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WHO HOLDS THE POWER OF THE PURSE IN WASHINGTON TODAY?

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PANEL DISCUSSION:

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WESSEL: Good afternoon and welcome. I'm David Wessel, director of the Hutchins Center on Fiscal and Monetary Policy here at Brookings, and I'm really pleased to have moderating this panel on the power of the purse, which when we conceived it seemed to be the big issue in Washington, but it's been kind of crowded out by tariffs and deportations.

As I'm sure many of you know, Article I of the Constitution says that no money shall be drawn from the Treasury but in consequence of law. Article 2 says the president's duty is to take care that the laws be faithfully executed. The Anti-Deficiency Act, which has its roots in 1870, makes it a crime for a federal government employee to spend money that has not been appropriated by Congress. And the Impoundment Control Act of 1974, passed after President Nixon refused to spend some funds that Congress has appropriated, says the president must spend the sums Congress has approved unless he submits a formal rescission request to Congress and Congress acts on it. But both President Trump and the White House Budget Director Russ Vought say that 1974 law is unconstitutional, and that stirred a debate over who actually holds the power of the purse in our government. Now, this isn't completely new to the Trump presidency. There were some issues in both the Obama and the Biden presidencies, but nothing of the magnitude that we've seen now.

So, we've invited four experts who I'm very pleased have agreed to join us. Josh Chafetz is a professor at Georgetown Law School and author of a book called Congress's Constitution, Legislative Authority and the Separation of Powers. At the end, Eloise Pasachoff is also a professor of Georgetown and has a forthcoming article called "Appropriations Presidentialism." Which is relevant to this conversation. Keith Kennedy is a veteran of the Senate staff, 28 years on the Senate's staff, 20 of them on appropriations committees, and three different stints as the minority staff director. And then joining us from Stanford is Michael McConnell, who's professor of law there and director of Constitutional Law Center and was a judge on the 10th Circuit from 2002 to 2009, nominated by President George W. Bush, confirmed unanimously by a democratically controlled Senate. And he's the author of a 2020 book called, "The President Who Would Not Be King, Executive Power Under the Constitution." I want to emphasize Brookings' commitment to diversity. Josh went to Yale Law School. Eloise went to Harvard. Judge McConnell went to Chicago. And Keith Kennedy, which I want hear about this, has a Masters of Divinity from Duke. Which probably explains his success on the

Senate staff. So, I've asked each of the panelists to talk for a few minutes, and then we'll have a conversation. I welcome some questions from the audience. And I asked Josh to start first by talking a little bit about the history of the power of the purse. Where does this come from? Where were the founders drawing inspiration from Britain and so forth?

CHAFETZ: Well, thank you so much. It's a pleasure to be here. So, when I get asked about the sort of history of more or less anything to do with Congress, but especially the power of the purse, I tend to start in the 17th century, so I go long. But it really, you know, there are sort of significant struggles between Parliament and the Stuart Crown, sort of over the course of most of the 17th century, that really begin to sort of define a role for the legislature in the power of the purse, right? Until the Stuart monarchs were sort of constantly engaged in adventurism on the continent which meant they needed more money than they could get from what was what Blackstone called their ordinary sources of revenue which is to say the rents on their lands that they held and feudal dues and things like that and so they relied more on taxation than previous monarchs had.

This was also a moment of sort of rising parliamentary power for various economic, social, and religious reasons. And so, parliament begins to push back, begins to say, first of all, you can't levy taxes without our permission. Now, this is a principle that traces its roots back to Magna Carta, but really sort of is given teeth in the 17th century. And secondarily, if you're going to tax us, we get to say what you spend the money on. And these fights sort of take place throughout. Uh the 17th century um they play a major part in the deposition of Charles the first and the English civil war after the restoration they play uh a major part in in the restored government as well in the 1660s and 1670s you have a number of instances where um appropriations uh you have sort of increasingly specific appropriations in several cases there's even what you might anachronistically call an independent auditing board that's provided for in legislation to make sure the Crown is spending the money the way it's supposed to.

There are several high-profile impeachments of royal officers specifically for spending money in ways that were not authorized by Parliament. And it again becomes a major issue in 1688, 1689, the Glorious Revolution, when James II becomes the second of the four Stuart monarchs to be forcibly

deposed. And then in the 1689 Bill of Rights, one of the sort of provisions is that The Crown can't raise or spend money except as has been authorized by Parliament. The 18th century colonists across the Atlantic were very much looking to this history because they saw a real analogy between parliament struggles against the Stuart Crown. And their struggles and their colonial assembly struggles against royal officials in the colonies.

And so, throughout the 18th century, you have all of these controversies where colonial officials or colonial legislatures will do things like refuse to pay the governor's salary, refuse to the salary of the judges. Actually, if you look at the Declaration of Independence, one of the complaints there is that after the colonists stopped paying judges' salaries, the Crown started paying their salaries, right? So, we actually, you know, one the complaints in the Declaration on Independence is that The Crown is paying his judges. There are cases where the Colonial Assembly stopped paying rent on the governor's house, all in an attempt to sort of pressure the governor into doing sort of what the assembly wants rather than doing what the governor wants. There are sort of specific controversies over how money would be spent.

There's something called the Wilkes Fund controversy in South Carolina, where the South Carolina assembly wants to send money to what we today might call a legal defense fund for John Wilkes, who was this sort of major thorn in the side of the British government at the time, and they sort of identified with his cause. So, they tried to send money to him. The governor vetoes that bill on the instructions from London, and the South Carolina assembly basically shuts down South Carolina government starting in 1771, and basically never passes another bill between 1771 and when they're driven out in 1776. Right? So, there's this real sense of sort of legislatures being at the core of the spending power and fighting to maintain it and fighting to use it as a sort of cudgel against executives. You see this in the early state Republican Constitution. So, after independence, I think 11 of the states write new state constitutions. In nine of them, they provide that the treasurer of the state would be appointed by the legislature, not by the governor.

You see it in the Constitution, right, especially in the Appropriations Clause, right? No money shall be drawn from the Treasury except in consequence of appropriations made by law. And you see it in

early statutes as well. So, there is a history right from the beginning, even though it's not constitutionally required, of annual appropriations. And that's again because that meant Congress would have a say every year in sort of how the money was getting spent and sort of collaterally would be able to use that as a stick if it didn't like other things the executive was doing. Starting in the 1790s as this sort of partisan competition picks up, you see increasingly detailed appropriation statutes, right, so the very earliest appropriate federal appropriation statutes are, you know, five or six lines long, but once you get competition between the sort of nascent federalists and Democratic Republicans, you start getting much more detailed appropriations statutes where people like Albert Gallatin, the great Democratic-Republican financier, doesn't want to give Alexander Hamilton sort of unfettered discretion about how to spend the money, so he starts writing more and more detailed statutes about how spend it.

You actually see this in the organic statute for the Treasury Department. So, one of the very first things the first Congress does is pass these statutes setting up the sort of three major departments, Treasury, War, and Foreign Affairs. And the War and Foreign Affairs departments are both called executive departments. Treasury is not. The War and foreign affairs departments, the Secretary is required to sort of do what the President tells him to. There's nothing like that in the organic statute for Treasury. However, the Treasury Secretary is given a whole host of reporting responsibilities directly to Congress. So, once again, there's this sense that there is something sort of core legislative about how money is raised and how money spent. And this just carries forward, I think Eloise will probably talk more about this, but there are these sort of, across the 18th century, there are the sort of grand fiscal statutes, so there's the miscellaneous receipt statute in early 1849, there's the Antideficiency Act, first passed in 1870, and then into the 20th century with the Impoundment Control Act.

These sort of major statutes, as well as the 1924 and 1974 budget acts, right, these major statutes that sort of assert Congress's power to define the fiscal constitution, right? And that is coming out of this sort of long history of really viewing how money is raised and spent as a sort of core legislative power, right. So, I think that really sort of sets the stage for how our constitutional order, you back into. English and British history sort of views the role of money.

WESSEL: And so, somebody said to me the other day—I'm embarrassed because it might have been one of these panelists or something I read you wrote—it wasn't that the founders thought Congress would be better at spending the money than the president. It's just that this was the one way that there could be a check on the president.

CHAFETZ: Absolutely. And you see this actually in the in the ratification debates over the Constitution. You know, people like Patrick Henry say in the Virginia ratifying convention says, you know, you've created this president who will be a king, right, to use something that sort of provides the title for Professor McConnell's book. Your president will become a king. And Madison immediately replies that that's not going to happen because of the separation of person sword, right? As long as the president can't put an army in the field unless Congress pays for it, then you don't that worry. And this is something that Madison says in the Virginia ratifying convention, something that Hamilton says in The New York ratifying convention. This is the major sort of federalist response to anti-federalist fears of the presidency.

WESSEL: Thanks. Judge McConnell, maybe you can pick up from there. Two questions. One is, how important is this to the functioning of our democracy that Congress has the power of the purse? And what do you make of the administration's arguments that, actually the 1974 Impoundment Act is unconstitutional, that blah, blah, we should, the president should have all this power.

MCCONNELL: Well, I think it's still foundational, although I have to say, as a practical matter, the budget process has been so messed up in the last 20 years that you really wouldn't know that Congress has this kind of authority. Under the impoundment, actually, the budget control portion of the Impoundment Control Act, there's supposed to be a budget passed that Congress then follows, and then you have certain appropriations bills that are programmatic under that. But most years, they fail to do that.

And then, as you—we come to this fiscal cliff at the end of the fiscal year, and they throw all the spending into one great big omnibus spending bill, which nobody knows what's in it, and it's—and so, Congress has basically failed to engage in the exercise of the powers that they have. Now, that

doesn't mean that the president has power either to spend money that hasn't been appropriated or to fail to spend the money that has. Both of those things, they are equally important. If anything, I think the more important issues recently—until the last two months—the more important issue were more presidents asserting the authority to spend more money, just spending money without appropriations.

There was a conspicuous case leading to litigation under President Obama, where he spent something like \$7 billion in extra subsidies to insurance companies, health insurance companies that Congress had conspicuously failed to appropriate. And that went to court. Then you had the Biden student loan forgiveness, which was an expenditure. It was a forgiveness, but, nonetheless, an expenditure without the authority of Congress. So, presidents do this, too. Until Trump, there hasn't been a lot of impoundment recently, and it's not quite clear how far he's going to press this. But if I understand the constitutional theory—and I may not, because they haven't made it clear, there's been no—you know, there are no briefs. We haven't really seen the arguments flashed out. But as I understand the argument, the claim is that for most of American history, presidents did exercise a kind of impoundment.

And that is actually true, although I think ultimately not a persuasive constitutional argument. But for a very long time, appropriations were understood to be ceilings rather than floors. And if the president could accomplish the purpose of the appropriation by spending less than what was appropriated, everybody was pretty happy about that. But the understanding was that whatever authority the president had through this was exercised not in opposition to the policies—spending policies of Congress, but rather in service of them. So, you know, if Congress decides to build a post office and appropriates \$8 million and the executive can build the post office for \$6 million, that's great. Most presidents did this, I think the first example, at least that I'm aware of, others may know of an earlier one, but the first one that I can recall is that Thomas Jefferson declined to use appropriations that were made for five gunboats for the Mississippi River. And his explanation was, now that we've bought the Louisiana purchase, we no longer have a foreign government on the other side of the Mississippians, so we don't need these gunboats anymore. Some members of the Federalist Party thought that this was an excuse because they were actually trying to build up a serious Navy, and Jefferson was not keen on that. But Jefferson did prevail in that. Then along comes Richard Nixon.

And Richard Nixon used this flexibility, shall we call it, the distinction between floors and ceilings of appropriations in a policy way and in direct opposition to the policy set by Congress and simply refuse to spend appropriated funds or sometimes he would cut it by 40 percent or whatever in an effort to bring federal spending down. And two things happened in response to that. One is that there was a whole spate of lawsuits, not even more than we see now under Donald Trump. So far.

And something like 180 lawsuits proceeded. And Nixon won one of those and lost something like 179, including one that went up to the U.S. Supreme Court. I think even more important than the court losses, though, is that Congress jumped into the act and asserted its authority. Get past the impoundment control act, which eliminated this flexibility. That is, it no longer were appropriations going to be treated as ceilings, but rather they were both floors and ceilings. They were commands. They were laws. And since the president under Article 2 has the obligation to take care that the laws be faithfully executed, once Congress decides that its appropriations actually commands to spend money. In my opinion, the president is constitutionally obligated to carry out Congress's wishes. Now, the Impoundment Control Act does give the president the ability to propose spending cuts, and there's a kind of a fast-track procedure. But Congress, both houses of have to approve any—they're called rescissions, under the Impoundment Control Act.

Just to add one more detail here—oh, and so, if—as I—the constitutional theory seems to be that since the president had this power for so long, for most of the history of the republic, the president has some kind of power not to spend up to the entire amount of the appropriation, that the inference is that that must be a constitutional power. I think that's incorrect, because I don't think it was a constitutional authority. What I think it is was an interpretation accepted by both branches of government, an interpretation of appropriations as being ceilings rather than floors. And once the Congress made it clear in the Impoundment Control Act that that was not the way appropriations would be seen, I think that ended the statutory ambiguity to the extent that there was that. Now, here's just for their current situation, though, it's not clear that the administration is impounding any funds yet. What they have been doing is canceling specific grants and programs under the, you know under the appropriations and I, I may not know every example.

I certainly you know, I don't spend my whole life, you know trying to figure out exactly what the Trump administration is doing next and so I could be wrong about this but at least of the ones that I have seen reported in the press and seen discussed these are not cases where Congress has appropriated money to a particular thing and Trump has said I'm not going to spend on that rather Congress appropriates money to a particular purpose, and then the executive branch has made grants that serve that purpose. And that means discretionary grants. And so, the Biden administration shoveled out money to a lot of things that the Trump administration does not think were a good use of the money. And the president does have substantial discretion to cancel individual grants under these programs.

What he can't do is cancel the overall spending. Now, there was one instance, was the National Endowment for Democracy, where Congress appropriated a certain amount of money to that organization. It had its own board. Trump did not replace that board. But they—he did cut them off from their funding. The National Endowment then sued. And then, rather quietly, the administration folded its tent and gave them the money that they were asking for, which I think is a recognition that somebody—some lawyers in the administration realized that they had, at that point, were about to cross a line that—where they did not have much of a legal basis. I do expect that they will create a test case, that there will be something where they publicly and formally assert an impoundment authority, it will go to court and I think they'll lose.

WESSEL: You don't have any doubt about the constitutionality of the 1974 impoundment control?

MCCONNELL: No, an appropriation is a law just like any other law, and the president has the constitutional obligation to take care that laws be faithfully executed.

WESSEL: I'm going to pick up a little bit later on this question of whether they've actually impounded funds. But Eloise, so talk to us a little about how this all works, the executive branch's authority, the Congress's statutory authority, and how they interplay and how that's relevant to where we are today.

PASACHOFF: So, one of the great challenges of administrative law is that in order to have a functional government, you actually need to have Congress delegate discretion to the executive branch to implement everything, to implement all the statutes, to implement to all the programs. And at the same time that you need to have functional government you also have to have an accountable government. And so, you need mechanisms by which the executive branch can be held accountable for the choices that it makes, whether under spending or any other law. And one of the real challenges of administrative law in general, and spending law in particular, is how to draw that line between discretion and flexibility and accountability.

And what I want to do now is talk a little bit about two buckets of discretion and flexibilities that the executive branch has been delegated in order to implement spending programs, because I think this will start to lay out some of the tensions between a full-on constitutional argument. And narrower statutory arguments, a lot of which is what we're seeing. So, there's two buckets I wanna talk about. The first bucket I wanna about is just the, what we call budget execution tools. So, after Congress has passed appropriations law and the president has signed them into law, the money then has to go over to the executive branch to be executed and there's a series of tools. Largely which reside in the Office of Management and Budget, or OMB, through which the executive branch implements these spending programs.

So, let me just name these tools and I'm going to say a word or two about each one and how they might or might not be seen to grant different amounts of discretion. So, the first tool is called apportionment. Apportionment is a part of the Anti-Deficiency Act and it was designed to make sure that agencies don't run out of money at the end of and so functionally, what apportionment means is that often on a quarterly basis, can be more frequent, can be less frequent, sometimes for the whole year, but by program by program. OMB agencies don't just get their money from Congress. It all goes through OMB apportionment and you can't as an agency spend any money unless OMB has apportioned it and complying with OMB's apportionments also a subject to the requirements of the Anti-Deficiency Act. So, you violate the Anti Deficiency Act. If you don't do what OMB says you have to do with your money. So that's a flexibility. And you can imagine ways in which the Office of Management and Budget, wanting to do more or less with kind of control over agency spending, could

try to use the apportionment power more or less flexibly. I have many specific examples I could give, but I'm now just going to be naming the tools.

So, apportionments are one of these tools of kind of discretion in the executive branch to implement spending programs. Another set of tools are the ability to transfer and reprogram. Transfer money between different appropriations accounts, for which you need statutory authority to do, and to reprogram money from one use to another use within one appropriations account, which is sort of typically understood to be part of what you're being delegated when Congress passes an appropriations law. So, if transfer and reprogramming sounds familiar to you, it's because some of those were the tools that the president used in the first Trump administration around moving money around to build the wall. So, you can again see from that little example that transfer and programming is another example of flexibility that the executive branch has. Again, we want the government to work, and to work you need some degree of delegation.

Transfer and rprogramming. A third tool is the Impoundment Control Act. And so, we've talked a little bit about the two formal mechanisms in the Impoundment Control Act. So, there's rescission, where if a president wants to just cancel the money, he has to put together a package, send it to Congress, and Congress actually has to pass it before the money is canceled. There's also deferral, where the president wants delay spending money. And again, you're supposed to send a notice to Congress and it can't be for a policy reason. You've got to be trying to work to implement the money. So, there's also deferral. But there is a third tool that is not mentioned in the statute, but which GAO has inferred from the statutory design. And that's called programmatic delay. And the idea behind programmatic delay is that there are some statutes that provide flexibilities to the executive branch.

And in those statutes that provide flexibilities, especially where you are kind of trying in good faith to implement the program, but which GAO has also interpreted implementing the program in good faith can include if your statute has flexibility to coordinate with the president's program, that's then permissible under programmatic delay. So programmatic delay is another tool that the executive branch can try to lean on to say that there's flexibility in the statute. The last tool on this kind of budget execution that I'll mention before I move over to the other set of tools, the last tool I'll mentioned here

is derived again from the Anti-Deficiency Act and that is the power of OMB to declare what shall remain open during a shutdown. And this turns out to matter. Because, so appropriations tend to be for one year, right?

But there are many that are not for one year, there are many that are funded for multi-years, or some years there are appropriations that cover half the government for the rest of the year, but not. So, it's not as easy to say as like there's a government shutdown. Government shutdowns are quite complicated in terms of what's, you know, where there is money and where there isn't money. And so, different presidents have made different, have made different choices, read statute, read underlying appropriations laws and the underlying authorizing laws in different ways to provide more or less flexibility about what actually can continue to operate under a shutdown. And so that's part of the background that was going on in the last month or so as Congress was trying to decide what to do with the shutdowns. So, as you can see from just that set of tools of budget execution, it's not as though it's not as though there is no discretion given to the executive branch. And where that line is, that's part of what we're working out.

That's part, the complexity of the current moment. I want to say one thing about the other bucket of tools that the executive has some discretion in. And these are the grant funding statutes. I use grant funding as an example, because that's the example that I know best. There are contracts, you can think about other degrees of spending, but I've done a lot of work on the kind of federal grants regime, and so I'll just say, grants are a form of spending under appropriations laws. They're justified, usually there's underlying authorizing laws that set up the contours of the program, but when the federal government is implementing grant programs, they do so in three different stages. So, the first stage is where they have to define the terms of the program.

So maybe for a competitive grant, they'll issue a notice of funding opportunity. Well, what goes into that notice of funding opportunity? What are we requiring? How flexible is the underlying grant statute in terms of providing flexibilities to the agency as may be controlled by OMB in the White House to put conditions in? So that's the first level at which the executive branch can try to claim some flexibilities. The second level of possible flexibilities in implementing grant programs comes at the award stage.

So great, we have our, you know, we're reviewing our grants applicants. Who are we giving awards to?

And you can think about both factored into what conditions are in place but also just you're looking at the array of you know there's a limited bucket of money you can't possibly give competitive grants to absolutely everybody who's applied that's another moment where there's flexibility that executive branch agencies can try to claim more or less of. The last one is the one that I really want to flag and that's the one that we are mostly in right now. It is perfectly ordinary for the federal government to enforce the terms of its grant agreements, just as it's ordinary for the federal government to do enforcement across all other different dimensions. I wrote a law review article a few years ago called, "Executive Branch Control of Federal Grant Making Policy, Pork, and Punishment," where I tried to make the argument that policy is what I described, pork is sort of like a complicated version of the award stage, but punishment is a dangerous version of the ordinary process of grant enforcement. And grant enforcement by statute, by regulation, there's a number of tools available to the executive branch.

And so, think about if this sounds familiar to you, the ability to impose special conditions on grantees that are non-compliant. That's actually in a regulation. That's a long-standing regulation. It's not usually applied to sort of like wholesale takeover a university. But the idea that there is a regulatory legal component to impose special conditions on a non-compliant grantee in order to try to bring them into compliance, that's a discretion that the executive branch has. And the last one I'll talk about is funding termination. That's also, we started to talk about this at the end of the last intervention. That's all so kind of written into the governing grant regulation that kind of applies across all agencies. Now, there's all sorts of things that are supposed to happen along the process of grant terminations. Historically, grant terminations have been extremely rare, almost never do agencies do funding cutoffs. So rarely do agencies, do funding cutoff that in 2014, I wrote a defense of the funding cut off saying this ought to be a tool that agencies should lean more into in their arsenal.

WESSEL: So, it's your fault.

PASACHOFF: Yeah. No, I know. I know in the first week of the new administration, a colleague said to me, oh, you're finally getting your way. I thought, well, this was not exactly, you know, like the rule of law context in which I envision funding cutoffs happening. But the idea is that it's a tool that exists.

WESSEL: All right, but before I turn to Keith, I have a question for the lawyers. If the president says, Congress has appropriated money to the Department of Education, and I presume in the appropriations bill, there's a certain amount of money for personnel. I haven't looked, but I assume Keith will correct me if I'm wrong. And the president says, I want to lay off all these people. I don't want to spend the money. Is that? That's not a grant. That's not in the grant bucket. Is that legal? Is that just another way of violating the Impoundment Act? Congress said you should spend this money on personnel. He's laying off all those people. Now, for now, they're still getting paid because the Doge thing seems to be put people on administrative leave, pay them, and have them not do any work, which I haven't figured out the efficiency of that. I heard about an employee of one agency who's required to log on, and she has a... Some kind of device that moves her mouse. So, it looks like she's at her station. But is that, where does that fall in all this and is it black and white?

PASACHOFF: So, I think it depends, and it depends because there is a statute that provides for reductions in force. And so, if you're following the reductions in force statute, then, presumably, you're able to not spend all the money on the employees that you would have had. Now, I would say that that does sort of suggest that you want to be communicating with Congress and communicating with the appropriators. Often, these things are very informal. I mean, I'm very eager to hear from our appropriator colleague. But sort of a lot of there is a lot kind of backchannel communication that is not sort of like the formal mechanism.

WESSEL: Judge McConnell, do you think it's, it's -- you mentioned the example of the National Endowment. That was a clear-cut case. But what about laying off all the people at USAID, or the employees, not the grantees, or the Department of Education? Isn't that not spending money that Congress is appropriate?

MCCONNELL: I have to say I haven't looked at the appropriation for USAID and don't know if there's a special line item within it for personnel. I think with the Reductions in Force Act that the administration does have a good deal of flexibility here. I don't I also don't know what they're going to do because they don't the administration doesn't tend to explain itself it just does things and then we're left sort of scratching our heads and wondering what's you know what is the theory but at least one possibility is that they plan to make use that money for direct services grants to do the work of USAID instead of, and I do not know if this is true, but critics of USAID claim that a great deal of that money has gone to grants to NGOs that are really ideological in nature and not that it's illegal to do this, but simply not in accordance with the new administration's policies. And as long as the money is being spent for the purposes of USAID or rescinded with Congress's approval, I don't think that there's going to be a problem. I think we do not yet know.

WESSEL: So, Keith, we're going to move beyond the lawyers here to how the world really works. So, talk to me a little bit about when Congress appropriates money, what are they thinking? How much do they think they're binding the administration? And is the reason that appropriation bills have gotten longer and longer over time is because they're trying to influence the administration.

KENNEDY: The reason appropriations bills have gotten longer and longer over time is that both houses ignore their own rules. Their standing rule of the Senate is you don't legislate on appropriations bill, same in the House of Representatives. In the House, they take a bill to the floor and they waive all rules and they throw everything but the kitchen sink in. In the Senate, they do the same. Judge McConnell is quite right in saying that the entire congressional budget process is broken down. Almost irretrievably in the past 20 years, and I think that perhaps one of the reasons why there's not more vocal uproar and outrage right now in the Congress about these potential impoundments is that nobody likes the Appropriations Committee. Nobody likes the appropriations process. It's an end-of-the-year thing in which very few people participate. Bills are written by the leadership. And huge packages are dumped on the respective floors in sort of an up or down way. The process has fallen into ill repute. There was a time back when I was first working for Mark Hatfield and he was chairman of the Appropriations Committee in the Senate, we could mark on the calendar when appropriations bills would come from the House. House committee, subcommittee, full

committee floor. Bills would come from the house like clockwork and the Senate committee would do the same. Report bills out with regularity, and things would move along. That process is long gone.

WESSEL: Why do you think that is? What happened?

KENNEDY: Well, I have some personal pet theories about that. Wendell could probably chime in on some of this. In my view, it goes back to the days of Newt Gingrich. And he was the one that instructed the rules committee. We were no longer going to have...this can get very technical. We're no longer going to have amendments and disagreement. We're going to everything can be made in order and put inside a conference report. So, there'll be an up and down vote on a conference report on an appropriations bill. And once that door was opened, that's when more and more things started getting loaded in to appropriations bills. The rules were there for a reason. If you try to legislate on appropriations bills, it will gum up the process.

WESSEL: Just to explain to people who aren't, what's the distinction between legislating on an appropriations bill and what, what was the, what is the alternative? Legislating means Congress says we want to have a program that does X and the appropriations bill is how they fill the tank.

KENNEDY: The last annual authorization act that still is around is the National Defense Authorization Act, an authorization bill that passes every year. No other authorizing committee does that on a regular basis anymore, so instead they turn to the one process that at the end of the day, at the last minute, there will be a vehicle that will get signed into law.

WESSEL: You say that the reason we haven't heard more from Congress is that everybody hates the Appropriations Committee, but the appropriators have been surprisingly quiet as well.

KENNEDY: Well, that's true, certainly on the Republican side.

WESSEL: Yeah, well, Rosa de Laura has not been quiet.

KENNEDY: No, nor has Patty Murray. Yeah, yeah. I mean, she made her views pretty clear in the confirmation hearings of Russell Vought.

WESSEL: So, do you think? Do you think something good comes out of this confrontation, that Congress realizes that it's screwed things up, or is that just too optimistic?

KENNEDY: I don't think that's too optimistic. I think that entirely possible. I mean, we'll have to see how the FY26 appropriations process moves along. And will they move individual bills and what will be in them? And will they actually go to conference on individual bills? Or even if we wind up once again with an omnibus at the end of the year. What's going to be in it? What's it going to look like? How's the administration going to react to it?

WESSEL: Josh, Judge McConnell mentioned the famous case which defenders of the president often mention and talk about Jefferson, but I read something you wrote where being the law professor you are, you read the statute and as I recall what you said is the statute was the president may appropriate, may spend money to buy up to five or something like that.

CHAFETZ: Right, so the statutory language there actually says, may spend up to, I think it was \$50,000 to purchase up to however many boats it was, right? So, it was the statute in that case is actually permissive, right. It's an example of, you know, it's an excellent example of precisely the kind of discretion that Eloise is talking about, right, so any sort of rationally designed appropriation system, Congress is going to want to give the executive a certain amount of discretion. And I think Professor McConnell's absolutely right that, you know, for much of the 19th century and into the 20th century, right, there was a sort of canon of statutory construction of appropriation statutes where, you know, they were interpreted as ceilings, not floors, on the assumption that the executive was going to be working towards congressional purposes and not working at cross purposes.

So, you have an attorney general opinion from 1896, I think, where the attorney general says, it's OK to spend less money, but because you're carrying out Congress's purposes and you just got a good deal on it. And that was an understanding shared by Congress and the presidency of how we should

understand appropriation statutes. And then when you get Nixon's policy impoundments at large scale, then I agree completely with Professor McConnell, then Congress comes back and says, no, we don't want you to have the discretion to spend less than it's appropriated simply because you don't like the policy.

KENNEDY: Well, you know, Congress expresses its intentions on appropriations and how they should be spent in report language from the respective committees on appropriation. And from time to time, there have been various administrations who have said, well, now wait a minute, report language is not law. That never goes well for them. Right. Back in the day, for example, the energy and water appropriations bill provides the money for the Corps of Engineers for construction projects all over the country. The report would enumerate, here would be a list of construction projects. They would add to a certain total. Then there would be line called savings and slippage, and that would be minus.

And then there would be a net, and that net was what was actually appropriated in law in the bill. And that line about savings and slippage was congressional recognition that construction projects don't always go the way the Corps of Engineers has told us they're going to go and the justification documents they presented to us. Congress is acknowledging that money identified for specific projects in report language may not actually be spent that way. Well, Jim Miller, in the second administration of the Reagan years, pronounced that federal executive agencies did not need to follow report language. This caused some tremors in the force. And there was a meeting with Senator Hatfield. And there is a rather stern discussion.

And later on, in that process Howard Baker, who was by then President Reagan's chief of staff, told Mr. Miller to calm down, and things went along. Mr. Panetta, during the Clinton administration, at one point, voiced the same view that, hey, you know, it's just report language. We don't have to follow this. He had a similar conversation with Senator Robert Byrd, and the outcome, again, was same. But, um...

WESSEL: Did he have fewer fingers when that was...

KENNEDY: I mean, the whole business about the impoundment stuff is going to be, it seems to me, determined on is this a refusal to spend money because of a policy disagreement. The executive branch has lots of reasons not to spend the money that are perfectly appropriate but when Congress appropriates a billion or 2.9 billion for a Corps of engineers construction, you better spend that money, and if... And if the president says, no, I'm not going to do it. I'm only going to spend a billion, that seems to me is a policy difference. And that's arguable and actionable, I would say. But who's got standing? That'll be interesting to see, too. I want to get to that, yeah.

PASACHOFF: So, just to say one other thing before we talk about the courts, I mean, one of the driving features of this system, I think strictly as a matter of law, report language is actually not binding. Right? Like, as a manner of law that's a true statement. But. The whole way that the system works is through a series of soft law relationship, right? Like, why would you bite the hand of your funder? You know, like, so relationships, not just with OMB at the highest levels and with the highest level of, you know, the actual appropriators, but staff to staff, right, there's just so much kind of interaction on the assumption that you care about your programs, you want them to get funded next year, and so you want to try to follow what the appropriators do. So, for me, one of the takeaways. Slash questions slash things to watch is what is Congress going to do? Right? So, like we're talking about the FY26 that you're talking about. I mean, this is really the question is, is there, are they going to come back in any kind of meaningful way to hold the administration accountable for the spending problems that have just been taking place in this fiscal year?

WESSEL: What does that mean, hold them accountable?

PASACHOFF: Are they going to put more limitations in? Are they're going to tighten up restrictions? Are they gonna take away money for the secretary's office? So, there's various tricks to make sure that we mean it for this program, but we are going to place limits on the secretary in different ways. And then the follow-up question for that will be, if in fact Congress does that, will the administration follow it?

KENNEDY: It's important to remember, thank you for raising this, that the appropriate committees on appropriations don't simply recommend the expenditure of money. They also recommend not spending money. And for decades, the benchmark for measuring an appropriations bill was where it stood relative to the president's budget request. Every single report on every single appropriations act. There it is for each account. Last year's enacted level, this year's president's request, recommended amount. And the two respective committees took great and justified pride in total, recommending appropriations that were less than the president's.

WESSEL: But also, sometimes said thou shalt not spend money on abortions or whatever

KENNEDY: Well, that's the thicket of legislating on appropriations bills.

CHAFETZ: Well, one thing I just wanted to bring in is, you know, one thing that a number of us have said, I think all of us have said at one point or another, is we're not exactly sure what the administration is doing, but we think it might be this, we think it might be that. And I think it's worth noting one reason for that is a sort of flagrant illegality of this administration, which is that as an appropriations writer, what, three years ago, two years ago? OMB was required to post on its website apportionments. And as of what, three or four weeks ago, they've just taken that website down. And the only justification is a two-paragraph letter that says, we think this information is confidential, citing to absolutely no legal authority for taking it down. So, there's also, there's both the question of what Congress is going to do about it, there's also the question of how much Congress is even going to be able to know about the spending decisions that are made, and that feeds into why we can't say really specific things about what's going on, because this is also sort of being hidden from the public.

MCCONNELL: Well, if I might just jump in. Yes, I will. We don't know what Congress is going to do in response, but at least one possibility is that they're going to support the administration on a lot of this by cutting spending. I think there seems to have been—I'm not a politician. I don't know. And I even live in California, which is a long way from all these things. But it seems to me there has been a bit of a mood shift in the last six months between in the direction of more budget restraint.

WESSEL: Well, maybe. I mean, it seems to be a belief in general on budget restraint, unless you're the senator from Missouri and discovered the restraints coming on Medicaid or something like that. But, Judge McConnell, what role, and I want to ask you about this as well, Elise, what role do the courts play here? What is it that the courts will be asked to decide, do you think? I know we're speculating. And where are the, where is it, where tough questions that the courts are going to have to wrestle with.

MCCONNELL: So, this is, again, not entirely clear, but I think that the – If you look both at the impoundment litigation under Nixon, and then, again, under Clinton, there was an ersatz line item veto authority that the court was held unconstitutional. And all of those cases would be grantees, that is, the people who would have gotten the money, had it not been for the executive action, were able to sue. They had standing, and the courts would hold that whatever it was that was standing in the way of their getting their money was illegal or unconstitutional. This was not done, I believe, under the Administrative Procedures Act.

Just yesterday, there was a decision out of the District Court in Rhode Island that held that billions of dollars in funding not cutoffs, it freezes, which I think is a delay rather than an actual funding cutoff or arbitrary and capricious, and this, I think, is a new assertion of judicial power over spending, because arbitrary and capricious in this context seems to mean we just don't think that the executive has offered a good enough reason, but I think historically the making of grants and Liz can correct me about this because she seems to know a lot more than I do about the actual operations of the termination power, but I don't think any of them have ever been accompanied by statements of reason that would be you know, the typical fodder for Administrative Procedures Act claims.

WESSEL: You can take that, but I also want you to talk about the pros and cons of having the courts in this.

PASACHOFF: So, I said at the beginning that one of the central challenges of administrative law is how do we draw the line between discretion and accountability. And in most of administrative, we draw the lines under the Administrative Procedure Act. And we allow the executive branch a fair

amount of discretion. The extent to which it exists under is governing statutes. And yet individual people can sue to make sure, you know, to hold the executive branch accountable. One of the real challenges in spending law, in appropriations law, is that there are a lot of threshold questions that typically are more straightforward in the non-spending context than in the spending context. And those threshold questions have often acted to keep spending questions of a whole variety of ways out of court.

So, some of them are the standing questions. Is somebody actually injured by this thing that the agency or the executive branch has done? It's easy to see if it is your particular grant being taken away from you. It's harder to see, if it's just the agency isn't spending its appropriations to hold up its agency well. Who has standing for that? So, standing is a challenge. Reviewability, is this the kind of thing that a court. Is able to review because there's some kind of judicially manageable standard against which to assess the reviewability. Well, the Supreme Court held some years ago that lump sum spending, under which a lot of appropriations accounts operate, that when the executive branch chooses how to spend from within that lump sum, some that it's not a reviewable question for courts. There's a third hurdle to get into court called Cause of Action. And again, there's kind of obvious causes of action under the Administrative Procedure Act.

But if you're trying, again, to challenge just an appropriations clause issue or an appropriation's provision, it's not exactly obvious how to get a cause of action out of that. And there's been some cases, especially coming into the last Trump administration, where people were challenging about that. So, these are just sort of a set of preliminary hurdles. And also, then, where to bring the case. And so, I would actually say typically most grant disputes that have made it through these spending hurdles have actually been in federal district court under some version of either the administrative procedure act or just a challenge to the underlying statutory reading, this underlying statutory interpretation. So most of the Nixon era lawsuits were based on just the plain reading of the statute. Did the statute allow this kind of discretion? But the Supreme Court has now sort of raised this question that maybe these cases ought to be heard in the Court of Federal Claims under the Tucker Act for kind of money damage.

WESSEL: Define the Court of Federal Claims.

PASACHOFF: The Court of Federal Claims is, so, usual federal courts, district courts, courts of appeal, federal courts of appeal, are where you go to hear kind of a wide variety of challenges, including under the Administrative Procedure Act, that the government acted arbitrarily and capriciously, it violated your statute, and so forth. The Tucker Act in the Court of federal claims is where you're supposed to go if You just have a money damages claim against the government. And so, the Supreme Court, again, is kind of like on the shadow docket and not really thought out. There was not really any rationale for it. It was a, we think this is likely. It was on a preliminary injunction, kind of, you know, maybe standard, not like an actual rule of standard. But they suggested that maybe these grant termination cases are supposed to go to the court of federal claims, which I think is surprising, but it's a new kind of hurdle that's among these, before we even get to the substantive challenges of do these things violate any of the underlying laws. And the administration is relying very heavily on these just disability challenges, no standing, not reviewable, wrong court.

WESSEL: So, the bottom line I get from this is that, one, we don't quite know what rationale the administration is using because they haven't been clear. It's not clear what will get to court, or what issues the court will be asked to decide. And three, the real check on the executive is Congress. And if Congress wants to do something and has the power to do it, just so far it hasn't exercised that power.

PASACHOFF: So, I am not totally prepared to say that courts have no role to play here. I think historically it has been the case that there have been many fewer lawsuits over spending challenges than over kind of ordinary government actions. But I think it's also the case that we have been in basically a period of detente. Where there just hasn't been the opportunity to develop this kind of thing. So, I do think it's possible that some of these doctrines will be resolved in different ways, on different issues, everything sort of fact-specific and law-specific. I'm not prepared to give up on the courts. I do the courts are gonna have some role to play here.

WESSEL: The law professor says don't give up on the courts, but could Congress itself be a plaintiff? Could members of Congress?

KENNEDY: Probably not.

PASACHOFF: So, this is another really complicated question in the, so one of the, just one of those doctrines I talked about the hurdles to get into federal court on the standing claim. So right, so sometimes it's just an individual person, "my grant was taken away." Okay, I have standing. Sometimes it might be a state saying, let's think about the, in the wall, in the building of the wall we move money around. I'm a state and I was harmed because the Department of Defense Appropriation wasn't supposed to be used this way and it's changing my money. Maybe standing, but kind of complicated. But then there's this question of Congress. Can Congress sue? And we don't have like final settled law on this question. Can it be one house?

Can a committee sue over information? You know, so Josh can kind of chime in on this as well, but there's been some DC circuit litigation over in the spending context, kind of allowing standing. But I do think that that's kind of the easier option from a kind of what do we think about what the different branches are supposed to be doing a clear separation of powers framework where everybody kind of has their role to play is that congress's main job should be on the side of the powers that congress is actually granted in article one. I'd love to hear Josh's thoughts on those congressional standing question too

CHAFETZ: Yeah, I mean, under Reins v. Barrett, right? Like the its congressional standing isn't completely foreclosed, but it's really hard to assert. And this is a Supreme Court that is significantly more skeptical of standing period than the court that decided Reins. So, I find it really hard. To imagine this Supreme Court.

PASACHOFF: Holding that DC circuit precedent? Yeah.

MCCONNELL: Well, I'm not aware of Congress ever suing about failures to spend, but they have sometimes successfully sued about spending money that was not appropriated.

KENNEDY: Certainly. It's going to be interesting to me. What we loosely refer to as the Impoundment Control Act is Title X of the Congressional Budget Control and Anti-Impoundment Act 1974, Public Law 93-344. Can you recite it from memory? The first nine titles of that set up the entire congressional budget process and CBO and that and the other thing. Title 10. Set up these procedures for where, if the president does not want to spend money, he's got to propose rescissions or propose deferrals, and Congress has to act on them. To my knowledge, there's not a severability clause in Public Law 93-344, and if Russ Vaught is right, and the court agrees with him, and Title 10 is struck down as unconstitutional, does that bring down the whole Congressional budget process?

PASACHOFF: I'm deeply skeptical at the idea that the court wouldn't read inseverability. There're often no severability clauses in statutes, and over-descends, right? Because there are some justices who think that it's just like rewriting statutes. But I am deeply skeptical about the idea, that any court would strike down the whole thing.

WESSEL: It's good to hear the lawyer's opinion. Turn the questions in. We have a couple people with mics. So, if you have a question, raise your hand. Wendell wants to start. Tell us who you are. That's Wendell Primus. And I'm going to take like two or three questions and then let people respond. So, Wendell, stand up so C-SPAN can see you in your full glory.

AUDIENCE QUESTION: Yeah, so my question is, when there are massive reductions in force, like 3,100 at FDA, and a lot of these appropriated levels are for salaries and expenses, 7,000 people gone from Social Security Administration, for which there may be bipartisan action, et cetera, are those violations of the Impoundment Act? Because surely now that we have full year appropriations at last year's levels in many cases, though they will be spending less even after the administrative leave runs out, let's say in June or there's still four months left. So, is that in a violation of the Impoundment Act?

WESSEL: OK.

KENNEDY: It could be. It's arguable.

WESSEL: One minute, Keith.

AUDIENCE QUESTION: Joe White, Case Western Reserve University. Two things. One is, I think it's important to point out that in the case of the Obama supposedly unjustified spending, there was a fairly strong argument that they were spending money for an appropriated entitlement. And that for an appropriate entitlement, the general principle is that even if Congress hasn't appropriated the money directly. That you spend it because otherwise they'll just go to the Court of Claims and people will get the money. So, it's just like when Congress a few times in the 80s hadn't appropriated for SNAP food stamps as it was then known on time, they still spent the money, so it's not that the Obama case was quite similar to the Trump cases, but I would like to more on the question of presidential authority being used for things like basically abrogating contracts, taking grants away from people. And that raises issues both of, I don't know, is there a contract clause issue? And who is actually doing this? Is the agency doing it or is DOGE doing it? And is that an issue?

WESSEL: Thanks. Another question? Here in the aisle, Alex.

AUDIENCE QUESTION: Hello, my name's McKenna. I work for Congress. I wanted to pose a hypothetical for the panelists. Say you're Lindsey Graham, who's an appropriator and also is the head of budget. What would your stance be in that you are a Republican, of course, but also you want to uphold Article One, what would your communications be to Article Two?

WESSEL: So, Wendell asked the question I tried to ask before. If they RIF 3,000 people and they don't spend the money on the personnel line, is that a violation of the Impoundment Act?

CHAFETZ: So, can I, so I've. I think when we're thinking about these questions, it helps not to go sort of statute by statute, right? But rather to think about these agencies are, so first of all, many of these agencies are created by statute in such a way that the executive doesn't have the discretion to

destroy the agency, right, that if you want to get rid of an agency that was created by statute, you need to pass another statute to get of it. Now, if the president then tries to use the RIF authority to basically say, okay, the agency still exists, but it has no employees now, I think that is a constructive destruction of the agency. So, we might think of that as being contrary to express statutory purpose in the statute creating agency.

Likewise, I think there's certainly, again, even though there is this expressed reduction in force power, to the extent that that is being used in ways that result in constructive impoundments, you might say, well, obviously, that should come in as a side constraint on the RIF power. So, I think, you know, if we're thinking about the sort of web of statutes that create and govern various agencies, right, we should be thinking in sort of those kinds of more sort of holistic institutional terms, rather than trying to go sort of statute by statute and say, well, you know, there is this rift power, and so, hey, it turns out all they're doing is rifting, and, so, that's basically okay, right? I think we need to think about more broadly than that.

WESSEL: Fabricating contracts.

PASACHOFF: Can I just say one other thing to that? So that makes a ton of sense to me. One other component of that is that that makes the answer then not just is it an impoundment control act problem, but is it a problem about the underlying, is it the violation of the underlying statutes that created the agency? And so, I think I wanna then maybe kind of broaden the frame a little bit because I think that is, you know, broadening the frame helps us answer that. One other kind of complicated thing is that Claims and a complaint do often get written statute by statute. So, I think there's a tension between trying to think about how the statutes fit together and the overall purpose But I but I completely something can be...

CHAFETZ: Something can be completely lawless and yet not be the kind of lawlessness that our courts are well designed to deal with.

PASACHOFF: I, as a law professor, yeah.

WESSEL: So, I see what's beyond the hypothetical here.

PASACHOFF: So, I don't know how to answer that.

WESSEL: Abrogating contracts?

PASACHOFF: Well, I don't know how to answer the contracts clause question. So that's the thing I want to think about. But I do not think that, you know, I do think that terminating grants in and of itself. Is following the procedures as kind of written in the grant provisions and the grant statutes and the agency rules that provide for how to do this and the OMB rules governing grants like I don't actually think that terminating grants itself is the thing that's bad I think it's sort of like the broader context the underlying factual background plus what the underlying statutes say about permissibility various things.

WESSEL: All right, Keith, you want to write a presentation? Oh, please.

MCCONNELL: Actually, I think this idea of not focusing on the individual statutes is probably not the cards, if we're talking about litigation, the courts are going to be very interested in the specific statutes. Back again in the Nixon era, when there were these multitudes of cases about claimed impoundments, the case that went up to the Supreme Court train against New York didn't say a word about the bigger questions. It was—it focused only on the one particular. Appropriation statute, and it therefore reads rather narrowly, although, you know, has broader implications than that. As to whether RIFs are impoundments, I think, in theory, they could be at some point. But this is where things like the reprogramming powers kick in, because the executive has some discretion under the guise of reprograming to take money to use it. Reprogramming has to be within the program. But if you riff some people, and then you use that money within the programs for something else, my guess is that that's a problem of may have legal problems, but it's not going to be an impoundment. Issue. You're assuming they spend the money. I'm assuming that they spend the money, that's right, or that they submit a rescission in Congress.

WESSEL: And if you want to reprogram, you're supposed to notify Congress, right, or not?

KENNEDY: Well, and you also need to get approval.

WESSEL: For reprogramming? From the Congress or the appropriators?

KENNEDY: From the committees.

PASACHOFF: OK, so two complexities about this. So, one, there's no general reprogramming law. So, it's written kind of provision by provision, or sort of like set of accounts by set of account. Different accounts will have different language about what's required. So that's the first thing. And the other wrinkle is that the Supreme Court has said that getting agreement from one committee, one house, one chamber, that's not the way we do legislation, right? That's effectively a one-house veto. So, this is what I mean about the soft power against which this whole system has worked for so long. So yeah, you do have to get approval sort of, sometimes it's just notification or you construe it as notification, but it depends from a relational perspective, not really from a legal perspective.

WESSEL: Right, so basically what you're saying is...

KENNEDY: Right. It depends based on provisions and appropriations acts. Whether it's notice or... And understandings written into appropriations reports.

PASACHOFF: Absolutely, but the executive branch OLC has construed approval requirements as notice requirements because of the Constitutional, because of this Supreme Court. So, this is why it's...

KENNEDY: You mean the whole deferral case?

CHAFETZ: Uh, Chadha.

KENNEDY: Chadha, pardon me.

PASACHOFF: And so, this is why the soft power with Congress really matters.

WESSEL: So, I mean, I get that basically the problem here is if Congress and the president don't trust each other, the system breaks down and we're running that experiment. Keith, so you don't want to give...

KENNEDY: Senator, no, Senator Graham is one of those individuals who has said, OK, fine, you want to cut all this money? That's great. Under the Budget Act, you ought to send up a rescission proposal. Rand Paul, of all people from Kentucky, has said the same thing. Great idea. And supposedly, the administration is going to send a rescissions package after this Easter break. The problem with that from the OMB director's point of view is, wait a minute, if all of a sudden, you're going to start following the provisions of Title X, how can I argue it unconstitutional? But I think that's where Lindsey Graham gets his wiggle room.

CHAFETZ: I think the other problem from their perspective is that's then going to force all their members to either vote against Trump or to vote for all of these cuts that are wildly unpopular, which is the beauty of how rescission is supposed to work.

KENNEDY: Some are and some aren't.

WESSEL: Some aren't going to be, yeah, I'm not betting on some of these, Congress would probably go along if they asked.

CHAFETZ: They may well, but it's going to cost them.

WESSEL: But your point to Keith is that if they're gonna use this power, then they can't say the law is unconstitutional. I think they've shown a rather flexible approach to things like this in this administration.

PASACHOFF: I mean, as a legal matter, I don't think you are formally forbidden from arguing in court.

WESSEL: He's talking about the accused of being hypocritical, and that doesn't seem to bother him. I think we have time for another question or two, if there are any. Oh, Molly. Molly Reynolds at Brookings.

AUDIENCE QUESTION: Thanks, David. So, we've talked a fair amount about the degree to which maybe some of the things that have been happening so far might not be illegal impoundments. What do we know about what is an illegal impounding? What examples do we have from perhaps GAO who weighs in on these questions about what would potentially constitute an illegal impoundment that could tee up the kind of test case that Judge McConnell was talking about to the Impoundment Control Act.

PASACHOFF: So, the best example that we have from the GAO from recent years was when the first Trump administration used its apportionment power to put a hold on the spending to Ukraine under the Defense Department, you know, money, which GAO said there's no discretion in that underlying statute, you have to. You know, the apportionment is not a blank check to the president, et cetera, et cetera. That then, um, was an illegal impoundment. However, there is a wrinkle that falls within the kinds of, you gotta look statute by statute.

And all of these specific questions really matter, which is, you know, you've sensed my reluctance to say, yes, firmly that is, because it just, you have to look at the details. So, GAO also issued an appropriations law decision that held that a different pot of money that OMB in the exact same week that it put a hold on the money from, you came from the DOD money. OMB put a hold on the Ukraine money under the State Department funding. And GAO said, actually, the underlying statute in that case is different, and it does give discretion to the president.

And so, therefore, the hold on money was in keeping—it's a permissible programmatic delay—it was in-keeping with the authority granted to the President under the statute. And so, one other further wrinkle is that that's not even the kind of thing that I think could trigger, could tee up a good case, because that's all about the portion of this power. And I don't think anybody's going to have standing to challenge anybody's kind of apportionment power. So, what I really think is that these cases are going to get teed up through the lens of just ordinary grant statutory interpretation as the cleanest, simplest version of these cases. That's how all the Nixon era cases came up. And if they want to make the strong impoundment constitutional argument then, if they haven't kicked all the cases out on those justiciability grounds or sent them all over to the court of federal claims, which they're trying to do, I and that would be where they would make it in sort of a defense, a response. To one of these challenges, rather than an affirmative, sort of.

MCCONNELL: And if we're looking to GAO precedents, there was also the Biden order very early, one of his first days as an office, that he would not spend the appropriation for the border wall. And if I remember correctly, the GAO ruling on this was Rather hard to understand, but when the smoke clears, they did not declare it to be illegal. And my guess is that the Trump people will cite that as a precedent.

PASACHOFF: It was, that theory was the exact same theory that GAO used for the second pot of State Department money to Ukraine. So, it's sort of in keeping with, you've got to look at the underlying statute because the underlying statute will provide or not provide the degree of discretion.

WESSEL: So, a lot rides on whether Congress figures out how to write appropriations bills this time around, if they want to constrain the president. OK, so it all relies on Congress. Take that for what you will. I want to thank our panelists for joining us. I think it's really important that we understand both the political and the legal aspects of this. And I hope that we've helped at least elevate the quality of the public debate on this, which sometimes. Bumper sticker level and as you can see the bumper stickers are very long so thank you all.

