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Prioritization Isn't Just an Economic Catastrophe, It's a Constitutional Crisis

Administration Lawyers are Walking the President into a Constitutional Crisis

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Introduction

As the debt ceiling deadline inches closer and closer, the dire warnings of economic catastrophe become clearer and more pronounced. Critical payments that Americans rely on every day, like social security or veteran benefits, are threatened by the prospect of "payment prioritization," whereby the Treasury would make certain payments while delaying others.

Both President Biden and Secretary Yellen have indicated that, in accordance with the advice of their legal counsel, they do not have the legal authority to act unilaterally to avoid such a situation. And just yesterday, it was reported that the Treasury is taking steps to prioritize debt payments above others "because the reliability of Treasury securities are central to the global financial system."

If this is true, then the attorneys at the Office of Legal Counsel and Treasury are providing deeply flawed counsel. Beyond the dire economic consequences, and absent congressional authorization, **the moment the executive branch makes a policy choice to prioritize one payment at the expense of another would be a Constitutional crisis.** It would very likely violate the principles of the Presentment clauses that dictate how laws are created and amended. And aside from the Presentment challenge, it would be an unconstitutional delegation of authority by forcing the President to make legislative decisions about spending that are solely and completely vested with Congress.

Contrary to the conclusions apparently reached by the Administration's top lawyers, the president is duty — bound to use any lawful alternative to avoid breaching the Constitution's clear separation of powers through payment prioritization.

The Constitution Requires that Laws Pass Through a Specific Process and Allows Only Congress to Make Legislative Decisions

Prioritization would violate the Constitution on two theories: (1) the President has no authority to abrogate that lawmaking process and act in a manner that would render a law inoperative; and (2) the decision to prioritize is a legislative decision. To understand these, one must first lay out the precepts underlying them.

The Constitution Requires that Legislative Decisions Go Through a Specific Process and Limits the President's Role in that Process

Article I of the Constitution requires that laws be passed through a very specific procedure. Art. I, § 1 vests all "Legislative Powers" in Congress, which is to consist of two houses, the Senate and a House of Representatives. Under Art. I, § 7, clauses 2 and 3, each bill that has passed both houses must be presented to the President, and if approved, shall take effect, unless the President disapproves, by which it shall only take effect if repassed by two-thirds of the Senate and House. This process was intentionally crafted. As the Court stated in the landmark case *I.N.S. v Chadha*:

> ***"These provisions of Art. I are integral parts of the constitutional design for the separation of powers. We have recently noted that '[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.' Buckley v. Valeo, supra, 424 U.S., at 124, 96 S.Ct., at 684. Just as we relied on the textual provision of Art. II, § 2, cl. 2, to vindicate the principle of separation of powers in Buckley, we find that the purposes underlying the Presentment Clauses, Art. I, § 7, cls. 2, 3, and the bicameral requirement of Art. I, § 1 and § 7, cl. 2, guide our resolution of the important question presented in this case. The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers"***

The President's role in this process was to provide guidance to Congress on issues worthy of legislative attention, and when necessary, to supersede the legislative process through a "limited and qualified" veto to ensure that Congress' powers were "most carefully circumscribed." *Chadha* demonstrated that the framers were "acutely conscious" of the importance of the strictures of the Presentment and Bicameralism clauses to the democratic process. In conjunction they created a process to ensure laws reflected the democratic will of the nation with appropriate checks on each branch of government:

> *"The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto, thereby precluding final arbitrary action of one person. See id. at 99-104. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a* ***single, finely wrought and exhaustively considered, procedure.****" [emphasis added]*

The holding that laws must be passed in accordance with a single, finely wrought, and exhaustively considered procedure was used to overturn the use of the line-item veto in *Clinton v. New York*. In that case, Congress enacted a veto that allowed "the President the power to 'cancel in whole' three types of provisions that have been signed into law: '(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.'" For all intents and purposes, a cancellation would "prevent the item from having force or legal effect." The Court found this unconstitutional.

As the Court stated, regardless of the procedure by which it occurred, the cancellation of the items at issue made the statutes "entirely inoperative as to the [plaintiffs]." Importantly, the fact that the cancellation occurred *after* a bill became law, rather than before, was an important distinction between it and another exercise of presidential authority, the Constitutional veto.

As a result, by employing the line-item veto on specific appropriations, the executive branch abjured the Presentment and Bicameralism requirements by, "in both legal and practical effect … [amending] two Acts of Congress by repealing a portion of each." From these cases, we can assert a generalizable principle, that after an obligation has passed through the finely wrought process of legislation and becomes law, **the President has no authority to abrogate that process and by rendering the law inoperative.**

Congress, and Only Congress, Can Make Legislative Spending Decisions

In addition to the process by which laws are created — the framers of the Constitution were very clear about where it vested the power to make legislative decisions about spending. The very first section of the very first Article vests all power to make legislative decisions with Congress. And as the authority to spend is also vested with Congress, in Sections 8 ("to pay the Debts and provide for the… general welfare") and 9 ("no money drawn from the Treasury except but in the Consequence of Appropriations made by Law"), it is clear that Congress has the *sole and complete* discretion to make legislative decisions about spending.

This might seem like a simple or obvious point — but it's an important one. In politics and the media, spending choices are often cast in presidential terms. The Inflation Reduction Act is viewed as a signature achievement of the Biden Administration (as it should be). And of course, in certain ways, presidents have wielded the tremendous power of the bully pulpit to dictate and push for their own spending priorities, or through the legally recognized process of submitting a budget. Nonetheless, from a strictly Constitutional perspective, the power to legislate spending decisions, and the compromises associated with them, sits with Congress. While the President advocated for the Inflation Reduction publicly and certainly had a hand in what it prioritized, it also reflects the policy tradeoffs that are required to be made by Congress, including the necessity to invest in our future, as advocated by progressive Democrats, and the necessity to reduce the budget deficit, as advocated by centrists like Senator Joe Manchin.

Where the executive branch comes in, aside from the circumscribed power to veto, to inform Congress, and to approve bills with his signature, is in administering the spending appropriated by Congress. And while Congress' spending power has few limitations — where litigation has clarified it, it's often been to require *more* clarity to guide executive branch administration and limit discretion and ambiguity. This is particularly true for cases involving federal grants to states. For example, In *Pennhurst State School and Hospital v. Halderman*, former Chief Justice Rehnquist (for whom Chief Justice Roberts was clerking for at the time) wrote the majority opinion requiring that conditions on spending be unambiguous, writing:

> ***"The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it … if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."***

Relying on spending being in the nature of a contract, *Pennhurst* had an important observation: the legitimacy of the spending power is directly related to the clarity with which it is described. This is understandable — the discretion that may lead to maladministration or unfair treatment would threaten the democratic legitimacy of spending decisions. Accordingly, Congress must carefully proscribe spending decisions to avoid these risks.

More broadly, when delegating power, whether it's spending power, the power to regulate, or the power to tax, Congress is required to provide an "intelligible principle" to guide the executive branch. This is the fundamental conceit of the nondelegation doctrine, a favorite of a majority of Justices on the Supreme Court. The intelligible principle standard is intended as a democratic safeguard to ensure that the difficult determinations of policy remain part of the legislative process. As Chief Justice Rehnquist wrote in a dissenting opinion in *American Textile Mfrs. Inst., Inc. v. Donovan*:

> ***"Even the neophyte student of government realizes that legislation is the art of compromise, and that an important, controversial bill is seldom enacted by Congress in the form in which it is first introduced. It is not unusual for the various factions supporting or opposing a proposal to accept some departure from the language they would prefer and to adopt substitute language agreeable to all. But that sort of compromise is a far cry from this case, where Congress simply abdicated its responsibility for the making of a fundamental and most difficult policy choice… That is a "quintessential legislative" choice, and must be made by the elected representatives of the people."***

More recently, in a dissenting opinion in *Gundy v. United States*, Justice Gorsuch helped define the boundaries that dictate what choices are legislative and what are executive:

> ***"Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands."***

These questions can help answer whether Congress has impermissibly delegated its legislative authority. And although, to our knowledge, the Supreme Court has never *directly* applied the intelligible principle test to Congress' spending power — it would be fair to say that the Court's jurisprudence requires that spending decisions also have an intelligible principle to guide them. The Eleventh Circuit came to this conclusion just earlier this year regarding a condition on grants passed during the American Rescue Plan. As the Court wrote, the problem in an ambiguous condition was not whether the statute left gaps that agencies should be able to fill, but the "lack of an ascertainable condition in the statute." It continued:

> *"even assuming an agency can resolve some ambiguity in a funding condition, the condition itself must be ascertainable on the face of the statute… our conclusion that the offset provision does not impose an ascertainable condition is similar to a conclusion that it provides no intelligible principle to guide an agency."*

A rule from these cases can be drawn: **Congress cannot abdicate its responsibility to make difficult policy choices associated with spending decisions.**

Understanding Executive Discretion on Spending

It would be slightly misguided to say that the executive has *no* authority over spending decisions. Agencies are authorized by Congress to do many things, and appropriations acts often tie funds to purposes rather than specific appropriations. Therefore, the President can choose which authorities to utilize to carry out the purposes described by Congress. So long as a spending activity is aligned with authorized law, and carries out the purposes laid out in an appropriations act, it is lawful (this is the broad principle undergirding much of the Antideficiency Act). Furthermore, within this flexibility, the executive branch has considerable discretion in the administration of spending power, including in designing the structure of grant programs, selecting the contractual forms used for certain types of acquisition, or determining the portfolio division for programs that provide both grants and loans. The authority to regulate to carry out spending choices, for example, by describing eligibility on conditional spending, wields enormous influence. However, this is entirely in the realm of discretionary spending — that is, spending provided through the appropriations processes in Congress.

A whole other category of spending exists that provides *zero* discretion to the executive branch, while accounting for nearly two-thirds of the Federal budget: mandatory spending. Certain spending is not subject to the appropriations cycles of Congress — these payments must be made. Mandatory spending includes Social Security, Medicare, certain veteran's benefits, student loans, and primary education programs (like school lunches). Changes to mandatory spending fall firmly within the ambit of Congress — as the Court noted in 1960 in *Flemming v. Nestor*, which upheld the right of Congress to make amends to the Social Security program:

> *"was designed to function into the indefinite future, and its specific provisions rest on predications as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify."*

These judgments and preferences were to be made by Congress, not the executive branch. And Congress has made those judgments. By mandating certain spending without discretion or ambiguity, the executive branch is obligated to make those payments. For example, in The Social Security Act, 42 U.S.C. § 402 states that beneficiaries "shall be entitled to an old-age insurance benefit for each month." In 31 U.S.C. § 3123(b), the Full Faith and Credit Act states that the Secretary of Treasury "shall pay interest due or accrued on the public debt." In each clause, the "shall" binds the executive branch to make these payments by any lawful means. This is why, even during government shutdowns, social security payments continue. Funds must always be drawn from the Treasury to make these payments, period.

As demonstrated here, discretion is limited for both discretionary and mandatory spending. Deviations from the circumscribed laws appropriating discretionary or mandatory spending, therefore, require Acts of Congress because they are decisions of a legislative character. The executive branch is bound by the purposes laid out in an appropriations act for discretionary spending, and executive branch has no discretion limit or modify mandatory spending.

Prioritization Fails Under Two Constitutional Tests: Presentment and Nondelegation

With this information, we can now make the case that if the executive branch were to begin payment prioritization, it would violate two constitutional requirements: the process described in the presentment and bicameralism requirements, and the nondelegation doctrine. By prioritizing payments, the executive branch would make inoperative laws that have passed through the Constitution's finely wrought procedure, and would be seizing the legislative power solely intended for Congress.

Prioritization, Functionally, Would Disturb the Finely Wrought Process of Presentment and Bicameralism

The key question in answering whether prioritization is constitutional is understanding whether it would constitute a "repeal" or constructively similar modification or abrogation of the law. In our view, it would. Prioritization, functionally, would disturb the finely wrought process of legislation and Presentment laid out in Article I, by making a part of the law inoperative after it has gone through the finely wrought process of lawmaking.

The Social Security Act requires that payments "shall be entitled to an old-age insurance benefit for each month." This is unambiguous and provides no discretion. *Shall* is the operative word — the President simply cannot exert any discretionary decision that would change *shall* to a *may*. There is no discretion for a President to delay a payment in preference of another. And as in the line-item veto case, a policy decision to miss a payment to an entitled person would render the statute "entirely inoperative" to the potential plaintiff, in this case, a Social Security beneficiary.

Now, in the specific case of prioritizing public debt payments over social security payments — one could argue the President is duty-bound to do so because the social security payments are a statutory creation, whereas debt payments are required to be made under the 14th Amendment. At best, this is an argument allowing only that payments on the debt can be prioritized — it would not allow the executive branch to discriminate between forms of mandatory spending equally weighted in statutes like veteran's benefits over social security payments. A related counterargument is that by creating the debt ceiling, Congress implicitly allowed the resulting and necessary process of prioritization that complying with the debt ceiling would entail, and accordingly, has gone through the finely-wrought process to be constitutional. However, we need only look at the recent decision by the Court in *West Virginia v. EPA* to find the counter to that argument. The Court was loath to find an implicit delegation, writing:

> ***"...in certain extraordinary cases, both separation of power principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."***

Here, it would even be hard to argue that the delegation is "lurking" in ambiguous text — the Court would have to find delegation by implication, as it is simply nonexistent. Both of these criticisms lead to another payment prioritization issue: it would be an unconstitutional delegation of legislative authority to the executive branch.

Prioritization is a Legislative Decision, and Can Only Be Made by Congress

Were the Court to rule that Congress had, through the finely-wrought process of creating the debt ceiling, implicitly authorized the President to prioritize payments, it would still be a violation of the constitution through the doctrine of nondelegation. As described earlier, Congress cannot delegate its legislative power to the executive branch. Payment prioritization would be an unconstitutional delegation of spending power. Consider a few dimensions on which prioritization might be made: technocratic or political.

Scenario A, a technocratic scenario, is not hypothetical. Yesterday it was reported that the Department of Treasury was preparing agencies for the possibility of a default, and that officials were discussing "giving priority to debt payments" because "the reliability of Treasury securities are central to the global financial system." Note here that the reasoning is not that "because of the 14th amendment, debt payments should be prioritized." Rather, it is a technocratic policy decision to favor the stability of the global economy. To prevent a global recession, it might be a reasonable trade to miss some student loan program or pension payments.

In Scenario B, consider a President examining all of the mandatory payments that make up nearly two-thirds of federal spending — and deciding which might be most politically palatable. Of course, mandatory spending often favors some of the most politically sympathetic groups like seniors and veterans. One reason why our debt trajectory has not meaningfully changed is because changing it would require decreasing benefits for some of these groups, for example, by increasing the retirement age. These are not popular choices, that's why Congress hasn't made them, and a President would be politically smart to deprioritize payments for less politically powerful interests like students or the poor. The same could be said for pulling discretionary appropriations outside the bounds of their appropriated purpose to make debt payments — how loud would the political outcry be if a President used the ~$150bn earmarked for low-income housing programs to pay debt payments? It would be reasonable to assume a President would make the popular choice here.

These are, however, the sorts of difficult decisions that require compromise, discussion by competing factions, and the adoption of language that is suitable to all. In short, they are the decisions that must be made by Congress. As underscored by former Chief Justice Rehnquist, Congress cannot abdicate its responsibility for making "fundamental and most difficult" policy choices — these are "quintessentially" legislative choices and must be made by the elected representatives of the people.

Taking it a step further, Justice Gorsuch's framework also offers guidance here. The statute makes no effort to set forth facts that the executive must consider or the criteria on which the executive branch must make determinations. As of now, the policy judgments for prioritization sit with the executive branch, rather than the legislative branch as required by the Constitution.

Of course, any of these scenarios require the judgment of Congress to have any democratic legitimacy. Congress cannot abdicate its authority to make these foundational policy determinations to the President, and certainly not without any intelligible principle to guide the President. Absent from the debt limit statute is any principle upon which the President can make these determinations. There is simply no justification for such a wide, authoritative grant of discretion to the executive branch. Especially considering the implications of such a delegation.

Unilateral Action to Avoid Prioritization Is Not Executive Overreach — It Would Be be a Preservation of Congressional Power

If the executive branch is allowed to prioritize payments, even if to fulfill a Constitutional obligation to pay the obligations of the debt, the implications for this democracy and our nation would be catastrophic. If a President can prioritize payments in subversion of the law, how far does that authority go?

Under Scenario A, the technocratic justification to protect the stability of the global economic order, could a future President divert half of the Pentagon's budget to USAID? And if the President were to justify prioritization on the Constitutional obligation to make debt payments, could a future President justify prioritization to serve another constitutional purpose, like shifting payments for the Department of Education to the Department of Defense? Or consider an extremely pacifist President who runs up against the debt ceiling. Could that President veto a bill to raise the debt ceiling, turn around, and prioritize payments away from contractors with the Department of Defense? A limiting principle is difficult to find. The President is duty-bound to use any lawful action to avoid prioritization, whether by minting a coin, issuing perpetual bonds, as we write in another piece, or through any other lawful solution available.

Notably, many critics that challenge these solutions do so by calling them "gimmicks" — rather than assessing their lawfulness. That's because the lawfulness of each is clear in the text. And because they are lawful activities, the President is obligated to use them to maintain the separation of powers and avoid seizing legislative authority.

And that's the key point — while the most misguided Constitutional critics may describe these actions as an abuse of executive authority, in fact, they are the opposite. Congress cannot abdicate its legislative authority or its role in the finely-wrought process of making laws — nor can the President seize those authorities. So long as there exists even one lawful action to preserve the delicate separation of powers, the President cannot violate the Constitution through the prioritization of payments.

Conclusion

Of course, one such lawful action is for Congress to pass a law increasing the debt ceiling. The prospect of this seems more and more likely. President Biden has made an effort to negotiate with Speaker McCarthy to come to some deal— an understandable position for him to take as a president committed to restoring bipartisanship.

However, if the demands from Congress are so extreme that he cannot in good conscience sign a “dirty” debt ceiling bill without hurting the millions of working Americans he was elected to serve — he must seek an alternative. His obligation is to faithfully execute the laws of the United States in accordance, first and foremost, with the Constitution, the supreme law of the land. That means he is duty-bound to find any legal means to ensure that Congress’ spending decisions are faithfully made in accordance with the law.