

The Demise and Rebirth of Fiscal Heroism

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Congress's Power of the Purse in the Administrative State

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[Note to readers: Thank you for reading this draft, which remains very preliminary. I need to complete further historical research, particularly on the 1905 amendments to the Anti-Deficiency Act and the budget changes between the 1920s and 1950s, and the theoretical analysis and reform suggestions remain tentative and underdeveloped. I welcome feedback about any and all aspects of the paper.]

INTRODUCTION

Across recent administrations, legal conflicts over government spending choices have emerged as a recurrent theme. When Congress failed to provide requested sums for border-wall construction, President Trump declared an emergency and transferred funds from military accounts—a legally dubious action that was promptly challenged in court. Trump also famously attempted to condition mandated military aid to Ukraine on steps to harm a political opponent. This action got him impeached, though the Senate failed to remove him from office. For his part, President Obama employed debatable legal theories to continue Affordable Care Act subsidies after Congress failed to renew appropriations for them. One court deemed these actions unlawful, but an appeals court held the case to be non-justiciable. Obama’s administration also employed still more debatable theories to effectively cancel some student educational debts, and it transferred Guantanamo Bay prisoners in violation of appropriations limitations based on dubious constitutional arguments. Finally, in the period straddling the George W. Bush and Obama Administrations, the Treasury Department and Federal Reserve effectively pledged or spent gigantic sums on legally dubious grounds to address the 2008 financial crisis. These actions were controversial but many were never effectively challenged in court.

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Each of these examples involved fiscal actions that were legally aggressive, if not downright unlawful. Even so, although none of these administrations were particularly modest in their approach to executive authority, it seems unimaginable that any of them would have simply spent money or even committed to spending money without claiming full compliance with appropriations statutes. By contrast, for roughly the first century and a half of the country's history, executive officials did just that—routinely.

Our most celebrated early Presidents spent money without any lawful authority at all when perceived exigencies required it. Thomas Jefferson, for example, purchased naval vessels in Congress's absence after the British attacked an American ship, and Abraham Lincoln spent significant sums without any appropriation in the early phases of the Civil War. These Presidents then threw themselves at Congress's feet, seeking absolution and retroactive ratification of their actions. And while Jefferson's and Lincoln's actions involved high matters of state, ordinary nineteenth-century administration involved similar techniques. Executive officials routinely outran their appropriations, creating "coercive deficiencies" that Congress was all but obliged to make good after the fact.

Gerhardt Casper labeled this nineteenth-century approach "fiscal heroism": officials made "the sacrifice of risking [their] career[s] so that [they could] act 'responsibly.'"¹ In other words, they openly violated legal spending restraints, thus risking legal and reputational sanctions, but then counted on Congress to approve their actions after the fact as unlawful but justified. Modern presidents, in contrast, are decidedly unheroic by this measure: far from slashing through spending restraints to advance the greater good, they purport to cower before the law's majesty. But this pretense is often a bluff. When the stakes are high, as the examples just mentioned illustrate, contemporary administrations adopt strained legal positions, probing what public opinion will support and daring courts to reverse them. Thus, the old fiscal heroism, though officially extinguished, may be returning in new guise, as what we might call the "legal stretch."²

This Article explores fiscal heroism's demise, as well as its possible resurgence in the veiled heroism of the legal stretch. The article speculates about the causes of fiscal heroism's demise, questions whether the change is

¹ GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* 94 (1997).

² I have adapted this term from Peter Shane's excellent essay on the "statutory stretch." Shane, however, employed the term specifically to describe strained statutory interpretations adopted in place of potential Article II arguments for executive action. By contrast, I use it here to refer to strained legal arguments of all sorts. See Peter M. Shane, *The Presidential Statutory Stretch and the Rule of Law*, 87 U. COLO. L. REV. 1231 (2016).

entirely positive, and attempts to draw lessons from the history with respect to emerging fiscal controversies.

Regarding the shift's causes, Congress's success in taming executive fiscal lawlessness is conventionally attributed to Congress's enactment of the Anti-Deficiency Act ("ADA") in 1870, followed by its addition of criminal penalties for violations in 1905. The ADA surely is a key part of the story. Particularly in combination with other statutes such as the Purpose Act and (decades later) the Impoundment Control Act, it made it personally costly for officials to pursue previously routine practices such as deficiency spending. At any rate, executive officials today appear to take ADA compliance very seriously—a fact dramatically illustrated by the federal government's recurrent "shutdowns" when annual appropriations expire without a new spending law. Yet on closer inspection the ADA cannot offer a complete explanation for this historical change. In fact, the Act's initial adoption did not immediately bring unauthorized spending to heel; coercive deficiencies remained routine for at least twenty years after 1905. Moreover, the statute's claimed importance today seems out of step with the law's actual enforcement: although ADA violations are regularly reported to Congress and sometimes carry professional repercussions, no criminal prosecution has ever been brought to enforce its requirements.

I therefore speculate that the ADA succeeded only in tandem with broader changes in the nature of office-holding and attitudes towards law. Around the time that coercive deficiencies and other forms of outright fiscal illegality disappeared, federal administration underwent a process of professionalization and bureaucratization that likely made claims to act legitimately outside the law appear increasingly anomalous. In the nineteenth century, federal office-holders were typically paid piecemeal, with fees or bounties for discrete actions or services. They also faced significant risk of personal liability for unlawful actions in common-law damages suits, but Congress regularly indemnified these liabilities if it deemed the conduct in question justified. As a more modern administrative state developed, salaries and career paths replaced piecemeal compensation as rewards for office-holding. Likewise, bureaucratic supervision and judicial review of administrative actions largely (though not completely) replaced personal liabilities as the central mechanism of officer accountability. In effect, these new legal structures placed greater emphasis on technical legal compliance while also seeking to define the bounds of official discretion within the law rather than outside of it. Ironically, then, it may have been only in this context of reduced personal liability and increased legal compliance overall that the ADA's mechanism of individual liability for unauthorized spending acquired real bite, giving force to the constitutional requirement of congressional primacy in spending that in the

past had often been obeyed in the breach.

In a further irony, the ADA's very success in eliminating overt fiscal heroism may now encourage reliance on legal stretches: because subordinate executive officials will balk at any overtly unlawful spending that could expose them to criminal penalties, presidents and senior officials must paper over their directives with at least tenuous claims of legality. This possibility then raises the question whether fiscal heroism's demise is in fact a wholly positive development. As a general matter, to be sure, Congress's success in bringing executive spending within statutory bounds is a triumph of law-bound governance. Through the ADA and related statutes, Congress has effectively reinforced its constitutional power of the purse and browbeaten the executive branch into general compliance. These restraints matter. Given the vast standing apparatus of the modern federal government, not to mention the accumulated legal authorities and delegated powers of the modern executive branch, Congress's capacity to check and constrain the presidency through appropriations is today a vital feature of separation of powers. A modern president who felt free to slip these bonds, even on pain of later seeking forgiveness, could be a terrifying prospect.

Yet the historical perspective developed here calls attention to some downsides as well. Insofar as eliminating fiscal heroism has channeled executive unilateralism instead into legal stretches, it has focused debate over aggressive presidential actions on technical legalism rather than political morality. As a result, it gives primacy to courts and commentators rather than legislators in enforcing limits on presidential power, and it does so in contexts where disputes often are not justiciable under current doctrine. What is more, at least in the contemporary political environment of increasing polarization and partisanship, this approach invites highly partisan accounts of presidential legality, polluting the interpretive landscape with salient outliers and making it harder for the public to tell when laws are being bent or broken in ways that should concern them. The problem, moreover, may be self-compounding over time: insofar as accumulated past examples make future stretches more likely, the current trajectory of executive practice could increasingly degrade Congress's hard-won authority to control executive activity through appropriations.

What, then, might be done to ameliorate current tendencies? If it is true that a new form of fiscal heroism is emerging—one that may be particularly difficult to restrain, precisely because it denies requiring any restraint—then the structure of legal accountability for executive action may require recalibration, and proper appreciation of historical successes and failures in restraining lawless spending should inform any proposed changes. With this perspective in mind, adjustments along two dimensions could be beneficial.

First, some modest reforms to appropriations law might capture benefits of the older accountability model even within the new legal structure. As noted, the existing criminal liability on individual officers for unauthorized spending seems to have had deterrent effect out of proportion with its actual enforcement. Accordingly, as others have proposed,³ expanding administrative or even criminal penalties to cover unauthorized delays and cancellations might usefully reinforce Congress's fiscal primacy. At the same time, reinforcing mechanisms of comparatively apolitical analysis of spending questions within the political branches could strengthen the deterrent effects of statutory prohibitions, thus helping keep fiscal illegality in check. In several recent opinions, the Government Accountability Office has identified illegal spending and noted explicitly that similar future violations should be considered willful, as required for criminal liability.⁴ More opinions of this sort, when warranted, could bolster executive officials' internal resistance to unlawful spending or non-spending requested by superiors. Likewise, as I have discussed more generally elsewhere, limiting reliance defenses in any subsequent penal litigation to officials who obtained reasonable legal opinions from the Justice Department's Office of Legal Counsel or other entities committed to comparatively objective legal analysis could encourage internal use of such mechanisms to restrain unlawful initiatives.⁵

A second set of useful reforms could bolster judicial restraints on executive illegality, thereby reinforcing the mechanism of accountability characteristic of modern administrative law. As a general matter, courts should adapt their understandings of justiciability and reviewability in light of fiscal disputes' increased importance and the historical trajectory that brought us to this point. In particular, courts should seek means of adjudicating disputes that can hold the worst executive abuses in check and reinforce Congress's primacy in determining government expenditures while at the same time avoiding routine injunctive remedies that unduly interfere with the government's ongoing operations. To do so, concretely, the Supreme Court should interpret standing and "zone of interests"

³ See, e.g., Testimony of Josh Chafetz, Hearing on "Protecting Congress's Power of the Purse and the Rule of Law," House Budget Committee (Mar. 11, 2020), <https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/Chafetz-BudgetComm-Testimony.pdf>; Congressional Power of the Purse Act, H.R. 6628, § 105 (introduced Apr. 28, 2020) (bill to add administrative penalties for Impoundment Control Act violations).

⁴ See, e.g., GAO, B-330776, *Department of the Interior—Activities at National Parks during the Fiscal Year 2019 Lapse in Appropriations* (Sept. 5, 2019), <https://www.gao.gov/assets/710/701165.pdf>.

⁵ Zachary S. Price, *Reliance on Executive Constitutional Interpretation*, 100 B.U. L. REV. 197 (2020).

requirements flexibly in spending-related litigation and should further recognize a general equitable cause of action to challenge ultra vires spending or non-spending. At the same time, however, it should strongly signal that the balance of equities in this context will often tilt against imposing preliminary or even final remedies. In fact, declaratory relief could be particularly helpful in this context, insofar as such relief would both alert the public to executive illegality and put officials on notice that similar future violations could incur penalties. In effect, such declaratory relief would force the emerging new form of fiscal heroism as legal stretch back into something closer to the old model: executive illegality would be rendered open and notorious, rather than self-disguised, so that political pressures and official self-restraint could better limit it to cases of genuine necessity.

This article contributes to a burgeoning literature regarding administrative law's application to fiscal disputes.⁶ It also contributes to debates over executive accountability more generally. In some ways, the appropriations-specific history addressed here provides a window onto a much broader transition from individual liability to judicial review as the central mechanism of executive legal accountability. Fraught debates over qualified immunity and *Bivens* officers suits, among other things, suggest that individual liability sits uneasily with the more bureaucratic forms of accountability that predominate today, and yet individual liability in some settings seems to remain an important backstop against executive abuse. Exploring this dynamic in the less familiar setting of appropriations law may thus illuminate broader questions about proper means of executive restraint in our moment of intense political contestation and increasing anxiety over governmental lawlessness.

My analysis will begin with a brief historical overview of federal executive spending controversies. My account emphasizes that establishing and maintaining congressional fiscal control has been a long struggle, notwithstanding the Constitution's express provision for congressional control over appropriations. It also highlights that while Congress, through a series of enactments over more than a century, has successfully abrogated open and notorious spending illegality, another longstanding technique of executive evasion—the legal stretch—has persisted. Indeed, this strategy may well be gaining ground today as increasing political polarization

⁶ See, e.g., Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. ___ (forthcoming 2021); Kevin M. Stack and Michael P. Vandenberg, *Oversight Riders* (draft paper); Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1 (2020); Mila Sohoni, *On Dollars and Deference*, 66 DUKE L.J. 1677, 1695 (2017); Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016).

impairs Congress's institutional capacity and enhances the executive's. Part II then offers critical reflections on this history. It suggests that Congress's repudiation of fiscal heroism has generally been a triumph, but one that carries costs as well insofar as it channels illegality instead into legal stretches. Part II also speculates about the causes of the shift. While Congress's escalating statutory restraints over time were of course central in bringing fiscal heroism to heel, Congress's success might not have been possible without associate broader shifts in the structure of office-holding and ideas about law. Part III turns to proposed reform. It makes the case for strengthening individual liabilities, reinforcing institutions devoted to comparatively apolitical legal interpretation within the political branches, and adjusting justiciability and reviewability doctrines to account for appropriations law's centrality as a check on the modern executive. The essay ends with a conclusion reflecting on contemporary appropriations questions in light of the historical trends documented in the paper.

I. A BRIEF HISTORY OF FISCAL LAWLESSNESS

To document the historical shift from fiscal heroism to the legal stretch, this Part offers a brief history of executive circumvention of Congress's power of the purse. It highlights both commonality and change. On the one hand, taking a long view of the appropriations process highlights an enduring tug of war between Congress's pursuit of control and the executive branch's desire for flexibility. This enduring tension no doubt reflects the United States's particular separation of powers system, which gives Congress authority over government funding and the executive branch responsibility for day-to-day administration. Yet it may also reflect a still deeper tension, likely inevitable in all republican governmental systems, between the imperative of legal restraint and the danger that excessive restraint will prompt disregard for law altogether.⁷ Even as this tension has endured, however, its manifestation has shifted steadily from various forms of overt and outright lawbreaking—what I call fiscal heroism—towards near-exclusive reliance on strained legal interpretation to escape legal restraints that obstruct perceived practical or political imperatives for the executive branch.

⁷ See, e.g., WALLACH, *supra* note __, at 22 (“the challenge is to devise some institutional design capable of avoiding the Scylla and Charybdis of political suicide—legal ‘hyperfidelity’ on one side and legal disintegration brought on by resorts to outright illegality on the other”); Adrian Vermeule, *The Publius Paradox*, 82 MODERN L. REV. 1 (2019) (suggesting that excessive legal restraint may lead paradoxically to executive legal defiance).

A. Fiscal Heroism from the Founding to the Civil War

The presidencies of George Washington, Thomas Jefferson, and Abraham Lincoln all featured high-profile instances of financial illegality. President Washington spent money without a supporting appropriation to suppress the so-called Whiskey Rebellion, a violent tax-revolt in western Pennsylvania that his administration perceived as a significant challenge to the new federal government's authority. To suppress the rebellion, the administration called up a militia force larger than the Continental Army that won the Revolutionary War. Yet Congress was out of session and had appropriated no funds for such a force. As Thomas Jefferson's future Treasury Secretary Albert Gallatin, then serving as a member of Congress from a rebellious district, later complained: "It might be a defect in the law authorizing the expense not to have provided the means, but the defect should have been remedied by the only competent authority, by convening Congress."⁸

The administration funded the operation by diverting money from regular military accounts, and Washington's Treasury Secretary Alexander Hamilton justified this maneuver with a legal stretch. It was true, Hamilton recognized, that "before money can legally issue from the Treasury for any purpose, there must be a law authorizing an expenditure and designating the object and the fund." Yet Hamilton argued for flexible construction of Congress's appropriations.⁹ "The business of administration," he asserted, "requires accommodation to so great a variety of circumstances, that a rigid construction would in countless instances arrest the wheels of Government."¹⁰ For his part, however, Washington implicitly conceded the expenditure's illegality by seeking (and obtaining) congressional ratification after the fact. "Having thus fulfilled the engagement which I took, when I entered into office, 'to the best of my ability to preserve, protect, and defend, the Constitution of the United States,'" Washington pleaded in a statement to Congress, "on you, gentlemen, and the people by whom you are deputed, I rely for support."¹¹

Casper therefore characterized this incident as an example of "the 'heroic' dimensions of the mundane subject of money matters."¹² "In

⁸ ALBERT GALLATIN, *A SKETCH OF THE FINANCES OF THE UNITED STATES* (1796), reprinted in 3 *THE WRITINGS OF ALBERT GALLATIN* 69, 118 (Henry Adams ed., Philadelphia, J.B. Lippincott 1879).

⁹ Alexander Hamilton, *Explanation* (Nov. 11, 1795), in 19 *THE PAPERS OF ALEXANDER HAMILTON* 405 (Harold C. Syrett ed., 1974).

¹⁰ *Id.*

¹¹ 4 *ANNALS OF CONG.* 791.

¹² CASPER, *supra* note __, at 93; JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY WITHIN THE SEPARATION OF POWERS* 59 (2017).

taking responsibility” as Washington did, Casper observed, “one cannot be sure of the concurrence of one’s contemporaries or the judgment of history.”¹³ To be sure, quoting Gallatin again, the operation’s success “may have thrown a veil over its illegality”;¹⁴ under the circumstances, Congress would have been unlikely to repudiate it after the fact. Nevertheless, Washington’s pattern of behavior—seizing the initiative to address a perceived emergency but later pleading a public-interest justification and seeking after-the-fact appropriations—reflected a form of deference to Congress’s ultimate authority over government spending.

Jefferson’s unlawful spending adopted the heroic pose in still more pristine form. After a British ship attacked the USS Chesapeake in 1807 while Congress was out of session, the President entered contracts for munitions and gunboats without any supporting appropriation.¹⁵ Seeking after-the-fact approval from Congress, Jefferson forthrightly acknowledged his actions’ illegality, but again pleaded adequate public-interest justification. “To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved,” Jefferson explained in his message to Congress. “I trust,” he went on, “that the Legislature, feeling the same anxiety for the safety of our country [as Jefferson did] . . . will approve, when done, what they would have seen so important to be done if then assembled.”¹⁶ One critic in the House complained that if the “crisis” required “the extraordinary expenses in question,” then “congress ought to have been immediately convened, in order that they might have given authority by law for these necessary expenses, and for adopting such measures, as national feeling and national honor called for.”¹⁷ But Congress as a whole approved the expenditures.¹⁸

President Lincoln, too, behaved heroically in this sense, albeit under inarguably exigent circumstances. When he assumed office amid a mounting rebellion, with Congress out of session, Lincoln authorized treasury expenditures for military preparations without any specific appropriation.¹⁹ To give himself a freer hand, moreover, Lincoln delayed calling Congress into session, though doing so might well have enabled him to obtain prior approval for his spending plans.²⁰ Eventually, however,

¹³ CASPER, *supra* note __, at 94.

¹⁴ *Id.*

¹⁵ DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS FROM 1776 TO ISIS* 73 (2016).

¹⁶ CASPER, *supra* note __, at 95.

¹⁷ *Id.*

¹⁸ HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* 75 (2015).

¹⁹ *Id.* at 132.

²⁰ BARRON, *supra* note __, at 133-34.

Lincoln sought and obtained retroactive approval from Congress.²¹ Lincoln did also order some secret expenditures that he did not disclose promptly to Congress. But when this spending came to light, he once again acknowledged his actions' illegality and took responsibility for the spending.²² Lincoln's actions overall thus fit the heroic model of presential spending accountability: despite ordering illegal spending to address a perceived emergency, Lincoln took personal responsibility for his actions and sought after-the-fact forgiveness and ratification from Congress.

These actions by Washington, Jefferson, and Lincoln involved perceived security threats, and commentators accordingly have often characterized them as reflecting a claimed Lockean prerogative to act outside the law when national security so requires.²³ Yet more mundane administration featured similar patterns of behavior in the nineteenth century. Even in the Jefferson administration, despite efforts by the president and his Treasury Secretary Gallatin to enforce norms of strict compliance with appropriations laws, "the departments, or some of them, spent their appropriations at whatever rate seemed proper to them and then came to Congress with requests for additional grants."²⁴ As the Navy Secretary's brother put it, "[t]his new mode [of strict construction] was beautiful in theory, but was attended with great inconvenience and public injury in practice. No estimate can provide for unforeseen circumstances. No man, when he undertakes repairs to a ship can estimate what they will cost."²⁵

Unlike Washington's, Jefferson's, and Lincoln's actions, such profligacy was not strictly illegal before enactment of the Anti-Deficiency Act. Executive officials only spent money that had actually been appropriated, and Congress in principle could deny to appropriate funds for any unfunded contractual obligations. Nevertheless, such executive behavior effectively defied Congress's constitutional authority over spending, and some in Congress were aghast.²⁶ As Representative John

²¹ BRUFF, *supra* note __, at 132.

²² David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1002–03 (2008); BARRON, *supra* note __, at 142.

²³ See, e.g., BRUFF, *supra* note __, at 70-72, 132-33, 136; J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1188-89.

²⁴ LUCIUS WILMERDING, JR., *THE SPENDING POWER: A HISTORY OF EFFORTS OF CONGRESS TO CONTROL EXPENDITURES* 65 (1943).

²⁵ 35 ANNALS OF CONG. 806.

²⁶ Modern courts characterize obligating funds without any appropriations authority as inconsistent with the Appropriations Clause. See, e.g., *United States House of Representatives v. Mnuchin*, 976 F.3d 1, 14 (D.C. Cir. 2020) ("The Appropriations Clause even 'prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority.'" (quoting U.S. Dep't of Navy v.

Randolph complained in 1806 debates over a Navy appropriation, “those who disburse the money [in the executive branch], are like a saucy boy who knows that his grandfather will gratify him, and over-runs the sum allowed him at pleasure. As to appropriations I have no faith in them. We have seen that so long as there is money in the Treasury, there is no defence against its expenditure.”²⁷ Yet Congress continued to encourage such behavior by appropriating funds for deficiencies.

As one example of this pervasive pattern, Lucius Wilmerding’s monumental 1943 history of appropriations disputes recounts at length the saga of the Capitol Surveyor.²⁸ Charged with constructing the Capitol’s south wing, he apparently considered the appropriated sums wholly advisory and sought to complete the construction, as a congressional committee later found, “in a style and character which should do honor to his art.”²⁹ At one point, according to Wilmerding, the Surveyor “laid a statement of the case [that he would likely exceed the year’s appropriations] before some of the principal mechanics and a number of them, to whom the greater part of the excess was likely to be due, voluntarily came forward and agreed to progress with the work at their own risk in the fullest confidence that Congress would not receive the benefit of their labor without remuneration and that, under the circumstances, an appropriation would in due time be made to indemnify them.”³⁰ The bet paid off. Congress ended up appropriating an additional \$51,000 for the project, a sum that Randolph complained was “more than the whole expense of some State governments.”³¹

B. Routinized Deficiencies and Fiscal Creativity in the Nineteenth Century

Over succeeding decades, this practice of “coercive deficiencies”—excess spending aimed at compelling further appropriations—ebbed and flowed. An 1809 statute, now known as the Purpose Act, required that appropriated sums be applied “solely . . . to the objects for which they are respectively appropriated, and to no other.”³² As originally enacted, this law included a proviso allowing certain transfers between departmental accounts, a safety valve that seems to have helped curb excess spending, at least at first. But the problem of over-spending continued. Then-

Fed. Lab. Rel. Auth., 665 F.3d 1339, 1347 (D.C. Cir. 2012))).

²⁷ 15 ANNALS OF CONG. 1063 (1806).

²⁸ WILMERDING, *supra* note __, at 68-70.

²⁹ *Id.* at 68.

³⁰ *Id.* at 68-69.

³¹ *Id.* at 69-71.

³² Act of Mar. 3, 1809, 2 Stat. 535; 31 U.S.C. § 1301(a); *see generally* GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 3 at 3-8, 3-9 (4th ed. 2017 revision).

Representative Henry Clay worried in 1819 that Congress would “lose our rightful control over the public purse” because “there is scarcely an officer, from the youngest menial in the service of the Government, upwards, that does not take upon himself to act *upon his responsibility*”—that is, to incur spending obligations with the expectation that Congress would later honor them.³³

Clay urged Congress to thwart these expectations by denying appropriations for some such obligation.³⁴ Congress did not take his advice, though it did impose general restrictions on surplus funds and transfers between accounts in 1820.³⁵ The general tendency toward unrestrained spending continued. Nearly forty years later, in 1858, another representative complained about the executive department’s “habit of making contracts in advance of appropriations, thus, without law, compelling Congress to sanction them or violate the public faith.”³⁶ “[T]he Executive Departments,” this Representative observed, “which have to execute [appropriations] laws, in utter disregard of them, and at their own mere discretion, contract obligations vastly beyond their authority, spending moneys they never asked for, which were never granted, or which were even refused, and we are summoned by all ties of party allegiance, and public faith, and governmental necessity, to pay the bills, and sanction the violations of law.”³⁷ Indeed, in the 1850s, annual deficiency appropriations repeatedly exceeded \$5 million—a huge sum in contemporary valuations.³⁸

During this period, to be sure, executive officials employed legal stretches too. As already noted, in connection with the Whiskey Rebellion controversy, Hamilton and Gallatin debated how strictly or flexibly appropriations laws should generally be interpreted, a debate Gallatin appeared to win with Jefferson’s election in 1800.³⁹ But even as Jefferson were publicly insisting on strict fidelity to appropriations laws, executive officials were not only exceeding their appropriations, as we have seen, but also creatively interpreting laws to preserve flexibility.

Although a 1795 statute (adopted at Hamilton’s urging) required the return of certain unexpended balances to the Treasury, executive officials developed the “convenient interpretation” of the law that distinguished “between appropriations unexpended on the books of the Treasury proper and appropriations unexpended on the books of the Treasurer as agent [of a

³³ WILMERDING, *supra* note __, at 90 (quoting Clay).

³⁴ *Id.* at 95.

³⁵ *Id.* at 96-98.

³⁶ *Id.* at 114.

³⁷ CONG. GLOBE, 35th Cong., 1st Sess., p. 1501.

³⁸ WILMERDING, *supra* note __, at 114.

³⁹ *See supra* note __.

particular department]. Only the former were considered subject to cancellation through the machinery of the surplus fund.”⁴⁰ When Congress discovered this practice in 1819, many were livid.⁴¹ Much as in modern debates, however, others argued that practice had established a gloss on the statute that now rendered the practice itself lawful. The Navy Secretary wrote: “Has the construction given to those laws by the Executive been erroneous? Of that every gentleman will determine for himself if it has. Congress has had it every year presented to their view; it has not been kept secret The whole subject has been faithfully reported to Congress; no objection having been made, no notice taken, Congress did negatively approbate the construction given to the law.”⁴²

Congress, as noted, did impose new general limits in 1820.⁴³ Yet executive officials continued to play fast and loose with accounts, often shifting money from one purpose to another or using new appropriations to pay old expenses.⁴⁴ Reflecting on this period, Wilmerding complained that such devices failed even to satisfy the requirements of the heroic spending model. “[I]f public officers are to violate the law,” he wrote, “they must violate it publicly. Let them, in cases of indispensable necessity, assume a responsibility, but let them report that fact, as promptly as may be, to Congress and so throw themselves upon the justice of the controlling powers of the Constitution.”⁴⁵ Executive officials’ secret machinations, Wilmerding complained, failed to enable such public accountability.

C. Bringing Coercive Deficiencies to Heel

During the Civil War, in addition to Lincoln’s unappropriated expenditures discussed earlier, executive officials freely mingled funds and transferred money between accounts, with scant regard for legal restrictions on the books.⁴⁶ After the war, however, Congress began a determined campaign to gain control over spending.

To facilitate greater control over government finance, the House had established for the first time in 1865 a distinct Appropriations Committee.⁴⁷ Proponents of the change argued that the prior arrangement, in which the House Ways and Means Committee handled revenue as well as spending,

⁴⁰ WILMERDING, *supra* note __, at 83.

⁴¹ *Id.* at 85.

⁴² *Id.* at 87 (quoting letter to Congress).

⁴³ Act of May 1, 1820, 3 Stat. 567.

⁴⁴ WILMERDING, *supra* note __, at 100-01.

⁴⁵ *Id.* at 101-02.

⁴⁶ *Id.* at 116.

⁴⁷ RICHARD F. FENNO, JR., *THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS* 6 (1966).

was inadequate given “the importance and immensity of the labor” relating to taxation and expenditure in the Civil War’s final phases.⁴⁸

Then in 1868, as a rider to a deficiency appropriation, Congress passed a law reiterating the Purpose Act’s requirement that “no money appropriated for one purpose shall hereafter be used for any other purpose, than that for which it is appropriated.”⁴⁹ In 1870, however, Congress learned that the Navy nevertheless planned to employ some \$17 million from prior appropriations for current construction and repair activities that Congress had not authorized.⁵⁰ Congress responded by enacting the first iteration of the Anti-Deficiency Act.⁵¹ This statute made clear that appropriations balances could “only be applied to the payment of expenses properly incurred during that year or to the fulfillment of contracts properly made within that year,” and that any unexpended balances would be returned to the treasury after two years.⁵² The same 1870 statute also forbade entering contracts for future payments in excess of current annual appropriations.⁵³ As one of this law’s lead proponents later explained, this provision aimed to preclude any inference that “from the existence of [legal] duties . . . the power to incur the necessary debts also existed.”⁵⁴

The executive branch responded to these constraints with legal stretches. The Attorney General interpreted the prohibition on spending unexpended balances not to apply if some portion of the funds had been withdrawn within two years.⁵⁵ Even after Congress repudiated that view with yet another statute, executive officials frequently mingled appropriations subheads into general accounts, making it difficult or impossible to determine later if funds had been spent in accordance with statutory specifications.⁵⁶

Meanwhile, coercive deficiencies remained widespread, notwithstanding the ADA’s enactment. In 1879, for example, the Post Office sought a new \$2 million appropriation on top of the \$5 million it had earlier requested and received for certain transportation purposes.⁵⁷ In response to his critics, the Postmaster General claimed to have technically complied with the prohibition on contracting beyond appropriations because

⁴⁸ CONG. GLOBE, 38th Cong., 2d Sess., p. 1312.

⁴⁹ Act of Feb. 12, 1868, 15 Stat. 36.

⁵⁰ WILMERDING, *supra* note __, at 124.

⁵¹ Act of July 12, 1870, §§ 5-7, 16 Stat. 230, 251.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ WILMERDING, *supra* note __, at 128 (quoting former Representative and then-Treasury Secretary John Sherman).

⁵⁵ *Id.* at 136.

⁵⁶ *Id.* at 135-36.

⁵⁷ *Id.* at 137.

he had not yet in fact spent any unappropriated money. He simply argued that he would be obliged to stop mail delivery altogether if Congress failed to provide the necessary funds for contracts to continue delivery.⁵⁸ Members of Congress decried the Postmaster General's insolence; one questioned "whether, in the history of this country, there ever was such audacity on the part of any departmental officer in time of peace and in the absence of any public exigency."⁵⁹ Yet in practice they had no choice but to comply. The same Representative conceded that "we cannot refuse [the request] without destroying the mail service in this country."⁶⁰

According to Wilmerding, coercive deficiencies became effectively routine during the period from roughly 1880 to 1905. Much as Congress today, on some accounts, often delegates authority so as to claim to have resolved problems without in fact having done so, Congress during this period seems to have regularly appropriated less than agencies could be expected to require. Doing so enabled Congress to make a pretense of economy while in fact regularly making additional appropriations later in the fiscal year.⁶¹

In fact, the House altered its internal committee structure in ways that may have encouraged such laxity. After establishing a standalone Appropriations Committee in 1865, concerns about the committee's stinginess led the House to pass new resolutions between 1877 and 1885 that significantly pared back its jurisdiction.⁶² By 1885, the House had transferred responsibility for eight out of fourteen annual appropriations bills, including those covering such important matters as Rivers and Harbors, Agriculture, and the Army and Navy, to substantive committees.⁶³ These changes, which lasted until 1920,⁶⁴ might well have given executive officials greater freedom to spend without fear of repercussions.

In any event, after increasing pension and other obligations along with decreasing customs revenue produced federal budget deficits beginning in 1904,⁶⁵ Congress finally undertook a serious effort to stamp out routinized coercive deficiencies. In 1905 amendments to the 1870 Anti-Deficiency Act, Congress forbid both payments and contractual obligations without supporting appropriations, barred the government from accepting "voluntary service[s] . . . except in cases of sudden emergency involving the

⁵⁸ *Id.*

⁵⁹ 10 CONG. REC. 1129 (Feb. 25, 1880) (statement of Rep. Blount).

⁶⁰ *Id.*

⁶¹ WILMERDING, *supra* note __, at 140-41.

⁶² FENNO, *supra* note __, at 43-44.

⁶³ *Id.* at 43.

⁶⁴ *Id.* at 45.

⁶⁵ Louis Fisher, *Presidential Fiscal Accountability following the Budget Act of 1974*, 67 ME. L. REV. 286, 290 (2015).

loss of human life or the destruction of property,” and required “apportionment” of funds over the fiscal year to prevent deficiencies from developing.⁶⁶ Most importantly, the law imposed criminal penalties for violations. “Any person,” it stated, “violating any provision of this [law] shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month.”⁶⁷ Initially, the law allowed department heads to waive the apportionment requirement provided they did so in writing and reported the waiver to Congress.⁶⁸ But after executive officials abused this waiver authority to request deficiency appropriations nearly as great as in the preceding year, Congress amended the ADA again in 1906 to limit such waivers to situations involving “some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making [the] apportionment.”⁶⁹

The amended law appears to have worked in the long run, and some saw immediate benefits. In a retirement speech in 1911, one of the law’s lead proponents observed that before 1905 “[a]dministrative officers did not hesitate to embark at the beginning of the fiscal year on a scale of annual expenditure fixed according to their own judgment and estimate of the needs of the public service, without reference to the amount appropriated by Congress for the year’s service.”⁷⁰ After the ADA’s enactment, this Representative bragged, “[t]he certainty of a jail sentence, coupled with a fine, has effectually set at rest this system of ‘coercive deficiencies.’”⁷¹

Yet if the ADA initially gained traction, World War I led to a renewed slackening of fiscal restraints barely a decade later. Although this flexibility came mainly from statutory changes during and after the war, the coercive deficiency snuck back into common use during the same period. Indeed, in Wilmerding’s judgment, “[b]y 1921, ‘the Anti-Deficiency Act was a dead letter.’”⁷² As one Representative complained at the time, “[e]very [executive department] exceeds the appropriations,” and “although Congress placed this criminal law upon the statute books, there had been no proceedings under it, with no action taken against anyone.”⁷³ By the end of the 1920 fiscal year in June 1921, agencies had requested nearly \$500 million in deficiency appropriations.⁷⁴

⁶⁶ Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257–58.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 34 Stat. 49.

⁷⁰ 46 CONG. REC. 234 (Mar. 4, 1911) (statement of Rep. Tawney).

⁷¹ *Id.*

⁷² WILMERDING, *supra* note __, at 167.

⁷³ 61 CONG. REC. 996 (statement of Rep. Blanton).

⁷⁴ WILMERDING, *supra* note __, at 169.

Congress's renewed exasperation with this executive lawlessness led to yet another round of statutory changes, this time in the Budget and Accounting Act of 1921. Among other changes, this law gave the President, rather than department heads, greater responsibility for budgeting and required the Comptroller General to report Anti-Deficiency Act violations to Congress⁷⁵—a requirement that remains on the books to this day.⁷⁶ President Warren Harding followed up the statute with an executive order “discountenanc[ing]” deficiencies,⁷⁷ and the overall scale of deficiencies appears to have declined, though not disappeared, in the 1920s.⁷⁸ Meanwhile, the House reversed its prior dispersal of appropriations authority, restoring full jurisdiction to the Appropriations Committee in 1920.⁷⁹ In making this change, “the clearly expressed expectation was that the move would effect greater economy than had been obtained under the post-1885 arrangement.”⁸⁰ Congress's adoption of a regular schedule of official salaries in 1923 also seems to have helped improve budgeting's predictability.⁸¹

Ironically, the fiscal turmoil of the Great Depression seems to have further reinforced executive fidelity to statutory spending limits. Following the post-1929 economic collapse, Congress gave President Hoover authority reorganize executive departments and lay off federal workers to achieve savings.⁸² For his part, President Franklin Roosevelt sought and obtained further authority to reorganize and consolidate certain federal functions.⁸³ At the same time, in 1934 and 1935, Congress made enormous lump-sum appropriations for emergency relief, giving President Roosevelt substantial discretion over the funds disbursement.⁸⁴ To obtain such flexibility, however, Roosevelt had to make multiple concessions, including “a commitment . . . to assume a degree of personal management of the program.”⁸⁵ In that context, Roosevelt issued a series of executive orders beginning in 1933 that sought to finally “compel obedience to the Anti-Deficiency Law” and consolidate control over expenditures in the Budget

⁷⁵ Budget and Accounting Act of 1921.

⁷⁶ See GAO, *supra* note __.

⁷⁷ WILMERDING, *supra* note __, at 171 (quoting executive order).

⁷⁸ *Id.* at 173-74.

⁷⁹ FENNO, *supra* note __, at 9.

⁸⁰ *Id.*

⁸¹ WILMERDING, *supra* note __, at 176-77; see also LOUIS FISHER, PRESIDENTIAL SPENDING POWER 72 (1975) (“The effect of the Classification Act was to wash from appropriation bills the mass of detail on different positions.”).

⁸² FISHER, *supra* note __, at 40.

⁸³ *Id.*

⁸⁴ *Id.* at 62.

⁸⁵ *Id.* at 63.

Bureau established by the 1921 Act.⁸⁶ This combined push from the executive and legislative branches seems finally to have instilled an ethic of appropriations compliance in executive officials, so that Wilmerding could bring his historical narrative to a close in 1938 at what he perceived to be a high point of congressional control over expenditure, albeit with some anxiety that the battle between congressional and executive officials over fiscal control would reemerge.⁸⁷

D. Solidifying Fiscal Restraints

World War II led to renewed fiscal flexibility, though mainly if not totally by statute rather than executive initiative.⁸⁸ Much as it had during World War I, Congress gave the executive branch statutory flexibility to transfer funds between accounts,⁸⁹ and even to reallocate executive agencies' authorities.⁹⁰ After the War, Congress sought to reimpose greater discipline. In 1946, Congress enacted the historic Administrative Procedure Act to impose legal restraints and judicial controls on the fledgling administrative state.⁹¹ That same year, it also overhauled and consolidated the House and Senate's internal committee structures and processes,⁹² a reform motivated by concerns that Congress was "neither organized nor equipped to perform adequately its main functions of determining policy, authorizing administrative organization and appropriations to carry out policy, and supervising execution of the resultant programs."⁹³

Some in Congress hoped these reforms would improve executive appropriations compliance. In reporting its proposed legislative reform bill, the Senate Special Committee on the Organization of Congress complained that "the efforts of Congress to compel compliance with the laws making specific appropriations have been too often frustrated. . . . The executive has mingled appropriations, brought forward and backward unexpended and anticipated balances, incurred coercive deficiencies, and otherwise escaped

⁸⁶ WILMERDING, *supra* note __, at 187, 189-90.

⁸⁷ *Id.* at 193-95.

⁸⁸ One study of the appropriations process during the war concluded that although "[o]ccasionally [the War Department's] spokesmen advocate that the budget be exceeded without waiting for Congressional invitation . . . [.] [f]or the most part[] . . . the Army adheres to the letter of the law, i.e., it regards itself as bound by the decisions of the Bureau of the Budget, acting for the President." Elias Huzar, *Congress and the Army: Appropriations*, 37 AM. POLI. SCI. REV. 661, 667-68 (1943).

⁸⁹ FISHER, *supra* note __, at 105.

⁹⁰ Overman Act, Pub. L. No. 65-152, § 1, 40 Stat. 556, 556 (1918).

⁹¹ Pub. L. No. 79-404, 60 Stat. 237 (1946).

⁹² Legislative Reorganization Act of 1946, 60 Stat. 812.

⁹³ S. Rep. No. 72-1400, at 2 (May 31, 1946).

the rigors of congressional control.”⁹⁴ To address this challenge, the committee proposed various measures that survived in the final legislation, including providing for regular open hearings on appropriations and strengthening committee staff.⁹⁵

Congress’s victory over coercive deficiencies and unauthorized expenditure appears to have finally solidified in the wake of these changes. In his 1966 study covering the years 1947 to 1962, Richard Fenno described an effective appropriations process in which the House and Senate committees exercised strong control over executive expenditures.⁹⁶ To be sure, according to Fenno, the House committee chairman “[a]ll have shared the view that the federal Treasury is besieged and beleaguered by people trying to extract its contents. And all have cultivated the Committee’s self-image as the heroic underdog in the endless battle against the ‘wolves,’ ‘pirates,’ and ‘thieves’ who eye the Treasury waiting for a relaxation of Committee vigilance.”⁹⁷ Fenno also found that Congress at times undercut the Committee’s authority by authorizing agencies to contract in advance of appropriations, thus enabling them to lawfully “create[] an obligation on the part of the government which the Committee must honor.”⁹⁸ But true coercive deficiencies—obligations incurred without lawful authority or in violation of funding limits—no longer appeared to be a routine and deliberate executive tactic for circumventing Congress’s fiscal control.

More recent scholarship has in fact marveled at Congress’s ability to get its way in appropriations battles.⁹⁹ Although post-War presidents have

⁹⁴ *Id.* at 5.

⁹⁵ *Id.*

⁹⁶ FENNO, *supra* note __. For a summary of Fenno’s analysis and discussion of the House Appropriations Committee’s later loss of authority relative to House leadership, see Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. REV. 487, 493-94 (2009).

⁹⁷ FENNO, *supra* note __, at 99.

⁹⁸ *Id.* at 46-47.

⁹⁹ See, e.g., Christopher C. DeMuth, Sr. & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555, 556 (2017) (observing that “appropriations are one of the principal means through which Congress controls and directs agencies” and noting agreement among “a great many scholars” that administrative agencies are “empire-builders” that seek to maximize their budgets and that “the budgetary maximand for regulatory agencies is legislative appropriations”); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1825 (2012) (“Congress uses the appropriations monopoly to exert control over agencies by altering total funding, targeting specific programs through earmarks and riders, and using signals and threats.”); Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 443 (1989) (“Because appropriations bills encompass large collections of specific programs, they facilitate cooperation among politicians to thwart all deviations even though each member might benefit from some of them.”). See generally

routinely undertaken unilateral executive initiatives of one sort or another, William Howell observes that “where funding is involved, and nonaction on the part of Congress spells demise of an agency or program [begun unilaterally by the executive branch], the president’s powers of unilateral action diminish significantly.”¹⁰⁰ Indeed, even when Congress has funded presidential initiatives, it has often imposed limits and conditions that altered the program or restricted its operation.¹⁰¹

More generally, annual appropriations laws are littered with conditions and limitations that shape executive governance; the hundreds of “limitation riders” blocking enforcement of disfavored laws and regulations are just one key example.¹⁰² Presidents and executive officials routinely comply with such limits, in some cases even after asserting a constitutional prerogative not to do so.¹⁰³ Still more remarkably, the government has repeatedly “shut down” in recent decades when annual appropriations have lapsed without new spending bills.¹⁰⁴ Although the executive branch has broadly construed which functions may continue by virtue of the ADA’s exception for “emergencies involving the safety of human life or the protection of property,”¹⁰⁵ it has otherwise declined to continue executive operations without a supporting appropriation—even to the point of closing popular government services like national parks rather than dare Congress to deny funds for a coercive deficiency.

Today, then, although framework statutes and recurrent annual provisions generally provide a degree of flexibility to executive officials, governing statutes also impose detailed limitations on executive activity,

CHAFETZ, *supra* note __, at 72 (observing that fiscal “pressures” from Congress in the form of budget cuts and threatened cuts “seem generally effective: there is a growing body of evidence suggesting that the federal bureaucracy is broadly responsive to congressional preferences”).

¹⁰⁰ WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 121 (2003).

¹⁰¹ *Id.* at 123, 134.

¹⁰² Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 768 (2010) (counting, on average, roughly three hundred provisions banning enforcement of specified regulations each year between 1993 and 2002).

¹⁰³ For my prior discussion of numerous examples of such compliance, see Price, *supra* note __. See also Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT’L L. 517, 518 (2013).

¹⁰⁴ See CHAFETZ, *supra* note __, at 68-71; Zachary S. Price, *The Constitutional Law of Shutdowns*, TAKE CARE BLOG (Jan. 8, 2019), <https://takecareblog.com/blog/the-constitutional-law-of-shutdowns>.

¹⁰⁵ 31 U.S.C. § 1342; *Authority to Employ the Services of White House Office Employees During an Appropriations Lapse*, 19 O.L.C. 235 (1995); *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 O.L.C. 1 (1981).

Congress closely monitors agency expenditures, ADA violations are regularly reported, and executive officials appear to take seriously their obligation to stay within limits prescribed by Congress.¹⁰⁶ Indeed, although reports indicate that ADA violations have continued to occur with some regularity, they generally involve “the minutiae of budget execution,” such as mistaken expenditures prior to an OMB apportionment, rather than deliberate spending without license of the sort common in the nineteenth century.¹⁰⁷

To be sure, periodic eruptions of executive fiscal creativity have continued to impede full congressional control. Legal stretches have remained in use, and indeed arguably increased in brazenness and scale of late, as we shall see. Likewise, presidents and executive officials employ statutory powers with creativity and gusto, and in some areas, particularly conduct of diplomacy, presidents have successfully claimed power to disregard fiscal limitations on constitutional grounds.¹⁰⁸ At least as a routine tool of governance, however, the coercive deficiency has effectively disappeared, along with overt fiscal heroism. The executive branch no longer claims authority to slip Congress’s fiscal reigns altogether, even in moments of real or perceived emergency.

E. Repudiating Impoundments

The biggest fiscal scandal in the decades after World War II in fact involved the opposite problem: refusal to make mandated expenditures. Beginning at least with Thomas Jefferson, Presidents had claimed a limited authority to “impound” appropriated funds when the President deemed the spending unnecessary. Thus, in 1803, Jefferson declined to spend \$50,000 appropriated for naval gunboats because he determined that a “favorable and peaceful turn of affairs” obviated any need for the vessels.¹⁰⁹ As Josh Chafetz observes, Jefferson’s action was not in fact contrary to the relevant

¹⁰⁶ Cf. John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 564 (2001) (“[D]epartments and agencies treat [appropriations] committee reports as the equivalent of legislation for purposes of their own budget planning. They would be foolish, except in extreme cases where the language is flatly inconsistent with the statute, to defy the committees on which they depend for appropriations by ignoring these instructions.”).

¹⁰⁷ Gordon Gray, American Action Forum, *The Antideficiency Act: A Primer* (Aug. 3, 2016), <https://www.americanactionforum.org/research/antideficiency-act-primer/>. See also Major Gary L. Hopkins & Lieutenant Colonel Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679): And Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 51, 56 (1978) (discussing discovery of violations in Army audits in the 1970s).

¹⁰⁸ For my prior discussion of this point, Price, *supra* note ___, at 454-56.

¹⁰⁹ CHAFETZ, *supra* note ___, at 64.

appropriation's terms; the law in question authorized spending only for a "sum not exceeding" the appropriated amount.¹¹⁰ Yet Jefferson's example set a precedent for declining to spend appropriated funds when the spending's objectives proved unnecessary or could be accomplished more cheaply.¹¹¹

This practice became controversial only when presidents began employing it to achieve broader policy goals. According to Chafetz, such "policy impoundments" "did not begin in any significant degree until World War II; Presidents Franklin Roosevelt, Truman, Eisenhower, Kennedy, and Lyndon Johnson all made use of them to a limited extent."¹¹² President Nixon, however, greatly expanded the practice, employing it to cancel spending on social programs he disfavored.¹¹³ The President's own Justice Department rejected any constitutional authority for such spending cancellations; in an opinion by then-Assistant Attorney General William Rehnquist, the Department's Office of Legal Counsel concluded that the president's duty to ensure faithful execution of the laws precluded him from disregarding funding mandates.¹¹⁴ The Supreme Court rejected this claimed practice, albeit without squarely addressing it, in a 1975 decision.¹¹⁵

For its part, Congress responded to Nixon's impoundments with a new framework statute, the Impoundment Control Act, making clear that appropriated spending should be considered presumptively mandatory.¹¹⁶ Under this law, the executive branch can avoid spending the full amount appropriated for specified purposes only if the President follow specified procedures for either a "rescission," meaning a cancellation of spending, or a "deferral," meaning a postponement.¹¹⁷ Rescissions must be reported to Congress and can be made only if Congress passes a new law approving them.¹¹⁸ Presidents also must report deferrals, and can make them on their own authority, but only for certain limited purposes.¹¹⁹ As amended over time, the Act allows deferrals only "to provide for contingencies," "to achieve savings made possible by or through changes in requirements or

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ BRUFF, *supra* note __, at 342-46; Fisher, *supra* note __, at 286-87, 293-94.

¹¹⁴ Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools, 1 Supp. Op. O.L.C. 303, 310 (1969). *See also* HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 263-66 (2006).

¹¹⁵ *Train v. City of New York*, 420 U.S. 35, 41 (1975).

¹¹⁶ CHAFETZ, *supra* note __, at 65.

¹¹⁷ 2 U.S.C. §§ 683, 684, 687.

¹¹⁸ 2 U.S.C. § 683.

¹¹⁹ 2 U.S.C. § 684.

greater efficiency of operations,” or “as specifically provided by law”; the law expressly forbids deferrals based on policy disagreement with the spending’s purposes.¹²⁰

F. Polarization and the Pressure to Spend

By the last quarter of the century, then, interlocking statutory restraints cabined executive spending. Executive officials could not outspend their appropriations without risking criminal liability. Nor could they decline mandated spending without legal risk, and governing statutes further directed them to construe appropriations laws narrowly. Congress appeared to have largely caged the fiscal lion, effectively repudiating fiscal heroism by making both excess spending and declinations of spending affirmatively unlawful.

Yet political pressures to remove restraints on officials’ own “responsibility” have remained. Indeed, in retrospect, Congress’s triumph in the Impoundment Control Act directly preceded a period of mounting political polarization, with important consequences for presidents’ ability to achieve desired legal changes through legislation rather than executive action. As a result, political pressures to spend or not spend as a president’s constituencies demand, and not as Congress has directed, have if anything intensified since Nixon, prompting the lion to keep rattling his cage.

At times, administrations dusted off the familiar technique of the legal stretch. A 1986 Government Accountability Office report accused the Marine Corps of diverting funds between accounts to continue certain weapons programs despite congressional funding cuts.¹²¹ A 1999 House Appropriations Committee report similarly accused the Pentagon of defying congressional priorities and limitations regarding expensive weapons programs.¹²²

In other instances, presidents sought to escape fiscal restraints with broad theories of constitutional executive power. Across American history, as I have discussed elsewhere, U.S. Presidents have periodically claimed independent constitutional authority to spend money for supposed Article II purposes including law enforcement, military operations, foreign aid, and diplomacy, but apart from spending for diplomatic communications they have rarely acted on these assertions.¹²³ One important exception came early on, when President Gerald Ford confronted the challenges of

¹²⁰ 2 U.S.C. § 684(b).

¹²¹ HOWELL, *supra* note __, at 124.

¹²² *Id.* at 125.

¹²³ For general discussion of this issue and assessment of such claims, see Price, *supra* note __.

unwinding U.S. involvement in Vietnam. In the course of evacuating U.S. personnel and allies from Vietnam, U.S. forces engaged in limited military actions despite statutory prohibitions on “combat activities” in Southeast Asia.¹²⁴

Another noteworthy example came a decade later in the so-called Iran-Contra scandal, in which officials in President Reagan’s administration established an ostensibly private corporation to funnel money to the Contra rebel group in Nicaragua from foreign donations and certain unlawful arms sales to Iran, despite categorical statutory prohibitions on any use of appropriated funds for the Contras’ benefit.¹²⁵ To justify these actions, President Reagan may have expressed a version of the heroic outlook to subordinates within his administration; he allegedly told his Secretary of State at one point that “the American people will never forgive me if I fail to get [certain] hostages out,” as the administration was seeking to do with the Iranian arms sales, “over the legal question.”¹²⁶ Yet the administration’s main public defense was to assert a constitutional prerogative to spend money on foreign aid in defiance of appropriations constraints, a view that Congress strongly repudiated in its committee reports on the controversy.¹²⁷

A few administrations later, President George W. Bush advanced outrageously capacious notions of his own power. Yet the salient legal controversies of his administration involved broad claims of executive power across the board, not any particular authority to evade appropriations restraints, and in any event key legal theories embraced by his administration were repudiated by his own lawyers later in his administration, not to mention by those who succeeded him in the Obama Administration.

G. A New Season of Stretches?

Partly in reaction to these constitutional excesses, the past two administrations—those of Barack Obama and Donald Trump—seem to have settled on the statutory stretch as the preferred mechanism of fiscal evasion. The scale and brazenness of some of their legal theories, however, not to mention the background dynamics of polarization and congressional gridlock that have encouraged such executive unilateralism, give reason to

¹²⁴ Barron & Lederman, *supra* note __, at 1072-73; BARRON, *supra* note __, at 358-62.

¹²⁵ BRUFF, *supra* note __, at 368-73.

¹²⁶ *Id.* at 372.

¹²⁷ S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 413 (1987) (“[T]he Constitution does prohibit receipt and expenditure of [funds for the Contras] by this Government absent an appropriation.” (footnote omitted)). For general discussion of the scandal and its implications for the fiscal constitution, see Price, *supra* note __, at 453-54.

worry that Congress’s hard-won control over government expenditure could be on the verge of serious degradation.¹²⁸

To begin with, government responses to the 2008 global financial crisis involved significant de facto expenditures based on dubious or even implausible statutory theories. Among other things, the Bush and Obama Administrations made substantial loans with limited expectation of repayment,¹²⁹ employed a fund intended to stabilize currency exchange rates to provide a \$50 billion guarantee to money market accounts,¹³⁰ interpreted statutory lending authorities broadly to reach entities Congress likely did not intend,¹³¹ and exempted entities it acquired in response to the crisis from significant tax liabilities.¹³² In at least one instance, the Treasury Secretary gave de facto approval to the Federal Reserve for actions that his own General Counsel had advised would violate the Anti-Deficiency Act.¹³³ The response, to be sure, nonetheless was not totally lawless. As Philip Wallach argues in his careful study, legal restraints including the ADA shaped government behavior in important ways.¹³⁴ Indeed, many of the government’s legal stretches reflected a perverse form of compliance with the fiscal constitution; the Treasury Department creatively interpreted its fiscal and lending authorities precisely because “it fundamentally respected the Anti-Deficiency Act’s prohibition on spending from its main accounts without a congressional appropriation.”¹³⁵ Yet executive officials’ willingness to push the envelope in the crisis response suggests how legal stretches could corrode Congress’s fiscal control over

¹²⁸ Pressures for executive unilateralism of course are not limited to fiscal matters. See, e.g., Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1958 (2015) (noting general trend that “administrative governance is increasingly outrunning legislative authorization”).

¹²⁹ WALLACH, *supra* note __, at 50-52, 74-76.

¹³⁰ *Id.* at 74-78, 214. Though one commentator describes this use of the fund as based on a “farcically thin legal justification,” the guarantee succeeded in stabilize money markets, so that in the end no money needed to be paid out of the fund. *Id.* at 76, 214.

¹³¹ See Bill Canis & Baird Webel, Congressional Research Service, *The Role of TARP Assistance in the Restructuring of General Motors* at 5-6 (May 9, 2013), <https://fas.org/sgp/crs/misc/R41978.pdf> (discussing assistance to automobile manufacturers under statutory authority for “financial firms”); SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* 55, 230 (2020) (“The legal problem was that there was no appropriation, no congressionally sanctioned funding, that could be drawn on to rescue General Motors or Chrysler.”).

¹³² J. Mark Ramseyer & Eric B. Rasmusen, *Can the Treasury Exempt Its Own Companies from Tax? The \$45 Billion GM NOL Carryforward*, 1 CATO PAPERS ON PUBLIC POLICY 1 (2011).

¹³³ WALLACH, *supra* note __, at 50-51.

¹³⁴ *Id.* at 50, 76, 202.

¹³⁵ *Id.* at 76.

time if repeated exigencies and political imperatives expand the range of precedent for effectively circumventing legal limits on expenditures and impoundments.

The Obama Administration in fact employed legal stretches in other significant examples, generally in situations involving perceived political imperatives. Most notably, the administration continued paying certain Affordable Care Act subsidies despite Congress’s denial of annual appropriations.¹³⁶ Although the administration claimed that the Act created a permanent appropriation for these subsidies, this argument was at the very least a legal stretch.¹³⁷ A federal court later rejected it, albeit in a case predicated on a dubious theory of legislative standing.¹³⁸ As Mila Sohoni has documented, the administration’s legal theories for financing a number of other health-insurance programs were similarly creative,¹³⁹ as was its adoption of new programs forgiving at least \$15 billion in federal student loans based on a dubious statutory interpretation.¹⁴⁰ The administration also released some \$1.5 billion in aid to Egypt in 2013 despite a statutory prohibition on any aid to states that had suffered military coups. The administration claimed, implausibly, that it could avoid the restriction by declining to make any determination that a coup had occurred.¹⁴¹ Finally, in yet another example, the administration released several Guantanamo Bay detainees in exchange for a captured American soldier, notwithstanding appropriations provisions barring use of funds to release Guantanamo prisoners unless certain conditions were met.¹⁴² The Government Accountability Office concluded that, because this transfer defied statutory spending prohibitions, the Department of Defense “obligated at least \$988,400 in excess of available appropriations” in violation of the ADA.¹⁴³

At the same time, reflecting in part its self-conscious repudiation of the

¹³⁶ Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1729-35 (2016).

¹³⁷ *Id.*

¹³⁸ United States House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015).

¹³⁹ Mila Sohoni, *On Dollars and Deference*, 66 DUKE L.J. 1677, 1695 (2017) (discussing four instances in which “the executive branch has adopted aggressive interpretations of the ACA or of relevant appropriations laws in order to disburse money”).

¹⁴⁰ *Id.* at 1700 (discussing the administration’s loan forgiveness programs and concluding “[i]t should be obvious that the Department of Education’s actions were not required by statute, but instead leveraged statutory ambiguity to produce the desired policy outcome”).

¹⁴¹ PRAKASH, *supra* note ___, at 232.

¹⁴² U.S. Gov’t Accountability Office, B-326013, *Department of Defense—Compliance with Statutory Notification Requirement* (Aug. 21, 2014), <http://www.gao.gov/assets/670/665390.pdf>.

¹⁴³ *Id.* at 6-7; *see also* PRAKASH, *supra* note ___, at 183-84.

prior administration's Article II unilateralism, the Obama Administration generally did not claim constitutional authority to spend in defiance of statutory limits. To be sure, the administration did disregard certain limits on diplomatic spending, but this action comported with bipartisan practice in prior administrations.¹⁴⁴ As noted, it also asserted implausible legal grounds as justification for unlawfully exchanging Guantanamo detainees for a captured American soldier. Otherwise, however, the administration abided by restrictions on overseas prisoner transfers, and it did not act at all on the President's more novel (and still less plausible) assertion in signing statements that he could disregard statutory prohibitions on use of funds to transfer Guantanamo prisoners to the United States for trial or continued detention.¹⁴⁵

For his part, President Trump repeatedly expressed nihilistic disregard for the very idea of legal restraint. But even if Trump's rhetorical bombast often exceeded his administration's actual behavior, several of his signature initiatives did involve spending in defiance of express statutory restraints. For example, when Congress rejected Trump's funding requests to build a wall along the Mexican border, Trump's administration made generous use of the legal stretch, claiming various grounds, with varying degrees of legal plausibility, to transfer or repurpose funds so as to spend far more on wall construction than Congress had provided. Lower courts have divided over both the justiciability and the legality of some of these transfers, setting up a Supreme Court case this year that may answer key questions.¹⁴⁶

The scandal that prompted Trump's first impeachment—his attempted withholding of military assistance for Ukraine—fit a similar pattern. In a phone call with the Ukrainian President, Trump indicated that he would withhold military aid mandated by Congress unless the Ukrainian government publicly announced an investigation of wrongdoing by the son of his anticipated political opponent, current President Joe Biden. Though the Senate ultimately failed to convict him and order his removal, the House of Representatives impeached Trump for abusing his power of diplomatic communication to advance a narrow partisan interest.

Holding aside the question whether Trump's corrupt partisan motive properly afforded a basis for impeachment, the central statutory issue

¹⁴⁴ See *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act*, 2011, 35 Op. O.L.C. __ (2011); *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. __ (2009); *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 52 (1990). For examples of defiance based on this legal theory, see Price, *supra* note __, at 454-55 & n.350.

¹⁴⁵ For details on both these examples, see Price, *supra* note __, at 433.

¹⁴⁶ *Sierra Club v. Trump*, 963 F.3d 874 (2020), *cert. granted*, __ U.S. __ (2020).

presented by this episode was whether postponing release of the Ukrainian aid was unlawful. Despite Trump’s actions, the administration ultimately released the money to Ukraine within the fiscal year, without Ukrainian acquiescence to Trump’s conditions, thus avoiding any actual impoundment of mandated spending. The Government Accountability Office nevertheless concluded that the delay was unlawful because the Anti-Deficiency Act bars apportioning spending later in the fiscal year based on policy disagreement with the spending’s goals.¹⁴⁷

As Eloise Pasachoff has observed, this delay and GAO’s critique of it reflect a broader pattern of spending delays in the Trump Administration. In a number of examples apart from the Ukraine episode, the administration asserted statutory power to flexibly apportion funds over the course of the fiscal year and transfer money aggressively between different accounts.¹⁴⁸ Pasachoff makes a compelling case that such maneuvers are unlawful, making them, in effect, yet another legal stretch aimed at increasing flexibility for the executive branch. As in the Obama Administration and before, pressures to deliver on political goals in the face of congressional restraints prompted the administration to shift the legal goalposts by interpreting fiscal framework legislation more flexibly than its predecessors. In that sense, its actions resembled the prior two administrations’ handling of the financial crisis, as well as Obama’s subsidy payments and the prisoner release. The heroic pursuit of policy aims in defiance of legal restraints is no longer quite so heroic, but instead hides behind creative claims of technical legality.

II. THE HISTORY APPRAISED

A. *Two Ideal Types: Fiscal Heroism and the Legal Stretch*

What should we make of this history? As noted earlier, the United States’s fiscal evolution betrays continuities but also at least one sharp disjuncture. At many moments across the Republic’s two centuries, the legislative and executive branch have circled the public purse like scorpions in a barrel, each seeking to cow the other into complying with its aims. Or perhaps John Randolph’s “saucy boy” metaphor better captures the dynamic: the executive branch seems to have been forever like a wayward teenager, chafing under the restraints of its generally wise but occasionally

¹⁴⁷ GAO, B-331564, *Office of Management and Budget—Withholding of Ukraine Security Assistance* (Jan. 16, 2020), <https://www.gao.gov/assets/710/703909.pdf>.

¹⁴⁸ Eloise Pasachoff, *The President’s Budget Powers in the Trump Era*, in EXECUTIVE POLICYMAKING: THE ROLE OF OMB IN THE PRESIDENCY (MEENA BOSE & ANDREW RUDALEVIGE, EDS., 2020).

blinker congressional parent.¹⁴⁹ From this point of view, the degree of relative congressional control and executive freedom has ebbed and flowed, but a dynamic tension between the branches has endured—and may well reflect an even more fundamental and enduring tension between legal restraint and administrative flexibility that bedevils all law-bound republics as they seek to navigate the exigencies of public life.¹⁵⁰

Amid this ongoing struggle, however, we can see that one means of executive fiscal evasion—overt fiscal heroism—was once commonplace but has essentially disappeared, while another, the legal stretch, has ebbed and flowed over time and seems lately to be rising to new heights. To the extent this pattern reflects fiscal heroism’s demise and reappearance in new garb, the historic shift invites inquiry into whether the old approach held advantages worth recovering.

The heroic approach was on the one hand alarmingly lawless in its open disregard for legal restraints, but on the other hand oddly respectful of law’s objectivity. Presidents or other executive officials make “the sacrifice of risking [their] career[s],” as Casper put it.¹⁵¹ They confessed having violated the law, but pled the greater good as justification and asked forgiveness from Congress, the body that could have authorized the action in the first place. Of course, the sacrifice was largely phony: once executive officials took the initiative and engaged in some popular action, or simply encouraged payment expectations in private parties, the baseline shifted, making the political stakes for Congress in repudiating their actions much higher than they otherwise would have been. Hence the repeated expressions of exasperation of Senators and members in congressional debates over deficiency appropriations. Despite anger over what executive officials had done, proposals by Randolph, Clay, and others to make an example of some “saucy boy” or another repeatedly went nowhere.

Nevertheless, all seemed to understand that committing funds in excess of appropriations violated Congress’s power of the purse, and indeed violated statutory law as well after 1870; the question was whether it was nonetheless appropriate or justified. For this reason, claims that early practice supports a constitutional executive authority to spend without limits are misguided.¹⁵² In principle, moreover, the heroic executive’s dependence on legislative ratification should have imposed some discipline. Congress

¹⁴⁹ Parenting analogies show up other times in congressional debates. For instance, in 1906 debates, Representative Leonidas Livingston of Georgia described contingency funds as “like giving a child more money than he wants for a trip uptown and back. He will surely spend the balance of it before he gets home.” 40 Cong. Rec. 1293 (1906), *quoted in* FISHER, *supra* note ___, at 66-67.

¹⁵⁰ *See supra* note ___.

¹⁵¹ CASPER, *supra* note ___, at 94.

¹⁵² For my prior analysis of this issue, see Price, *supra* note ___.

in fact debated at length whether to approve even Lincoln's actions; it ultimately passed a bill ratifying his unauthorized spending only on the last day of its session, over a month after it convened.¹⁵³ Likewise, recurrent debates over coercive deficiencies, and whether to make an example of some hapless officer or another, must have induced some anxiety among responsible officials over how far they could push Congress's presumed largesse. Thus, at least in principle and at the margins, dependence on back-end legislative approval should have encouraged sound front-end judgments about whether spending genuinely accorded with the public interest and could meet with public approval. In any event, this posture at least cleanly separated such judgments of public necessity from judgments of legality. It avoided twisting and distorting legal interpretation to meet perceived exigencies; instead, it acknowledged legal limits even as it violated them.

From this point of view, the legal stretch carries opposite vices and virtues. While it poses as fully respectful of law, in practice it insidiously undermines it. In particular, instead of distinguishing judgments of the public good from judgments of legality, it imports the former into the latter, daring Congress or the courts to overthrow an action that is putatively not only beneficial but lawful as well. To be sure, as Peter Shane argues with respect to strained statutory arguments offered in place of Article II theories, this pose of statutory fidelity may reinforce norms of subordination to law insofar as it implies that a clearer or more precise statute would have confined the executive, even if the laws actually on the books did not.¹⁵⁴ For that reason among others, strained statutory interpretation is normally preferable to constitutional inventiveness of the sort President Bush typified.

Yet legal stretches of both sorts—statutory and constitutional—carry marked costs. For one thing, their repeated use normalizes legal aggression, making presidents who abjure strained interpretations appear feckless. It also promotes cynicism about law, encouraging a public perception that Presidents can always do as they please. Furthermore, it makes courts, rather than Congress, the principal checks on the executive, and in doing so it reverses the burden of proof in imposing constraints: instead of Congress needing to ratify the chosen action after the fact, either courts or Congress must affirmatively overturn it. Finally, insofar as some strained legal

¹⁵³ BARRON, *supra* note __, at 144 (noting that this bill “had been no easy sell” and “[e]ven die-hard Republicans were embarrassed to endorse it”).

¹⁵⁴ Shane, *supra* note __, at 1249, 1259-63 (“A President conspicuously eschewing Article II claims in favor of statutory claims shows respect for the accountability principle by implicitly acknowledging Congress’s entitlement to set constraints on executive action and the President’s willingness to be bound by them.”).

theories stick, those examples muddy the waters of statutory construction, clouding proper interpretation in future cases and making it harder for Congress to be certain that its future enactments will have their intended effects.

B. What Ended Fiscal Heroism?

Fiscal heroism and the legal stretch, then, seem to both carry benefits and costs. Why did the one replace the other? Insofar as the shift is significant, this question seems worth considering, in part because it may illuminate what sorts of statutory reforms may and may not be effective in constraining executive behavior. Of course, the explanation might be the one suggested by the straightforward historical narrative I sketched above: perhaps Congress simply beat the executive branch into submission over time through its steady accretion of statutory restrictions on executive departures from Congress's dictates. No doubt there is much truth in that view (and in earlier work I suggested its validity¹⁵⁵). Yet the very fact that Congress had to enact so many laws, and yet so often encountered the same executive abuses all over again, suggests that other factors might be at work in Congress's eventual victory of routine deficiencies. Likewise, executive officials' widespread adherence to the ADA today presents something of a mystery, considering that the law is almost never enforced, at least through criminal sanctions.¹⁵⁶

One practical factor that may have played a role could be Congress's more regular meetings. As a practical matter, any claimed executive imperative to spend without authorization might have appeared more plausible in the past given Congress's frequent recesses, not to mention challenges of distance and unreliable communication affecting officers away from the capital. At the least, Jefferson and Lincoln both justified

¹⁵⁵ Price, *supra* note __, at 420-26.

¹⁵⁶ GAO indicates in its "Red Book" on appropriations law that "no officer or employee has ever been prosecuted, much less convicted, for a violation of the Antideficiency Act as of this writing [in February 2006]." GAO, *supra* note __, at 6-144. Another survey indicates that between 2005 and 2015, eight federal employees were suspended or removed from particular positions for ADA violations, and at least one of these individuals was removed from federal service altogether. Gray, *supra* note __. Regarding executive officials general compliance with the ADA, see, e.g., Stack & Vandenberg, *supra* note __ (draft at 29-30); Lawrence, *supra* note __, at 82-83 (discussing officials' incentives to comply with the ADA); Deposition of David Fisher Before the H. Comm on Ways & Means (2016), <https://democrats-waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/HWM132060%5b1%5d.pdf> (testimony by IRS employee indicating that "when it comes to the Antideficiency Act, which has criminal penalties associated with it, we take it very seriously").

their unauthorized spending (and, in Jefferson’s case, non-spending) based in part on Congress’s absence. Physical control over money, moreover, was a significant challenge in the early Republic: in 1838, the former New York Customs Collector Samuel Swartwout managed to “abscond[] to England with funds estimated at nearly one-fifth of the annual federal budget.”¹⁵⁷

Nevertheless, there is reason to doubt that these shifts were decisive with respect to unauthorized spending and non-spending. Coercive deficiencies and other forms of lawlessness persisted even amid Congress’s availability and the development of a nationwide banking infrastructure; indeed, pressure to defy legal restraints persists to this day. What is more, even Lincoln’s need to act without Congress was to a degree artificial; he could have called Congress back into session but preferred a freer hand at the outset of his administration.¹⁵⁸ Thus, while practical challenges may have played a role in early examples of fiscal lawlessness, improvements in transportation and communication seem inadequate to explain Congress’s eventual success in repudiating fiscal heroism.

A better explanation might lie in other, much more fundamental changes in the nature of office-holding and attitudes towards law. As Jerry Mashaw and Nicholas Parrillo, among others, have documented, nineteenth-century office-holding employed a markedly different structure of legal accountability than the more bureaucratic arrangements typically employed today.¹⁵⁹ Officers were often paid piecemeal, receiving fees or commissions per case, or even a share of the taxes, duties, or penalties they extracted from private parties. On the back end, however, they were also subject to personal liability for legal violations. Injured parties could sue customs collectors and law enforcement officers for common-law torts, and if federal law provided no valid defense, the resulting liabilities could be ruinous.¹⁶⁰ Officers subject to such court judgments would then often seek indemnity through a private bill from Congress.¹⁶¹ Much like presidents and other officials who sought after-the-fact ratification of expenditures that were unlawful but (in their view) justified, these hapless customs collectors and enforcement officials argued in effect that their actions, even if tortious, were worthy of sanction.¹⁶²

¹⁵⁷ JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 217 (2012).

¹⁵⁸ BARRON, *supra* note __, at 135-36.

¹⁵⁹ MASHAW, *supra* note __; NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* (2013); *see also* JAMES E. PFANDER, *CONSTITUTIONAL TORTS AND THE WAR ON TERROR* (2017).

¹⁶⁰ MASHAW, *supra* note __, at 69-71.

¹⁶¹ PFANDER, *supra* note __, at 9.

¹⁶² PFANDER, *supra* note __, at 9 (describing a nineteenth-century system of officer accountability in which “[c]ourts increasingly came to understand that their duty was to

This system aimed to strike a rough balance between competing incentives: it created financial incentives for energetic enforcement, while at the same time deterring legal violations with after-the-fact personal liability.¹⁶³ Balancing official incentives in this way is no less important today, but the more professionalized modern civil service relies principally on more bureaucratic mechanisms to achieve it. Specifically, top-down directives, long-run career paths, and a sense of mission have replaced financial incentives as spurs to action, while internal discipline has largely replaced personal liability as the chief constraint on illegality.¹⁶⁴ In effect, the high-risk, high-reward structure of nineteenth-century office-holding has given way to a structure with lower risks but also lower rewards.

This general shift in the structure of office-holding might have reinforced congressional fiscal control in at least two ways. First, as Josh Chafetz has observed, replacing fees with salaries likely facilitated Congress's direct control over individual officers' financial incentives.¹⁶⁵ “[P]ulling the purse strings is only effective to the extent that the officials in question are paid out of the relevant purse Salarization allowed Congress . . . to exert greater control.”¹⁶⁶ More concretely, the prospect of career-ending ADA penalties might actually carry greater force once office-holders were invested in long-term bureaucratic careers, rather than merely holding temporary or part-time positions as they often did in the nineteenth century.¹⁶⁷

As a second, complementary factor, however, general changes in the structure of office-holding might also have shifted the terms of debates over official action, creating pressure to characterize every public-regarding action as technically lawful. In a compelling essay on increasing unease

apply the law and determine, often with the help of a jury, the legality of official action,” while “[t]he burden of ameliorating the financial consequences of personal liability fell to Congress, and the enactment of private bills of indemnity”). Pfander argues that Congress came to routinely indemnify actions, often on the basis implicit legal principles akin to the law of agency, but in principle Congress could withhold relief if it deemed the officer's actions improper. *Id.* at 10. In any event, according to Pfander, “[t]hroughout the nineteenth century, courts consistently took the position that the task of conferring immunity was a matter for the legislative branch to consider.” *Id.* at 11.

¹⁶³ MASHAW, *supra* note __, at 63-64.

¹⁶⁴ See, e.g., MASHAW, *supra* note __, at 76 (arguing that “[c]ontemporary administrative law sees judicial review as a means for controlling administrative action by full-time, salaried officials whose identities merge with their offices,” whereas in the early Republic “office-holding was an ambiguous station” and judicial remedies focused on keeping office-holders' private and official identities “separate”).

¹⁶⁵ CHAFETZ, *supra* note __, at 73.

¹⁶⁶ *Id.*

¹⁶⁷ MASHAW, *supra* note __, at 18, 76 (discussing the “ambiguous station” of office-holding in the early Republic).

with both executive clemency and jury nullification, Rachel Barkow has identified just this sort of shift.¹⁶⁸ In Barkow's account, clemency and nullification are essentially ad hoc, unreviewable exercises of discretion that came to appear increasingly anomalous within a legal culture shaped by administrative law. The rise of administrative agencies, she argues, has on the one hand prompted fears of unreviewable discretion and how it might be abused, while on the other hand empowering courts to serve as the principal guarantors of law-bound governance.¹⁶⁹ She writes: "In a legal culture that is firmly committed to judicial review, wedded to reasoned decisionmaking, and devoted to a fair and regular process, there is little space for the exercise of unreviewable legal power that is dispensed without reason and without the need to be consistent."¹⁷⁰

A similar dynamic might have helped squelch fiscal heroism, while also encouraging its rebirth in the legal stretch. If regularity, consistency, and reasoned explanation are the hallmarks of law, then deliberate defiance of statutory restraints to address perceived exigencies may appear paradigmatically lawless, rather than nobly respectful of the law's outer boundaries and their inadequacy in particular circumstances. But by the same token if law is ultimately defined by what executive actors can get away with in court, then legal stretches may become an attractive strategy for pushing the boundaries of spending restraint. This explanation for the change might answer why routine coercive deficiencies seem to have disappeared at precisely the point when the modern administrative state (and key restraints surrounding it) took hold, and not earlier when the ADA was passed and then strengthened.

At the least, the parallels between fiscal heroism's demise and these other background changes suggest that something more than a functional distinction between public safety and ordinary governance is at work in fiscal heroism's decline. Indeed, the ADA's ultimate success in squelching open spending illegality may have led, ironically, to greater pressure to distort legal interpretation so as to address perceived practical or political exigencies without exposing government personnel to personal legal liability. At any rate, some recent scholarship suggests that, at least in some areas such as immigration and national security, executive practice is shifting towards more aggressive and policy-suffused modes of statutory interpretation.¹⁷¹ Whether or not these accounts are correct, they reinforce a

¹⁶⁸ Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (2008).

¹⁶⁹ *Id.* at 1334-35.

¹⁷⁰ *Id.* at 1339.

¹⁷¹ See, e.g., ADAM B. COX & CRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020); Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV.

sense that the ground has shifted under president’s feet, encouraging them to push boundaries through legal creativity rather than open defiance of legal restraints.

C. *What’s at Stake*

With the benefit of this broader contextual perspective, we can better appraise the relative costs and benefits of the two models of fiscal lawlessness at this historical juncture. What, ultimately, should we make of the shift from fiscal heroism to the legal stretch?

As I have argued elsewhere, Congress’s power of the purse may well be the most important constraint on the modern executive branch.¹⁷² In an environment of broad delegation and presumed executive authority, presidents today often have great power of initiative in both domestic and foreign policy. They may adopt regulations, establish policies, and even launch wars on their own, daring Congress and the courts to overturn popular initiatives. In that context, Congress’s power to push back through appropriations restraints is a vital means of maintaining functional checks and balances and ensuring executive accountability. Accordingly, Congress’s success in establishing a norm of technical legal compliance with appropriations restrictions—in effect, repudiating outright fiscal heroism—is an important achievement. Given the enormous standing capacity of the modern federal executive branch, a president who felt free to behave like John Randolph’s “saucy boy,” outrunning appropriations or for that matter pocketing mandated spending in hopes of later public approval, could be a terrifying prospect.

Furthermore, from a rule-of-law perspective, strained statutory arguments may have considerable advantages over open lawlessness, or even tendentious constitutional claims. As Peter Shane observes, “[s]tatements by or on behalf of the President that purport to hew to statutory constraints can acclimate the executive legal establishment to an understanding that such constraints are to be observed. Congressional authority is ordinarily to be accepted. Interbranch accountability is to be treated as a given.”¹⁷³ What is more, by signaling that more precise statutory restraints would preclude the actions in question, reliance on statutory authority, however strained, “implicitly invit[es] Congress to weigh in.”¹⁷⁴ Finally, insofar as they eschew available claims of constitutional authority, or abandonment of law altogether, legal stretches

805 (2017).

¹⁷² See Price, *supra* note __.

¹⁷³ Shane, *supra* note __, at 1261.

¹⁷⁴ *Id.*

may “strengthen[] the ethos of accountability in the executive bureaucracy more generally.”¹⁷⁵ Executive officials might thus avoid opening the door to open illegality or limitless Article II claims, even as they get their way in defiance of the law in some particular instance.

Yet President Trump’s recent impeachment, along with other recent examples such as the financial-crisis response, ACA subsidies, and wall transfers, highlight stresses on the current accountability model. They thus cast into relief this approach’s drawbacks relative to the older, heroic model. Again, modern presidents’ pose of legal fidelity channels questions about aggressive executive actions into debates over technical legal compliance—debates that seem inevitably to grow partisan and tendentious.¹⁷⁶ One side’s commentators go to work manufacturing legal legitimacy, while the other side’s seek to do the opposite. Considerable pressure then falls on courts to sort through such claims with relative neutrality, yet spending questions often evade judicial review; potential litigants often lack standing, or simply fail to sue. To the extent aggressive presidential actions stick, either by surviving legal challenge or by virtue of facing no challenge at all, they then pollute the interpretive landscape, establishing high-profile precedents for dubious statutory understandings.

To the extent legal interpretation itself grows less formal and determinate, as proponents of more open-textured legalism believe it already has in at least some areas, these problems may grow worse. Perhaps, then, the current moment calls for some new equilibrium—some adjustment in the balance between the branches aimed at keeping executive sauciness in check.

III. A FEW PROPOSED REFORMS

A few modest reforms seem both plausibly achievable, without undue disruption of existing doctrines and understandings, and also generally beneficial, in terms of maintaining a productive balance between the branches and preventing further executive slippage beyond statutory control. First, some elements of the older accountability system of personal official liability might usefully be resuscitated or reinforced, so as to capture benefits of the older approach even within the current context. And second, the modern system of accountability through judicial review might be adjusted to prevent legal stretches on some important questions from escaping accountability altogether. Both sets of changes would draw strength from existing features of the governing structure of legal

¹⁷⁵ *Id.* at 1260.

¹⁷⁶ *Cf.* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016) (discussing the recent rise in accusations of bad faith in constitutional argumentation).

accountability in ways that could give them significant chances of success.

A. Adjustments in the Political Branches

To begin with, Congress and the courts should consider reinforcing certain mechanisms of individual accountability for responsible officials other than the President. In the heyday of fiscal heroism, as we have seen, individual federal officers often faced crushing personal liability for misconduct, offset by Congress's potential willingness to indemnify actions it judged to be unlawful but justified. With respect to the fiscal constitution, this structure survives in the Anti-Deficiency Act, which imposes serious employment sanctions as well as potential criminal liability on officials who spend or obligate funds without a supporting appropriation. This mechanism, indeed, was the principal device through which Congress eventually brought the coercive deficiency to heel. And, again, it has achieved its goals despite low levels of actual punitive enforcement.¹⁷⁷

Illegality in the form of legal stretches, however, puts pressure on this accountability structure. Whereas individual officers with spending responsibility can be expected to understand that, say, obligating funds beyond the amount in a particular account is unlawful, they will likely have much more difficulty assessing technical arguments that the Constitution or applicable statutes allow particular expenditures. Indeed, we have seen this dynamic play out repeatedly in non-spending contexts in recent years. The most notorious examples involved coercive interrogation and surveillance practices during the George W. Bush administration; intelligence personnel operating under severe stress and time pressure could not realistically defy directives to undertake certain actions when senior officials obtained legal opinions, however dubious, deeming those actions lawful. In terms of the dichotomy developed here, the central problem in such situations is that those charged with carrying out a particular policy are not in a position to take responsibility for its illegality in the manner that the heroic pose demands, and yet at the same time those above them abjure heroism altogether and instead deploy the legal stretch to induce line officials' action.

Though I am not aware of any public evidence to this effect, recent spending controversies have presumably involved these same dynamics too. Given directives from on high to spend money for certain purposes or transfer funds between accounts, especially if accompanied by legal assurances of some sort or another, lower-level officials with no particular legal expertise could not realistically have resisted transferring money for

¹⁷⁷ See *supra* note __.

wall construction. In fact, however, at least some recent spending was contestable. Some lower courts, for example have deemed the Trump administration's border wall transfers unlawful, and the Supreme Court will soon decide whether those decisions were correct. If the transfers were not legal, then those who authorized them could in principle face sanctions under the Anti-Deficiency Act, yet the executive branch's internal assurances of legality would likely preclude showing willfulness, as required for criminal sanctions, or even any lesser mental state required for other penalties. Even apart from formal legal defenses, moreover, prudential considerations might well discourage a subsequent administration from retroactively punishing officials who relied on flawed internal guidance. Doing so, after all, could not only be unfair to the affected individuals, but also might discourage reliance on the new administration's own internal directives.

Managing these dynamics is a difficult problem involving complex tradeoffs. The best that can be done is probably to strengthen incentives for objective legal interpretation within the political branches. In several Trump-era opinions, the GAO concluded that spending violated the Anti-Deficiency Act, and that similar future conduct should therefore be considered willful.¹⁷⁸ In particular, the GAO found that a number of measures taking to continue government operations during a "shutdown" due to lapsed annual appropriations were unlawful.¹⁷⁹ The administration presumably undertook this spending to blunt the shutdown's negative political effects. Whereas in past shutdowns presidents sought to maximize public disruption and pin blame on Congress, President Trump himself precipitated the shutdowns in question and thus sought to minimize resulting disruption of popular services such as national parks. The GAO's opinions should stiffen internal resistance to any such politically driven actions in the future. Although GAO opinions do not bind the executive branch because the GAO is a congressional agency, such clear signals of illegality would weaken any future protestations of innocence on the part of executive officials, thus enhancing the Anti-Deficiency Act's deterrent effect.

Within the executive branch, the central institutional mechanism for enforcing objective legal compliance is the Justice Department, and

¹⁷⁸ See, e.g., GAO, B-330776, *Department of the Interior—Activities at National Parks during the Fiscal Year 2019 Lapse in Appropriations 2* (Sept. 5, 2019), <https://www.gao.gov/assets/710/701165.pdf> (“[W]hile Interior should correct its Antideficiency Act violation, it must report the violation to Congress and enumerate actions it has taken to prevent recurring violations in the event of future funding lapses. With this decision, we will consider such violations in the future to be knowing and willful violations of the Act.”).

¹⁷⁹ See, e.g., *id.*

particularly its Office of Legal Counsel. By delegation from the Attorney General, OLC holds authority to issue legal opinions that bind the executive branch. Ideally, OLC and other similar institutions within the executive branch could provide relatively apolitical and far-sighted legal interpretation outside of courts, thus enabling executive officials to obtain sound guidance ahead of time about whether spending they are asked to undertake is unlawful. In practice, OLC's very capacity to provide such guidance can lead to capture and corruption of its analysis. As reflected in its notorious George W. Bush Administration national-security opinions, the Office may face pressure to take broad views of executive authority that effectively grant permission to executive officials to undertake actions that a court or more objective interpreter would not consider lawful.¹⁸⁰ Yet this risk can also be exaggerated. Having an office within the executive branch that is institutionally and reputationally committed to providing sound legal advice may help forestall any number of illegal actions.¹⁸¹

In any cases that make their way to court after the fact, courts could reinforce OLC's role as a source of objective legal guidance by recognizing a limited reliance defense for officials who sought OLC's advice. Specifically, as I have argued elsewhere, courts might recognize a reliance defense when officials obtained guidance that was objectively reasonable, even if ultimately unconvincing in the court's view, and obtained it from OLC or some other entity institutionally and reputationally committed to providing objective analysis.¹⁸² By the same token, so as to create incentives for seeking such guidance and thus reinforcing its authority, courts should not recognize any such defense when the guidance was unreasonable or was obtained from lawyers with weaker institutional commitments to legal objectivity.¹⁸³ With respect to spending disputes, this structure would create incentives to obtain sound legal advice by rewarding officials who do so with potential defenses in any future Anti-Deficiency Act prosecution.

For its part, Congress should expand the existing structure of personal accountability for fiscal abuses. At present, the Anti-Deficiency Act imposes personal liability, including potential criminal sanctions, on individual government officials for spending or obligating funds in excess of available appropriations. Congress could establish parallel liability for other forms of fiscal abuse, particularly impoundments and delays of the

¹⁸⁰ See, e.g., Emily Bremer, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. __ (forthcoming 2021).

¹⁸¹ See, e.g., Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1458, 1480-84 (2010).

¹⁸² Price, *supra* note __.

¹⁸³ *Id.*

sort involved in President Trump’s impeachment. Insofar as the Anti-Deficiency Act has had remarkable success in deterring coercive deficiencies and other unlawful spending despite low levels of actual enforcement, similar benefits might follow from extending criminal prohibitions to other forms of fiscal illegality. New prohibitions of this sort would effectively extend the structure of personal accountability characteristic of the older heroic model of accountability, so as to help cabin emerging abuses of the legal stretch.

In sum, to the extent fiscal heroism is reappearing in the form of more aggressive legal stretches, reinforcing surviving elements of the older accountability system could provide effective means of keeping the new heroism in check. Executive officials should bear personal responsibility for spending decisions they authorize, particularly if institutional mechanisms such as GAO and OLC opinions are reinforced to provide strong and comparatively objective signals about what actions are and are not lawful.

B. Adjustments to Judicial Review

In addition to enhancing mechanisms of personal accountability for fiscal abuses, Congress and the courts should strengthen the mechanisms of judicial review through which unlawful executive action is most often restrained today.

In ordinary administrative law, judicial review has replaced individual tort liability as the central check on executive illegality: presidents and agencies cannot bend and twist the law too far without inviting judicial rejection, even under the deferential standards of review applied to many administrative actions. As noted earlier, however, unlawful spending (or non-spending) poses particular challenges for judicial review, at least under existing doctrines. For one thing, fiscal shenanigans often may not concretely injure any particular private party, making Article III standing difficult to establish. Those who receive money unlawfully will generally have no interest in challenging it, yet any negative effects on others may not be sufficiently concrete and direct to establish an Article III case or controversy. Courts have also struggled with whether any cause of action exists to challenge ultra vires fiscal action. Although the Administrative Procedure Act generally permits suits to challenge unlawful actions by executive agencies, the Supreme Court has understood the APA to allow suits only by parties whose injuries fall within the “zone of interests” protected by the underlying laws in question. Insofar as appropriations limits aim mainly to protect the public fisc at large rather than any particular set of interested parties, litigants may have difficulty establishing that their

purported injuries satisfy this requirement for APA litigation.

Even apart from these procedural hurdles, the dynamic and time-limited nature of appropriations disputes may complicate any resulting litigation. On the one hand, because Congress typically makes funding available for only one year at a time, judicial action to block spending, particularly on a preliminary basis, may interfere with ongoing government operations in a manner that is difficult to correct down the road. On the other hand, if courts do not swiftly grant relief, the money may be spent, rendering the dispute largely moot, by the time courts get around to ruling on the merits. What is more, both the appropriations laws and the executive actions implementing them often involve messy political compromises that are largely opaque to courts. Spending that appears unlawful may even have been undertaken with the full awareness and tacit acceptance of congressional appropriators. Finally, because spending is generally time-limited, Congress itself may be able to enforce its own understanding of governing appropriations provisions by clarifying them in the next appropriations cycle.¹⁸⁴

In short, courts confront multiple practical and legal obstacles in reviewing fiscal improprieties through conventional administrative-law litigation. Yet insofar as such actions escape both judicial review and the older mechanisms of legal and political accountability that accompanied fiscal heroism, current limitations on judicial review risk creating a legal black hole for an increasingly important for of executive illegality. Indeed, insofar as spending restraints are Congress's most important check on the executive in the current environment of broad delegations and presumed executive authorities, potential erosion of these restraints through unchecked executive legal stretches appears worrisome. As Gillian Metzger has observed, “[a]gainst the backdrop of today’s political climate and the structural barriers Congress faces in reacting to executive branch misuse of appropriations, leaving appropriations to the political branches too often amounts to transferring a *de facto* power over appropriations to the President.”¹⁸⁵

To mitigate this danger, courts should resolve emerging questions about the reviewability of fiscal actions in a manner that preserves substantial opportunities for judicial review while also avoiding undue interference with the government’s ongoing fiscal operation. While all the complications surrounding judicial review in this context are real, so are the costs of abjuring judicial involvement altogether. The history canvassed earlier reveals an abiding structural pressure on executive officials to spend,

¹⁸⁴ See, e.g., Pasachoff, *supra* note __ (arguing that solutions to new spending challenges must necessarily focus on Congress rather than judicial remedies).

¹⁸⁵ Metzger, *supra* note __, at __ (draft at 70).

or not, as they deem best, even in the face of congressionally imposed limits. That pressure, moreover, seems to have intensified lately due to polarization and the inter-branch political deadlocks that often result, and it has assumed the new and pernicious form of self-disguising fiscal heroism, that is, legal stretches that purport to follow the letter of the law. These tactics may complicate congressional responses, as they invite highly partisan accounts of legality that the public has difficulty adjudicating. By contrast, courts, though themselves potentially subject to political pressures and distortions too, are at least better situated institutionally to sort out the objective validity of executive actions.

To be concrete, courts might strike a better balance in this context by widening the door, at least marginally, to appropriations litigation, while at the same time preferring declaratory relief to more invasive injunctive remedies. For example, courts should interpret standing requirements flexibly in this context, so as to minimize risks that serious fiscal improprieties will escape judicial review due to justiciability limitations. By the same token, courts should interpret the “zone of interests” requirement for APA litigation flexibly in appropriations suits. Under a narrow view of the zone of interests, appropriations laws would aim only to protect the public fisc and not any particular private interest, thus precluding private challenges. But the zone-of-interests requirement itself is a judicial invention imposed on the APA with limited support in the statute’s text or history; it should accordingly be interpreted in light of current governing realities. Insofar as fiscal legal stretches are an increasing temptation for executive officials, courts should elaborate existing court-made doctrines in a manner that maximizes opportunities for review, rather than limiting them.

Finally, for all the same reasons, courts should also recognize a freestanding equitable cause of action to challenge unlawful expenditures and non-expenditures even when the APA fails to allow review. The Court itself has entertained a number of recent suits involving such freestanding equitable claims to challenge putatively unlawful presidential actions—actions that would not be subject to APA review because the APA does not apply to the President. Although it has recently cast doubt on this opportunity for “nonstatutory review,” the Court should preserve it at least in the context of appropriations disputes, given all the other impediments to judicial review and the risk that Congress’s essential appropriations check on the executive will further erode. Alternatively, if the Court fails to take this option, Congress should enact a cause of action to allow such suits.

Some might argue that courts and Congress should instead disfavor litigating appropriations disputes. As noted earlier, because appropriations are typically time-limited, disputes over provisions in annual appropriations

may be moot by the time courts complete review. For the same reason, Congress itself may have means of redressing executive improprieties without court involvement if the provision in question will expire and require renewal in the next annual appropriation. What is more, given Congress's increased leverage over spending, executive spending choices may reflect tacit political bargains with congressional appropriators—bargains that may be opaque to reviewing courts. Indeed, appropriations laws often include committee approval requirements that, though technically unconstitutional under the Supreme Court's decision in *INS v. Chadha*, may in practice continue to shape executive behavior with respect to funding transfers and other spending changes. For all these reasons, Congress may be better situated to police executive appropriations abuses than it is to redress practically any other form of executive illegality, and in that context some might argue that courts should encourage Congress to act on its own rather than enlisting courts in checking the executive.

Rather than abjuring review altogether, however, courts could handle these challenges by applying the balance of equities to avoid interfering in ongoing government operations, particularly at preliminary stages of litigation, and by favoring declaratory over injunctive relief whenever possible. Although it is true that annual appropriations cycles afford Congress an ongoing opportunity to check the executive, that check itself could be corroded if the executive branch may play fast and loose in interpreting appropriations provisions. Furthermore, loose interpretation, unconstrained by courts, may complicate legislative restraints on the executive by requiring greater precision in legislation, which may raise the costs of legislative compromise and impair Congress's overall ability to effectuate its will. On balance, then, judicial review to back up congressional enactments and hold executive officials to account seems like more likely to reinforce Congress's power of the purse rather than undermining it.

By the same token, however, affirmatively enjoining executive spending, particular when programs are underway or litigation regarding contested spending is proceeding, may not be necessary to reinforce Congress's authority. Indeed, given ongoing reliance on spending and any adverse effects to halting a project, such as border-wall construction, once under way, the balance of harms may often weigh against awarding injunctive relief in this context, even if the spending appears unlawful.

Such declaratory rulings could be practically significant in this context. A court decision declaring some executive actions unlawful, or at least signaling that they are likely so, would feed back into the structure of personal official accountability addressed earlier. In effect, declaratory remedies alone could force presidents and executive officials to own up to

their fiscal heroism, making clear that they prioritized their judgment of the public interest over judgments of technical legality. As in the older heroic model, Congress could then choose either to condemn the breach or ratify it in the next cycle; and absent ratification, executive officials would be on notice going forward that similar future actions could incur criminal penalties under the Anti-Deficiency Act. Much like the GAO opinions discussed earlier, declaratory court rulings could thus activate the Anti-Deficiency Act's latent deterrent effect and help strengthen Congress's power of the purse as a check on the executive.

Some have also argued that courts should open the door to litigation still wider by recognizing legislative standing to challenge unlawful spending. Metzger, for example, though calling it a close question, advocates recognizing standing for either house of Congress as an institution to challenge unlawful executive spending.¹⁸⁶ Legislative standing, however, would create problems of its own. Among other things, it would require direct judicial mediation of inter-branch political disputes, something courts have long sought to avoid by instead requiring intermediation of such controversies by their effects on a concrete private party seeking judicial redress.

Indeed, because picking sides in such disputes would almost inevitably appear political, ruling on such cases could compromise courts' very capacity to settle legal and constitutional disagreements for the polity. Were a court, for example, to rule for the House of Representatives against the executive branch, the executive might feel free to disregard the ruling, just as it disregarded Congress's action itself. The public might then punish the executive politically for its breach of inter-branch etiquette, but increasing political polarization makes it hard to take that outcome as a given, and the nakedly political character of ruling on a suit brought by a house of Congress itself might at least marginally increase the chances that the executive branch would defy the court's ruling. At any rate, such worries may well have dissuaded the Supreme Court in the past from recognizing legislative standing, particularly at the federal level, and for that reason it seems unlikely as a practical matter that the Court will recognize legislative standing today. In fact, for all its theoretical incoherence, the current standing inquiry's amorphous character may well strike judges as a feature, not a bug, insofar as it sometimes gives them credible doctrinal means of avoiding disputes that seem too politically fraught.

In sum, judicial review necessarily has a limited role in appropriations disputes, given their time-limited character and the potential for disruption of ongoing government operations. Yet the increasing centrality of

¹⁸⁶ *Id.*

appropriations as a check on the executive, and the executive's increasing willingness to push the envelope in response, calls for some judicial reinforcement of Congress's authority over government finance. Courts might navigate these twin challenges—the practical difficulties of review on the one hand, and the need to buttress congressional authority on the other—with a twofold response. First, they should resolve open standing, zone-of-interests, and cause-of-action questions in a manner that widens the door at least marginally to litigation. But second, they should apply the balance-of-equities analysis in a manner that recognizes how disruptive court injunctions may be for government operations and thus avoids injunctive remedies in most cases.

CONCLUSION

Echoing a timeless literary theme of justified rule-breaking, the schoolmaster Dumbledore in *Harry Potter and the Chamber of Secrets* tells the book's eponymous hero and his best friend: "I seem to remember telling you both that I would have to expel you if you broke any more school rules. . . . Which goes to show that the best of us must sometimes eat our words. . . . You will both receive Special Awards for Services to the School. . . ." ¹⁸⁷ Once common in the United States's fiscal governance, the heroic posture that Dumbledore approves—risking legal sanction for the greater good—has given way to stronger norms of technical legal compliance in the federal executive branch. Congress fought hard to accomplish this change, and overall its benefits are enormous. Indeed, given expansive statutory delegations and accumulated assertions of expansive Article II power, the modern presidency often holds considerable power of initiative in setting national policy, making Congress's power of the purse—and strong norms of compliance with statutory spending dictates—a particularly important feature of checks and balances in our era.

Yet the heroic attitude has quietly crept back on stage, this time in disguised form. In recent examples, including responses to the 2008 financial crisis, ACA subsidy payments, border-wall funding transfers, and the Ukrainian aid shenanigans that got President Trump impeached (the first time), executive officials have stretched legal authorities to achieve desired policy results in high-stakes matters. Precisely because it veils its illegality, this form of heroism is in some ways harder to combat, and in any event has

¹⁸⁷ J.K. ROWLING, *HARRY POTTER AND THE CHAMBER OF SECRETS* 330-31 (1998). In the film rendition of this dialogue, Dumbledore's statement is still more direct: "You both realize, of course, that in the past few hours, you have broken perhaps a dozen school rules. There is sufficient evidence to have you both expelled. Therefore, it is only fitting that you both receive Special Awards for Services to the School."

multiple negative effects. Among other things, it normalizes executive legal aggression, corrodes objective standards of statutory construction, and impairs legislative compromise by requiring greater precision in laws restraining the executive. In addition, it shifts power from Congress to courts by making them the principal arbiters of executive conduct, yet in doing so often presents disputes in contexts raising difficult justiciability problems. At the same time, however, this shift in fiscal behavior appears to resonate, to a degree outright heroism would not, with the deep logic of modern governance, in which mechanisms of bureaucratic accountability have largely replaced individual personal responsibility as the primary means of enforcing law on public officials. Within that context, the legal stretch may seem to be the natural outlet for public-spirited law-breaking.

Looking back across two centuries of American history, it may be that a degree of heroism, whether outright or veiled, is an inevitable and even occasionally desirable feature of federal governance. The law can never account adequately for every circumstance, and governing a continent-wide global superpower continually presents new and unexpected contingencies. But to be heroic, and thus to be held in check, unlawful spending must be accountable, meaning it must carry potential costs. Indeed, the long history of coercive deficiencies and other nineteenth-century fiscal shenanigans demonstrate that officials who do not expect accountability may end up showing little regard for congressional dictates. To strengthen constraints on casual legal defiance and thus perhaps nip in the bud a potentially alarming tendency, the GAO and OLC should more aggressively police legal violations, courts should apply the zone of interests test flexibly to enable after-the-fact litigation of spending decisions, and Congress should tighten limits on impoundments, including through personal sanctions on officials who approve them. With these adjustments, the never-ending struggle between presidential ambition and legal restraint might be better recalibrated for our time.