctions); Price, *supra* note 3, at 389–449 (distinguishing among executive powers).

C. CONGRESS MUST DEFEND ITSELF

Finally, we stress that there is ultimately no substitute for Congress when it comes to spending. Courts have an important role to play in safeguarding Congress's authority, to be sure. But the power of the purse does not belong to courts or the President. It belongs to Congress. To preserve this power, Congress must reassert itself and defend its soft power influence over the Executive Branch.

In the long run, Congress may need to consider amending the framework statutes that structure federal spending decisions.¹³⁵ We note, in this regard, that Congress has not reconsidered the existing framework in light of new digital payment systems, even though those systems may weaken existing tools of congressional control, as illustrated by the White House's apparent use of such systems to gain greater control over payments.¹³⁶ To be sure, major legislative change aimed at limiting executive authority is likely a non-starter at the time of this writing. The President would presumably veto any such bill, and Republicans fearful of a primary challenge—or for that matter Democrats in competitive districts—might be reluctant to cross him, even if they should.¹³⁷ Yet Congress might still begin investigating options and laying groundwork for longer-term changes by holding hearings and interest-group meetings and investing in congressional staff and institutions.¹³⁸ In any event, other more limited and indirect responses may be both politically realistic and effective even in the short term.¹³⁹

To begin with, deadlines to appropriate funds to avoid a shutdown will give Congress an opportunity to weigh in on executive policies, and some presidential priorities will inevitably require affirmative legislative action. Congress might use the leverage provided by such bills to override particular actions of which it disapproves, or simply to encourage greater consultation with Congress and more serious fidelity to enacted laws. During the Biden Administration, for example, Democrats in Congress included permanent legislative changes promoting transparency around apportionments in the 2022 Consolidated Appropriations Act.¹⁴⁰ As this example illustrates, must-pass or high-priority legislative packages will continue to provide opportunities for members of Congress to exert influence both publicly and behind the scenes. Indeed, even in the early

¹³⁵ One of us has proposed several specific reforms to Congress's power of the purse statutes. *See generally* Pasachoff, *supra* note 41 (identifying reforms to the Antideficiency Act and the Impoundment Control Act that would cabin executive overstepping and affirm congressional control over spending).

¹³⁶ *See, e.g.*, Duehren, *supra* note 18.

¹³⁷ *Cf.* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2315 (2006).

¹³⁸ *See* Pasachoff, *supra* note 1, at 90–91. *See generally* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020) (exploring Congress's investments in congressional institutions and their importance to both affirmative lawmaking and congressional efforts to combat executive encroachment).

¹³⁹ For an excellent overview of tools of congressional influence, *see generally* CHAFETZ, *supra* note 37.

¹⁴⁰ *Cf.* Matthew B. Lawrence, *Apportionment Transparency in the 2022 CAA: The Return of Congressional Institutionalism?*, Notice & Comment, YALE J. REG. (Mar. 16, 2022), <https://www.yalejreg.com/nc/apportionment-transparency-in-the-2022-caa-the-return-of-congressional-institutionalism-by-matthew-b-lawrence/> [<https://perma.cc/LJ9W-VMYT>] (noting that Congress included apportionment transparency provisions in the 2022 Consolidated Appropriations Act).

months of the second Trump Administration, a continuing resolution enacted in March 2025 to fund government agencies through the end of the fiscal year included at least one provision aimed at executive transparency: it required OMB to provide monthly reports for each agency “set[ting] forth obligations by account” and comparing those obligations to those “incurred in the same period in fiscal year 2024”—information that will presumably help Congress keep tabs on executive actions.¹⁴¹ Rescission packages proposed by the Administration could offer further opportunities for interbranch dialogue; as this Essay went to press, one such package affecting foreign aid and public broadcasting had been approved without change by the House, but the Senate Appropriations Committee was considering whether to approve, amend, or reject it.¹⁴²

Going forward, internal divisions within the Executive Branch could create further opportunities for congressional influence. Like Congress itself,¹⁴³ the Executive Branch is a “they,” not an “it”: it is composed of numerous individuals whose interests and goals do not always align. Indeed, even some of the appropriations presidentialism we have described may not have originated with the President himself. Some reports suggest, for example, that OMB’s attempt to pause federal financial assistance government-wide originated with OMB General Counsel Mark Paoletta, apparently without specific approval by the President or other White House officials.¹⁴⁴ Similarly, in past cases, agency officials have sometimes clashed over spending with officials in the Executive Office of the President (such as at OMB or, more recently, DOGE).¹⁴⁵ Through various soft power tools—hearings, private meetings, public statements, requests for GAO review, oversight requests, and formal or informal participation in litigation—representatives and senators might bolster some executive officials’ positions over others without publicly defying the President.¹⁴⁶

¹⁴¹ Full-Year Continuing Appropriations and Extensions Act, 2025, Pub. L. No. 119-4, div. A, tit. I, § 1114, 139 Stat. 9, 13. In addition, both this statute and the more recent One Big Beautiful Bill Act, Pub. L. No. 119-21 (2025), made numerous funding rescissions. To our knowledge, however, neither law generally ratified or authorized earlier administration actions.

¹⁴² See, e.g., Alison Main, Ted Barrett, & Morgan Rimmer, *White House’s DOGE Cuts Package Faces Uncertain Path in Senate as Clock Ticks*, CNN (July 8, 2025, 7:16 PM), <https://www.cnn.com/2025/07/08/politics/senate-vote-white-house-doge-cuts> [https://perma.cc/M7ZJ-UD55].

¹⁴³ See Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 249 (1992).

¹⁴⁴ See, e.g., Katherine Faulders & Will Steakin, *OMB General Counsel Faces Backlash Following Federal Funding Freeze Order: Sources*, ABC NEWS (Jan. 31, 2025, 3:04 PM), <https://abcnews.go.com/US/omb-general-counsel-faces-backlash-federal-funding-freeze/story?id=118321938> [https://perma.cc/F8PB-R7N4].

¹⁴⁵ See Kate Brannen, *Exclusive: New Unredacted Emails Show How Deeply OMB Misled Congress on Ukraine*, JUST SEC. (Feb. 11, 2020), <https://www.justsecurity.org/68614/exclusive-new-unredacted-emails-show-how-deeply-omb-misled-congress-on-ukraine/> [https://perma.cc/B25D-PVZR] (reporting email from OMB General Counsel to OMB Director stating “Can we call you in 5, DoD is being extraordinarily difficult” regarding Ukraine impoundment); Nandita Bose & Alexandra Alper, *Trump’s Cabinet Ready to Reassert Power as Musk Steps Back*, REUTERS (Apr. 23, 2025, 5:38 PM), <https://www.reuters.com/world/us/trumps-cabinet-ready-take-back-power-with-musk-stepping-back-sources-say-2025-04-23/> (reporting that “[c]abinet secretaries have consistently pushed for greater control over budgetary decisions” instead of leaving these decisions to DOGE).

¹⁴⁶ See, e.g., Catie Edmondson, Robert Jimison, & Jess Bidgood, *Republican Senators Question Musk on DOGE Cuts, Gently Insisting on Input*, N.Y. TIMES (Mar. 10, 2025), <https://www.nytimes.com/2025/03/05/us/politics/elon-musk-doge-republican-senators.html>.

To help senators and representatives focus their attention, concerned voters, donors, and volunteers, particularly in primaries, should spare a thought for the long-term health of the separation-of-powers system and reward those politicians who stand up for our country's constitutional framework rather than narrow partisan interests. For their part, commentators should resist the pull of our era's relentless partisanship and provide objective analysis of these issues' long-term stakes. Congress's power over appropriations should not be a partisan issue. As we discussed in Part II, appropriations presidentialism will weaken checks and balances for all future administrations and could lead in the long term to less accountable, responsive, effective, and efficient governance.

CONCLUSION

As OMB Director Russell Vought and General Counsel Mark Paoletta have previously acknowledged, "under our constitutional republic, Congress holds the power of the purse."¹⁴⁷ Through various choices and enactments over time—the adoption of general framework statutes, the creation of key institutions, the use of time-limited appropriations for key programs and activities, and the deployment of soft power tools to influence executive behavior—Congress has molded this power into an effective check on the modern imperial presidency.

But the imperial presidency has been pushing back, and the second Trump Administration has dramatically expanded executive efforts to degrade this key congressional authority. These efforts, if successful, could disrupt Americans' lives, build permanent instability into a key aspect of governance, and undermine constitutional checks and balances. Courts, for their part, have an important role to play in maintaining the rule of law and the centrality of congressional authority over spending, but succeeding in this task will require navigating a host of challenging and unresolved issues. We urge courts and others to approach such questions with a sense of caution about disrupting political constraints, an appropriate focus on the specifics of particular spending laws and programs, and a recognition that ultimately Congress must play the lead role in defending its own prerogatives in this area.

In the Federalist Papers, James Madison called Congress's authority over spending "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."¹⁴⁸ This key legislative power has proven resilient in the past. We hope and expect—though with some trepidation—that it will prove so again.

¹⁴⁷ Letter from Russell T. Vought & Mark R. Paoletta, Dir. & Gen. Couns., Off. of Mgmt. & Budget, Exec. Off. of the President, to John Yarmuth, Chairman, House Budget Comm. (Jan. 19, 2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/Response-to-House-Budget-Committee-Investigation.pdf> [https://perma.cc/YK5A-368G].

¹⁴⁸ THE FEDERALIST NO. 58 (James Madison).