

# DIGITIZING THE FISC

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## ABSTRACT

*President Trump's escalating defiance of statutory spending directives since returning to office has pushed the United States to the brink of a constitutional separation of powers crisis. Perhaps most shockingly, he recently attempted to seize direct political control over the core payments software of the Treasury's Bureau of the Fiscal Service, which handles spending for most of the federal government, to block funds to politically disfavored agencies and programs. Opponents immediately challenged the takeover, and the dispute appears destined for the Supreme Court. Whatever the judicial outcome, Trump's actions have revealed the inherent constitutional fragility of the existing centralized public payments architecture. A nation in which a single government IT official can effectively commandeer all federal budget activity is a nation vulnerable to attack and compromise by a dictatorial president.*

*There is no good reason—technological, constitutional, or political—for this fragile design. Instead, this Article proposes a wholesale reimagining of the legal and technological infrastructure of the fiscal administrative state through a new digital dollar system: the 'New Digital Fiscal Regime' or 'NDFR'. In contrast to Trump's vision of a 'unitary executive fisc', in which the President channels all federal spending through a single administrative process under their direct control, the NDFR takes a two-tier 'centralized legislature, decentralized executive' approach to fiscal infrastructural reform. Under this approach, the House and Senate maintains a central digital database and ledger of all public funds appropriated, drawn, held, spent, and collected, while agencies administer federal funds directly. To spend, executive agents first draw from an appropriated public credit line by using a Congressionally-issued 'Public Credit Card' to virtually withdraw newly created digital dollar 'eCoin' balances from Congress's 'ATM,' within legislatively determined limits. eCoins are loaded onto a digital 'ePurse', hosted locally by the agent on a secure server. From there, agents can spend per statutory directives and oversight procedures without risk of obstruction by the President or broader executive branch. Congress, in turn, is responsible for defining, clarifying, and adjusting executive access to spending authority through administration of both the 'ATM' and 'Credit Card' software and data systems.*

*Restructuring the fisc along these lines reinforces the constitutional separation of powers in three ways. First, disintermediating the Treasury and Federal Reserve from the federal payments process reduces intra-executive branch entanglement and increases the cost and complexity of operational takeover by the President. Second, unbundling fiscal policy from public debt management by allowing agencies to directly spend newly created digital dollars practically empowers them to honor constitutional and statutory spending commitments over conflicting presidential directives. Third, streamlining the legislative budget process to resolve longstanding interpretive tensions between statutory spending directives and statutory delegations of financing authority enhances Congress's fine-grained control over executive spending while reducing the risk of it unintentionally causing constitutional fiscal crises. Addressing these challenges will require massive levels of practical and political organizing effort. However, as recent events have demonstrated, the constitutional stakes could not be higher, and maintaining the status quo is no longer an option.*

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## INTRODUCTION

“[The] power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”

- James Madison<sup>2</sup>

“He who saves his country violates no law”

- Donald Trump<sup>3</sup>

“Abolish the Federal Reserve and replace it with a computer.”

- Milton Friedman<sup>4</sup>

The United States is on the brink of a constitutional crisis. As part of a broadside effort to consolidate federal power in the office of the President, President Trump is attempting to seize direct control of the operational levers of the public purse, in the process defying Congressional spending directives.

Most shockingly, Trump—in partnership with Elon Musk and the new Department of Government Efficiency (DOGE)—has moved to take over the government’s centralized payments IT infrastructure to better exercise direct and absolute operational control over federal fiscal activity. On January 30th, President Trump ordered the U.S. Treasury’s Bureau of the Fiscal Service to grant DOGE staff direct admin-level access to its core payments software, which processes spending for nearly the entire federal government.<sup>5</sup> In effect, they are hacking the constitution by bypassing the traditional executive chain of command through a single IT choke point.

This new muscular application of ‘unitary executive theory’ to fiscal administrative infrastructure threatens the separation of powers between branches. The Constitution squarely entrusts Congress with the powers of the purse, i.e., creating, spending, borrowing, taxing, and regulating money.<sup>6</sup>

<sup>2</sup> THE FEDERALIST No. 58 (James Madison).

<sup>3</sup> See Maggie Haberman, Charlie Savage & Jonathan Swan, *Trump Suggests No Laws Are Broken if He’s ‘Saving His Country’*, NEW YORK TIMES (Feb. 15, 2025), <https://www.nytimes.com/2025/02/15/us/politics/trump-saves-country-quote.html>.

<sup>4</sup> See Kathleen O’Toole, *Greenspan Voices Concerns About Quality of Economic Statistics*, STANFORD NEWS (Sep. 9, 1997), <https://web.archive.org/web/20090214014500/http://news-service.stanford.edu/pr/97/970910greenspan.html>.

<sup>5</sup> See Jack Newsham, Juliana Kaplan, *What DOGE has done so far: Timeline of first 17 days*, BUSINESS INSIDER (Feb. 6, 2025), <https://www.businessinsider.com/trump-musk-doge-timeline-federal-workforce-2025-2>.

<sup>6</sup> U.S. CONST. ART. I, § 8, 9. See also *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 303 (1935) (“The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the

Presidential refusal to spend money appropriated by the U.S. Congress, known as “impoundment,” is constitutionally prohibited outside of limited, statutorily-defined, and presently inapplicable circumstances.<sup>7</sup>

Judicial challenges have begun to emerge,<sup>8</sup> although their prospects remain uncertain.<sup>9</sup> Even if one or more challenges are successful and enforced, the question of how to defend against future similar attacks remains. President Trump’s actions have exposed the underlying political fragility of the U.S. government’s payments IT architecture. A nation that allows one person to fully control the operational levers of the fisc is a nation vulnerable to destabilizing hacks and political coups.

By neglecting its duty to exercise leadership in modernizing the fisc, Congress has abdicated its power to check the Executive branch and defend its own constitutional authority. Trump’s actions, while destabilizing, thus have the potential to serve as a positive change catalyst by encouraging a long-overdue reimaging and redesign of the federal payment system.

Presently, fiscal administration is both centralized and polycentric, reflecting the executive branch's and federal government's fragmented yet entangled public payments architecture. The Treasury Department’s Bureau of Fiscal Services (“BFS”) serves as the central coordinating hub for federal monies,<sup>10</sup> with the Federal Reserve as its primary fiscal agent.<sup>11</sup>

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powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power ‘to make all laws which shall be necessary and proper for carrying into execution’ the other enumerated powers”).

<sup>7</sup> See, e.g., Mark Thomas, *The Overlooked Conundrums of Impoundment*, YALE J. REG. NOTICE & COMMENT BLOG, (Jan. 28, 2025),

<https://www.yalejreg.com/nc/the-overlooked-conundrums-of-impoundment-by-mark-thomas>.

<sup>8</sup> Among others, a coalition of State Attorneys General has challenged the administration in court, citing, inter alia, violation of separation of powers and Article II’s Take Care clause. *New York v. Trump*, 25 Civ. 1144 (JAV), 2025 WL 573771, at \*1 (S.D.N.Y. Feb. 21, 2025). See also Request for Emergency Temporary Restraining Order at 3, 7-8, *New York v. Trump*, --- F.Supp. --- (S.D.N.Y. 2025) (25-CV-01144 (JAV)). The lawsuit is in its early stages but appears destined for the Supreme Court.

<sup>9</sup> Thus far, Trump is adhering to the court’s temporary injunction, but it is unclear whether he will continue to do so given recent public comments. Jacob Knutson, *Musk, Trump Allies Use Impeachment Threats to Intimidate Federal Judges — What You Need To Know*, DEMOCRACY DOCKET, (Mar. 4, 2025),

<https://www.democracymarket.com/analysis/elon-musk-house-republicans-impeaching-judges-in-timidation> (discussing Trump’s attacks on the judiciary, including describing one federal judge as “evil” and demanding their resignation, and posting on social media that the “only way to restore rule of the people in America is to impeach judges.”).

<sup>10</sup> Under the Miscellaneous Receipts Act, established in 1849, government officials “receiving money for the Government from any source” are required to “deposit the money in the Treasury as soon as practicable” unless explicitly statutorily authorized. 31 U.S.C. § 3302(b). See also Gillian Metzger, *Taking Appropriations Seriously*, 121(4) COLUM. L. REV. 1075, 1088-9 (2021).

<sup>11</sup> See, e.g., Paula Hillery & Stephen Thompson, *The Federal Reserve Banks as Fiscal Agents and Depositories of the United States*, FED. RES. BANK BULLETIN (April 2000), <https://www.federalreserve.gov/pubs/bulletin/2000/0400lead.pdf>.

Simultaneously however, many departments, agencies, and public entities operate with some degree of budgetary autonomy,<sup>12</sup> including by conducting transactions directly with private actors.<sup>13</sup> The BFS, while overwhelmingly dominant, only processes 88% of federal payments.<sup>14</sup> Moreover, public entities regularly engage in intra-government transfers and parallel record-keeping, even while remaining part of the broader consolidated government.<sup>15</sup>

This “interior” legal, institutional, and technological infrastructure of the fisc is often ignored or downplayed in budget policy discussions, but it is critical to properly situating the fisc in the dollar digitization process, as well as ensuring future fiscal reforms strengthen rather than weaken the integrity of the constitutional order.

To that end, this Article proposes a wholesale technological reimagining of the fiscal administrative state; a ‘New Digital Fiscal Regime’ (“NDFR”). Under the NDFR, the House and Senate maintain records and accounts of public funds appropriated, drawn, held, spent, and collected across the government. Federal spending is administered directly at the agency level, with local budget data shared directly back to Congress on a continuous basis.

To spend, executive agents obtain spending authority in the form of a ‘Public Credit line’, recorded against the ‘Congressional Fiscal Record’—a bicameral digital database. Agents then ‘draw’ on this credit line up to statutorily determined qualitative and quantitative limits by using a ‘Public Credit Card,’ issued and administered by Congress. Funds are drawn through ‘Congress’s Treasury ATM’—a Congressionally managed, secure central server—and loaded onto local agency ‘ePurse’ devices, connected to each other and the public through a peer-to-peer federated network.

From there, agencies spend directly per statutory directives and limits, without risk of obstruction by the President or rest of the executive branch. Congress, in turn, maintains primary responsibility over central ledgers and databases, as well as legislative credit lines and the Congressional Treasury ATM server.

Restructuring the fisc along these lines reinforces the constitutional separation of powers in three ways. First, disintermediating the Treasury

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<sup>12</sup> See, e.g., OFF. OF LEGAL COUNS., DEP’T OF JUST., APPLICATION OF THE MISCELLANEOUS RECEIPTS ACT TO THE SETTLEMENT OF FALSE CLAIMS ACT SUITS CONCERNING CONTRACTS WITH THE GENERAL SERVICES ADMINISTRATION, 57 (Jan. 10, 2006), <https://www.justice.gov/opinion/file/786171/download> (noting the Veterans Affairs Medical Care Collections Fund is exempt from the general requirement to deposit all received funds with the Treasury).

<sup>13</sup> See *Treasury Disbursing Helps DoD*, U.S. DEP’T OF THE TSY. FISC. SERV., <https://fmvision.fiscal.treasury.gov/treasury-disbursing-helps-dod.html> (last visited Mar. 8, 2025).

<sup>14</sup> *What We Do*, BUREAU OF THE FISCAL SERVICE (2025), <https://fiscal.treasury.gov/about.html>.

<sup>15</sup> See e.g., OFF. OF GEN. COUNS., U.S. GOV’T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW—CHAPTER 2, at 2-25 (4th ed. 2016), <https://www.gao.gov/assets/gao-16-464sp.pdf> (comparing discretionarily appropriated funds, revolving funds, and non-appropriated fund instrumentalities).

Department and Federal Reserve from the public payments process reduces intra-executive branch entanglement and increases the cost and complexity of direct takeover of the federal government by an imperial president. Second, unbundling fiscal policy from public debt management by allowing agencies to directly spend newly created digital dollars increases their budgetary independence and practically empowers them to honor constitutional and statutory spending commitments over conflicting presidential directives. Third, streamlining the legislative budget process to resolve longstanding interpretive tensions between statutory spending directives and statutory delegations of financing authority enhances Congress's fine-grained control over executive spending while reducing the risk of it unintentionally causing constitutional fiscal crises.

Recently, U.S. lawmakers and legal scholars have begun to explore the possibility of the federal government issuing retail digital money directly.<sup>16</sup> Thus far, these debates have largely focused on central bank-issued digital currencies, while ignoring fiscal infrastructure.<sup>17</sup> But as recent events have underscored, digital public payments systems are also both small-c and large-C constitutional technologies.<sup>18</sup> Moreover, they are central to Congress's struggle to regain its constitutional dominion over fiscal affairs.

Conceived properly, dollar digitization offers a bridge to a more stable fiscal regime in which the respective functions, responsibilities, and relationships of the legislative, executive, and judicial branches are clearly defined and harmonized. More generally, in our currently fraying constitutional order, digital public money can play a vital part in a larger political project to revitalize a collective sense of shared identity and common public purpose.<sup>19</sup>

Lawmakers thus can and should look to digital dollarization for insights and opportunities to improve the separation of powers between Congress and the executive branch by architecturally embedding constitutional values and imperatives in ways not imaginable under previous technological conditions.

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<sup>16</sup> See, e.g., Lael Brainard, *CBDCs*, SPEECH GIVEN AT THE CONSENSUS BY COINDESK 2021 CONFERENCE, WASHINGTON D.C. (May 24, 2021), <https://www.federalreserve.gov/newsevents/speech/brainard20210524a.htm> (noting that central banks had “sharpened their focus” on CBDCs as a result of *inter alia*, concerns about financial exclusion and the “growing role of digital private money”).

<sup>17</sup> Except for narrow discussion of preserving fiscal-monetary policy separation and proposes for new universal cash transfer programs. See, e.g., *Central Bank Digital Currencies: Foundational Principles and Core Features*, JOINT BIS REPORT, 6 (Oct. 9, 2020), <https://www.bis.org/publ/othp33.htm> (discussing use of CBDC to facilitate COVID emergency relief payments, but noting the “risk of blurring the division between monetary and fiscal policy and a potential reduction in monetary policy independence”).

<sup>18</sup> See CHRISTINE DESAN, *DEMOCRACY MAKING MONEY: COIN, CURRENCY AND THE COMING OF CAPITALISM 1* (2014) (describing money as “a constitutional (small “c”) effort”); Metzger, *supra* note 9 at 1084 (arguing for the importance of appropriations law to separation of powers analysis).

<sup>19</sup> See generally JAKOB FEINIG, *MORAL ECONOMIES OF MONEY: POLITICS AND THE MONETARY CONSTITUTION OF SOCIETY* (2022) (tracing the evolving and contested role of monetary design, issuance, and regulation debates in the American constitutional and democratic traditions).

Addressing these challenges will require massive levels of technical capacity and political organizing effort. However, as recent events have demonstrated, the constitutional stakes could not be higher, and maintaining the status quo is no longer an option.

The remainder of the paper proceeds as follows. Part I analyzes the current constitutional fiscal crisis, focusing on its unique constitutional, political, and technological dimensions. It argues that Trump’s consolidation of both executive and fiscal power, particularly through targeting the core payments IT infrastructure of the government, represents an unprecedented constitutional attack against both Congress and the independent administrative state by the ‘unitary executive fisc’

Part II analyzes four fiscal institutions—the Treasury and the Federal Reserve, the Office of Management and Budget (“OMB”), and the legislative budget process—that function as sources of major constitutional weakness with respect to preserving the separation of fiscal powers between the legislative and executive branches. In particular, it argues that they all share or embody three characteristics that render them vulnerable to presidential compromise: high procedural entanglement, operational bottlenecks, and ambiguous and contradictory functions. Understanding these characteristics is necessary to appreciate the urgent need to develop and implement new digital dollar infrastructure that reflects and reinforces Congress’s constitutional authority over the creation, regulation, and spending of public money.

Part III offers an affirmative vision of the digital fisc—the New Deal Fiscal Regime, or “NDFR”—grounded in a ‘centralized legislature, decentralized executive’ design. In contrast to Trump’s vision of a ‘unitary executive fisc,’ in which all federal spending is conducted through a single administrative process under his direct control, the NDFR would reinforce the separation of powers and restabilize the constitutional order by reducing the possibility of unitary operational takeover through reducing entanglement and bottlenecks, streamlining operations, and reorienting core fiscal responsibilities back to the legislative branch.

## I. THE CURRENT FISCAL SEPARATION OF POWERS CRISIS

“A rotten tree trunk appears strong until the storm breaks it in two.”  
- Hari Seldon<sup>20</sup>

This Part explores the current constitutional fiscal crisis from three angles. First, it contextualizes and frames Trump’s consolidation of presidential power since returning to office through the lens of the ‘unitary executive fisc,’ a synthesis of two radical constitutional theories—the unitary executive and inherent presidential impoundment power—long advanced by the

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<sup>20</sup> *Foundation: Preparing to Live* (Apple+ television broadcast Sept. 24, 2021)

American legal right. Second, it examines Trump’s efforts to directly commandeer the Treasury’s centralized payments IT systems, and considers the implications of politicizing fiscal infrastructure for the future of the administrative state and constitutional separation of powers. Third, it considers the initial wave of litigation challenging Trump’s executive actions, and critically evaluates the limits of judicial defenses against presidential imperialism.

### A. The Unitary Executive Meets the Impoundment Power

“Trump Claims He Can Overrule Constitution With Executive Order Because Of Little-Known ‘No One Will Stop Me’ Loophole”

- The Onion (2018)<sup>21</sup>

President Trump’s second term has thus far been defined by the unprecedented expansion of presidential power at the expense of both Congress and the rest of the executive branch.<sup>22</sup> In little over a month, he has asserted and exercised authority to unilaterally interpret the law and set regulatory priorities across the entire federal government,<sup>23</sup> direct independent agency actions,<sup>24</sup> commandeer public infrastructure,<sup>25</sup> ignore administrative

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<sup>21</sup> *Trump Claims He Can Overrule Constitution With Executive Order Because Of Little-Known ‘No One Will Stop Me’ Loophole*, THE ONION (Oct. 20, 2018), <https://theonion.com/trump-claims-he-can-overrule-constitution-with-executiv-1830106306/>.

<sup>22</sup> *See, e.g.*, Steven Greenhouse, *Trump’s Disregard for US Constitution ‘A Blitzkrieg on the Law’*, *Legal Experts Say*, THE GUARDIAN (Feb. 1, 2025), <https://www.theguardian.com/us-news/2025/feb/01/trump-executive-orders-constitution-law> (quoting Berkeley Law dean Erwin Chemerinsky, “I cannot think of any president who has ever so ignored the constitution as extensively in the first 10 days of office as this”).

<sup>23</sup> The White House, *Fact Sheet: President Donald J. Trump Reins in Independent Agencies to Restore a Government That Answers to the American People* (Feb. 18, 2025), <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-reins-in-independent-agencies-to-restore-a-government-that-answers-to-the-american-people/> (“The Order notes that Article II of the U.S. Constitution vests all executive power in the President, meaning that *all* executive branch officials and employees are subject to his supervision.”).

<sup>24</sup> *See* Natalie Allison, Ann Marimow & Andrew Ackerman, *Trump Order Challenges Independence of FCC, FTC and Financial Regulator*, WASH. POST (Feb. 18, 2025), <https://www.washingtonpost.com/politics/2025/02/18/trump-executive-order-fcc-ftc-sec/> (“The [Order] states that only the president and the attorney general—‘subject to the President’s supervision and control’—can interpret law on behalf of the executive branch”).

<sup>25</sup> *See* Leah Feiger, *The GSA Plans to Sell Hundreds of Its Federal Government Buildings*, WIRED (Feb. 12, 2025), <https://www.wired.com/story/gsa-sell-government-buildings/> (detailing Trump’s plan to sell off 500-plus federal government buildings across the US”).



procedure,<sup>26</sup> and fire protected public workers and independent political officials at will.<sup>27</sup>

Trump's actions represent both the culmination and radical escalation of a decades-long campaign by the Republican party and American legal right to replace the fragmented and semi-autonomous Rooseveltian post-war administrative state with a centralized, politicized federal bureaucracy under direct presidential control.<sup>28</sup>

### *i) Unitary Executive Theory*

A major plank of the legal right's generational strategy, beyond securing electoral victories and appointing judges, has been the jurisprudential legitimization of expanding presidential power under an extreme constitutional framework called the 'unitary executive' theory.<sup>29</sup>

The unitary executive theory is premised on an ahistorical and idiosyncratic reading of Article II, which states that "the executive Power shall be vested in a President" who shall "take care that the laws be faithfully executed."<sup>30</sup> It argues that the President, as chief executive, enjoys final authority over both the interpretation and selective enforcement of the laws, within broad statutory boundaries established by Congress. This includes the

<sup>26</sup> See, e.g., Christina Gatti, *Trump's Executive Actions Are Getting Challenged as 'Arbitrary.' What Does That Mean?*, NAT. PUB. RADIO (Feb. 8, 2025), <https://www.npr.org/2025/02/08/g-s1-47098/trump-arbitrary-lawsuits-gender-executive-actions> (describing legal challenges to Trump's executive orders for violating the Administrative Procedure Act).

<sup>27</sup> See, e.g., Emily Davies, Jeff Stein & Hannah Natanson, *DOGE Barrels Toward a Fresh Round of Hirings, the Most Widespread Yet*, WASH. POST (Feb. 26, 2025), <https://www.washingtonpost.com/dc-md-va/2025/02/26/doge-federal-workforce-firings-job-cuts/> (describing impending plans for mass firings at the SSA); Lynn Rhinehart, *How Donald Trump Dismantled a Worker Protection Agency with One Late-Night E-Mail*, THE NATION (Feb. 19, 2025), <https://www.thenation.com/article/politics/trump-gwynne-wilcox-firing-nlr/> (discussing the attempted firing of NLRB Chair Gwynne Wilcox, whose position carries removal protection).

<sup>28</sup> Amanda Hollis-Bruski, *Barr Blames Lawyers for Undermining the President's Power. Actually, They Helped Build It*, WASH. POST (Nov. 18, 2019), <https://www.washingtonpost.com/politics/2019/11/18/attorney-general-barr-blames-lawyers-undermining-presidents-power-actually-they-helped-build-it/> (arguing the Federalist Society played a "critical, even indispensable role in growing . . . the "imperial presidency").

<sup>29</sup> *Id.* ("Unitary executive theory was . . . intellectually nurtured and developed by Federalist Society academics"); David Dreisen, *The Specter of Dictatorship and the Supreme Court's Embrace of Unitary Executive Theory*, AM. CONST. SOC. EXPERT FOR. (Jul. 21, 2021), <https://www.acslaw.org/expertforum/the-specter-of-dictatorship-and-the-supreme-courts-embrace-of-the-unitary-executive-theory/> (describing the judiciary's gradual embrace of unitary executive theory as a "pathway to autocracy"); Cass R. Sunstein, *This Theory Is Behind Trump's Power Grab*, N.Y. TIMES (Feb. 26, 2025), <https://www.nytimes.com/2025/02/26/opinion/trump-roberts-unitary-executive-theory.html> ("[T]he current [C]ourt . . . has yet to undertake the kind of radical revision of national institutions that would come from invalidating independent agencies.").

<sup>30</sup> U.S. CONST. art. II §§ 1, 3; Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 132 (2022) ("[T]he Founding generation never understood the unitary executive to be part of our Constitution.").

power to both direct and remove public officials across the entire federal government at will.<sup>31</sup>

Early efforts to constitutionally embed unitary executive theory focused on expanding the President’s removal authority, and inversely, limiting Congress’s ability to delegate executive powers to independent agencies not subject to presidential control.<sup>32</sup> More recently, proponents of the theory have sought to limit the fiscal autonomy of agencies not under the President’s direct budgetary supervision.<sup>33</sup>

President Trump is now close to fully realizing these efforts. He has asserted the inherent prerogative to appoint, direct, and fire at will all government officials and employees in the executive branch.<sup>34</sup> In addition, he has demanded the entire federal government obey his directives, as well as adopt and loyally enforce his singular interpretation of constitutional and federal law and regulation.<sup>35</sup>

Trump’s vision of a unified executive branch under the absolute control of a singular chief executive is radically at odds with the federal government’s long history of agency independence and bureaucratic professionalism.<sup>36</sup> Even more worryingly, it represents a rejection of Congress’s authority to determine

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<sup>31</sup> See *Seila L. LLC v. CFPB*, 591 U.S. 197 (2020) (holding the CFPB Director’s removal protection unconstitutional).

<sup>32</sup> See, e.g., *Myers v. United States*, 272 U.S. 52 (1926) (proposing that executive officers are the “alter ego” of the president). Recently, the legal right has opened a new constitutional front, arguing that statutory delegations of indefinite, broad, discretionary, off-budget funding authority to independent agencies violate the separation of powers implied by the Appropriations Clause. U.S. const. art. I § 9 cl. 1 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”). In 2024, the Supreme Court rebuffed the argument in *CFPB v. Community Financial Services Association of America* (“Community Financial”), holding that the Appropriations Clause established procedural, rather than substantive limits on legislative delegations of spending authority. 601 U.S. 406, 416 (2024). At the same time, it left the larger separation of fiscal powers issue unaddressed, instead merely noting that “there may be other constitutional checks on Congress’ authority to create and fund an administrative agency,” beyond the Appropriations Clause. *Id.* at 441.

<sup>33</sup> See *Community Financial Services Association of America v. CFPB*, 51 F.4th 616 (5th Cir. 2022) (holding the CFPB’s funding scheme unconstitutional).

<sup>34</sup> *Wilcox v. Trump*, No. 25-334, 2025 U.S. Dist. LEXIS 40651\*48 (D. D.C. 2025) (“An American President is not a king—not even an ‘elected’ one—and his power to remove federal officers . . . but may be constrained”).

<sup>35</sup> See Natalie Allison, Ann E. Marimow & Andrew Ackerman, *Trump Order Challenges Independence of FCC, FTC and Financial Regulator*, WASH. POST (Feb. 18, 2025), <https://www.washingtonpost.com/politics/2025/02/18/trump-executive-order-fcc-ftc-sec/> (“The new [executive] order . . . states that only the president and the attorney general—‘subject to the President’s supervision and control’—will interpret law on behalf of the executive branch, blocking independent federal agencies from adopting legal interpretations that are at odds with the Trump White House”).

<sup>36</sup> Chabot, *supra* note 31, at 133. See also Christine Kexel Chabot, *The Founder’s Purse*, 110(5) VIR. L. REV. 1027 (2024) (discussing the uniquely independent budgetary and governance structure of the Founding-era Sinking Fund Commission, established to stabilize the price and liquidity of public debt); *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, NOTRE DAME L. REV. 1 (2020) (same).

the means and mechanisms through which its constitutional powers are exercised.<sup>37</sup>

*ii) Impoundment*

At the same time, Trump has gone far beyond the traditional unitary executive playbook by taking aim at the operational levers of the public fisc itself.<sup>38</sup> Within hours of his inauguration on January 20th, 2025, President Trump signed a series of executive orders that, *inter alia*, directed federal agencies and departments to pause all funding streams deemed inconsistent with the incoming administration’s policy agenda.<sup>39</sup> On January 27th, 2025, Trump’s acting director of the Office of Management and Budget (OMB) issued a follow-up memorandum, temporarily freezing all disbursements to federal financial assistance programs implicated by the earlier executive orders, pending an internal review to “determine the best uses of the funding for those programs consistent with the law and the President’s priorities.”<sup>40</sup>

The next day, a non-profit consortium led by Democracy Forward filed a federal lawsuit (the “Nonprofits Suit”) in Washington D.C., arguing that the OMB memo violated the First Amendment and the Administrative Procedure Act.<sup>41</sup> In response, Judge Loren AliKhan of the U.S. District Court for the District of Columbia immediately issued an administrative stay, rescinding the

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<sup>37</sup> Cf. Julian Mortensen, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1334 (2020) (describing “the exercise of executive power” as “fully subordinate to instructions by its legislative principal”).

<sup>38</sup> See Vicki Divol, *Transcript: Eight Things I Hate About the Unitary Executive Theory*, 38 VERMONT L. REV. 147, 152 (2013) (Dividing unitary executive advocates between the Reagan-era faction, who narrowly focus on the removal power, and Bush-era faction, whose more expansive interpretation implicates, *inter alia*, the President’s foreign policy powers); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 429 (2008) (citing President Nixon’s impoundment argument as an example of “inherent executive powers to authorize emergency acts” while noting “aside from the power to remove and direct, the theory of the unitary executive is ultimately agnostic about the question of the scope of executive power.”); Cf. Phillip Hamburger, *How Washington Can Finally Get Back to Fiscal Sanity*, CITY J. (Jan. 20, 2025), <https://www.city-journal.org/article/trump-spending-cuts-budget-fiscal-responsibility> (a “shift in fiscal direction...will have to be secured in constitutional structure, not just in personalities”).

<sup>39</sup> See, e.g., Exec. Order No. 14151, 90 Fed. Reg. 8339, 8339 (Jan. 20, 2025) (terminating all “equity-related” grants).

<sup>40</sup> OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMO M-25-13 (Jan. 27, 2025). An earlier OMB memo directed executive agencies to stop disbursing funds pursuant to the Inflation Reduction Act of 2022 and the Infrastructure Investment and Jobs Act. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMO M-25-11 (Jan. 21, 2025). Both were followed by a third memo directing the heads of executive departments and agencies to review all funding for Nongovernmental Organizations (NGOs) and “align future funding decisions with the interests of the United States and with the goals and priorities of my Administration.” THE WHITE HOUSE, *Memorandum For The Heads Of Executive Departments And Agencies* (Feb. 6, 2025), <https://www.whitehouse.gov/presidential-actions/2025/02/memorandum-for-the-heads-of-executive-departments-and-agencies/>.

<sup>41</sup> Complaint at 15–18, *Nat’l Council Nonprofits v. Off. Mgmt. & Budget*, No. 00239 (D.D.C. Jan. 28, 2025).

OMB memo only minutes before it went into effect.<sup>42</sup> Separately that day, a consortium of state Attorneys-General also filed a lawsuit (the “State AG Suit”) in Rhode Island, arguing that the President’s funding freeze unconstitutionally violated the separation of powers, as well as the Take Care, Appropriations, Spending and Presentment clauses.<sup>43</sup>

On January 29th, the OMB rescinded its memo—only two days after its release. However, the Trump administration quickly clarified that the underlying spending freeze established by the President’s executive orders remained in effect, and that the purpose of rescinding the memo was merely to “end any confusion created by the [D.C.] court’s injunction.”<sup>44</sup>

On February 25th, Judge Alikhan replaced an earlier temporary order with a preliminary injunction, preventing the OMB from implementing or “reinstating under a different name” its earlier “unilateral, non-individualized directives...with respect to the disbursement of federal funds under all open awards.”<sup>45</sup> In her accompanying decision, Judge Alikhan described the OMB’s directives as “breathtaking” in scope, with “massive” ramifications that extended well beyond the “everyday exercise of federal power.”<sup>46</sup> She further held that the OMB’s statutory authority was limited to “monitor[ing] the financial execution of the budget in relation to actual expenditures,” and that expanding its authority to including actively determining whether or not the U.S. government spent up to \$3 trillion in federal assistance likely violated the so-called ‘Major Questions Doctrine.’<sup>47</sup>

On March 6th, Judge McConnell also granted his own preliminary injunction in the State AG Suit.<sup>48</sup> In the decision, he noted that President Trump’s actions “fundamentally undermin[e] the distinct constitutional roles of each branch of our government.”<sup>49</sup> Going further, Judge McConnell observed that “[t]he interaction of the three co-equal branches of government is an intricate, delicate, and sophisticated balance,” and found that Trump’s actions had “put itself above Congress” by “impos[ing] a categorical mandate on the spending of congressionally appropriated and obligated funds without regard to Congress’s authority to control spending.”<sup>50</sup>

Both orders, however, still preserve agencies’ ability to individually cut spending in accordance with existing legal statutory authority, provided

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<sup>42</sup> Order at 4–5, *Nat’l Council Nonprofits v. Off. Mgmt. & Budget*, No. 00239 (D.D.C. Jan. 28, 2025).

<sup>43</sup> Complaint at 28–35, *New York v. Trump*, No. 00039 (D.R.I. Jan. 28, 2025).

<sup>44</sup> Karoline Leavitt (@PressSec), X (Jan. 29, 2025), <https://x.com/PressSec/status/1884672871944901034>.

<sup>45</sup> Order at 1, *Nat’l Council Nonprofits v. Off. Mgmt. & Budget*, No. 00239 (D.D.C. Feb. 25, 2025).

<sup>46</sup> Memorandum Opinion at 33, *Nat’l Council Nonprofits v. Off. Mgmt. & Budget*, No. 00239 (D.D.C. Feb. 25, 2025) (quotations omitted).

<sup>47</sup> *Id.* at 32.

<sup>48</sup> Memorandum Opinion and Order at 1, *New York v. Trump*, No. 00039 (D.R.I. March 6, 2025).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

they follow proper process and do so on the ostensible basis of their own discretion, rather than in response to the President’s executive orders or the OMB’s directives. This opening, in turn, has allowed the Trump administration to keep indirectly pushing for broad spending cuts by pressuring agency heads, as well as expansively interpreting existing statutory delegations of discretionary spending authority.<sup>51</sup>

Although many previous presidents have used discretionary adjustments in executive budget allocations to express political priorities, President Trump is the first since Nixon to assert the inherent constitutional prerogative to “impound” funds—unilaterally stop Congressionally mandated spending.<sup>52</sup> Indeed, he has gone even further, arguing that Article II’s “Take Care” clause affords him final discretion over the enforcement of all laws directing the spending of appropriated funds.<sup>53</sup>

In doing so, he rejects the constitutionality of the Anti-Impoundment and Control Act of 1974,<sup>54</sup> which established specific limits and procedural conditions on executive impoundment after President Nixon used it to defy Congress and deny funding to programs for communities he politically opposed.<sup>55</sup> He also rejects the Supreme Court’s long, unbroken history of upholding the constitutional duty of the executive branch to spend public money in accordance with Congressional directives.<sup>56</sup>

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<sup>51</sup> See Memorandum Opinion and Order at 17, *Nat’l Council Nonprofits v. Off. Mgmt. & Budget*, No. 00239 (D.D.C. Feb. 3, 2025) (“[T]he court is not persuaded that the continuing freezes are solely due to independent agency action”).

<sup>52</sup> Julian Zeilzer, *The Dangers of President Impoundment*, FOREIGN POL. (Feb. 16, 2025), <https://foreignpolicy.com/2025/02/16/presidential-impoundment-trump-nixon-history> (noting that prior to Nixon, impoundment was not based on a general claim to constitutional power, but instead rooted in statutes or the President’s military authority. Consequently, it remained “within the framework of predominant congressional intent,” and was “controlled by the give-and-take of the political process,” such that “[i]f Congress made enough of an outcry, Presidents released the funds”).

<sup>53</sup> See, e.g., Paul M. Krawzak, *Trump Says He’ll Restore Presidential Impoundment Authority*, ROLL CALL (June 20, 2023), <https://rollcall.com/2023/06/20/trump-says-hell-restore-presidential-impoundment-authority/> (noting Trump’s campaign promise to do “everything [he] can” to challenge the Impoundment Act in court and/or via legislation”).

<sup>54</sup> *Id.*

<sup>55</sup> See Pub. L. No 92-344, 88 Stat. 297; Zeilzer, *supra* note 39; *Protecting Congress’s Power of the Purse and the Rule of Law: Before the H. Budget Comm.* (2020) (statement of Josh Chafetz) (noting the Act “created [new] counterweights to executive-branch budgetary authority[,] understood as congressional capacity-building meant to blunt some of the executive advantage in budgeting, such that, post-1974 . . . the White House [no longer] dominates the budget process”).

<sup>56</sup> See, e.g., *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); Rohan Grey, *Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy*, 109 KY. L.J. 229, 240–41 (2020–2021).

*iii) The Unitary Executive Fisc*

In addition to enacting broad spending cuts via impoundment, Trump has also unilaterally imposed the “largest [foreign] tariffs in modern history,”<sup>57</sup> articulated an industry-friendly financial regulatory agenda,<sup>58</sup> and taken steps toward establishing a sovereign wealth fund and strategic cryptocurrency reserve.<sup>59</sup> In doing so, he has asserted the constitutional prerogative to not just spend and freeze funds, but also to invest, reallocate, collect, and regulate public money in accordance with his own policy priorities, subject only to broadly defined legislative outer limits.

Viewed together, Trump’s agenda is even more radical holistically than the sum of its parts.<sup>60</sup> By combining an extreme interpretation of his chief executive powers with an equally extreme interpretation of his discretionary budgetary powers, he is rapidly shifting the gravity of the entire constitutional order away from both Congress and the administrative state and toward the unitary presidency.

Notably, Trump asserts the prerogative to not only discretionarily wield the levers of the public purse, but to unilaterally reshape the economy in accordance with his own personal whims. In this respect, his vision of a ‘unitary executive fisc’—which treats monetary and fiscal institutions as direct extensions of his own political authority<sup>61</sup>—ironically resembles most closely that of a pre-parliamentary, absolute monarch.

If fully realized, Trump’s vision would wholly undermine the constitutional separation of powers by granting the president open-ended discretionary budget authority, as well as final veto over all and executive branch spending. At the same time, it would fundamentally alter the fiscal

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<sup>57</sup> Joey Politano (@JosephPolitano), X (Mar. 4, 2025, 10:00AM), <https://x.com/JosephPolitano/status/1896984027086905486>. Several acts of Congress throughout the 20th century granted the executive branch greater authority over tariffs than domestic taxes, though the specifics vary. *See e.g.*, Adam Looney & Elana Patel, *Why Does the Executive Branch Have so Much Power over Tariffs?*, BROOKINGS INST., (Jan. 15, 2025), <https://www.brookings.edu/articles/why-does-the-executive-branch-have-so-much-power-over-tariffs>.

<sup>58</sup> *See, e.g.*, The Editorial Board, *Trump’s Reckless Experiment with Financial Deregulation*, FIN. TIMES (Feb. 17, 2025), <https://on.ft.com/3EXDKnB> (noting that Trump’s financial regulatory agency leadership nominations “poin[t] to deregulation for its own sake”).

<sup>59</sup> *See, e.g.*, Trevor Hunnicutt & Pete Schroeder, *Trump Orders Creation of US Sovereign Wealth Fund, Says It Could Buy TikTok*, REUTERS (Feb. 4, 2025), <https://www.reuters.com/markets/wealth/trump-signs-executive-order-create-sovereign-wealth-fund-2025-02-03/> (“Administration officials did not say how the [sovereign wealth] fund would operate or be financed, but Trump has previously said it could be funded by ‘tariffs and other intelligent things’”).

<sup>60</sup> In sum, this includes granting the President taxing, spending, and financing tools, including impoundment powers, tariffs, an income-generating sovereign wealth fund, and low-interest rate financing from a subordinate Federal Reserve.

<sup>61</sup> Ty Roush, Donald Trump Launches \$TRUMP Meme Coin—Token Hits \$9 Billion Market Cap, FORBES (Jan. 19, 2025), <https://www.forbes.com/sites/tyleroush/2025/01/19/donald-trump-launches-trump-meme-coin-token-exceeds-12-billion-market-cap>.

profile of the United States, and in doing so potentially threaten the broader stability of the U.S. dollar-based global regime.<sup>62</sup>

Opposing further presidential consolidation of fiscal power is thus critical to preserving both constitutional order and broader socio-economic stability. At the same time, as discussed further in the next section, the crisis underscores the central importance of fiscal architecture in the larger struggle to defend Congress's powers from executive takeover.<sup>63</sup>

## B. Hacking The Public Purse

“Watch closely as Grandpa topples an empire by changing a one to a zero.”

- Rick Sanchez<sup>64</sup>

President Trump's fiscal power grab is unique not only in terms of its scale of vision, but in the form, speed, breadth, and extremity of actions undertaken to enact it.<sup>65</sup> Most notably, he has taken the unprecedented step of bypassing the traditional executive branch chain-of-command by assuming direct operational control of the centralized accounting and IT infrastructure relied upon by the majority of the federal government.<sup>66</sup> In doing so, he has upended the legal and political dynamics of federal fiscal policymaking.

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<sup>62</sup> Harriet Clarfelt, *Amundi CIO Says Donald Trump's Move to Rein in Regulators Is a 'Big Mistake'*, FIN. TIMES (Feb. 23, 2025), <https://on.ft.com/4kgEzrG> (“the US dollar status is . . . [linked to] . . . trust in the US system, in the Fed, in the US economy. If you think checks and balances are weaker . . . you can start to lose . . . trust”).

<sup>63</sup> See Nathan Tankus, *Special Notice: DOGE Is Now Going After the IRS Which Means I Need Former and Current IRS Sources, Especially COBOL Programmers*, NOTES ON THE CRISES (Feb. 18, 2025), <https://www.crisisnotes.com/special-notice-doge-is-now-going-after-the-irs-which-means-i-need-former-and-current-irs-sources-especially-cobol-programmers/> (noting the escalation of Presidential takeovers of agency-level IT systems, including the Internal Revenue Service's taxing infrastructure).

<sup>64</sup> *Rick & Morty: The Rickshank Redemption* (Adult Swim television broadcast Apr. 1, 2017).

<sup>65</sup> See Charlie Savage, *Trump Team Finds Loophole to Defy Spirit of Court Orders Blocking Spending Freezes*, N.Y. TIMES (Feb. 19, 2025), <https://www.nytimes.com/2025/02/19/us/politics/trump-foreign-aid-freeze.html> (“In short, critics say, administration officials are paying lip service to complying with the letter of the court orders while violating their spirit. The tactic shows how aggressively and nimbly the Trump administration is working to keep funds jammed up and the complexity judges face...”).

<sup>66</sup> See Bruce Schneier & Davl Ottenheimer, *DOGE is Hacking America*, FOR. POL. (Feb. 11, 2025), <https://foreignpolicy.com/2025/02/11/doge-cyberattack-united-states-treasury> (describing Trump's operational assault on the BFS as possibly “the most consequential security breach in [American] history—not through a sophisticated cyberattack or an act of foreign espionage, but through official orders by a billionaire with a poorly defined government role,” and describing the situation as unprecedented in not “just the scope, but also the method of attack”).

*i) DOGE*

On January 20th, Trump signed an executive order renaming the U.S. Digital Service the U.S. DOGE Service (DOGE),<sup>67</sup> and relocating it from the Office of Management and Budget (OMB) to the Executive Office of the President under the informal direction of close Trump advisor, Elon Musk.<sup>68</sup> The order directed the office to undertake a comprehensive “Software Modernization Initiative” to “improve the quality and efficiency of government-wide software, network infrastructure, and information technology (IT) systems.”<sup>69</sup> It also directed agencies to take “all necessary steps” to provide DOGE with “full and prompt access” to relevant records, software and IT systems.<sup>70</sup>

Since then, Musk and DOGE have stayed at the forefront of the political news cycle, thanks to a combination of high-profile incursions into the IT systems of dozens of federal agencies,<sup>71</sup> disruptive policy stunts,<sup>72</sup> dramatic

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<sup>67</sup> Dominick A. Fiorentino & Clinton T. Brass, CONG. RSCH. SERV., IN12493, *Department of Government Efficiency (DOGE) Executive Order: Early Implementation* (2024); see also Complaint for Declaratory and Injunctive Relief at 12, *New Mexico v. Trump*, No. 00429 (Feb. 13, 2025) (noting Trump’s campaign pledge to establish DOGE as a ‘Manhattan Project’ for the federal government to ‘pave the way’ to ‘dismantle Government Bureaucracy, slash excess regulations, cut wasteful expenditures, and restructure Federal Agencies’”).

<sup>68</sup> But see Martha Coven & Bridget Dooling, *Spending, Regulations and DOGE: OMB Director Has Vital Role*, THE CONVERSATION (Jan. 15, 2025), <https://theconversation.com/spending-regulations-and-doge-office-of-management-and-budget-director-plays-vital-role-helping-government-get-stuff-done-246406> (describing necessary coordination between DOGE and OMB).

<sup>69</sup> EXEC. ORDER NO. 14158, 90 Fed. Reg. 8441, 8442 (Jan. 20, 2025). This includes “promot[ing] inter-operability between agency networks and systems, ensure data integrity, and facilitate responsible data collection and synchronization. *Id.* But see Aatish Bhatia et al, *DOGE’s Only Public Ledger Is Riddled With Mistakes*, N.Y. TIMES (Feb. 21, 2025), <https://www.nytimes.com/2025/02/21/upshot/doge-musk-trump-errors.html> (describing DOGE math as “slapdash” and “marred with accounting errors, incorrect assumptions, outdated data and other mistakes”).

<sup>70</sup> E.O. 14158, *supra* note 67. The order also directed agencies to establish internal teams, selected in consultation with the DOGE administrator, to coordinate with the DOGE office and advise agency heads on “implementing the President’s DOGE Agenda.” *Id.* at 8441.

<sup>71</sup> See, e.g., Makena Kelly, *DOGE Is Now Inside the Consumer Financial Protection Bureau*, WIRED (Feb. 7, 2025),

<https://www.wired.com/story/doge-access-consumer-financial-protection-bureau-data/> (detailing DOGE staffer access at the CFPB). Since then, President Trump has signed two additional orders on February 11 and 19 granting DOGE additional powers over the federal workforce and the determination of agency regulatory priorities, respectively. See EXEC. ORDER NO. 14210, 90 Fed. Reg. 9669, 9669 (Feb. 11, 2025); EXEC. ORDER NO. 14219, 90 Fed. Reg. 10583, 10583–84 (Feb. 21, 2025).

<sup>72</sup> See, e.g., Paulina Smolinsky, *DOGE’s Elon Musk Says Federal Employees Must Document Their Work or Resign; Some Agencies Push Back*, CBS NEWS (Feb. 24, 2025), <https://www.cbsnews.com/news/elon-musk-doge-federal-employees-document-work-resign/> (describing a February 23rd ultimatum given by Musk to federal workers: Reply to an email from OPM with five accomplishments from the last week or be forced to resign). *Id.*



and misleading media statements,<sup>73</sup> and legal challenges.<sup>74</sup> Along the way they have, among other ‘accomplishments,’ frozen hundreds of millions in research contracts and foreign financial assistance,<sup>75</sup> and fired or bought out tens of thousands of federal employees.<sup>76</sup>

*ii) The Bureau of the Fiscal Service*

Perhaps most shockingly, Musk and DOGE immediately set their sights on the IT systems of the Treasury Department’s Bureau of the Fiscal Service (BFS), responsible for managing payments on behalf of approximately eighty-eight percent of the federal government.<sup>77</sup> On January 24th, Daniel Katz, the Chief of Staff to incoming Treasury Secretary Scott Bessent, sent an email to senior Treasury officials requesting that Tom Krause, a “longtime technology executive” and “special government employee” serving as the DOGE affiliate to the Treasury, be granted access to the BFS payments systems for the purpose of suspending USAID grants and other “potentially programmatic payments” en masse, pending programmatic review by the administration.<sup>78</sup>

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<sup>73</sup> See, e.g., Elon Musk (@elonmusk), X (Feb 17, 2025) (“Who is confirming that gold wasn’t stolen from Fort Knox? Maybe it’s there, maybe it’s not”).

<sup>74</sup> On February 13th, twenty-six unnamed current and former federal employees filed a lawsuit in the U.S. District Court of Maryland alleging the creation of DOGE violated the Appointments clause and separation of powers. See Complaint for Declaratory and Injunctive Relief at 40–43, *Does 1–26 v. Musk et al.*, No. 00462 (D. Md. Feb. 13, 2025). That same day, another similar lawsuit was filed in Washington, D.C. by a consortium of fourteen state Attorneys-General. See Complaint for Declaratory and Injunctive Relief at 1, *New Mexico v. Trump*, No. 00429 (Feb. 13, 2025).

<sup>75</sup> See Department of Government Efficiency (@DOGE), X (Feb. 10, 2025), <https://x.com/DOGE/status/1889113011282907434> (“Also today, the Department of Education terminated 89 contracts worth \$881mm.”). For a full list of agencies subject to cuts, see Claire Dickey, *Full List of DOGE Spending Cuts as Trump Marks One Month into Presidency*, NEWSWEEK (Feb. 21, 2025), <https://www.newsweek.com/doge-spending-cuts-findings-one-month-trump-administration-2034150>.

<sup>76</sup> See Laurel Wamsley, *New CFPB Chief Closes Headquarters, Tells All Staff They Must Not Do ‘Any Work Tasks’*, NAT. PUB. RADIO (Feb. 10, 2025), <https://www.npr.org/2025/02/08/nx-s1-5290914/russell-vought-cfpb-doge-access-musk>. <https://www.democracymarket.com/news-alerts/new-filing-could-force-doge-to-reveal-how-it-operates-within-government>.

<sup>77</sup> Nathan Tankus, *Elon Musk Wants to Get Operational Control of the Treasury’s Payment System. This Could Not Possibly be More Dangerous*, NOTES ON THE CRISES (Feb. 3, 2025), <https://www.crisisnotes.com/elon-musk-wants-to-get-operational-control-of-the-treasurys-payment-system-this-could-not-possibly-be-more-dangerous>. The Trump transition team “puzzled many career officials” by inquiring into “granular details about the bureau’s proprietary computer systems, including ‘each step in the disbursement process.’” Katelyn Polantz, Phil Mattingly & Tierney Sneed, *How an Arcane Treasury Department Office Became Ground Zero in the War Over Federal Spending*, CNN (Feb. 1, 2025), <https://www.cnn.com/2025/01/31/politics/doge-treasury-department-federal-spending?>

<sup>78</sup> *Letter from Jonathan Blum, Principal Deputy Assistant Sec’y, U.S. Dep’t of the Treasury, to Sen. Elizabeth Warren* (Feb. 4, 2025), [https://www.banking.senate.gov/imo/media/doc/treasury\\_response.pdf](https://www.banking.senate.gov/imo/media/doc/treasury_response.pdf).

The proposal was immediately challenged by David Lebryk, then the highest ranked civil servant in the Treasury Department,<sup>79</sup> who expressed concern that the Treasury lacked the authority to refuse to process agency payments, and that doing so could expose Treasury officials to legal liability.<sup>80</sup> In response, Krause intimated that Lebryk could face personal legal liability if he failed to comply, prompting Lebryk to resign on January 31st.<sup>81</sup> That same day, Secretary Bessent directed the Treasury to grant the DOGE team “full access” to its payments systems.<sup>82</sup>

At the time, Bessent repeatedly and publicly stated that the purpose of granting DOGE access was not to suspend payments to other agencies, but to conduct an “operational efficiency assessment,” similar to previous internal audits.<sup>83</sup> These claims were later contradicted by sworn statements from both Krause and the Deputy Assistant Commissioner for Federal Disbursement—responsible for processing foreign payments—who stated that the Trump administration had directed DOGE and BFS to “help agencies effectuate the President’s Executive Orders [by] requiring pauses to certain types of foreign transactions, including with respect to foreign development assistance.”<sup>84</sup>

In addition, Secretary Bessent also claimed that DOGE’s Treasury payments systems access would be limited to “read-only” privileges granted directly to Krause.<sup>85</sup> Subsequent investigative reporting, however, revealed that the Treasury temporarily granted both read and write access to another DOGE employee, 25-year old programmer Marko Elez.<sup>86</sup>

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<sup>79</sup> See Nilutpal Timsina & Susan Heavey, *Senior US Treasury Official to Exit After Rift with Musk Allies, Report Says*, REUTERS (Jan. 31, 2025), <https://www.reuters.com/world/us/senior-us-treasury-official-david-lebryk-leave-agency-soon-wapo-reports-2025-01-31/> (“David Lebryk, the top-ranking career U.S. Treasury Department official, will leave following a clash with allies of billionaire and Trump adviser Elon Musk over payment system access, the Washington Post reported on Friday.”).

<sup>80</sup> Katelyn Poltanz & Phil Mattingly, *Musk Associates Sought to Use Critical Treasury Payment System to Shut Down USAID Spending, Emails Show*, CNN (Feb. 6, 2025), <https://edition.cnn.com/2025/02/06/politics/elon-musk-treasury-department-payment-system/index.html> (“Lebryk suggested a ‘legally less risky approach’ would be for the State Department, which oversees USAID, to rescind the payments itself and examine whether they complied with President Donald Trump’s Inauguration Day executive order freezing foreign development aid.”).

<sup>81</sup> *Id.*

<sup>82</sup> Andrew Duehren, Maggie Haberman, Theodore Schleifer & Alan Rappeport, *Elon Musk’s Team Now Has Access to Treasury’s Payment System*, N.Y. TIMES, (Feb. 1, 2025), <https://www.nytimes.com/2025/02/01/us/politics/elon-musk-doge-federal-payments-system.htm>.

<sup>83</sup> U.S. Dep’t of the Treasury, Treasury Department Letter to Members of Congress Regarding Payments Systems (Feb. 4, 2025), <https://home.treasury.gov/news/press-releases/sb0009>.

<sup>84</sup> Letter from Sens. Elizabeth Warren, Ron Wyden, Jack White, U.S. Sen., to Sec. Scott Bessent, Dep’t. of Treas. (Feb. 12, 2025), [https://www.banking.senate.gov/imo/media/doc/bessent\\_letter\\_on\\_doge.pdf](https://www.banking.senate.gov/imo/media/doc/bessent_letter_on_doge.pdf)

<sup>85</sup> Michael Stratford, Sam Sutton & Holly Otterbein, *Trump Administration Gives Musk Allies Access to Treasury Payment System*, POLITICO (Feb. 1, 2025), <https://www.politico.com/news/2025/02/01/musk-claims-doge-lax-treasury-00201946>.

<sup>86</sup> Nathan Tankus, *Day Five Of The Trump-Musk Treasury Payments Crisis of 2025: Not “Read Only” Access Anymore*, NOTES ON THE CRISES (Feb. 4, 2025),

### iii) Initial Reactions

On February 3rd, a consortium of public sector unions filed a complaint in the U.S. District Court for the District of Columbia, arguing that the granting of DOGE access to the Treasury’s payments IT system violated the Administrative Procedure Act, and impermissibly placed sensitive private data at risk.<sup>87</sup> On February 6th, U.S. District Judge Colleen Kollar-Kotelly filed a consent order, limiting Krause and Elez to ‘read’ access, and preventing further payment system access by non-Treasury officials, including “Special Government Employees.”<sup>88</sup> On February 20th, Judge Kollar-Kotelly modified her earlier consent order in the D.C. lawsuit to expand its access prohibitions to include “Treasury DOGE Team members.”<sup>89</sup>

Separately, on February 6th a consortium of nineteen states led by New York filed a lawsuit in the Southern District of New York, seeking an emergency restraining order preventing further Trump administration access to the BFS payments system. In addition to alleging statutory and procedural violations, the plaintiffs argued that the Trump administration’s actions violated Article II’s “Take Care” clause, as well as the separation of powers doctrine under which legislative functions are vested in Congress, not the executive branch.<sup>90</sup>

On February 7th, Krause was reassigned from the DOGE office in the White House to the Treasury Department, while remaining classified as a “Special Government Employee.” In that capacity, he was assigned the interim

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<https://www.crisisnotes.com/day-five-of-the-trump-musk-treasury-payments-crisis-of-2025-not-read-only-access-anymore>. Elez subsequently resigned, ostensibly due to journalists uncovering his racist internet posts, before subsequently being rehired and sent instead to work with the DOGE team at the Social Security Administration. It was rumored that he was rehired after a public show of support from Vice President J.D. Vance. Holly Honderich, *Musk To Rehire Doge Aide Who Resigned Over Racist Posts*, BBC NEWS (Feb. 7, 2025),

<https://www.bbc.com/news/articles/c93q625y04wo>. However, there are good reasons to doubt both the stated reasons for Elez’s firing and the likelihood that he would be rehired. See Nathan Tankus, *Day Eleven Of The Trump-Musk Treasury Payments Crisis of 2025: Marko Elez’s Resignation, Return and Irrelevance*, NOTES ON THE CRISES (Feb. 10, 2025),

<https://www.crisisnotes.com/day-eleven-of-the-trump-musk-treasury-payments-crisis-of-2025-marko-elezs-resignation-return-and-irrelevance/> (expressing skepticism about both claims).

<sup>87</sup> Complaint for Declaratory and Injunctive Relief at 15–18, *All. for Retired Ams. v. Bessent*, No. 25-0313 (D.D.C. Feb. 3, 2025).

<sup>88</sup> Order at 1–2, *All. for Retired Ams. v. Bessent*, No. 25-0313 (D.D.C. Feb. 6, 2025).

<sup>89</sup> Order at 2, *All. for Retired Ams. v. Bessent*, No. 25-0313 (D.D.C. Feb. 20, 2025) Because Elez resigned, the modified order named Treasury employee Ryan Wunderly as an individual who would have “read only” access instead of Elez.

<sup>90</sup> Complaint for Declaratory and Injunctive Relief at 46–55, *State of New York v. Donald Trump*, No. 25-CV-1144 (S.D.N.Y. Feb. 7, 2025). House Education and Labor Committee Ranking Member Bobby Scott also wrote to request the Government Accountability Office review the IT systems of the cabinet departments under the committee’s purview, describing a “void of oversight for a very young and inexperienced team.” Letter from Rep. Bobby Scott, Ranking Member U.S. House of Reps. Comm. on Educ. and Workforce, to Gene Dodaro, Compt. General of the U.S. (Feb. 6, 2025),

[https://democrats-edworkforce.house.gov/imo/media/doc/scott\\_letter\\_to\\_gao\\_re\\_doge\\_access\\_to\\_agency\\_data.pdf](https://democrats-edworkforce.house.gov/imo/media/doc/scott_letter_to_gao_re_doge_access_to_agency_data.pdf).

duties of Assistant Fiscal Secretary—David Lebryk’s former position—which include overseeing the BFS payments systems, Treasury debt management, and other fiscal operational infrastructure.

On February 8th, Judge Paul Englemayer responded by issuing a temporary restraining order, prohibiting further BFS systems access by non-Treasury employees, Special Government Employees, and controversially, “all political appointees,” including the Treasury Secretary.<sup>91</sup> The Trump administration immediately challenged the latter part of the order on the grounds that it impermissibly restricted Treasury officers, and by extension, the President, from overseeing the department’s executive functions.<sup>92</sup>

On February 11th, Judge Jeanette Vargas—taking over from Judge Englemayer—modified the temporary order to permit Treasury officers appointed through the Article II appointments process to access the BFS’s payments systems.<sup>93</sup> On February 21st, she issued a superseding preliminary injunction that limited restrictions on BFS payments systems access only to DOGE affiliates, including members of the “DOGE Team established at the Treasury Department.”<sup>94</sup> In addition, the injunction directed the Treasury to establish training, vetting, and clear legal accountability processes for DOGE employees seeking future systems access.<sup>95</sup>

Presently, both lawsuits continue to work their way through the district courts. In the meantime, the precise limits of the judiciary’s current restrictions on BFS system access remain unclear. In particular, Judge Vargas’s injunction treats Krause as part of the Treasury’s “DOGE team,”<sup>96</sup> and thus excludes him from ongoing payments system access pending BFS’s establishment of

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<sup>91</sup> Order at 2–4, *State of New York v. Donald Trump*, 25 Civ. 1144 (S.D.N.Y. Feb. 8, 2025) (restraining defendants from Treasury system access). Early in the morning on February 9th, Elon Musk called for the impeachment of District Court Judge Paul Englemayer for ordering the temporary restraining order. Ian Swanson, *Musk Calls for Impeachment of Judge Who Blocked DOGE Access at Treasury*, THE HILL (Feb. 9, 2025), <https://thehill.com/policy/technology/5134725-elon-musk-impeachment-demand/>. Later that day, Vice President J.D. Vance compared Englemayer to a judge “tell[ing] a general how to conduct a military operation” or “command[ing] the attorney general in how to use her discretion as a prosecutor,” and wrote “judges aren’t allowed to control the executive’s legitimate power.” Lauren Irwin, *Vance Challenges Courts, Suggests They Are Going Too Far*, THE HILL (Feb. 9, 2025), <https://thehill.com/regulation/court-battles/5135004-jd-vance-courts-trump-orders/>.

<sup>92</sup> Memorandum of Law in Support of Emergency Motion to Dissolve, Clarify or Modify Ex Parte Temporary Restraining Order at 5, *State of New York v. Dep’t. of Treas.*, 25 Civ. 1144 (S.D.N.Y. Feb. 9, 2025).

<sup>93</sup> Memorandum Opinion and Order at 7, *State of New York v. Dep’t. of Treas.*, No. 25 CV. 1144 (S.D.N.Y. Feb. 11, 2025).

<sup>94</sup> Opinion and Order at 1, *State of New York v. Donald Trump*, No. 25-CV-01144 (S.D.N.Y. Feb. 21, 2025).

<sup>95</sup> *Id.* at 63.

<sup>96</sup> *Id.* at 7. “Krause claims that he is ‘not an employee of USDS/DOGE,’ but an employee of the Treasury Department. The Court notes, however, that in his role as DOGE Team Lead, Krause coordinates closely with officials at USDS/DOGE. He provides USDS/DOGE officials with regular updates on his work. He also “receive[s] high-level policy direction” from USDS/DOGE.” *Id.* at 10 (citations omitted).

additional vetting, onboarding, and safety protocols.<sup>97</sup> By contrast, Judge Kolar-Kotelly’s temporary restraining order explicitly exempts Krause from its broader categorical access restrictions, while limiting him to ‘read-only’ privileges.

*iv) Crossing the Fiscal Rubicon*

The courts’ efforts thus far have managed to slow down Trump’s assault on the BFS payments system, if not halt it completely. But they are unlikely to keep him away forever. Indeed, the judiciary has already identified multiple pathways by removing access restrictions for Senate-confirmed Treasury officials and directing Treasury to establish training, vetting, and access protocols for onboarding internal Treasury DOGE team members.<sup>98</sup>

If and when Trump’s loyal subordinates finally do secure access, it will be technically possible for them to repurpose existing IT procedures that permit account entry modification for correcting mistakes to designate politically undesirable spending items as “improper payments.”<sup>99</sup> On that basis, they will then be able to defend—at least facially—freezing disbursements en masse on the grounds of preserving systems integrity rather than the president’s alleged impoundment authority, like they have already begun to do at the agency-level.<sup>100</sup>

From a technical and political perspective, the BFS represents the single most politically vulnerable centralized bottleneck in the entire fiscal administrative process.<sup>101</sup> In contrast to the Fed, which has an independent governing board appointed to long terms protected from Presidential removal, the Treasury Department is a political agency whose chief officer serves at the pleasure of the president. In addition, as discussed further below, Federal Reserve balance sheet management is inextricably intertwined with its

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<sup>97</sup> Consequently, the order appears “to leave Krause barred from access to the very systems the Fiscal Assistant Secretary oversees.” Vittoria Elliott, *Elon Musk’s Man in the Treasury Is Still Holding Down His Day Job as Software CEO*, WIRED (Feb. 14, 2025), <https://www.wired.com/story/musk-krause-treasury-bfs-conflict-of-interest/>.

<sup>98</sup> See generally Section I(b) *supra*.

<sup>99</sup> See Tankus, Operational Control, *supra* note 75 (“It’s important to understand that ‘improper’ is in the eye of the beholder, and the danger of operational access to the payments system is precisely that there are very little safeguards for its improper use or manipulation. . . . Is ‘Wokeness’ . . . going to be the new definition of an ‘improper payment’?”).

<sup>100</sup> See Nathan Tankus, *Day Thirteen of the Trump-Musk Treasury Payments Crisis of 2025: Bombshell Court Filings Confirm Wired & Notes on the Crises Reporting & Raise Alarms About BFS-Based Impoundment*, NOTES ON THE CRISES (Feb. 12, 2025), <https://www.crisisnotes.com/bombshell-court-filings-confirm-wired-notes-on-the-crises-reporting-raise-alarms-about-bfs-based-impoundment/> (reporting such a justification for ongoing impoundment of USAID funds). This is paired with a public relations strategy of falsely claiming massive government fraud and waste. See, e.g., Elon Musk (@elonmusk), X (Feb 10, 2025), <https://x.com/elonmusk/status/1888891512303263815> (“The @DOGE team just discovered that FEMA sent \$59M LAST WEEK to luxury hotels in New York City to house illegal migrants. Sending this money violated the law . . . A clawback demand will be made today to recoup those funds.”).

<sup>101</sup> See *infra* Part II.

implementation of monetary policy, which for decades has been considered ‘independent’ of presidential control.<sup>102</sup>

Even more fundamentally, at both a symbolic and operational level, there is no single master settlement ledger at the Fed’s headquarters in Washington, D.C. from which its payments system can be centrally administered. Instead, its Board of Governors holds and accesses operating funds through a reserve account managed by the Federal Reserve Bank of New York<sup>103</sup>.

The New York Fed, in turn, settles directly with other regional Federal Reserve Banks as one ‘node’ in a decentralized, peer-based system of connected independent ledgers, connected and harmonized through standardized technologies, administrative processes, and common institutional design.<sup>104</sup> Crucially, the regional Reserve Banks’ ‘*e pluribus, unum*’ ethos is maintained not only technologically but legally, through the preservation of at-par clearing and singular legal treatment of their distinct balance sheet liabilities. Moreover, while regional Reserve Banks are legally independent entities, they remain legal instrumentalities of the central Federal Reserve System, and are required to obey the directives of its seven-member Board of Governors on a non-discretionary basis.<sup>105</sup>

Thus, while obscure, wonky, and somewhat outdated, the BFS and its payments IT systems come closest to practically, politically, and symbolically embodying the Trumpian vision of the twenty-first century unitary executive fisc: all federal spending managed via a single spreadsheet, run from a single machine under the control of one person. A big, beautiful fiscal death star for the galactic emperor.

At the same time, it also represents his embrace of budgetary commandeering and radical funding deprivation as managerial tools for ensuring discipline and compliance among his ostensible subordinates within the federal government. In particular, by hacking the centralized IT architecture of the intra-governmental payments system, Trump has bypassed the traditional bureaucratic chain-of-command, and instead asserted the prerogative to exert fine-grained control over independent agency activity

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<sup>102</sup> See generally Robert Hetzel & Ralph Leach, *The Treasury-Fed Accord: A New Narrative Account*, 87 FED. RSRV. BANK RICHMOND ECON. Q. (2001) (historicizing the institutional settlement of central bank “independence”); *Consumer Fin. Prot. Bureau v. Comm. Fin. Servs. Ass’n Am.*, 601 U.S. 416, 467 n.16 (2024) (Alito, J., dissenting) (“The [Federal Reserve] Board is a unique institution with a unique historical background. . . . For Appropriations Clause purposes, the funding of the Federal Reserve Board should be regarded as a special arrangement sanctioned by history.”).

<sup>103</sup> *System Open Market Account Holdings of Domestic Securities*, FED. RSRV. BANK OF N. Y. (March 5, 2025), <https://www.newyorkfed.org/markets/soma-holdings>.

<sup>104</sup> On the other hand, the New York Fed acts as *primus inter pares*—first among equals—among the Reserve Banks, administering the Treasury’s primary operating account, the TGA, as well as government security auction, account, and settlement services.

<sup>105</sup> See *U.S. v. Wells Fargo*, No. 18-1746, 28 (2d. Cir. 2019) (noting Federal Reserve Banks are “federal instrumentalities” and “part of a system created by Congress and subject to the Board’s general supervisory authority”).

directly at the line-item budget level, ostensibly across the entire government.<sup>106</sup> To borrow Gibbon’s description of the despotic powers of Roman Emperor Augustus:

To resist was fatal, and it was impossible to fly. On every side he was encompassed with a vast extent of sea and land, which he could never hope to traverse without being discovered, seized, and restored to his irritated master[.] "Wherever you are," said Cicero to the exiled Marcellus, "remember that you are equally within the power of the conqueror."<sup>107</sup>

In this sense, Presidential takeover of BFS payments infrastructure is not merely an operational means to the broader fiscal end goal of imposing budget cuts, but also a fiscal end goal in itself. Specifically, it represents the vanguard of a broader revolutionary autocratic effort to recenter the institutions, practices, and norms of the U.S. republic around the new constitutional and administrative locus of a unitary executive fisc, headed by a unitary fiscal executive.<sup>108</sup> The (politicized) medium is the (political) message, and Trump’s message is characteristically simple: the commander-in-chief is the person with the power to press the red button. He is the fiscal commander-in-chief, BFS is his red fiscal button, and he can press it whenever he feels like it.<sup>109</sup>

### C. The Limits of Judicial Defense

“Yeah, well, you know, that’s just like, your opinion, man.”  
- Jeff “The Dude” Lebowski<sup>110</sup>

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<sup>106</sup> Indeed, questions concerning proper intra-governmental procedures and the political independence of agency heads and career civil servants quickly become near-moot when the President has the operational capacity to unilaterally impound funds and freeze salaries across the entire government at will.

<sup>107</sup> Edward Gibbon, *Fall in the West: The Decline and Fall of the Roman Empire* 59 (1776).

<sup>108</sup> See Brief of Amici Curiae Former Treas. Dept’t Officials in Support of Plaintiff’s Motion for a Preliminary Injunction at 13, *New York v. Trump*, No. 25-CV-01144 (S.D.N.Y. Feb. 14, 2025) (“Even if the Trump Administration took no action, just the perceived ability to block payments in this manner could coerce individuals or entities into complying with Administration preferences that are not enshrined in law . . . . In short, it could become a tool to bully those with whom the President or Elon Musk disagree.”). Separately, Trump and Musk have been running the same play at the agency level, commandeering payments and data systems at USAID and the Departments of Education, Education, and Labor to freeze hundreds of millions of dollars in programmatic spending under the pretext of eliminating ‘waste, fraud, and abuse.’ See *infra* section I.B. These efforts, while not as systemically threatening as their occupation of the BFS, nevertheless underscore the inherent political fragility of digitally centralized payments infrastructure.

<sup>109</sup> See, e.g. *Implementing the President’s “Department of Government Efficiency” Cost Efficiency Initiative*, THE WHITE HOUSE (Feb. 26, 2025), <https://www.whitehouse.gov/presidential-actions/2025/02/implementing-the-presidents-department-of-government-efficiency-cost-efficiency-initiative/> (directing each agency to build a “centralized technological system” to record every payment pursuant to “covered contracts and grants,” along with a “brief, written justification for each payment”).

<sup>110</sup> *The Big Lebowski* (PolyGram Filmed Entertainment & Working Title Films 1998).

The Madisonian conception of the constitutional separation of powers is premised on the assumption that the powers of each branch can and will be held in check by the others.<sup>111</sup> In reality, however, Republican majorities in Congress have thus far demonstrated little interest in reining Trump in, even as he consolidates executive control over functions that have traditionally been closely guarded by the legislative branch.<sup>112</sup>

Instead, primary responsibility for resisting Trump's fiscal assault has fallen to the judicial branch, with district courts frantically issuing emergency injunctions and restraining orders against spending freezes and cuts as lawsuits begin to make their way toward the Supreme Court.<sup>113</sup> While these efforts have had some early success, their long-term viability as the 'last line' of defense is questionable, as new disputes and tensions between Trump officials and executive agencies concerning spending directives continue to arise even as earlier ones progress through the lengthy litigation process.<sup>114</sup>

Thus far, Trump has yet to openly refuse to obey a federal court, even as he has ignored and sought workarounds for the various restrictions they have imposed.<sup>115</sup> At the same time, he has demonstrated little deference towards the independent judiciary, instead preferring to accuse judges who rule against him of political bias, and in some cases even threatening judicial impeachment.<sup>116</sup>

With the recent Supreme Court holding in *Trump v. United States* that the president is immune from prosecution for official acts, there is little chance

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<sup>111</sup> THE FEDERALIST No. 51 (James Madison) ("Security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others").

<sup>112</sup> Chris Morris, *No DOGE, No Deal: A Battle Over Elon Musk's Team Risks a Government Shutdown*, INC. (Mar. 8, 2025) (noting that despite quiet critical mutterings, Republican legislators have been publicly reluctant to restrict DOGE's authority, with many expressing "strong resistance" to any attempt).  
<https://www.inc.com/chris-morris/no-doge-no-deal-battle-over-elon-musk-team-risks-government-shutdown/91156433>

<sup>113</sup> See, e.g., *Litigation Tracker: Legal Challenges to Trump Administration Actions*, JUST SECURITY (Mar. 6, 2025),  
<https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration>.

<sup>114</sup> See, e.g., Nate Raymond, *US Judge Blocks Musk's DOGE Team from Accessing Education Department, OPM Data*, REUTERS (Feb. 24, 2025),  
<https://www.reuters.com/world/us/us-judge-blocks-musks-doge-team-accessing-education-department-opm-data-2025-02-24/> (discussing an injunction against DOGE access to "sensitive personal information" at the Department of Education).

<sup>115</sup> See Justin Jouvenal, Leo Sands & Ann E. Marimow, *Trump Comes Close to the Red Line of Openly Defying Judges, Experts Say*, WASH. POST (Feb. 20, 2025),  
<https://www.washingtonpost.com/politics/2025/02/20/trump-judge-orders-comply-defy-usaid/> (quoting Georgetown University law professor David Super, describing the administration's strategy of "insist[ing] that injunctions relate only to one source of legal authority and then manufacture another to keep doing what they have been ordered not to do").

<sup>116</sup> See Elon Musk (@elonmusk), X (Feb. 8, 2025),  
<https://x.com/elonmusk/status/1888315706598731904?s=42> ("This [Judge Engelmayer] is an activist posing as a judge"); Elon Musk (@elonmusk), X (Feb 25, 2025),  
<https://x.com/elonmusk/status/1894529307524923512> ("The only way to restore rule of the people in America is to impeach judges. No one is above the law, including judges.")



that Trump will face legal consequences for escalating judicial defiance.<sup>117</sup> Nevertheless, courts retain the ability to indirectly fight back by imposing sanctions and holding sub-presidential government officials in contempt for violating generally applicable court orders.

Ultimately, however, these disputes are mere skirmishes compared to Trump's seemingly inevitable clash with the Supreme Court over the constitutionality of impoundment. It remains to be seen whether the Court has any desire, yet alone willingness, to check rather than merely rubber-stamp Trump's agenda.<sup>118</sup> If it does, Trump will be forced to either defy the Court directly, or retreat to a more narrow conception of his own executive authority than he has thus far asserted under both the constitution and clear political mandate granted to him by the 2024 election.

Defiance, whether done explicitly or implicitly, would constitute a full-blown separation of powers crisis, with the legislative and judicial branches positioned against the president, and the rest of the executive branch stuck in between.<sup>119</sup> Conversely, retreat, while possible, would be wholly at odds with Trump's "never-back-down" personality,<sup>120</sup> as well as the increasingly dictatorial tone of his recent public statements.<sup>121</sup> Both outcomes are almost inconceivable, yet one or the other is looking increasingly likely.

Alternatively, the Supreme Court could attempt to 'split the baby' by affirming the Trump's authority as chief executive to selectively enforce the law via discretionary impoundment, while simultaneously interpreting the requirement that he do so "faithfully" as prohibiting him from doing so with the express intent of frustrating Congress's spending directives. This approach would allow the Court to preserve some semblance of a workable separation of fiscal powers doctrine within a broader unitary executive framework, while punting the issue of practical interpretation back to the courts on a case-by-case basis.

At the same time, however, it would dramatically expand the president's effective fiscal control on a day-to-day basis, by requiring opponents to

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<sup>117</sup> 603 U.S. 593 (2024).

<sup>118</sup> See, e.g., Stephen Dinan, *Supreme Court Demurs on Trump's Appeal Over Firing Powers*, WASH. TIMES (Feb. 23, 2025), <https://www.washingtontimes.com/news/2025/feb/23/supreme-court-demurs-trumps-first-appeal-firing-powers/> ("The [Supreme Court] on Friday allowed special counsel Hampton Dellinger to remain in his job, where he serves as the government's top cop for whistleblower protections and Hatch Act violations, while lower courts hear his challenge to Mr. Trump's attempt to fire him").

<sup>119</sup> This, in turn, could produce and exacerbate divided loyalties within and between parts of the executive branch, leading to potential political destabilization.

<sup>120</sup> This may be best epitomized by his insistence that he won the 2020 election. Cf. Nick Corasaniti, *2020 Election Lies Keep Unraveling as Courts Push for Evidence*, N.Y. TIMES (Feb. 16, 2024),

<https://www.nytimes.com/2024/02/16/us/politics/2020-election-lies-no-evidence.html> ("More than three years after a swirl of conspiracy theories that the 2020 election was stolen . . . the originators of many of the false allegations are now being forced to admit—some under oath—that there is no evidence to back up their outlandish claims").

<sup>121</sup> See Trump, *supra* note 45 ("He who saves his Country does not violate any Law").

challenge each contentious presidential impoundment action individually through lengthy and expensive litigation.<sup>122</sup>

Moreover, as discussed further in the next section, due to the government’s centralized fiscal IT architecture, the President would in most cases retain effective control over impounded funds while disputes were litigated in the courts. This, in turn, would empower them to delay, undermine, and defy legislative spending directives and promote their policy agenda through indirect procedural means, while claiming to maintain fidelity to judicial orders and the rule of law.

#### D. Nuts and Bolts

Trump’s decision to “cross the Fiscal Rubicon” by directly commandeering the Treasury’s payments systems has had, and will continue to have, profound legal, political, and social implications. Almost overnight, he has shaken up the balance of power between branches and within the executive branch, and elevated the issue of overly-centralized fiscal design to a first-order constitutional concern.

In doing so, he has underscored the basic insight that if political independence requires budgetary independence, and budgetary independence requires being able to actually spend money, then political independence is, in turn, at least partly a function of payment system design. Whereas properly decentralized architectures can promote resiliency and local autonomy, overly-centralized architectures create legal and operational vulnerabilities that increase the risk and severity of constitutional crises and institutional compromise.<sup>123</sup>

## II. CONSTITUTIONALLY FRAGILE FISCAL INFRASTRUCTURE

“Admiral Motti: This [Death Star] is now the ultimate power in the universe.

Stewie (Darth Vader): Terrific work. So no weaknesses at all?

Motti: ... Well, I mean, there's this little hole. It was kind of an aesthetic choice by the architect. And if you shoot a laser into this hole, the station blows up.

Stewie: Whoa! That sounds like a pretty big design flaw.

Imperial Officer: ...[W]e can get [the repair] done tomorrow if price is no object.

Stewie: Ehhhh...

<sup>122</sup> See, e.g., Ian Millhiser, *Trump’s biggest power grab just reached the Supreme Court*, Vox, (Feb. 27, 2025),

<https://www.vox.com/scotus/401838/supreme-court-usaid-impoundment-trump-aids-vaccine> (noting the Trump Department of Justice, instead of defending impoundment outright, is arguing that the courts must adjudicate challenges narrowly on a case-by-case basis, rather than enjoining Trump from issuing broad-sweeping impoundment orders).

<sup>123</sup> Of course, there is still agency in individual choices to obey the rules, but the choice of architecture shapes who those people are, the factors they must consider, the accountability they face, the protections they enjoy, and the degree of cross-validation or dependency on third-party consent required to act.

Imperial Officer: We'll get estimates.  
Stewie: Get estimates, yeah, yeah.”

- Family Guy<sup>124</sup>

Monetary regimes are often said to be “small-c” constitutional, in that they are constitutive of the obligations, relationships, and social practices of political communities.<sup>125</sup> Yet they are also “big-c” Constitutional, in the sense that the institutional, technological, and operational design of money and payments systems both shape and are shaped by how constitutional texts are written, interpreted, and enforced.<sup>126</sup> A poorly designed regime can open the door to constitutional crises, while a well-designed one can safeguard constitutional order and reinforce the separation of powers between co-equal branches of government.<sup>127</sup>

The ongoing Treasury payments crisis has revealed the U.S. dollar system’s vulnerability to constitutional ‘hacking’ by the executive branch through seizure and operational manipulation of highly centralized technical ‘bottlenecks’ in the public payments system.<sup>128</sup> The existing fiscal architecture exacerbates the risk of presidential encroachment into Congress’s powers of the purse. To that end, the rest of this section focuses on four budgetary institutions—the Treasury and the Fed, the Office of Management and Budget (“OMB”), and the legislative budget process—that function as sources of major constitutional weakness with respect to preserving the separation of fiscal powers between the legislative and executive branches.

In particular, it argues that they all share or embody three characteristics that render them vulnerable to presidential compromise: high procedural entanglement, operational bottlenecks, and ambiguous and contradictory functions. Together, they underscore the urgent need to develop and implement new digital dollar infrastructure to recover and reinforce Congress’s constitutional authority over the creation, regulation, and spending of public money.

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<sup>124</sup> *Family Guy: Blue Harvest* (Fox television broadcast Sep. 23, 2007).

<sup>125</sup> CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 1 (2014) (describing money as “a constitutional (small “c”) effort;” in a very particular sense: money is a mode of mobilizing resources, one that communities design for that end and individuals appropriate for their own purposes. It defines authority and distributes material as it operates”).

<sup>126</sup> *Id.* See generally Christine Desan, *From Blood to Profit: The Transformation of Value in the American Constitutional Tradition*, 20 J. POL’Y HIST. 26 (2008); Roy Kreitner, *The Jurisprudence of Global Money*, 11 THEOR. INQ. L. 177 (2010); Holton, Woody, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (2007).

<sup>127</sup> Indeed, the Constitution both grants the federal government the tax power and restricts States from issuing their own monies in direct response to the failure of the earlier Confederate monetary regime, which experienced rampant inflation. See generally Holton, *supra* note 125; Farley Grubb, *The US Constitution and Monetary Powers: An Analysis of the 1787 Constitutional Convention and the Constitutional Transformation of the US Monetary System*, 13(1) FIN. HIST. REV. 43 (2006).

<sup>128</sup> Tankus, *supra* note 73; *Musk In Your Computers: Paul Krugman Interviews Nathan Tankus*, NOTES ON THE CRISES (Mar. 1, 2025); Shayna Jacobs, *Judge orders ban on DOGE from access to sensitive Treasury data*, WASH. POST (Feb. 19th, 2025), <https://www.washingtonpost.com/national-security/2025/02/21/doge-treasury-data-access>.

## A. The Treasury & the Fed

Although now generally considered part of the executive branch, the founders' original understanding of the Treasury Department was more constitutionally ambiguous, reflecting its special relationship to Congress as the primary institutional embodiment of its powers of the Purse.<sup>129</sup> As Josh Chafetz recently noted:

Once the Constitution was ratified and the new national government was up and running, the earliest Congresses made clear that they understood themselves to have special responsibility for matters of the purse. When it came time to set up the first three departments, two of them—Foreign Affairs and War—were expressly denominated “Executive department[s],” and their organic statutes specified that their heads were to carry out orders from the president.

By contrast, the organic act for the Treasury Department did not refer to it as an “executive” department. Moreover, the act says nothing about taking direction from the president, but it does create specific reporting requirements to Congress. In short, the Treasury was understood as being not simply a creation of Congress, but a continuing arm of Congress.<sup>130</sup>

Today, the Treasury serves as a central coordinating and clearing hub for federal spending, revenue and deficit-financing operations. It does this primarily through receiving funds and making transfers to, from, and on behalf of other agencies through accounts administered through its fiscal agent, the Fed.<sup>131</sup> In doing so, both the Treasury and the Fed function as critical procedural and infrastructural bottlenecks in the broader fiscal administrative process, while facing competing pressures from other agencies' statutory obligations, their own institutional interests, and the President's policy agenda and directives.

### *i) Spending, Borrowing, and “Printing”*

The constitutional and political dynamics of government ‘financing’ are fundamentally structured by, if not fully reducible to, the question of which government entities have the statutory authority and constitutional

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<sup>129</sup> *But see also* Chabot (2020), *supra* note 34 (discussing the early Congressional establishment of the budgetarily independent Sinking Fund for the purpose of buying and selling government securities in order to stabilize the value and maintain liquidity in the public debt).

<sup>130</sup> *See* Chafetz, *supra* note 54 at 5.

<sup>131</sup> Under the Miscellaneous Receipts Act, which was first established in 1849, government officials “receiving money for the Government from any source” are required to “deposit the money in the Treasury as soon as practicable” unless authorized explicitly by statute. 31 U.S.C. § 3302(b). *See also* Gillian Metzger, *Taking Appropriations Seriously*, 121(4) COLUM. L. REV. 1075, 1088-89 (2021).

responsibility to create and spend ‘fiscally significant’ forms of public money in accordance with Congress’s statutory spending directives. The ability to create dollars in *some* form alone is not sufficient. What is needed is proximity or access to, if not direct control over, the core retail money used in the public payments system.

Treasury spending obligations are settled with end-recipients through a range of ‘last-mile’ mechanisms, including most commonly bank transfers.<sup>132</sup> Separately, the Bureau of the Fiscal Service provides its own standardized yet customizable ‘white label’ public debit card product, which it makes available to other public sector entities, including state and local governments.<sup>133</sup> While the public entity listed as “issuing” the debit card varies, the actual physical card itself, as well as the payments software and back-end account it connects to, are all centrally administered by the BFS’s partnering bank agent.

Federal debit card services offered by the BFS do not directly rely on publicly issued dollars. Instead, they are linked to FDIC-insured deposit account balances held at the BFS’s partnering commercial bank,<sup>134</sup> which in turn holds reserve balances at the Fed. Typically, other agencies or government actors transfer funds to Treasury’s reserve account, and the BFS then transfers them onward to its partnering bank’s reserve account after accounting for clearing, hold-backs or other charges. At that point, they become available to the end-recipient as commercial bank deposit balances, and both interbank transfer and back-end reserve settlement operations are subsequently processed identically to any regular commercial bank transaction.

In effect, this allows the Treasury to indirectly issue its own form of retail bank money directly to end-recipients and then rely on ‘generic’ Fed commercial banking infrastructure for subsequent payments processing. This process contrasts with the processes for sending checks and making direct bank transfers, both of which require the Fed to process reserve settlement requests directly from the Treasury’s own reserve account in a specialized intra-governmental process.

Although each of these processes involves notably different front-end dynamics, the back-end settlement process is ultimately the same: transfer of digital balances from a government reserve account at the Fed to a private entity’s reserve account at the Fed.<sup>135</sup>

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<sup>132</sup> Even as early as 2002, electronic funds transfers accounted for 76 percent of total government payments. *Electronic Funds Transfers: Use by Federal Payment Recipients Has Increased But Obstacles to Greater Participation Remain*, GAO-02-913, 2 (2002).

<sup>133</sup> *U.S. Debit Card*, U.S. TSY. BUR. FISC. SERV. (2025), <https://fiscal.treasury.gov/us-debit-card>.

<sup>134</sup> See, e.g., *BNY to Manage U.S. Department of the Treasury's Largest Prepaid Debit Card Program for Federal Benefits - Direct Express*, PR NEWswire (Nov. 21, 2024), <https://www.bny.com/corporate/global/en/about-us/newsroom/press-release/bny-to-manage-us-department-of-the-treasurypercent27s-largest-pr-130414.html>.

<sup>135</sup> See, e.g., Adam Copeland & Sarah Yu Wang, *The Dueling Intraday Demands on Reserves* (Oct. 21, 2024),

Separately, the Treasury also issues digital “debt” securities.<sup>136</sup> In contrast to coins and notes, Treasury debt is typically sold at a positive interest rate and maturity.<sup>137</sup> In some contexts, the Treasury directly and indirectly sets or caps the interest rates it is willing to pay.<sup>138</sup> Normally, however, interest rates are superficially set by markets, and at a deeper level by the Federal Reserve through its monetary policy operations<sup>139</sup>.

Perhaps surprisingly, Treasury debt certificates originally served as one of the earliest forms of circulating paper money, in part due to the government’s willingness to accept them back at face value prior to maturity.<sup>140</sup> As part of this system, the Treasury would literally *spend* the debt into existence, just as with coins and currency notes, rather than *sell* it to acquire other funds to then spend.

Today, Treasury debt primarily functions as ‘wholesale’ money—i.e. designed for institutional investors—by serving as the primary collateral asset underlying the U.S. money markets and global dollar-based financial system more broadly.<sup>141</sup>

These two forms of digital public money issuance— “Fed reserves” and “Treasury debt”—are loosely connected through the Treasury’s practice of avoiding running an inter-day overdraft on its primary reserve account at the Fed, which is used to process most end-payments on behalf of the entire

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<https://libertystreeteconomics.newyorkfed.org/2024/10/the-dueling-intraday-demands-on-reserves> (discussing the Fed’s different interbank settlement and liquidity operations).

<sup>136</sup> See generally Kenneth D. Garbade and Jeffrey Ingber, *The Treasury Auction Process: Objectives, Structure, and Recent Adaptations*, 11(2) FRBNR CURR. ISS. IN ECON. & FIN. 1 (2005).

<sup>137</sup> *Id.* at 1.

<sup>138</sup> For example, the retail investor-only TreasuryDirect portal, administered directly by the Treasury, offers fixed-rate savings and inflation-protected bonds to individuals, within aggregate limits. See, e.g., *Savings Bonds: About*, TREASURYDIRECT (2025),

<https://www.treasurydirect.gov/savings-bonds>.

<sup>139</sup> See, e.g., Ben Bernanke, *The New Tools of Monetary Policy*, AM. ECON. ASS. PRES. ADDR. JAN. 4, 2020,

[https://www.brookings.edu/wp-content/uploads/2019/12/Bernanke\\_ASSA\\_lecture.pdf](https://www.brookings.edu/wp-content/uploads/2019/12/Bernanke_ASSA_lecture.pdf) (noting that even when short-term rates reach their lower bound, it remains possible to “add stimulus by operating on longer-term interest rates and other asset prices and yields”).

<sup>140</sup> Between 1812 and 1815, for example, the Treasury authorized five issues of interest-bearing notes in denominations of between \$3 and \$1000, totaling over \$36 million, which circulated widely and were generally accepted as money by banks and merchants. See Donald Kagin, *Monetary Aspects of the Treasury Notes of the War of 1812*, 44 J. OF ECON. HIST. 69, 72 (1984).

<sup>141</sup> Ironically, it is not retail but wholesale Treasury debt infrastructure that today provides the greater degree of ‘fiscal moneyness’ from a consumer perspective. This is due to its tight integration with the regular retail payments system via money market fund accounts, which provide deposit-like account services backed by a large pool of Treasury securities held in common by the fund.

federal government.<sup>142</sup> This practice ostensibly compels the Treasury to periodically sell additional securities to acquire additional reserve balances and keep honoring federal spending commitments administered through its account.<sup>143</sup>

*ii) Payments, Not Money*

An illustrative example of the practical importance of being able to create not just ‘money’ but ‘fiscally-significant money’ is the U.S. Mint. The Mint has enjoyed exclusive, continuous jurisdiction over coinage since its inception in the 1790’s, preceding the creation of the Fed by over a century.<sup>144</sup> Today, it enjoys statutory budget independence equivalent to the Federal Reserve.<sup>145</sup>

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<sup>142</sup> Since explicit overdraft authority was removed in 1980, the Treasury has acted as if effectively prohibited to run an inter-day (but not intraday) overdraft. *See* Kenneth D. Garbade, *Direct Purchases of U.S. Treasury Securities by Federal Reserve Banks*, FED. RSRV. BANK N.Y. STAFF REP. NO. 684 (2014),

[https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr684.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr684.pdf); Howard Hackley, *Legal Aspects of Proposals for Assisting Treasury in Connection with Cash and Debt Ceiling Problems*, BD. GOV. FED. RSRV. SYS. MEMO (Jan. 31, 1969), <https://www.federalreserve.gov/monetarypolicy/files/FOMC19690131Memo02.pdf>; J.P. Koning, *The Final Draft on Fed-Treasury Overdrafts*, MONEYNESS (Dec. 27, 2012), <http://jpkoning.blogspot.com/2012/12/the-final-draft-on-fed-treasury.html>.

<sup>143</sup> The Treasury occasionally also issues debt for other purposes. *See, e.g., Statement Regarding Supplementary Financing Program*, FED. RSRV. B. N. Y. (Sept. 17, 2008), [https://www.newyorkfed.org/markets/statement\\_091708.html](https://www.newyorkfed.org/markets/statement_091708.html) (announcing a “supplementary” Treasury auction facility, “separate from Treasury’s current borrowing program...[to] drain reserves from the banking system, and...therefore offset...recent Federal Reserve lending and liquidity initiatives”).

<sup>144</sup> In this sense, the Fed has only ever at best *shared* responsibility over money creation with the Treasury. *See, e.g.,* DAVID LANGE & MARY JO MEAD, *HISTORY OF THE UNITED STATES MINT AND ITS COINAGE*, 4 (2005).

<sup>145</sup> In 2024, the Mint transferred \$608.5 million in seigniorage income to the Treasury. *2024 Annual Report*, U.S. MINT 8 (2024),

<https://www.usmint.gov/content/dam/usmint/reports/2024-annual-report.pdf><https://www.usmint.gov/wordpress/wp-content/uploads/2021/02/2020-US-Mint-Annual-Report.pdf>. By contrast, the Bureau of Engraving and Printing does not retain the seigniorage revenue on the creation of Federal Reserve Notes – instead, it sells them at cost to the Federal Reserve, who then sells them at their nominal face value to banks, and pays the Bureau of Engraving and Printing a negotiated fee sufficient to cover operating expenses and maintain its internal revolving operating fund. U.S. GAO, *Bureau of Engraving and Printing: Options For and Costs Of a Future Currency Production Facility*, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON CAPITAL MARKETS, SECURITIES, AND INVESTMENT, COMMITTEE ON FINANCIAL SERVICES, HOUSE OF REPRESENTATIVES, 8 (April 2018), <https://www.gao.gov/assets/gao-18-338.pdf>.

Presently, the Mint issues circulating coins primarily by distributing them to Federal Reserve Banks, who in turn distribute them to commercial banks.<sup>146</sup> Additionally, like most other government entities, it also holds its operating funds, which it uses to pay employees and procure goods and services, as reserve balances in accounts managed by the Fed. Together, this means that the Mint, despite enjoying the legal power to fund itself through the creation of widely accepted ‘retail money,’ is still effectively dependent on the Fed for both internal and external day-to-day fiscal administration and payments processing.

### *iii) Consolidating Debt Management*

The Fed periodically purchases new coins from the Mint in order to make them available to its commercial bank affiliates. Separately, the Treasury also ‘deposits’ old coins collected through its agents with the Fed. Although the legal treatment of coin sales and deposits differ, the Fed’s balance sheet operation is identical: it acquires a safe monetary asset (U.S. legal tender), by issuing its own liability (digital settlement balance), which the Treasury then uses as *its* safe monetary asset.<sup>147</sup> In effect, the Fed is ‘laundering’ the Treasury’s coin into a more widely usable form of ‘digital fiscal money’, namely its own reserve balances<sup>148</sup>.

Both of these processes are ‘direct’ transactions between the Treasury and Fed, conducted under the Fed’s ‘fiscal agent’ responsibilities.<sup>149</sup> By contrast, the Fed is statutorily restricted from purchasing Treasury debt “except on the open market”.<sup>150</sup> Nevertheless, the Treasury and Fed have mostly worked

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<sup>146</sup> Stephanie Meredith, *How Coins Are Made*, U.S. MINT (Sep. 21, 2020), <https://www.usmint.gov/news/inside-the-mint/how-coins-are-made-bringing-coins-into-circulation>. At the time of the Mint’s founding, gold coins circulated as scarce “high value” money that accompanied more widely used “low value” money in the form of paper notes and bills. As the United States weaned itself off a metallic currency standard and paper-based and eventually digital monetary technology improved, the economic significance of coins—and thus the payments system centrality of the Mint—decreased. *See, e.g.*, Farley Grubb, *Is Paper Money Just Paper Money? Experimentation and Variation in the Paper Monies Issued By the American Colonies From 1690 to 1775*, NAT. BUR. ECON. RES. WORK. PAPER 17997 (April 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2039611](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039611) (examining early American colonial experimentation in paper monies driven by scarcity of metallic coins).

<sup>147</sup> The Federal Reserve then elects to pay positive interest balances on the Treasury’s reserve balances as part of general liquidity and interest rate management. *See generally* Scott Fullwiler, *Paying Interest on Reserve Balances: It’s More Significant Than You Think*, SSRN (Dec. 1, 2004), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1723589](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723589).

<sup>148</sup> *See also* Grey, *supra* note 54 at 280 (2020–2021) (arguing that proposals to sidestep the debt ceiling by minting a ‘trillion dollar coin’ under—an admittedly broad reading of—existing coinage law and subsequently depositing with the Fed, serve as an “imaginative catalyst” to “invite and challenge us to collectively develop new monetary myths and budgetary practices better suited to our modern context and needs”).

<sup>149</sup> *See* note 129 *supra*.

<sup>150</sup> *See* Nathan Tankus, *What Exactly Is an “Open Market Operation”?* #MonetaryPolicy201, NOTES ON THE CRISES (Dec. 10, 2024) <https://www.crisisnotes.com/what-exactly-is-an-open-market-operation-monetarypolicy201>



around the latter constraint through the creation of a complex process involving private third party dealer intermediaries, as well as indirect Fed backstopping of Treasury debt market liquidity and price conditions.<sup>151</sup>

The secular trajectory of Congress-Treasury fiscal relations in the United States over the past century and a half has been towards greater legislative micromanagement of aggregate spending and revenue levels.<sup>152</sup> At the same time, Congress has consolidated and delegated discretionary responsibility for public debt management in the Treasury.

Together, these trends have empowered the Treasury to more flexibly accommodate Congress's fundamental fiscal directives, while at the same time promoting greater entanglement between the Treasury and other agencies seeking to meet their own statutory spending obligations. This, in turn, has cemented the Treasury's function as the primary institutional gatekeeper for federal deficit financing capacity.

In addition to issuing publicly-circulating debt to meet its own funding needs, the Treasury is separately responsible for centrally coordinating and intermediating intra-government debt issuance on behalf of other agencies and other public actors. In keeping with the historical practice of routing all public funds and payments through the Treasury,<sup>153</sup> most public agencies directed by Congress to issue debt to finance spending in excess of revenue or budgetary allocations do so by selling non-marketable securities to the Federal Financing Bank ("FFB"), a sub-branch of the Treasury Department.<sup>154</sup>

The FFB, in turn, finances the acquisition by issuing additional generic Treasury securities into private circulation as part of the Department's regular debt issuance operations conducted by the BFS.<sup>155</sup> Notably, the FFB's lending

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<sup>151</sup> See, e.g., Stephanie Kelton & Scott Fullwiler, *The Helicopter Can Drop Money, Gather Bonds, Or Just Fly Away*, FIN. T. (Sep. 12, 2013), <https://www.ft.com/content/227b3e08-c44e-3f35-8236-18a3c82c9f77> (explaining the operational mechanics of Treasury-Fed coordination).

<sup>152</sup> Grey, *supra* note 147 at 238. This macro-trend contrasts with the program level, where as discussed in the next section, responsibility over day-to-day infra-statutory funding oversight has been largely delegated (or ceded) to the Office of Management and Budget, under close direction of the President.

<sup>153</sup> 31 U.S.C. § 3302. For a detailed account of the history and operational significance of the Miscellaneous Receipts Act, see Stith, *supra* note 146 at 1364-6; Office of Legal Counsel, Department of Justice, *Application of the Miscellaneous Receipts Act to the Settlement of False Claims Act Suits Concerning Contracts With the General Services Administration*, MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL, GENERAL SERVICES ADMINISTRATION, 56 (Jan. 10, 2006), <https://www.justice.gov/opinion/file/786171/download>.

<sup>154</sup> Federal Financing Bank, *Audit of the Federal Financing Bank's Financial Statements for Fiscal Years 2020 and 2019*, 7 (2020), <https://ffb.treasury.gov/assets/files/FY2017.pdf> ("The mission of the Bank is to reduce the costs of Federal and federally assisted borrowings, to coordinate such borrowings with the Government's overall fiscal policy, and to ensure that such borrowings are done in ways that least disrupt private markets"). See also Coleen Pantalone & Marjorie Platt, *The Federal Financing Bank: Harbinger of the Federal Deficit*, 21(2) BUS. ECON. 46 (1986).

<sup>155</sup> Federal Financing Bank, *supra* note 153 at 7 ("To accomplish [its] mission, the Bank exercises its statutory authority to purchase obligations issued, sold, or guaranteed by Federal agencies").

authority is negotiated and established outside the regular debt ceiling re-suspension process, and is not counted under the debt ceiling limit, even as the securities themselves are functionally identical to those subject to the ceiling limit.<sup>156</sup>

In its best light, the process promotes consistency between deficit financing costs for different government agencies, as well as the uniformity and standardization of government debt markets.<sup>157</sup> Viewed critically, however, it increases the logistical complexity of agency fund procurement, promotes budgetary entanglement between the Treasury and rest of the federal government, and establishes the Treasury (via the FFB) as a primary institutional bottleneck in the federal financing process.<sup>158</sup> In doing so, promotes constitutional fragility by centralizing ‘intra-government’ deficit financing capacity in the hands of the Treasury Secretary, at the expense of the independent agencies who are statutorily required to use that capacity to honor their own spending obligations.<sup>159</sup>

Although the FFB is legally obligated to make its ‘debt laundering’ services available to other agencies in accordance with statutory budget directives,<sup>160</sup> as evidenced by Treasury Secretary Mnuchin’s actions during the first Trump administration, in practice the process of negotiating and formalizing these financing arrangements remains discretionary and subject to political manipulation.<sup>161</sup>

In August 2019, the FFB failed to renew its longstanding \$15 billion loan agreement with the U.S. Postal Service, after Treasury Secretary Mnuchin made further support conditional on the Postal Service “surrender[ing] its authority” and handing over “operating control” to the Treasury.<sup>162</sup> In 2020,

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<sup>156</sup> See, e.g., Pantalone & Platt, *supra* note 153 at 48 (noting that the FFB was structured as an “off-budget” entity in order to avoid the double-counting problem with the agency debt it purchased).

<sup>157</sup> In rare cases, government agencies and government-sponsored enterprises are granted independent budgetary authority to issue their own securities directly into circulation independent of the Treasury, much as the Mint is authorized to issue its own monetary obligations directly into circulation independent of the Treasury’s other fiscal activities. *Grey*, *supra* note 54 at 237. The legal and accounting treatment of these securities varies widely.

<sup>158</sup> Pantalone & Platt, *supra* note 153 at 48.

<sup>159</sup> See generally Gillian Metzger, *Agencies, Polarization, and the States*, 115(7) COLUM. L. REV. 1739 (2015) (critiquing the view of agencies as passive, “acted-upon” agents in accounts of contemporary polarization and presidential unilateralism, and arguing instead that agencies enjoy “broad grants of preexisting authority that they can use to reshape governing policy and law, often at presidential instigation, thereby putting pressure on Congress to respond”).

<sup>160</sup> Pantalone & Platt, *supra* note 153 at 47.

<sup>161</sup> See also *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2074 (2012) (discussing President Reagan’s use of signing statements to express policy, including a statement on a 1986 supplemental appropriations bill indicating the President’s intent to establish Federal Financing Bank regulations to “ensure” funding extended support financially troubled borrowers under the Act would be restricted to have “no adverse affect on [the FFB’s balance sheet],” and would be extended “only to the most financially troubled borrowers.”)

<sup>162</sup> Alison Durkee, *Treasury Tried to Take Over Postal Service Control, Docs Show*, FORBES (Sept. 17, 2020), <https://www.forbes.com/sites/alisondurkee/2020/09/17/treasury-tried-to-take-over-postal-service-control-mnuchin-trump-administration-american-oversight/?sh=7ce2d00159be>.

Treasury Mnuchin again attempted to deny the Postal Service access to FFB financing – this time, a dedicated \$10 billion lending facility that had been established under the CARES Act – unless it agreed to his desired changes concerning price increases for shipping.<sup>163</sup> Eventually, he conceded following mounting public pressure and criticism.

Since then, the incidents have been largely forgotten. With hindsight, however, they retroactively take on additional precursive weight as canaries in the coal mine for Trump 2.0’s current DOGE-led assault on the BFS.

Back then, the infrastructural choke point was intra-governmental debt management; today it is intra-governmental payments processing. In both instances, agencies trying to uphold their independent constitutional and statutory spending obligations face obstruction from the President’s weaponized control of centralized fiscal infrastructure that until then had historically been managed by the Treasury on behalf of the federal bureaucracy on an independent, apolitical, technical basis.

#### *iv) Politicizing Debt Crises*

One way that Congress exercises fiscal leverage over the executive (and itself) is through the establishment and periodic resuspension of the debt ceiling, which establishes a total cap on the amount of interest-bearing securities that the Treasury can issue.<sup>164</sup>

The debt ceiling was first introduced in 1917 to replace a different earlier system, in which each agency, and sometimes even each spending program, had its own financing authority, and each public monetary instrument its own individual issuance cap.<sup>165</sup> Somewhat surprisingly, the ceiling’s original function was not to constrain Treasury officials in their financing operations, but to provide them greater flexibility over internal budgeting and public debt management in light of the growing size and complexity of the twentieth-century administrative state, particularly during wartime.<sup>166</sup>

For decades, the debt ceiling was increased on a routine basis, reflecting a general bipartisan consensus that it was an operational rather than ideological matter.<sup>167</sup> By the 1980s, however, it had become a political football, with both members of Congress and the President attempting to leverage the threat of a federal financing crisis to secure particular budgetary and legislative

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<sup>163</sup> Justine Coleman, *Postal Service Reaches Agreement for \$10B Loan From Treasury ‘Should the Need Arise,’* THE HILL (July 29, 2020), <https://thehill.com/policy/finance/509631-postal-service-reaches-agreement-for-10-billion-loan-from-treasury-should-the>.

<sup>164</sup> 31 U.S.C. §3101 (“The face amount of obligations . . . whose principal and interest are guaranteed by [U.S. government] . . . may not be more than [x] outstanding at one time”).

<sup>165</sup> Grey, *supra* note 54 at 235.

<sup>166</sup> *Id.* at 235-241.

<sup>167</sup> *Id.* at 253.

concessions from their rivals.<sup>168</sup> Since 1982, partisan disputes over increasing the ceiling have caused recurrent and increasingly severe government shutdowns, sequestrations, and concern that the United States will default on its financial obligations.<sup>169</sup>

In response, Congress has taken the seemingly awkward, half-step of rendering the ceiling functionally non-operational while simultaneously preserving its political salience in the budget process. In 2013, it switched from periodically increasing the debt ceiling based on prospective spending estimates for the upcoming budget period, to suspending the cap by default for fixed periods of time, and then ‘re-suspending’ it again almost immediately when the prior suspension expires.<sup>170</sup>

This creates a biphasic dynamic, in which extended periods of tranquility are periodically ruptured by intense bursts of intensity and uncertainty. During the calm periods, the Treasury Secretary effectively enjoys complete discretion in the issuance of Treasury securities in such amounts as deemed necessary to meet the needs of the United States. By contrast, during the temporary negotiation periods where the ceiling is ‘in effect’, the Treasury Secretary is often forced to undertake various ‘extraordinary measures,’ including accounting gimmicks and pulling funds from other public accounts, to source additional funding and avoid the Treasury incurring a negative inter-day operating balance.<sup>171</sup>

Thus far, no debt ceiling crisis has reached a so-called ‘fiscal cliff’ where the Treasury Secretary is forced to announce that the government lacks the funds to continue honoring general spending commitments. Nevertheless, multiple Treasury Secretaries, including Timothy Geithner, Janet Yellen, and Jack Lew, have expressed concern for its imminent possibility in the event of future prolonged failure to reach legislative agreement over debt ceiling resuspension.

While facially reasonable, such assertions are constitutionally problematic for two reasons. First, the determination that the executive branch has ‘exhausted available measures,’ while objective sounding, is ultimately a subjective value-judgment made by the Treasury Secretary.<sup>172</sup> By asserting the power to decide which plausibly legal ‘extraordinary’ mechanisms are worth attempting and which are not, the executive branch in effect asserts the right to

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<sup>168</sup> *Id.* at 256.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* Between 2013 and 2025, the debt ceiling has been ‘re-suspended’ eight times, and with the current suspension due to expire in January 2025. (See Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 48. (2023); Congressional Research Service (“CRS”), *Federal Debt and the Debt Limit in 2025*, 1 (Jan. 16, 2025), <https://crsreports.congress.gov/product/pdf/IN/IN12045>) Each time, Congress has directed that the limit be increased upon reinstatement to reflect the securities issued during its suspension, thereby retroactively validating all deficit-financing undertaken during the suspension period.

<sup>171</sup> See Grey, *supra* note 54 at 253-4 (discussing the history of Treasury Secretary use of extraordinary measures).

<sup>172</sup> *Id.*

practically determine the extent to which Congress’s spending and debt ceiling directives should be seen as—and thus are—in direct conflict.<sup>173</sup>

Second, even if federal budgetary and debt ceiling directives did come into direct, unavoidable conflict, that alone would not inherently justify or require the ‘driving over the fiscal cliff’ by prioritizing the debt ceiling over Congress’s expressly stated spending directives.<sup>174</sup> For example, the Secretary could instead choose to ignore the debt ceiling itself, citing the superiority of other conflicting laws. Alternatively, they could creatively repurpose alternative forms of existing money-creation authority, and justify doing so in terms of avoiding the relative constitutional calamity of failing to spend what Congress has mandated be spent, in addition to debt default.

v) *Fiscal Fragmentation as Monetary Entanglement*

As noted above, the two executive branch entities with the broadest statutory budgetary powers are undoubtedly the Treasury and Federal Reserve. Both issue their own monetary instruments, have effectively unlimited finance capacity (in normal times), and exert meaningful control over their own accounts and payments infrastructure.<sup>175</sup> At the same time however, both also function as intra-executive fiscal coordinating entities by using their own balance sheet and internal software systems to process payments on behalf of other agencies. In this respect, they both arguably resemble ‘exceptions that prove the rule’ than appropriate architectural models for other agencies to attempt to emulate.

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<sup>173</sup> Regardless of whether the Secretary would ultimately be proven correct in their prediction of the eventual judicial outcome of a legal challenge to the attempted use of a specific novel financing mechanism, the very fact that they are discretionarily empowered to determine when “enough is enough” means the final practical determination of whether or not a “fiscal cliff” occurs on any day is ultimately up to them—and by extension, the President—rather than Congress. See Nathan Tankus, *The Fed will have to accept the \$1tn platinum coin, so just MTFC already*, FIN. TIMES ALPHAVILLE (Jan. 18th, 2023), <https://www.ft.com/content/3e9d6924-42af-4892-951e-dee36a020ea7>

Nathan Tankus, *Three questions for Fed Chair Jay Powell: About the platinum coin and the US Constitution*, FIN. TIMES ALPHAVILLE (Jan. 31st, 2023), <https://www.ft.com/content/afb6ef8f-be7c-45ac-8a7d-56550b64fd9e>.

<sup>174</sup> To the contrary, as other legal scholars have argued, in such an instance the Secretary is arguably constitutionally obligated to continue honor spending obligations, given they reflect a more fundamental—and thus protected—expression of Congress’s constitutional authority directives regarding the specific operational mechanics of financing such spending. See generally Neil Buchanan & Michael Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 12(6) COLUM. L. REV. 1175 (2012).

<sup>175</sup> As discussed *infra*, the Treasury, while responsible for managing payments on behalf of other federal agencies, ultimately itself settles payments through the Federal Reserve, who processes payments requests on an automatic, non-discretionary basis. See Viktoria Dendrinou, *Powell Says Fed Has No Role to Deciding on Payments By Treasury*, BLOOMBERG (Feb. 11, 2025), <https://news.bloomberglaw.com/federal-contracting/powell-says-fed-plays-no-decisional-role-in-payments-system> (reporting Powell’s statement before the Senate Banking Committee that “We make no judgments [about process Treasury payment requests] whatsoever, those are all made upstream from us”).

For an agency to be fully fiscally secure from external takeover or operational obstruction by the President, it needs both intra-executive branch budgetary and payments independence. In other words, it must be able to internally source, hold, and externally distribute funds without reliance on centralized fiscal infrastructure or budgetary procedures over which other executive actors, especially the President have the power to gatekeep through controlling key bottlenecks.

The government agency whose fiscal design arguably comes closest to meeting these criteria today is the CFPB, which is an off-budget, independent sub-bureau of the Federal Reserve exempted from both OMB and Treasury oversight and control.<sup>176</sup> The CFPB avoids unnecessary and complex debt financing arrangements through not only the collection of fines and fees, but its statutory discretion to request supplementary funds up to a generously capped amount directly from the Fed, which must comply on a non-discretionary basis.<sup>177</sup>

At the same time, however, the CFPB remains dependent on the Fed for ongoing account management and payments processing, as well as funding support.<sup>178</sup> Thus far, the Fed has given no indication it believes it has any discretion over the processing of CFPB budget requests up to the limits set by Congress.<sup>179</sup> Yet as evidenced by Trump's recent assault on the Treasury's BFS, it is at least conceivable that one day a more presidentially compromised Fed could attempt to politically leverage its 'disbursement' of balance sheet access to the CFPB, rather than merely processing transfer requests on a technical basis as it does today.<sup>180</sup>

In this respect, while enjoying perhaps the most fiscally autonomous design one might hope for under current arrangements, the CFPB nevertheless remains trapped by the more generally centralized architecture of the public payments system in which it is embedded.<sup>181</sup>

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<sup>176</sup> Joseph Yenouskas & Collin Grier, *CFPB Structure Returns to the Supreme Court*, BUS. LAWYER (May 28, 2024), [https://www.americanbar.org/groups/business\\_law/resources/business-lawyer/2024-spring/cfpb-structure-returns-to-the-supreme-court](https://www.americanbar.org/groups/business_law/resources/business-lawyer/2024-spring/cfpb-structure-returns-to-the-supreme-court).

<sup>177</sup> The CFPB is also authorized to retain and invest surplus funds for its own future purposes, rather than being required to return profits to the general Treasury fund, as is the case for the Fed, Mint, and others. *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Kyle Campbell, *Powell: CFPB Shutdown Creates Consumer Oversight Gaps*, AM. BANK. (Feb. 11, 2025), <https://www.americanbanker.com/news/powell-cfpb-shutdown-creates-consumer-oversight-gaps> (noting Powell's statement that the Fed "must" continue honoring funding of CFPB transfer requests despite running its own operating loss).

<sup>180</sup> For an extended treatment of the debate over the constitutionality of the Federal Reserve System's independent governance structure, see Daniel Tarullo, *The Federal Reserve and the Constitution*, 97 S. CAL. L. REV. 1 (2024).

<sup>181</sup> Of course, following *Seila Law LLC v. Consumer Fin. Protection Bur.*, 591 U.S. 197 (2020), in which the Supreme Court ruled that the CFPB Director's 'for cause' removal protection was unconstitutional, Trump can and has now simply appointed his own director and occupied the CFPB from the inside, rendering its budgetary independence moot. Nevertheless, its funding model stands independent of its single-director leadership structure as a potential model for

vi) *Balance Sheet Intermediation as Fiscal Control*

By limiting the financing capacity of other government agencies, some combination of the President, Federal Reserve Board, and Treasury Secretary can effectively undermine Congress’s intent to bestow politically independent agencies with meaningful fiscal autonomy. Separately, they can also use their balance sheet control to exert pressure over how and when other entities access and spend their own funds. This budgetary obstructionism, in turn, threatens not only the smooth and stable administration of public policy, but also the constitutional separation of powers between Congress and the executive branch.<sup>182</sup>

For the purposes of this Article, the key feature of the current setup is that it expands the President’s unilateral jurisdiction over fiscal matters at the expense of Congress and the rest of the executive branch. Specifically, it does so by rendering the entire federal government dependent on ongoing legal—and crucially, operational—cooperation from both the Treasury and Federal Reserve. This operational dependence is two-fold: agencies require one or both to a) ‘monetize’ their own government obligations—“debt laundering”; and b) to access the primary digital payments system bridging the public and private sectors (reserve account).

In both instances, the major practical tension is that the key “resource” that the Treasury and Fed have, which the other agencies ultimately want access to, is access to their own balance sheet.<sup>183</sup> In effect, the Treasury and Fed both bear the ‘exorbitant fiscal privilege’ of being expected to serve both their own narrow institutional interests, and those of the entire federal administrative state, through the same financial, legal, and technological mechanism.<sup>184</sup>

As with similar debates over the Fed’s ‘exorbitant monetary privilege’ with respect to managing dollar liquidity in the global U.S.-centric financial regime, this tension cannot be easily resolved merely by demanding greater principled commitment to multilateralism on behalf of the fiscal intermediaries

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other agencies with different governance arrangements. *See, e.g.*, Memorandum Opinion and Order at 36, *Wilcox v. Trump*, No. 25-334 (D.C. March 6, 2025) (declaring Trump’s firing of the independent National Labor Relations Board chair unlawful and ordering her reinstatement pending fulfillment of her term).

<sup>182</sup> *See generally*, David Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (2022) (arguing for the importance of designing administrative agencies in ways that avoid their susceptibility to internal ‘sabotage’ by agency leadership under the President’s direction).

<sup>183</sup> *See also* Julie Anderson Hill, *Opening a Federal Reserve Master Account*, 40 Y. J. REG. 453 (2023) (examining various recent legal challenges to Federal Reserve determinations denying various special-purpose banks’ requests to open master reserve accounts).

<sup>184</sup> Typically the concept of ‘exorbitant privilege’ refers to the United States’ ostensible benefits from serving as the global reserve currency. *See, e.g.*, Adam Tooze, *Why the US Dollar Rules the World*, AUS. FIN REV. (Oct. 21, 2022), <https://afr.com/markets/currencies/why-the-us-dollar-still-rules-the-world-20221017-p5bqhj>.

themselves.<sup>185</sup> The unavoidable institutional self-interest of central intermediaries should not be naively downplayed or dismissed. Rather, it should be acknowledged and properly *balanced* against the interests of the counterparties they serve through sound design. Failure to acknowledge and address structural conflicts of interest engenders the kind of budget obstructionism that Trump has exemplified since returning to office.

As the aforementioned FFB, BFS, and debt ceiling crises respectively demonstrate, the Treasury and Fed both not only can but already do leverage their central payments system positions to exercise fiscal influence and control over other agencies operating under their own, independent statutory authority.<sup>186</sup> Importantly, they each do so not just by monopolizing the issuance of key forms of ‘highly fiscal’ public money, but through politicizing and manipulating intra-governmental ‘laundering’ processes intended to turn their institutional balance sheets into quasi-common resources for the entire federal government.

By contrast, the demonstrated practical success of more humble, albeit anachronistic forms of public money, such as coins and paper currency, underscore the possibility for other, less constitutionally fragile, equally non-utopian fiscal arrangements.<sup>187</sup>

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<sup>185</sup> *But see id.* (noting that the U.S. dollar is trapped between “two fundamentally incommensurate visions of the world economy: the one cosmopolitan, the other national or inter-national,” and arguing that the dollar’s true strength and resilience lies not in its “national” character, but the “global financial network that is woven in dollars, and the willingness of the Fed to support that network”).

<sup>186</sup> Durkee, *supra* note 160; Coleman, *supra* note 161.

<sup>187</sup> Both coins and notes are made by small, dedicated-purpose, budgetarily autonomous, and largely politically obscure agencies. Their issuance is clearly distinguished in legal and accounting terms from the issuing entity’s own operating funds, and their responsibilities are tightly limited to the initial creation and injection of dollar balances into general circulation, after which point they become available for direct agency control and use as a bearer instrument. Indeed, it is difficult to imagine how the Mint even could exercise control over other agencies’ use of coins already under their possession, underscoring the degree to which operational autonomy and decentralized control are baked into the very design of physical currency instruments.



## B. The OMB

The OMB is uniquely situated between Congress, the President, and the rest of the executive branch.<sup>188</sup> It is an independent agency established by Congress,<sup>189</sup> with Senate-confirmed leadership and statutorily defined responsibilities,<sup>190</sup> that exists for the core purpose of assisting the President with managing the federal government.<sup>191</sup>

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<sup>188</sup> See, e.g., Taylor Riccard, Clinton Brass & Barbara Schwemle, *Office of Management and Budget (OMB): An Overview*, CONG. RSCH. SERV. RS21665 30 (2023), <https://sgp.fas.org/crs/misc/RS21665.pdf> (“OMB is required to faithfully execute its statutory responsibilities as passed by Congress. In addition, OMB may act as an agent to pursue presidential policy preferences. From Congress’s perspective, there may be tensions or contradictions between the two roles...”, and *Id.* at 27: “it is clear that Congress faces potential trade-offs when considering issues that involve OMB. Congress may choose to authorize OMB to undertake certain activities in order to leverage its expertise and position to help implement Congress’s institutional and policy objectives. However, granting such authorities may leave room for OMB to implement policies more in line with presidential agendas regardless of the intent of Congress. As a result, Congress may face difficult choices when considering how to legislate with respect to OMB’s activities. Congress also may face related challenges in conducting oversight of OMB in situations when OMB’s interactions with agencies are not publicly visible”).

<sup>189</sup> Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 *YALE L.J.* 2182, 2266 (2016), <https://www.yalelawjournal.org/article/the-presidents-budget-as-a-source-of-agency-policy-control> (“The fact that OMB is considered an ‘agency’ under FOIA means that it is considered ‘substantially independent’ rather than meant ‘solely to advise and assist’ in a manner akin to ‘the President’s immediate personal staff’”).

<sup>190</sup> *Id.* at 12.

<sup>191</sup> The OMB was first established in 1921 as the Bureau of the Budget. *Id.* at 1. It was initially housed in the Treasury department, but operated under the direct supervision of the President. *Id.* at 5. In 1939, it was transferred to the Executive Office of the President upon the latter’s establishment. In 1970, it was renamed the OMB. James Pfiffner, *OMB, The Presidency, and the Federal Budget*, in *Executive Policymaking* 16 (Meena Bose and Andrew Rudalevige, eds., 2020),

<https://pfiffner.gmu.edu/wp-content/uploads/2022/05/OMB-the-Presidency-and-the-Federal-Budget-Jim-Pfiffner.pdf>. “At the same time, it created a partial congressional counterweight with the General Accounting Office (later renamed the Government Accountability Office (GAO)). Roughly contemporaneous cameral resolutions gave exclusive jurisdiction over appropriations legislation to the Appropriations Committees. Even with these counterweights, however, the 1921 Act has been understood as ushering in a period of “presidential dominance” of the budget process, a period that lasted for half a century.” Chafetz, *supra* note 54, at 6. In 1974, Congress passed legislation requiring the director and deputy director of the OMB be subject to Senate confirmation, and establishing four divisions with distinct functions and responsibilities ranging from federal procurement and agency financial management to e-government and regulatory policy. 31 U.S.C. §502 (codification of Public Law 93-250; requiring confirmation for OMB directors); 31 U.S.C. §§ 504–507 (enumerating each division). see also Judith H. Parris, *The Office of Management and Budget: Background, Responsibilities, Recent Issues*, 44-50 *CONG. RSCH. SERV.* 78-158, (1978),

<https://digital.library.unt.edu/ark:/67531/metadc992709>.

In addition to preparing the President’s annual budget submission to Congress,<sup>192</sup> the OMB oversees and regulates the spending of appropriated funds by executive agencies under the President’s budgetary control through a process called apportionment.<sup>193</sup> Apportionment is administered by a series of Resource Management Offices (“RMOs”), which coordinate closely with agencies to determine budgetary needs and approve funding access requests consistent with legislative directives and the President’s policy agenda.<sup>194</sup>

The apportionment process was originally established to prevent agencies from overspending too quickly and running out of funds before the new fiscal year.<sup>195</sup> Since then, however, it has warped into a mechanism for centralizing fiscal control in the hands of the unitary executive by allowing the OMB—and by extension, the President—to exert “last-mile” discretion over executive spending levels, as well as the terms and conditions under which such spending occurs.<sup>196</sup>

Specifically, it does so by allowing the OMB to leverage its *operational* control over the centralized funding allocation process in order to expand its *political* control over executive branch budget policy.<sup>197</sup> In the process, they undermine agencies’ ability to independently uphold their constitutional duty to honor Congressional spending commitments in the face of Presidential resistance, as well as Congress’s power to determine and delegate spending capacity across the executive branch in ways that best reflect its substantive and structural goals.

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<sup>192</sup> See Pasachoff, *supra* note 187 at 2221 for lists of executive entities that either submit budget requests directly to Congress at the same time, or submit requests to OMB, but which OMB must allow to pass through untouched. *But see also* Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 806 (2013) (noting that bypass procedures “decrease presidential control over the agencies’ agendas by decreasing the information asymmetry between Congress and the President”) (quoted in Pasachoff, *supra* note 187 at 2222); Pasachoff, *supra* note 187 at 2222-3 (noting that mandatory programs, despite being outside of congressional control, still have discretionary operating budgets under OMB direction, and OMB can also submit non-discretionary budget change requests to Congress).

<sup>193</sup> *Id.* at 2222-3, note 187 (noting that most agencies not subject to apportionment are self-funding financial regulatory entities).

<sup>194</sup> *Id.* at 2214–18 (noting that RMOs represent the largest fraction of the OMB workforce, yet they are mostly separated from its other divisions and functions, such as regulatory policy and digital governance).

<sup>195</sup> Riccard et al, *supra* at 16 (noting that the purpose of apportionment is compliance with the Antideficiency Act, and that “The statute’s express purpose is to prevent federal officials from obligating or expending funds at a rate that would prematurely exhaust the funds, such as before the end of a fiscal year”).

<sup>196</sup> See e.g., *id.* at 2233-34 (describing various reasons why debt ceiling-induced shutdowns empower the OMB to exercise greater discretion over agency budgets than normal circumstances); Order at 14–15, *Glob. Health Council v. Trump*, No. 00402 (D.D.C. Feb. 13, 2025) (temporarily enjoining the Trump administration from implementing a blanket freeze of grant disbursements and other foreign financial assistance, while preserving its discretion to conduct individualized review on an award-by-award basis).

<sup>197</sup> Noll, *supra* note 182, at 796. See also Pasachoff, *supra* note 187 at 2231–32 & fn. 225 (clarifying the important difference between permitted executive deferrals and prohibited policy-motivated impoundments).

Over the decades, Congress has taken steps to formalize and exercise greater influence over OMB's leadership and governance structure.<sup>198</sup> In doing so, however, it has legitimized the agency's expanding fiscal entanglement with the rest of the executive branch, while hardening its outer organizational shell against deeper reform.<sup>199</sup>

*i) Unbundling Apportionment*

Executive branch actors enjoy the least constitutional discretion when effectuating Congress's fiscal directives, and the most when interpreting the exercise of traditional executive powers.<sup>200</sup> In the context of apportionment, however, this distinction is tricky to define, as the OMB combines budgetary and executive policymaking functions within a single administrative process, in which mechanical funding allocations are made conditional on compliance with the OMB's subjective legal interpretations and the President's budgetary priorities.<sup>201</sup>

In particular, RMOs exercise control over agency spending primarily through determining the amount, timing, and occasionally, conditions imposed on periodic allocations of appropriated funds.<sup>202</sup> They also manage the transfer and reprogramming of specifically earmarked allocations, deferral and rescission requests, and budget coordination and reallocation in the event of a government shutdown.<sup>203</sup>

Despite often being presented as apolitical and neutral, in reality RMOs are responsible for making "value-laden decisions about how to confront

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<sup>198</sup> *Id.* at, 2285–2286 (2016) (“Congress turned [the director and deputy director] into Senate-confirmed positions as the scope of their policymaking authority grew and as the President started to use OMB more politically.”). *See also* Pfifner, note 188 at 17 (noting that in 1974, a bipartisan committee report described OMB as a “super department with enormous authority over all of the activities of the Federal Government. Its Director has become, in effect, a Deputy President who exercises vital Presidential powers”).

<sup>199</sup> Today, for example, the OMB is engaged in a range of management and oversight functions beyond budgetary affairs, including digitizing government, legislative coordination and clearing, and establishing regulatory standards. *See, e.g.*, Pasachoff, *supra* note 187, at 2180-2181; Riccard, Brass & Schwemle, *supra* note 185 at 21. This is regrettable, as, as discussed below, certain administrative functions currently assigned to the OMB, particularly apportionment, have distinct constitutional and political dynamics that are arguably best addressed through being spun off and managed separately under different institutional arrangements, but under current arrangements enjoy the shared legitimacy and political clout of the larger organization.

<sup>200</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system”).

<sup>201</sup> Pasachoff, *supra* note 187 at 2233 (noting the OMB's use of separate managerial responsibilities to exert budgetary influence on agencies).

<sup>202</sup> *Id.* at 2229. *See also* Riccard et al, *supra* at 185.

<sup>203</sup> *Id.* at 2230-5.

tradeoffs and project them into an uncertain future.”<sup>204</sup> Even more subjectively, RMOs are authorized to attach ‘footnotes’ to apportionment approvals, specifying changes, conditions, and other criteria that agencies must adhere to in order to receive funding disbursements.<sup>205</sup>

The persistence of this discrepancy between perception and reality is partly due to the dry and technocratic nature of the budget oversight process.<sup>206</sup> As Professor Eloise Pasachoff argues, the “complexity [of the work]...allows a technocratic appearance to obscure underlying substantive choices, thereby reducing accountability.”<sup>207</sup> And yet, as the recent political and legal uproar over the Trump OMB’s January 27th memo has starkly highlighted, the political and constitutional significance of its actions could not be greater.<sup>208</sup>

Today, apportionment serves not one but three distinct administrative functions, each with separate legal and practical dynamics. First, as noted above, it promotes temporal harmonization between immediate agency funding needs and longer-term statutory funding limits by delegating to OMB responsibility for transforming static statutory funding grants into dynamic, periodized budget flows. These flows are managed by RMOs through a standardized, technically sophisticated, and highly collaborative agency oversight process.<sup>209</sup>

Second, apportionment allows RMO staff and OMB leadership to impose procedural and substantive conditions and other changes on specific disbursement requests, as well as adjust total and program-specific discretionary funding levels depending on overall budget capacity. In contrast to rationing decisions made solely out of concern for temporal harmonization, these actions are best understood as a form of discretionary executive budget

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<sup>204</sup> Eugene Bardach, *Report from the Trenches: The Life of the Apprentice Budget Analyst*, 24 J. POL’Y ANALYSIS & MGMT. 419, 419 (2005), quoted in Pasachoff, *supra* note 187, at 2269.

<sup>205</sup> *Id.* at 2229 (noting RMO ‘footnotes’ are enforceable through the Antideficiency Act and can lead to employee suspension without pay, or removal from office).

<sup>206</sup> See, e.g., Pfiffner, *supra* note 188, at 16. (“Presidents needed [the Bureau of the Budget–OMB’s precursor] because it had a monopoly on the technical information necessary to make informed budgetary decisions. The BOB’s influence was based on the budget examiners’ intimate familiarity with the programs and agencies they oversaw.”)

<sup>207</sup> Pasachoff, *supra* note 187, at 2269. RMOs work is secretive and largely operationally autonomous. However, as Professor Pasachoff has argued, given its high-level policy significance and vast discretion involved, including exercising “power over activities taking place elsewhere in the government,” there is a “danger, more than theoretical, that their role will [increasingly] be co-opted in the service of partisan action.” *Id.* at 2264.

<sup>208</sup> For example, in 2019 OMB withheld approximately \$219 million allocated for security assistance for the Ukraine/Russia war. In re Office of Management and Budget, B-331564, GOVT. ACCT’Y. OFFICE (Comp. Gen. 2020), <https://www.gao.gov/assets/b-331564.pdf>. See also Rachel Cletus, Russell Vought Is a Dangerous Choice to Head OMB. Congress Should Vote No on His Nomination, THE EQUATION (Feb. 5, 2025), <https://blog.ucs.org/rachel-cletus/russell-vought-is-a-dangerous-choice-to-head-omb-congress-should-vote-no-on-his-nomination> (noting Trump OMB Director-appointee Vought testified to Congress during his nomination that he agreed with President Trump that the Anti-Impoundment Act was unconstitutional).

<sup>209</sup> See generally Pasachoff, *supra* note 187.

policy-making. As such, they are appropriately subject to political input and direction from the president.<sup>210</sup> At the same time, the OMB remains bound by statutory limits, and cannot exercise its discretion to undermine or contravene Congress’s express budgetary directives.<sup>211</sup>

Third, apportionment compels the OMB to coordinate and administer the operational disbursement of approved appropriated funding requests across the federal government in accordance with statutory directives and mandates. In contrast to the other two functions, which involve exercising some degree of subjective judgment and policy discretion, the act of executing fund disbursement itself is (or at least should be) largely mechanical. In particular, it aims to process disbursements efficiently and securely through a single, standardized procedure, while minimizing unnecessary agency interaction with ‘back-of-house’ payments processing intermediaries such as the Treasury or Federal Reserve.<sup>212</sup>

#### *ii) Disintermediating Appropriations Authority*

Currently, the OMB’s process is to determine *how much* spending is needed, *when* it is needed, and *what* it should be spent on, before finally *authorizing* the release of funds. Upon first glance, this sequence of operations appears sensible—how can the OMB know how much to “release” if it doesn’t first know how much is needed? Moreover, under prevailing budget norms that presume the inherent scarcity of public funds, it is politically and economically rational to seek to avoid allocating extra unnecessary funds that could have been saved or reallocated elsewhere.<sup>213</sup>

At a deeper level, however, the design and sequencing of the disbursement process promotes ongoing intra-executive entanglement and creates a major procedural bottleneck by empowering the OMB to leverage its central control over funding access and distribution procedure to advance its own institutional priorities, including expanding its bureaucratic autonomy and promoting the president’s policy agenda. In doing so, it effectively repurposes a

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Thus the core intra-executive budgetary conflict has for many years been seen as between the Office of Management and Budget and individual agencies. Once agencies and the OMB come to an agreement, it was believed that the budgetary conflict was settled. The payment process layer involving the Treasury’s Bureau of the Fiscal Service was seen as a “back end” issue with no budgetary conflict significance until the Department of Government Efficiency’s incursion into the BFS. Tankus, *supra* note 75; Nathan Tankus, *I asked Former Bureau of the Fiscal Service Employees to Interpret An Elon Musk Tweet. Here’s What they Told me*, NOTES ON THE CRISES (Feb. 14th, 2025),

<https://www.crisisnotes.com/elon-musk-wants-to-get-operational-control-of-the-treasurys-payment-system-this-could-not-possibly-be-more-dangerous/>.

<sup>213</sup> For a challenge to this view *see, e.g.*, Grey *supra* note 54; STEPHANIE KELTON, THE DEFICIT MYTH: MODERN MONETARY THEORY AND THE BIRTH OF THE PEOPLE’S ECONOMY 41–42 (2020); Raúl Carrillo, *Our Money Where Our Mouth Is*, CURRENT AFFAIRS (Aug. 14, 2020), <https://www.currentaffairs.org/news/2020/08/our-money-where-our-mouth-is>.

Congressional delegation of fiscal administrative authority, over which its interpretative discretion is most constitutionally restricted, into a tool for expanding the limits of other executive powers that enjoy greater degrees of constitutional interpretative deference. Come for the disbursement, stay for the Presidential budgetary micromanagement.<sup>214</sup>

The OMB has long been criticized for obscuring the subjective and political nature of its management of the apportionment process.<sup>215</sup> But the inverse is also true: By downplaying and conflating aspects of the process that are (or should be) mechanical with those that are undeniable subjective and discretionary, the OMB has also effectively subsumed narrow questions of operational design within larger debates over the legal limits of executive discretion and the politicization of the bureaucracy.

Importantly, OMB apportionment is not a source of public money in itself. Rather, it establishes an agency's authority to access funds that are operationally sourced and administered, in turn, by the Treasury and Federal Reserve.<sup>216</sup> Consequently, the OMB's role is better understood as adjudicative rather than executory. Its apportionment authorizations function as warrants to exercise specific 'draw' authority against the public fisc.

The 'redemption' of these warrants into actually-spendable 'retail' money, in turn, remains contingent on a separate, underlying process of account transfers processed via digital ledgers maintained by other parties. In this sense, they exist purely as a virtual intra-governmental accounting record between the legislative and executive branches—a form of 'proto' or 'interior' credit obligation—rather than as 'money' issued by the executive branch for circulation among the public.

This arrangement is neither necessary nor inevitable. There is no inherent technical or substantive reason for agency spending restrictions or incremental release conditions to be enforced prior to and through the process of funding disbursement, as opposed to ongoing oversight and periodic review, or even partial automation at the payments layer.<sup>217</sup> To the contrary, there are many alternative mechanisms to conduct central budgetary oversight, management,

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<sup>214</sup> Notably, disbursement doesn't 'exist' anywhere. There are funds which may be disbursed, the capacity to create funds ("money") and there are payment orders but disbursement is not, in and of itself, monetary or legal "object". It represents the budgetary authority to enact the order.

<sup>215</sup> See *supra* note 194.

<sup>216</sup> Technically, apportionment approvals take the form of an OMB-approved 'Treasury Appropriation Fund Symbol' ("TAFS"), a standardized informational form for authorizing spending requests from the Treasury that specifies 1) a Treasury departmental index; 2) a period of availability to incur new obligations; and 3) a Treasury account symbol. *Account Establishment*, TSY. FIN. EXP. (2025), <https://tfx.treasury.gov/account-establishment>.

<sup>217</sup> See, e.g., James Grimmelmann, *All Smart Contracts Are Ambiguous*, 2(1) J. L. & INN. (2019) ("Smart contracts cannot be perfectly unambiguous, but they do not need to be perfect to be useful...Much of the time, legal contracts work adequately, despite the ambiguities of natural language. If smart contracts can perform as well or better in even a single domain, they will have a worthwhile role to play").

and accountability that do not presuppose or require the power to unilaterally withhold initial agency access to funding itself.<sup>218</sup>

More broadly, there is also no reason to presume agencies even require external administrative oversight to avoid overspending in the manner that originally provoked the formation of pre-OMB. Indeed, some of the most high profile government agencies enjoy budgetary independence and unconstrained funding capacity, and yet continue to exercise internal fiscal discipline.<sup>219</sup> Prior to Trump’s return, for example, the CFPB had acquired a ‘war chest’ of over \$600 million in surplus operating funds, which it then invested in Treasury securities as part of a longer-term budget sustainability strategy.<sup>220</sup>

Ultimately, it is up to Congress to determine the degree of fiscal autonomy to grant executive agencies on a case by case basis. While some degree of central budgetary oversight is often politically desirable, and even occasionally unavoidable, there is no reason for it to be structurally enmeshed into the operational mechanics of disbursement as either an intrinsic or default arrangement. To the contrary, disbursement in its most basic constitutional form, is best conceived—and thus should be approached—as a mechanical, non-discretionary process through which agencies access discrete amounts of funding directly from Congress, with oversight and regulation of spending activity maintained separately through agency self-regulation, automated enforcement, and central executive oversight ‘from afar.’

### C. The Legislative Budget Process

The existing statutory framework governing the executive administration of fiscal policy is vague, fragmented, and anachronistic. These problems of

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<sup>218</sup> Crucially, it is both possible and common to enforce agency action through executive directives and judicial orders without ever asserting direct physical control over an agency’s internal operating infrastructure. This includes, for example, through authority to access accounts, query budget plans, make recommendations and requests, prepare independent audit reports, and even initiate administrative or legal proceedings to enjoin or compel agency action.

<sup>219</sup> For example, the CFPB. See Section IIA *supra*.

<sup>220</sup> Notably, these were not-marketable securities issued directly by the Treasury. See Nathan Tankus, *What the Hell is Going On With CARES Act “Funds”? The Federal Reserve’s “Useless Accounting Gimmick” Comes Back to Bite*, NOTES ON THE CRISES (Nov. 25th, 2020), <https://www.crisisnotes.com/what-the-hell-is-going-on-with-cares/>; See also Nathan Tankus, *The Dizzying Array of Accounting Gimmicks Preventing Silicon Valley Bank’s Failure From Affecting the Debt Ceiling*, NOTES ON THE CRISES (Mar. 19th, 2023), <https://www.crisisnotes.com/the-dizzying-array-of-accounting-gimmicks-preventing-silicon-valley-banks-failure-from-affecting-the-debt-ceiling> (“...the FDIC does not have an account with any chartered bank or hold private financial assets. Instead, like social security, it has an account — really an accounting entry — with the United States Treasury. These accounts are, confusingly, called ‘non-marketable treasury securities’. When the FDIC needs to “draw down” the Depositor Insurance Fund, what is really happening is this “non-marketable treasury security” account gets marked down. At that point, the Treasury sends a payment from its checking account at the Federal Reserve, called the Treasury General Account. ...Those non-marketable treasury securities are just intragovernmental accounting tools used to authorize the payments”).

legislative *substance*, in turn, reflect deeper unaddressed problems in the legislative *process*.

Most notably, the Congressional budget process conflates and entangles distinct concerns and goals regarding spending and revenue programs, macroeconomic aggregates, and public debt management into the singular process of Reconciliation.<sup>221</sup> Reconciliation, in turn, is then wrapped around periodic debt ceiling suspension expiration and re-suspension negotiations, which have unintentionally come to function as a general fiscal ‘handbrake’ on the federal government, at the cost of recurrent and increasingly severe government shutdowns and constitutional crises.<sup>222</sup> Finally, parliamentary procedure effectively corrals the bulk of contentious legislative activity into the budget process to avoid the 60-vote threshold of the filibuster, while simultaneously limiting its scope to issues deemed sufficiently ‘budget-related’ and reinforcing a unidimensional approach to legislative negotiation based around macro-oriented budget impact analysis.<sup>223</sup>

These legislative design problems are an ongoing source of constitutional fragility in themselves. More broadly, they generate, define, and exacerbate, other downstream administrative and design issues at the executive branch level.

#### *i) General Procedural Overview*

The Congressional budget process consists of multiple legislative components. In the stylized account, these are typically divided between authorization, appropriations, and financing, with each undertaken by different committees within the House and Senate, in coordination with the executive branch.<sup>224</sup>

Authorization involves granting specific agencies and entities the authority to spend on particular programs or for particular purposes up to a particular limit. Appropriations determines the specific amount to be spent on authorized programs within a particular time frame, subject to the predetermined limits. Financing, which is often conceptually separated from the other two, establishes the government’s general budget authority to run deficits by issuing monetary and other financial obligations.<sup>225</sup>

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<sup>221</sup> Section II(b)(ii).

<sup>222</sup> Section II(b)(iii).

<sup>223</sup> Section II(b)(iv).

<sup>224</sup> Metzger, *supra* note 129 at 1089. *See also* CONG. BUDGET OFFICE, EXPIRED AND EXPIRING: AUTHORIZATIONS OF APPROPRIATIONS: FISCAL YEAR 2020 (Feb. 2020), <https://www.cbo.gov/system/files/2020-02/56082-CBO-EEAA.pdf>; Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U. L. REV. 51, 53 (1979).

<sup>225</sup> Financing legislation, in turn, is typically divided between statutory delegations of agency or program authority to spend “out of any money in the Treasury not otherwise appropriated”—which are treated as part of the appropriations process—and general financing restrictions placed on the Treasury to honor all such spending commitments on behalf of the



Each of these processes is ostensibly distinct, creating a separation of fiscal powers between different committees and bills within the House and Senate.<sup>226</sup> In reality, however, the procedural sausage-making of the federal budget is far messier and less coherent than this idealized version. As Louis Fisher noted in 1979,

Authorization bills contain appropriations, appropriation bills contain authorizations, and the order of their enactment is sometimes reversed. The Appropriations Committees, acting through various kinds of limitations, riders, and nonstatutory controls, are able to establish policy and act in a substantive manner. Authorization committees have considerable power to force the hand of the Appropriations Committees and, in some cases, even to appropriate.<sup>227</sup>

Today, for example, so-called “mandatory spending” programs, which are established via substantive authorizing legislation containing permanent appropriation authority, represent sixty-one percent of the total federal budget.<sup>228</sup> This has effectively created a two-track system, in which such spending commitments persist independently from the annual discretionary appropriations process.<sup>229</sup>

At the same time, appropriators have also developed new ways to exercise political influence beyond narrow questions of how much to spend on authorized discretionary programs.<sup>230</sup> As Metzger notes, “[r]ather than amending or repealing substantive authorizations, Congress [now] resorts to appropriations riders and funding denials as its tools of choice to control

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broader federal government, which are treated as part of overall public debt management. GAO Office of the General Counsel, *supra* note 13 at 23.

<sup>226</sup> See, e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. Callaway*, 382 F. Supp. 610, 620 (D.D.C. 1974) (“[I]t is a general principle that Congress cannot and does not legislate through the appropriation process”). *But see*, e.g., Matthew Lawrence, *Disappropriation*, 20 COLUM. L. REV. 1, 84 (2020) (arguing that “in actual operation, Congress can and does legislate through the appropriation process”); Metzger, *supra* note 9 at 1089 (“Ever since appropriations committees were created after the Civil War, they have fought subject-area ‘authorizing committees’ for control over spending”).

<sup>227</sup> Fisher, *supra* note 220 at 53. See also Metzger, *supra* note 9 at 1087 (appropriators “encroached on authorizing committees domains...with substantive riders and legislative provisions regularly appearing in annual appropriations bills”).

<sup>228</sup> Metzger, *supra* note 9, at 1090 (citing Schick, *infra* note 232 at 209-212); Congressional Budget Office, *The Federal Budget in 2019: An Infographic* (Apr. 15, 2020), <https://www.cbo.gov/publication/56324>.

<sup>229</sup> Moreover, the principle that authorizing legislation can, under certain circumstances, serve as its own spending authority has also been extended beyond mandatory programs to things like federal contracts. As Professor Metzger has recently argued, the Supreme Court has, across multiple recent cases, “refused to read an appropriations measure as limiting a payment promise contained in an authorization statute, in contexts where services were already provided in reliance on the payment promises.” Metzger, *supra* note 9, at 1129. According to Metzger, this is likely driven by the judicial “desire to protect expectations and enforce statutory obligations.” *Id.*

<sup>230</sup> Fisher, *supra* note 20 at 53 (“Appropriations Committees, acting through various kinds of limitations, riders, and nonstatutory controls, are able to establish policy and act in a substantive manner”).

government policy.”<sup>231</sup> Moreover, appropriations are often committed even in the absence of authorizing authority – In 2024, for example, nearly one third of all discretionary spending - \$516 billion in total – had an expired authorization, up from \$121 billion in 2000.<sup>232</sup> More generally, appropriations bills are now regularly included in omnibus packages with other legislation to improve passage, thereby subjecting an ever wide range of legislative issues to the interests and demands of appropriators.<sup>233</sup>

## ii) Reconciliation

Perhaps the most significant budgetary development in recent memory, however, has been the rise of reconciliation as a primary means of coordinating and determining overall fiscal activity.<sup>234</sup> Reconciliation refers to the legislative process by which individual spending and revenue-generation bills are together made commensurate with Congress’s non-binding joint budget resolution, which sets out its aggregate targets for total public spending and revenue, as well as operational instructions on how to finance any resulting deficits.<sup>235</sup>

The original intent behind reconciliation was for it to serve as a legislative means for the various committees in Congress to increase or lower total amounts spent and/or collected by particular programs and agencies in accordance with the targets set forth in the budget resolution.<sup>236</sup> Over time, however, the reconciliation process, along with intermediary continuing

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<sup>231</sup> Metzger, *supra* note 9, at 1077. *See also* Kate Stith, *Congress’ Power of the Purse*, 97 *YALE L. J.* 1343, 1387, n.218 (1988), and more generally Edwin Meese III, *The Appropriations Power and the Necessary and Proper Clause*, 68 *WASH. U. L. Q.* 623 (1990); Kate Stith, *Federal Spending and the Deficit: Is a Constitutional Remedy Necessary?*, 11 *GEO. MASON U. L. REV.* 119 (1988-1989); Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 97 *CALIF. L. REV.* 593 (1988).

<sup>232</sup> Congressional Budget Office, *Expired and Expiring Authorizations of Appropriations for Fiscal Year 2024* (2024), <https://www.cbo.gov/publication/60580>; Metzger, *supra* note 9 at 1092 (citing CBO, *Expired and Expiring Authorizations of Appropriations: Fiscal Year 2020*, 3, Table 1 (2020), <https://www.cbo.gov/system/files/2020-02/56082-CBO-EEAA.pdf>; CBO, *Unauthorized Appropriations and Expiring Authorizations*, 4, Table 1 (2000), <https://www.cbo.gov/system/files/2019-04/12063-UAEA.pdf>).

<sup>233</sup> Metzger, *supra* note 9, at 1092.

<sup>234</sup> *See, e.g.*, CRS, *The Budget Reconciliation Process: Stages of Consideration*, REPORT FOR CONGRESS (Jan. 25, 2021), <https://fas.org/sgp/crs/misc/R44058.pdf>; CRS, *The Budget Reconciliation Process: House and Senate Procedures*, REPORT FOR CONGRESS (Aug. 10, 2005), [https://www.everycrsreport.com/files/20050810\\_RL33030\\_fb910a65893f2a53ec2760647edd7ade6720ffb4.pdf](https://www.everycrsreport.com/files/20050810_RL33030_fb910a65893f2a53ec2760647edd7ade6720ffb4.pdf).

<sup>235</sup> The joint budget resolution must be passed before the reconciliation process must begin. *See, e.g.*, David Wessel, *What is Reconciliation in Congress?*, BROOKINGS INSTITUTE (Jan 13, 2025), <https://www.brookings.edu/blog/up-front/2021/02/05/what-is-reconciliation-in-congress>; Metzger, *supra* note 9 at 1091.

<sup>236</sup> ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 121 (3d ed. 2007) (“The resolution is advisory; the work of other committees is legislative. The resolution deals with aggregates and a small number of major spending categories; other committees get into the details and make specific program decisions”). *See also* Wessel, *supra* note 230.

resolutions, have become the primary means through which general budget policy is negotiated and implemented.<sup>237</sup>

Since its first use in 1980, reconciliation has been used to pass 232 omnibus bills as of January 2025, including both the Affordable Care Act and the American Rescue Plan.<sup>238</sup> In the process, it has become a central coordinating mechanism for a broad range of actors, from Congressional committees to the executive branch, with interests ranging from particular programs and taxes to general macroeconomic stability, to .<sup>239</sup>

The main reason for reconciliation’s increased procedural significance is that unlike regular appropriations and authorization legislation, it is not subject to the Senatorial filibuster and thus can be passed with a bare Congressional majority in both houses, rather than the sixty votes needed to end filibuster via cloture.<sup>240</sup> Avoiding the filibuster, in turn, has become increasingly politically existential as electoral demographics and party polarization reduce the prospects of both bipartisan consensus and either vote securing lasting sixty-vote majorities in the Senate.<sup>241</sup>

At the same time, however, a longstanding senate parliamentary rule known as the “Byrd Rule” prohibits the attachment of non-budgetary substantive provisions—i.e., provisions that are ‘merely incidental’ to total spending, revenue, or debt levels—in addition to restricting amendments that would violate the aggregate spending, revenue, and deficit targets initially established by the Congressional budget resolution.<sup>242</sup>

Consequently, a major feature of the reconciliation process is its highly technical emphasis on legal delineations between ‘budgetary’ versus ‘non-budgetary’ legal authority, budget impact projection calculations, and ‘back-of-the-envelope’ line-item negotiations to keep within the macro-constraints of the budget resolution.

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<sup>237</sup> CRS, *Continuing Resolutions: Overview of Components and Practices* (May 16, 2023), <https://crsreports.congress.gov/product/pdf/R/R46595> (detailing the continuing resolution process)..

<sup>238</sup> Schick, *supra* note 231 at 21.

<sup>239</sup> At the same time, the reconciliation process remains limited in jurisdiction to laws that have a “not incidental” effect on overall spending and revenue limits. This, in turn, narrows the scope of legislative issues considered during the budget process to those capable of being passed through reconciliation, even as Congress’s general appropriations and authorization power faces no such limits. *Id.*

<sup>240</sup> See generally Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U. C. DAVIS L. REV. 261 (2013).

<sup>241</sup> See, e.g., Greta Bedekovics, *How the Racist History of the Filibuster Lives On Today*, CTR. FOR AM. PROG. (Apr. 29, 2024), <https://www.americanprogress.org/article/how-the-racist-history-of-the-filibuster-lives-on-today> (describing the filibuster as the “preeminent institutional tool used to deny rights and liberties to tens of millions of Black and brown Americans”)

<sup>242</sup> For an extended discussion of the history and current procedural implications of the Byrd Rule, see, e.g., CRS, *The Budget Reconciliation Process: The Senate’s “Byrd Rule,”* REPORT TO CONGRESS (May 28, 2021), <https://crsreports.congress.gov/product/pdf/rl/rl30862>.

In addition to setting both aggregate spending and revenue targets, as well as specific sub-targets across different functional spending categories, the Budget Resolution also separately establishes aggregate targets for the issuance and growth trajectory of public debt.<sup>243</sup> In doing so, it sets up a constitutional crisis-inducing fiscal paradox, in which the executive branch's legislative spending and revenue directives can end up requiring deficit spending levels beyond the aggregate public debt issuance limits set by Congress.<sup>244</sup>

As detailed in the next subsection, Congress has thus far attempted to resolve this paradox by functionally repurpose the debt ceiling itself from an *ex ante limit on financing*, into a periodic '*handbrake*' on spending in an otherwise continuously fluid, open-ended financing regime. While not removing the threat of crisis completely, this approach nevertheless has a stabilizing effect through compartmentalizing the risk of crisis into a localized, clearly defined, and regularly scheduled sub-component of the broader legislative budget process.

### *iii) Debt Ceiling 'Re-Suspension'*

The debt ceiling establishes a statutory cap on the total nominal value of interest-earning government securities that the Treasury and (most) other government agencies may issue to finance their spending commitments.<sup>245</sup> In practice, however, it is suspended by default, and only periodically and briefly reinstated to indirectly facilitate larger budget disagreements.

This relatively recent arrangement has effectively allowed the executive branch to issue securities as necessary on a day-to-day basis to meet Congress's spending directives, while simultaneously preserving Congress's ability to subject the overall amount and trajectory of public debt issuance to periodic review and potential legislative obstruction. In effect, Congress has replaced a quantitative constraint on the executive's deficit spending authority with a temporal one.<sup>246</sup> This allows Congress and the President to reliably

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<sup>243</sup> CRS, *The Congressional Budget Resolution: Frequently Asked Questions*, 6 (Nov. 26, 2024), <https://crsreports.congress.gov/product/pdf/rl/rl30862>.

<sup>244</sup> See generally Grey, *supra* note 147; Nathan Tankus, *I Got the Fed to Release its 2011 "Treasury Default" Playbook. Here's What it Says and Why it Matters*, NOTES ON THE CRISES (Nov. 7, 2023), Nathan Tankus, *Three questions for Fed Chair Jay Powell: About the platinum coin and the US Constitution*, FINANCIAL TIMES ALPHAVILLE (Jan. 31st, 2023), <https://www.ft.com/content/afb6ef8f-be7c-45ac-8a7d-56550b64fd9e>.

<sup>245</sup> See Section IIA(i) *supra*.

<sup>246</sup> In this respect, it functions somewhat similar to a stronger-form of the "Gephardt Rule," a House of Representatives' parliamentary rule that existed from 1979 until its repeal in 2011, which provided that when the House adopted the budget resolution for a fiscal year, it would be treated as equivalent to passing legislation increasing the statutory debt limit up to the amount approved by the resolution, without the need for a separate vote. CRS, *Debt Limit Legislation: The House "Gephardt Rule."* REPORT TO CONGRESS, 2 (Feb. 13, 2019), <https://fas.org/sgp/crs/misc/RL31913.pdf>.

predict exactly when the next debt ceiling suspension must be passed to prevent a fiscal finance crisis, and plan accordingly.

The fiscal implications of this shift, while subtle, are profound. For arguably the first time in the history of the United States, the Treasury faces no day-to-day operational restrictions on its financing activities beyond the general spending restrictions imposed by Congress through the regular budgetary process. In effect, the default position of the U.S. government has been inverted from a presumption of budgetary scarcity to one of abundance, at least with respect to its so-called “borrowing” authority.

Rather than operating with a “maximum limit on its credit card,” the Treasury now enjoys a “blank check” to issue new government obligations in accordance with Congressional spending directives, subject to periodic Congressional review through the debt ceiling re-suspension process. Congress, in turn, has shifted from an “only when we say” to an “okay unless we say it isn’t” attitude to the Treasury’s discretionary issuance of government securities.

Importantly, however, this shift has not resulted in a loss of Congressional control over fiscal financing affairs. To the contrary, Congress counterintuitively enjoys greater regularity in the timing and structure of debt ceiling negotiations today than it ever did before.<sup>247</sup> In effect, the re-suspension process has turned the debt ceiling from a ticking time bomb into a *predictable* ticking fiscal time bomb.

Notwithstanding the greater degree of regulatory control afforded to Congress by its newly revised structure, the continued existence of the debt ceiling—even in its current, mostly dormant form—represents a major source of constitutional fragility. Specifically, it creates a non-trivial risk that Congress and the President will one day fail to re-suspend it in a timely manner, or otherwise modify it in a way that gives irreconcilably conflicting spending and financing directives to the executive branch.

Such an occurrence would likely precipitate a constitutional crisis, as the President and Treasury Secretary would be forced to choose whether to resolve

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<sup>247</sup> Some legal experts have argued that the prior arrangement, in which the debt ceiling established a fixed, quantitative debt issuance cap that the Treasury Secretary (and President) were then expected to navigate while simultaneously honoring statutory spending commitments, effectively undermined Congressional authority by empowering the President to decide what direction and approach to take when faced with a perceived statutory conflict. *See, e.g.,* Chad DeVeaux, *The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoffs Through the Prism of Youngstown Steel*, 47(2) CONN. L. REV. 395 (2014) (“Congress, by confronting the president with a no-win scenario, increased his power. Conflicting legislative commands necessarily invest the executive with a measure of discretion that resembles law making. By commanding the president to implement particular programs, while denying him the funds necessary to pay for those endeavors, Congress tacitly afforded the president the discretion to take any of [a range of possible corrective actions]”).

the conflict by unilaterally cutting spending, raising revenue, ignoring the debt ceiling, or relying on even less conventional financing mechanisms.<sup>248</sup>

Crucially, however, the constitutional and statutory tension between spending mandates and financing constraints does not arise solely in the context of aggregate debt limits imposed on the Treasury’s total borrowing capacity within the consolidated budget process. Many agencies and mandatory programs face individual budgetary constraints, either in terms of borrowing limits, or a prohibition on spending in excess of pre-accumulated receipts, that make it difficult – if not impossible – for them to honor their statutory spending commitments.<sup>249</sup>

For example, there has been a longstanding concern that under current financing arrangements, the Social Security Trust Fund will eventually run out of operating funds. If such an eventuality were to occur, as the Government Accountability Office has noted,

Under the Social Security Act, beneficiaries would be still legally entitled to their full scheduled benefits. However, the Antideficiency Act prohibits government [entities from] spending in excess of available funds, so the Social Security Administration (SSA) would not have legal authority to pay full Social Security benefits on time.<sup>250</sup>

Such concerns have led some legal experts to argue for an implied constitutional duty for Congress to fund the executive branch to the degree necessary for it to carry out its substantive fiscal duties as determined by the appropriations process.<sup>251</sup> According to Metzger, such a “duty to fund” is entirely compatible with “a robust view of Congress’s appropriations power when both are understood as part of an overall obligation by Congress to supervise delegated [fiscal] authority.”<sup>252</sup> In her view,

Whether providing adequate funding or refusing to fund on policy grounds, Congress is playing [a] supervisory role [over the executive branch]. The two are also aligned in both offering ways of targeting systemic legal inconsistency, albeit from opposite angles—one urging Congress to provide funding to meet statutory obligations and

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<sup>248</sup> Buchanan & Dorf, *supra* note 172; *but see* Grey, *supra* note 54 (arguing that the perceived statutory conflict can be avoided by the Treasury exercising alternative financing tools, notably high value coin seigniorage through the U.S. Mint).

<sup>249</sup> See generally Lawrence, *supra* note 222; Metzger, *supra* note 185.

<sup>250</sup> CRS, *Social Security: What Would Happen If the Trust Funds Ran Out?*, REPORT TO CONGRESS, 2 (July 29, 2020), <https://fas.org/sgp/crs/misc/RL33514.pdf>.

<sup>251</sup> Metzger, *supra* note 9 at 1149; Gillian Metzger, *The Constitutional Duty to Supervise*, 124 YALE L. J. 1836, 1931–32 (2015). See also Daniel Martin, *The Duty to Appropriate: Why Congress Has a Constitutional Obligation to Fund Criminal Law Enforcement*, 106 CALIF. L. REV. 511 (2018); Stith, *Congress’ Power of the Purse*, *supra* note 229 at 1337.

<sup>252</sup> Metzger, *supra* note 185 at 1150.

the other arguing that Congress's failure to fund should be recognized as sometimes changing the underlying law.<sup>253</sup>

Viewed from this angle, both the decision to re-suspend and *not* re-suspend the debt ceiling are arguably, at their core, legitimate expressions of Congress's fundamental power of the purse – at least, to the extent such decisions are ultimately made by Congress, and not by the President through their veto power.<sup>254</sup> As socially harmful and politically unwise as it may be for Congress to “go nuclear” and suspend government-wide deficit spending authority, it is not inherently constitutionally prohibited from doing so.<sup>255</sup> Functionally speaking, the difference between Congress precipitating a general government shutdown by intentionally not renewing the debt ceiling suspension, and terminating a particular spending program through non-renewal of annual appropriation authority, is largely a matter of degree and scale, not kind.

In this sense, recognizing a constitutional “duty to fund” does not undermine or eliminate Congress's discretionary prerogative to revise or repeal previously incurred fiscal commitments through new legislation, or through exercising a general fiscal brake by periodic revocations of temporary grants of general spending authority. Rather, it merely enforces consistency between statutory spending commitments and the financing authority necessary to adequately meet them *to the extent the spending obligations remain good law*.<sup>256</sup> As Metzger argues, “Congress can alter the government's substantive responsibilities, but it violates the duty [to fund] if it leaves these responsibilities in place but sabotages the government's ability to meet them.”<sup>257</sup>

On the other hand, in contrast to the legislative de-funding of a specific program, seen widely as equivalent to terminating its existence, debt ceiling

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<sup>253</sup> *Id.*

<sup>254</sup> In 2017, for example, President Trump threatened to veto any spending legislation that did not include funding for his proposed border wall. Erik Wasson, *Trump Shutdown Threat Complicates Congress's Debt Ceiling Plans*, BLOOMBERG (Aug. 23, 2017), <https://www.bloomberg.com/news/articles/2017-08-23/trump-shutdown-threat-complicates-congress-s-debt-ceiling-plans>.

<sup>255</sup> CRS, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, REPORT TO CONGRESS 24 (June 16, 2020), <https://crsreports.congress.gov/product/pdf/R/R46417>.

<sup>256</sup> See generally Lawrence, *supra* note 222; Zachary Price, *Funding Restrictions and Separation of Powers*, 71(2) VAND. L. REV. 357 (2018). The implicit tension between funding and spending directives was last explored in depth by legal scholars in the late 1980's during the Iran-Contra Affair, when the Reagan Administration asserted that the President, as Commander-in-Chief, retained the constitutional right to provide non-appropriated funding to the Contras under his authority over military affairs. See, e.g., Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?* 83(4) AM. J. OF INT. L. 758 (1989). But see also Christian Bale, *Checking the Purse: The President's Limited Impoundment Power*, 70 DUKE L. J. 607 (2020-2021) (arguing that the President, as Commander in Chief, has limited authority to impound funds for a discrete number of military-related programs, notwithstanding general statutory prohibitions on unilateral impoundment).

<sup>257</sup> Metzger, *supra* note 9 at 1149. See also Metzger, *supra* note 249 at 1931-32.

crises are typically viewed as temporary events that hinder, rather than invalidate, the federal government's statutory spending directives.<sup>258</sup> While it is possible to treat Congress's failure to extend the debt ceiling as an "intentional" repudiation of the executive branch's general deficit-spending authority, and thus a legitimate expression of its constitutional fiscal powers, this interpretation is clearly at odds with the reality of how debt ceiling crises actually arise and unfold.

As an empirical matter, debt ceiling crises have generally not functioned as broad-scale referenda on the legitimacy of each and every one of the federal government's spending commitments, or of the President's interpretation of how to execute those commitments.<sup>259</sup> Rather, they have generally centered around disagreements over aggregate deficit and borrowing levels, and concerns about fiscal prudence and macroeconomic stability.<sup>260</sup> Although individual programs often end up losing funding in the end-negotiated compromise, in general the federal government quickly recommences normal operating activities and payments, and honors previously incurred financial obligations and backdated payments orders.<sup>261</sup>

Furthermore, it is clear that one of the major reasons why debt ceiling disputes have become such constitutional high-stakes, potentially catastrophic affairs is precisely because responsibility and accountability for ensuring a successful outcome does not lay solely with Congress, as is normally the case with fiscal issues in parliamentary regimes. Instead, it is formally shared with the executive branch in two ways – through the President's legislative veto power (which requires a two-thirds vote of both houses to overturn, in contrast to the bare majorities needed to pass reconciliation), and through the (arguably) constitutional discretion of the Treasury Secretary to decide to continue honoring pre-existing statutory spending commitments even when the debt ceiling suspension is not renewed.<sup>262</sup>

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<sup>258</sup> See, e.g., CRS, *Shutdown of the Federal Government: Causes, Processes, and Effects*, REPORT TO CONGRESS (Dec. 10, 2018), <https://fas.org/sgp/crs/misc/RL34680.pdf>.

<sup>259</sup> The latter typically arises in the context of disputes over the Anti-Deficiency Act, which restricts the executive branch from spending funds that have not been appropriated, and the Impoundment Control Act, which restricts the executive grant from *not* spending funds that *have* been appropriated. See, e.g., Andrew Cohen, *The Odd Story of the Law That Dictates How Government Shutdowns Work*, ATLANTIC (Sept. 28, 2013), <https://www.theatlantic.com/politics/archive/2013/09/the-odd-story-of-the-law-that-dictates-how-government-shutdowns-work/280047>, Takeshi Fujitani & Jared Shirck, *Executive Spending Powers: The Capacity to Respond, Reprogram, Rescind, and Impound*, HARVARD LAW SCHOOL FEDERAL BUDGET POLICY SEMINAR BRIEFING PAPER No. 8 (May 4, 2005), [http://140.247.200.140/faculty/hjackson/ExecutiveSpendingPowers\\_8.pdf](http://140.247.200.140/faculty/hjackson/ExecutiveSpendingPowers_8.pdf); Wm. Bradford Middlekauff, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100(1) YALE L. J. 209 (1990).

<sup>260</sup> See, e.g., Grey, *supra* note 54 at 253-60; Kenneth Garbade, *The First Debt Ceiling Crisis*, FEDERAL RESERVE BANK OF NEW YORK STAFF REPORT No. 783 (June 2016), [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr783.pdf?la=en](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr783.pdf?la=en).

<sup>261</sup> CRS, *supra* note 253.

<sup>262</sup> See, e.g., Buchanan & Dorf, *supra* note 172; Alan Feld, *The Shrunken Power of the Purse*, BOSTON UNIVERSITY SCHOOL OF LAW WORKING PAPER No. 9-14, 4 (March 18, 2009),



Together, these create a dynamic in which Congress can blame the President for causing any political logjam that emerges during the suspension re-negotiation process, as well as the Treasury Secretary for failing to adequately pursue alternative financing arrangements (of whatever legality) to prevent government shutdown. Simultaneously, it allows the executive to effectively nullify duly established Congressional spending commitments both through obstruction of new financing authority via the threat of Presidential veto, and the Treasury Secretary's ability to unilaterally determine that existing financing authority is no longer sufficient to meet the government's ongoing payments commitments.<sup>263</sup>

Consequently, despite being initially introduced to increase the executive branch's discretionary capacity to honor Congress's spending directives, today the debt ceiling serves the opposite function. First, it empowers the executive branch to discretionarily *ignore* legislative spending directives by pointing to ostensible contradictions with broader financing constraints.<sup>264</sup> Second, it increases the President's control over overall spending levels by granting them the discretion to block Congress's efforts to reauthorize financing authority for previously approved spending. Third, it allows Congress to undermine and/or pick fights with former versions of itself, while deflecting political blame for any resulting social and economic disruption by blaming the President or partisan opposition for any intransigence.

*iv) Filibuster & the Byrd Rule*

Finally, at the procedural level, the combination of the filibuster and Byrd Rule—which excludes from reconciliation any substantive amendment deemed by the parliamentarian to be merely 'incidental' to the budget—together create a narrow, unidimensional legislative process, whereby all new legislative proposals are evaluated nominally on their aggregate deficit-impact first, and practically on their social need and economic benefits last.<sup>265</sup> This, in turn,

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[https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1503&context=faculty\\_scholarship](https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1503&context=faculty_scholarship) (arguing that “[t]he difference in structure between the two political branches places Congress at an institutional disadvantage in its confrontations with the President” due to the difficulty in achieving necessary working Congressional majorities, but that “[t]he burden of congressional inaction shifts [back] in Congress's favor . . . when a desired outcome requires enactment of new legislation”).

<sup>263</sup> For example, in the 1970's, President Nixon attempted to defend the impoundment of various program funds that Congress has specifically exempted from the possibility of impoundment on the grounds that the executive lacked sufficient available funds to honor total spending commitments. In reality, however, Nixon had plenty of financing means that had not yet been fully exhausted, prompting legal experts to widely dismiss his claims of financial incapacity as a justification for violating his constitutional obligation to spend in accordance with Congress's express directives. Grey, *supra* note 54 at 241.

<sup>264</sup> Nathan Tankus, *Everything About the Trump Administration's Impoundment Putsch You Were Too Afraid to Ask*, NOTES ON THE CRISES (Jan. 31st, 2025), <https://www.crisisnotes.com/everything-about-the-trump-administrations-impoundment-putsch-you-were-too-afraid-to-ask>.

<sup>265</sup> See *supra* note 237.

feeds back into and further reinforces the political and procedural centrality of debt ceiling and financing authority disputes, increasing their value as targets for constitutional pressure and attack by an imperial presidency.

In particular, the Filibuster and Byrd Rule together weaken Congress's constitutional powers of the purse in two key ways. First, they obscure and impede Congress's basic constitutional function as a bicameral parliamentary body empowered to 'present' bills for the president's signature, and eventual passage into law, upon a majority vote of both houses. Instead, Congress's raw majoritarian power is restricted to only the most incontrovertibly budgetary legislative proposals.<sup>266</sup> Everything else is subject to exclusion from the reconciliation process upon a negative determination of its adequate budgetary significance by the parliamentarian.<sup>267</sup> After that, it is thrown to the mercy of the filibuster's 60-vote senate threshold, which under current electoral map conditions means effectively no chance of down-the-line partisan passage.<sup>268</sup>

Second, they subordinate consideration of the standalone merits of specific policy proposals underneath a broader concern for both its fiscal impact and relative prioritization against other fiscal priorities. They do so by redirecting all politically contentious policy debates through the conceptual bottleneck of 'budget-related' law, and then meta-structurally constraining the budget process around both aggregate deficit targets and periodic debt ceiling resuspension debates.<sup>269</sup> This, in turn, forces Congress to engage and negotiate with the President primarily through the rhetorical and substantive lens of abstract, headline numbers, compiled from hundreds of individual program estimates whose budget impact projections are treated as akin to neutral and scientifically rigorous "pay-for" price tags.<sup>270</sup>

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<sup>266</sup> Jacobi & VanDam, *supra* note 235.

<sup>267</sup> In doing so, it effectively elevates the parliamentarian's discretion into a near-metaphysical constraint on the majoritarian lawmaking process. *See e.g.*, Michael Bopp et al, *Flying Right: Avoiding Byrd Rule Challenges in Budget Reconciliation*, GIBSON DUNN (Feb. 11, 2025), <https://www.gibsondunn.com/flying-right-avoiding-byrd-rule-challenges-in-budget-reconciliation> (noting that Parliamentarian determinations occur "behind closed doors," with "no public record of the arguments or outcomes," and that consequently, it can be "difficult to divine the standard" they use when making Byrd Rule-related denominations, "in particular, the 'merely incidental' test") (internal quotes omitted).

<sup>268</sup> This is especially constitutionally problematic given the British parliamentary history of vesting fiscal powers not just with the legislative branch but with the lower house specifically. *See, e.g.*, CFPB v Community Financial, *supra* note 30, at 11-12 (2024) ("By the time of the Constitutional Convention, the principle of legislative supremacy over fiscal matters engendered little debate and created no disagreement. It was uncontroversial that the powers to raise and disburse public money would reside in the Legislative Branch. The only disagreement was about whether the right to originate taxation and appropriations bills should rest in a legislative body with proportionate representation...Ultimately, the Convention agreed to grant the House an exclusive power to originate revenue laws but not for appropriations laws").

<sup>269</sup> *See generally* Kelton, *supra* note 209.

<sup>270</sup> *But see* Stephanie Kelton, *What Every American Needs to Know About the Congressional "Pay-For" Game (Part 3)*, THE LENS, (Aug. 29, 2021), <https://stephanickelton.substack.com/p/what-every-american-needs-to-know-5b0> (arguing against the funding-constrained 'pay-for' budgeting approach in favor of an 'inflation-targeting' approach that evaluates bills for their inflationary risk not their impact on total 'deficit' levels).

### III. DOLLAR DIGITIZATION AS FISCAL TRANSFORMATION

“You never change things by fighting the existing reality. To change something, build a new model that makes the existing model obsolete.

- Buckminster Fuller<sup>271</sup>

The previous Part examined the structure of the public fisc as a nested system of centralized entities and processes, each with distinct and often contradicting directives, interests, and priorities. It argued that this structure engenders constitutional fragility through excessive administrative entanglement that orients the entire spending process around a small number of key procedural and institutional bottlenecks. This, in turn, renders it vulnerable to Presidential manipulation and compromise, undermining the separation of powers.

As underscored by Trump’s DOGE-led attempts to take over the BFS discussed in Part I, however, the currently fragile state of the constitutional fisc is also in part a function of monetary technology and public payments infrastructure design. Notably, the same architectural flaws found at the legal and institutional level—excess entanglement, key bottlenecks, and contradicting directives and functions—are also observable at the technical level.

Recently, policymakers have become increasingly interested in new forms of government-issued digital public money under the conceptual frame of ‘central bank digital currencies’ or “CBDCs.”<sup>272</sup> Although these debates thus far have largely ignored fiscal considerations, they represent an initial political and practical opening through which to develop an even more fundamental reimagining of the Constitution’s various fiscal and monetary powers.

To that end, this Part makes the case for a wholesale re-imagining of fiscal design, administration, and policymaking through the technological lens of digital public money. It proceeds by briefly tracing the rise of central bank digital currencies, arguing that they represent an unseized opportunity for a broader digital reimagining of fiscal policy and public payments infrastructure. It then proposes and outlines a blueprint for a ‘New Digital Fiscal Regime’ (“NDFR”) centered around a two-tier ‘centralized legislature, decentralized executive’ approach to the division of fiscal administrative responsibilities. Finally, it argues that this framework clarifies and simplifies fiscal and monetary operations, resolves major constitutional weaknesses in the existing fiscal architecture, and serves as a progressive counter-vision to Trump’s constitutionally threatening unitary fiscal executive vision.

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<sup>271</sup> Quoted in L. STEVEN SEIDEN, *A FULLER VIEW—BUCKMINSTER FULLER’S VISION OF HOPE AND ABUNDANCE FOR ALL* 358 (2011).

<sup>272</sup> See *Central Bank Digital Currency—Frequently Asked Questions*, FED. BD. OF GOV. (2025), <https://www.federalreserve.gov/cbdc-faqs.htm> (a CBDC would “differ from existing digital money available to the general public because [it] would be a liability of the Federal Reserve, not of a commercial bank”); *Central Bank Digital Currency Tracker*, ATLANTIC COUNCIL (2025), <https://www.atlanticcouncil.org/cbdctracker> (tracking current CBDC projects internationally).

### *a. Digital Currency Technology's Untapped Fiscal Potential*

Money is both material and symbolic, driven by practicality yet imbued with perceptual meaning.<sup>273</sup> How the public fisc is designed and functions shapes the economic and political conditions under which broader social action and change occurs.<sup>274</sup> Disputes over the precise definition of ‘appropriation’ or interoperability standards for publicly issued debit cards are in one sense highly esoteric and abstract. Yet their impacts are felt concretely and acutely by millions, whether from financial crises, government shutdowns, austerity, or the re-balkanization of the payments system.

Trump has tragically illustrated the risks of allowing public payments technologies to atrophy, as well as failing to keep up evolving best practices for resilient and secure system design. Neglecting fiscal infrastructure is a negatively reinforcing dynamic. Reduced state administrative capacity increases the rate of fiscal operational failure, which becomes, in turn, a justification for further reductions in resources and operational responsibility.

Beyond the clear material and political harms, this dynamic also impoverishes our collective imagination of what is technically possible in fiscal and monetary governance and reform. In ceding the imaginative realm of digital monetary innovation, opponents of the right-wing vision of the unitary executive fisc have found themselves in the position of primarily defending the anachronistic, contradictory, and constitutionally fragile status quo.

By contrast, President Trump has paired his internal assault on the federal bureaucracy with an external embrace of the private ‘crypto’ industry, as well as industry leaders from both Wall Street and Silicon Valley, such as Elon Musk.<sup>275</sup> In doing so, he has aligned himself with a vision of market-centric digital monetary innovation, in which the government’s role is

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<sup>273</sup> See e.g., Grey, *supra* note 147 at 295 (arguing that proposals to sidestep the debt ceiling by minting a ‘trillion-dollar’ platinum coin “confronts the public directly with the reality of the ‘big monetary infinity sign in the sky,’ and in doing so, forces us to collectively grapple with the economic and cultural implications of the state’s money creation power,” while simultaneously presenting an “opportunity to imaginatively reclaim the public fisc from the austere clutches of red ink, overburdened grandchildren, bond vigilantes, and empty coffers”); generally SCOTT FERGUSON, *DECLARATIONS OF DEPENDENCE: MONEY, AESTHETICS, AND THE POLITICS OF CARE* (2018).

<sup>274</sup> Grey, *supra* note 147 at 294 (arguing the rise of private digital currencies highlights the “urgent need to develop new social narratives and symbols to educate the public about the...future of public finance”). Indeed, even the constitutional separation of powers, which vests Congress with the powers of the ‘purse’—including the powers to ‘coin’ money and ‘draw’ it from ‘the Treasury’—is impossible to practically conceptualize without some prior material understanding of a ‘purse’ (and ‘coin’ and ‘Treasury’) from which to infer metaphorical meaning and through which to analogize between the physical and legal processes involved in creating money and making payments.

<sup>275</sup> See, e.g., David Yaffe-Bellany, *At Crypto Summit, Trump Says U.S. Will Be ‘the Bitcoin Superpower’*, N.Y. TIMES (Mar. 7, 2025)

<https://www.nytimes.com/2025/03/07/technology/trump-crypto-summit.html> (reporting Trump’s statement at the first-ever White House-organized ‘Crypto Summit’ that his administration was taking “historic action” to deliver on his campaign promise to make the United States “the Bitcoin superpower of the world and the crypto capital of the planet”).

to embrace and support private profit-driven ventures.<sup>276</sup> Meanwhile, the internal fiscal architecture of the state is metaphorically and practically reduced to a single digital database managed by a single, austerity-obsessed systems admin.

Immediate efforts to “stop the wave” of Trump’s assault, while critical, leave unaddressed the deeper architectural problems that he was able to exploit to seize power in the first place, many of which long preceded his political ascendance. Instead, shifting the current political momentum requires articulating a compelling counter-narrative for the future of digital money, public spending, budget policymaking, and the constitutional separation of powers. Put another way, it takes good vision to beat a bad vision.

### *i) CBDCs and the Bigger Fiscal Picture*

Governments have long administered dematerialized account and payments services, particularly through their central banks.<sup>277</sup> In most countries, however, these account payment services are predominantly limited to handling interactions between national governments, major banks, and systemically important financial institutions.<sup>278</sup> In recent years, however, governments have faced growing pressure to take a more active role in retail money services.<sup>279</sup>

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<sup>276</sup> *But compare* The White House, REMARKS BY PRESIDENT OBAMA AT THE SIGNING OF THE SMALL BUSINESS JOBS ACT, SEPT. 27, 2010,

<https://obamawhitehouse.archives.gov/the-press-office/2010/09/27/remarks-president-signing-small-business-jobs-act> (“[W]hen I took office, I put in place a plan an economic plan...guided by a simple idea: Government can’t guarantee success, but it can knock down barriers to success...Government can’t replace -- can’t create jobs...but it can create the conditions for small businesses to hire more people”).

<sup>277</sup> *See, generally* David Fox & Wolfgang Ernst, MONEY IN THE WESTERN LEGAL TRADITION: MIDDLE AGES TO BRETTON WOODS (2016).

<sup>278</sup> Richard J. Sullivan, *The Federal Reserve’s Reduced Role in Retail Payments: Implications for Efficiency and Risk*. ECONOMIC REVIEW-FEDERAL RESERVE BANK OF KANSAS CITY, 1 (2012).

<sup>279</sup> *See, e.g.*, Co-Pierre George & Katharina Pistor, *The Right Response to the Libra Threat*, PROJ. SYNDICATE (Aug. 6, 2019),

<https://www.project-syndicate.org/commentary/regulating-private-money-facebook-libra-by-katharina-pistor-and-co-pierre-georg-2019-08> (describing Facebook’s announcement of its proposed ‘Libra’ digital currency in mid-2019 as a “bombshell” that catalyzed public policymakers’ “sudden realisation of the threat posed by digital currencies to the existing monetary system”); Rohan Grey, *Facebook Wants Its Own Currency. That Should Scare Us All*, THE NATION (Jul. 22, 2019),

<https://www.thenation.com/article/archive/facebook-libra-currency-digital> (arguing that Libra’s announcement “reveal[ed] the stakes of the struggle for the future of money” by “[bought] monetary reform to the forefront of our collective consciousness, [making] it impossible to ignore”); *generally* Raúl Carrillo, Banking on Surveillance: The Libra Black Paper, AM. FOR FIN. REFORM & DEMAND PROGRESS JOINT REPORT (2020),

<https://ourfinancialsecurity.org/wp-content/uploads/2020/06/Libra-Black-Paper-FINAL-2.pdf>.

Policy discussions around digital public money have thus far focused on ‘central bank digital currency’ (“CBDC”).<sup>280</sup> In the process, the possibilities and implications of digital currency innovation for constitutional reorganization of legislative budgetary procedure, as well as transforming the executive financing process, have been overlooked.

As recent national events have definitively established, this fiscal neglect has been a grave oversight with profound practical and legal repercussions. In focusing almost exclusively on one institutionally narrow, hyper-technical conception of digital currency, central bankers and legislators have sidestepped more difficult but fundamental questions about the future of public money and the constitutional fiscal order.<sup>281</sup> These include, among others, how to radically improve the mechanisms and procedures of public spending to preserve Congressional fiscal authority against executive branch encroachment in a world defined by digitally-native governance, increasingly extreme political volatility, and a hierarchically centralized administrative state.

At one level, this oversight reflects an imaginative failure among policymakers to conceptualize the broader implications and possibilities of dollar digitization.<sup>282</sup> More deeply, however, the problem is systemic: elected officials, the media, interest groups, and advocacy movements have all broadly failed to devote proper attention and resources to understanding and securing

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<sup>280</sup> See, e.g., *Money and Payments: The U.S. Dollar in the Age of Digital Transformation*, FED. RSRV. BD. GOV. REPORT 17 (Jan. 2022), <https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf> (noting that the Federal Reserve had been and would continue to explore a “wide range of designs for a CBDC” to determine how it might “fit into the U.S. money and payments landscape”). For extended discussion of leading CBDC-oriented reform proposals, see Saule T. Omarova, *The People's Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231 (2021); Morgan Ricks, John Crawford, & Lev Menand, *FedAccounts: Digital Dollars*, 89 *George Washington Law Review*, GEO. WASH. L. REV. 113 (2021); Mehrsa Baradaran, *It's Time For a Public Option in Banking*, POP. MEDIA 229 (2015); Robert Hockett (2021) *Digital Greenbacks: A Sequenced 'Treasury Direct' and 'Fed Wallet' Plan for the Democratic Digital Dollar*, 25(1) J. OF TECH. L. & POL. 1 (2021).

<sup>281</sup> See Rohan Grey, TESTIMONY BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON FINANCIAL SERVICES, TASK FORCE ON FINANCIAL TECHNOLOGY, ON “DIGITIZING THE DOLLAR: INVESTIGATING THE TECHNOLOGICAL INFRASTRUCTURE, PRIVACY, AND FINANCIAL INCLUSION IMPLICATIONS OF CENTRAL BANK DIGITAL CURRENCIES,” JUNE 15, 2021, <https://rohangrey.net/files/testimony-6-15-21-written.pdf> (arguing that the Federal Reserve is “clearly not the only government agency with a legitimate interest in the future design and administration of a digital dollar”); generally Jacqueline Best, *Uncomfortable Knowledge in Central Banking: Expertise Confronts the Visibility Dilemma*, 51(4) ECON. & SOC 51, 51 (2022) (arguing that the “knowledge that is often most uncomfortable for [central bankers] is the fact of their own ignorance,” and that “[e]ven when central bankers themselves are open to acknowledging what they don’t know, they face external pressure to demonstrate their expertise”).

<sup>282</sup> Cf. Raúl Carrillo, *Seeing Through Money: Democracy, Data Governance, and the Digital Dollar*, 57(3) GA. L. REV. 1207 (2023) (considering the consumer privacy implications of dollar digitization and arguing for the U.S. Postal Service to offer privacy-respecting digital dollar services); John Haskell & Nathan Tankus, *Virtual Currency (in the Shadows of the Money Markets)*, JUST MONEY (Apr. 9, 2020), <https://justmoney.org/j-haskell-n-tankus-virtual-currency-in-the-shadows-of-the-money-markets> (exploring the risks of telecommunications infrastructure providers as digital currency ‘shadow banks’).

the most sensitive and mission-critical central sub-components of the entire global dollar regime.<sup>283</sup>

As explored in Part II, modern fiscal policy administration is complex and multidimensional. The OMB, Treasury, and Fed play central roles, while many other federal entities and agencies enjoy varying degrees of budgetary independence and payments autonomy. Moreover, agencies and other public entities regularly engage in intra-government transfers and parallel record-keeping, and maintain separate jurisdictional authority over particular spending decisions, even as they remain part of the broader consolidated federal government.

Operationally, not all federal spending is presently administered simply by directly transferring public funds from the general Treasury fund to end-recipients. Rather, spending is often locally ‘financed’—in the sense of locating or obtaining a specific source of funds—using mechanisms with distinct stakeholder interests and practical considerations. For example, some spending comes out of legally segregated bank accounts which partially or entirely receive inflows from taxes, fees, fines, or seigniorage,<sup>284</sup> with strict cash-flow restrictions placed on agency or program budgets. In other cases, public entities finance their expenditures through the issuance of tax credits or federally-guaranteed securities, which are then held by private counter-parties and traded in dedicated financial markets.<sup>285</sup>

This “interior architecture” of the modern fiscal state is often ignored or downplayed in public discussions of fiscal policy centered around quantitative budget allocations and retail payments logistics. Nevertheless, intragovernmental payment systems and processes serve important constitutional and statutory functions that must be properly accounted for in any meaningful broader re-imagining of the digital fisc.

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<sup>283</sup> See, e.g., Schneier & Ottenheimer, *supra* note 59; Nathan Tankus, *Elon Musk’s Attempt to Control the Treasury Payment System Is Incredibly Dangerous*, ROLLING STONE (Feb. 3, 2025), <https://www.rollingstone.com/politics/politics-features/trump-elon-musk-treasury-payment-system-dangerous-1235254831> (noting that the programming language upon which the Treasury’s payments software relies, ‘COBOL’, has “proved to be impossible and uneconomic to move away from for the most complex, oldest and most important legacy IT systems,” and arguing that “number of people who comprehensively understand these legacy IT systems can likely be counted on two hands — and that may be optimistic”).

<sup>284</sup> See, e.g., UNITED STATES MINT, *2024 Annual Report 6* (2024), <https://www.usmint.gov/content/dam/usmint/reports/2024-annual-report.pdf> (“Since Fiscal Year (FY) 1996, the Mint has operated under the Public Enterprise Fund (PEF) (31 U.S.C. § 5136). The PEF enables the Mint to operate without an annual appropriation. . . . Revenue in excess of amounts required by the PEF is transferred to the United States Treasury (Treasury) General Fund.”).

<sup>285</sup> See e.g. Starling Marshall, Christine Lane, and Carina Federico. *Tax Credit Transferability and Direct Pay Proposed under the IRA: Potential for Interactions with Section 174 Complicate a Seemingly Simple Program.* TAX EXECUTIVE 75 (2023).

ii) *Embracing Sensible, Radical Redesign*

Protecting and reinforcing the constitutional and functional integrity of the dollar's fiscal regime in the immediate and longer-term sense will require more than mere defense or incremental reforms. Instead, what is needed is nothing less than a radical or 'first-principles' reimagining of the legal, institutional, and technical architecture and operating procedures of the public fisc.

Addressing and navigating the associated practical complexities requires sensitivity to the nuanced and partly tense relationship between bureaucratically efficient and politically resilient approaches to infrastructural design. There are, for example, clear practical benefits to promoting standardization, interoperability, and integration between identical or similar administrative processes and functions undertaken across different government organs.<sup>286</sup> Yet as has been detailed above, greater centralization can also exacerbate political vulnerabilities, legal tensions, and risks of operational failure.

At the macro-level, concerns for systemic capacity, consistency and harmonization support a 'write once, run everywhere' approach—that is, developing a single approach to problem solving and implementation wherever the problem appears, so that public actors can more easily coordinate and communicate across institutional and policy domains about shared concerns.<sup>287</sup> Practically, this involves developing and promoting universal best practices through common standards, uniform (but not necessarily centralized) procedures, and interoperable and well-integrated 'universal' technologies with broad, generic functionality.

At the micro-level, concerns for autonomy, agency, and resiliency necessitate distributing power and responsibility over operational capacity from the center to the 'edges' to the greatest degree reasonably possible.<sup>288</sup> This, in turn, encourages the prioritization of architectures built around open standards, peer-to-peer federation, modularity, customizability, simplicity, ease of general use by non-specialized audiences, low operating latency,<sup>289</sup> and the

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<sup>286</sup> See generally, David Singh Grewal, *Network Power and Global Standardization: The Controversy Over the Multilateral Agreement on Investment*, 36(1/2), METAPHILOSOPHY 128, 132-33 (2005) (discussing the inherent 'network power' of standards, as well as their potential risks).

<sup>287</sup> This slogan was first developed in 1995 to refer to the Java programming language's ostensible capacity to run across different hardware and software platforms using a common interpretative 'virtual machine'. See, generally, *How Java Revolutionized the Programming World—Interview With Gaetano Tonello*, DATATEX (2025), <https://magazine.datatex.com/how-java-revolutionized-the-programming-world>.

<sup>288</sup> See, e.g., Eben Moglen, *Freedom in the Cloud*, PRESENTATION AT THE INTERNET SOC. OF N.Y., FEB. 5, 2010, <https://softwarefreedom.org/news/2010/feb/10/highlights-eben-moglens-freedom-cloud-talk>.

<sup>289</sup> Latency, also known as 'lag', refers to the delay between a system input and its corresponding output. See, e.g., Joseph Sommer, *Commentary—Where is the Economic Analysis of Payment Law?*, 82(2) U. CHI. KENT L. REV. 751, 755 (2008) (noting that payments intermediaries



broad and anti-hierarchical diffusion of administrative and infrastructural capacity across the federal government.

At both levels, concerns for quality control, precision, efficacy, and accountability support a ‘make each thing do one thing well’ approach to both technology and process. Critically, this involves identifying and disentangling, if not completely ‘unbundling,’ the sub-components of larger administrative systems responsible for *determining* public policy from those responsible for *implementing* it.<sup>290</sup> This disentanglement, in turn, allows for the development and use of objective performance criteria and clear accountability metrics for evaluating the government’s demonstrated actions against its official policy stance and stated goals.

### *iii) Back to the Future (Sort Of)*

It is easy to take the stability and legal predictability of the U.S. monetary regime for granted. Yet it is a relatively recent and fragile historical development—to the degree it exists at all—and given recent events its longevity looks increasingly tenuous.<sup>291</sup>

Concurrently, the historical evolution of the U.S. budget process has followed its own tumultuous process of centralization and re-fragmentation. For most of the 18th and 19th centuries, individual agencies regularly submitted their budget requests directly to Congress without any Presidential involvement or approval.<sup>292</sup> Beginning in the late 19th century, however, the President began to take a more active role by consolidating most (but not all) of these requests into a single, periodic, annual submission to Congress, called the “Book of Estimates.”<sup>293</sup>

Although the Book of Estimates represented a major step in the consolidation of executive budget authority, it remained comprised of “uncoordinated agency submissions” rather than a single, integrated budget vision.<sup>294</sup> In 1884, Congress passed a law requiring that all agency estimates be directed through the Treasury Secretary for inclusion in the Book of Estimates. In 1901, it passed another law requiring that such estimates be presented to the

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“simplify the credit topology” by reducing the required number of direct dyadic settlement transactions through offsetting clearing).

<sup>290</sup> Critically, this distinction also maps onto the constitutional separation of powers between the legislative and executive branch.

<sup>291</sup> Prior to the civil war, for example, the dominant means of day-to-day payment were not coins but banknotes whose actual value, in contrast to their nominal face value, fluctuated on a daily basis depending on the health of the issuing entity. See e.g. Shane White, *Freedom’s First Con: African Americans and Changing Notes in Antebellum New York City* 34(3) J. OF THE EARLY REPUBLIC 385 (2014).

<sup>292</sup> Schick, *supra* note 231 at 14.

<sup>293</sup> CRS, *The President’s Budget: Overview of Structure and Timing of Submission to Congress*, REPORT TO CONGRESS (rev. Feb. 9, 2016),

<https://www.everycrsreport.com/reports/R43163.html> (citing, *inter alia*, Charles Ascher & James Wolf, eds., *Current Legislation*, 20(2) COLUM. L. REV. 237 (1920)).

<sup>294</sup> *Id.* See also Fisher, *supra* note 130 at 58.

Treasury annually by October, in order for them to be consolidated and presented to Congress by November.

In 1910, President Taft created the Commission on Economy and Efficiency, which in 1912 published a report titled “The Need for a National Budget,” recommending that the President take a more direct coordinating role over individual agency spending levels.<sup>295</sup> This format would ultimately be adopted in 1921, when, following the unprecedented fiscal needs of World War I, Congress passed the Budget and Accounting Act directing the President to prepare a single consolidated budget on behalf of the executive branch.<sup>296</sup> Since then, the President and Treasury have prepared an annual federal budget proposal for consideration by Congress as part of the joint budget resolution process.<sup>297</sup>

In contrast to the pre-1920’s regime, a “budgetarily centralized and operationally decentralized” regime would preserve both the President and Congress’s roles in determining and overseeing macroeconomic policy targets, while reducing the threat of Presidential executive branch consolidation by empowering individual agencies to both negotiate directly with Congress and directly manage their own funds and payments process.

The remaining sections of this Part sketch out a blueprint of what the reimagined digital fisc should look like, and consider its implications for the future of fiscal administration, legislative process, and the constitutional separation of powers.

## B. Imagining the Digital Fisc



<sup>295</sup> CRS, *supra* note 239.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* Even as the President has consolidated control over executive involvement in the annual legislative budget process, the rise of mandatory spending programs and other forms of non-discretionary spending obligations over the 20th century have simultaneously effectively re-fragmented the federal budget itself.

This section outlines the core powers, duties, operational functions, and infrastructural responsibilities for a reimagined digital fisc (henceforth the “New Digital Fiscal Regime” or “NDFR”). In keeping with the issues and concerns raised in Parts I and II, its design is centrally but not exclusively motivated by the constitutional need to clarify, reinforce, and reorganize the legal and practical delineation of fiscal powers and responsibilities between the legislature, President, and rest of the executive branch.<sup>298</sup>

To do so, it reimagines fiscal administration as a suite of ‘small-c constitutional’ technologies and processes that figuratively and literally embody big-C Constitutional concepts.<sup>299</sup> Specifically, the NDFR is designed around three main systems, each with multiple subcomponents, in accordance with the architectural principles outlined in the previous section.

The foundational level is the ‘Congressional Fiscal Record’ a digital database jointly managed by both houses of Congress that records, defines, and administers delegations of legislative lines of “Public Credit.” Crucially, these “credit lines” represent executive delegations not of sums of money but of spending *power*.<sup>300</sup>

Next, ‘Congress’s Treasury ATM,’ a secure, centrally housed digital terminal connected to locally-managed agency “ePurse” devices. Public agents withdraw and deposit spendable digital dollar balances from the virtual ‘Treasury’ in the form of “eCoins” by drawing from the ATM through pre-approved Public Credit lines, formalized and administered through Congressionally-issued ‘Public Credit Cards’.

Finally, the ‘Federated Federal Ledger,’ a semi-centralized, semi-decentralized distributed database that synchronizes micro-level agency budget data with Congress’s macro-level consolidated public Fiscal Statement and Account, while preserving local autonomy and appropriate data protections.<sup>301</sup>

Together, these three systems provide the core infrastructure for the the five primary phases of fiscal administration under the NDFR, which in turn map directly onto big-C Constitutional processes:

1. **Appropriating:** First, Congress passes a law authorizing or directing an agency to undertake action for which spending is or may be

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<sup>298</sup> The implications of dollar digitization on the judicial branch are also important, but beyond the scope of this Article and thus a subject for future follow-up projects.

<sup>299</sup> Specifically, the NDFR reimagines the various fiscal powers articulated in Art I., Sections 8 and 9 of the Constitution—which together vest Congress with the powers to “coin” money and “regulate” its value, “draw” money from the “Treasury,” “borrow” it on the “credit” of the United States, and “spend” to promote general welfare—as discrete material processes based around particular technological systems.

<sup>300</sup> *See. e.g.,* Julliard v. Greenman, 110 U.S. 421, 444 (1884) (The power ‘to borrow money on the credit of the United States’ is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills or notes . . .)

<sup>301</sup> For example, agencies can and do maintain budget accounts separate from records of individual consumer payments, which often contain private personal identifying information of the end-recipient.

required—by adding a Public Credit line entry to the Congressional Fiscal Record through approving an edit request with the digital signatures of Congress and, in some instances, the President.

2. **Drawing** - next, the agency requests a ‘Public Credit Card’—digital ‘Purse Key’—from Congress in order to activate and ‘draw’ on its new Public Credit line, which Congress grants after clarifying and negotiating restrictions and conditions through both formal and informal processes incorporating third-party support from legislative and executive branch agencies.
3. **Coining** - third, the agency uses its newly activated Public Credit Card to automatically ‘withdraw’ eCoins from the Congressional Treasury ATM, which are then held locally on a secure, network-connected hardware ‘ePurse’ device.
4. **Spending** - once locally acquired, the agency can spend new eCoins directly into public circulation, in line with statutory and regulatory directives per the Fiscal Record and Credit Card.
5. **Publishing** - finally, the agency records its spending data locally on a self-hosted Federated Federal Ledger node, which is partially synced to the Congressionally managed federal Public Statement and Account.

*i) The Congressional Fiscal Record*

“There’s Always Money in the Banana Stand!”

- George Bluth Sr.<sup>302</sup>

Under the NDFR, the fiscal capacity of the United States is most primitively expressed in its “Public Credit”, grounded in Congress’s constitutional authority to both impose taxes and other legal debts, and to determine the specific means through which such obligations may be satisfied—that is, to make money.<sup>303</sup> This dyadic tax-and-money authority is in turn backed by the political consent of the People, and the real productive capacity of the U.S. economy and global dollar regime.<sup>304</sup>

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<sup>302</sup> *Arrested Development: Top Banana* (Adult Swim television broadcast Nov. 9, 2003).

<sup>303</sup> Desan, *supra* note 17. See also Pavlina Tcherneva, *Money, Power, and Monetary Regimes*, LEVY ECON. INT. WORK. PAPER No. 861 (Mar. 2016), [https://www.levyinstitute.org/pubs/wp\\_861.pdf](https://www.levyinstitute.org/pubs/wp_861.pdf); *Chartalism and the Tax-Driven Approach to Money*, In P. Arestis & M. Sawyer (eds.), *HANDBOOK OF ALT. MON. ECON.* (2004). The U.S.’s imperial dollar regime, which places most of the rest of the world in a state of needing dollars and thus selling real assets to the US, can be understood in a soft sense as the extension of the ‘taxing’ function beyond its narrow domestic borders. See, e.g., Tooze, *supra* note 181. Put simply: everyone in the world today wants US dollars, which makes the ability to *spend* US dollars *ex nihilo* the equivalent to walking around a massive global supermarket with a black Amex card.

<sup>304</sup> See generally Charles Yablon, *Madison’s Full Faith and Credit Clause: A Historical Analysis*, 33 *CARDOZO L. REV.* 125 (2011).

Importantly, Public *Credit*, while part of the larger ‘money family,’ is categorically different from public *currency* (or debt),<sup>305</sup> in that it embodies the legal *authority* to spend and collect dollars within qualitative (and sometimes also quantitative) constraints, rather than mere ownership or access to a specific quantity of legal tender dollar balances. In this respect, Public Credit is an exclusively intra-governmental resource for public agents, complementing public *currency*’s role as an exclusively extra-governmental resource for private actors.<sup>306</sup> It represents Congress bestowing its official blessing on the ongoing constitutional legitimacy of the fiscal acts of the executive branch.

The technical requirements for the Public Credit system are simple: a single distributed database—the ‘Congressional Fiscal Record,’ managed jointly and separately in the first instance by both Houses of Congress. This database serves as the primary technological medium through which all new fiscal legislation and revisions to existing legislation are recorded, formalized, and codified.

Edit approval ‘votes’ are granted to each member of Congress (and the President) in the form of unique, secure digital ‘keys’ or signatures. In keeping with the Constitution, the Congressional Fiscal Record has a simple two-tier voting structure for making substantive changes. First, Congress can approve an edit unilaterally upon a two-thirds vote of both houses.<sup>307</sup> Alternatively, Congress can make edits with a bare majority vote in both houses, plus either the President’s signature or failure to propose an alternative edit proposal in ten days.<sup>308</sup> Together, these signatures act as “Budget Keys,” collectively establishing new sources of Public Credit by ‘passing’ new laws, i.e. editing the database.

Legislation recorded in the Record is natively digital, incorporating version control, hypertext and linking, among other features. It allows for the inclusion of bespoke and fine-grained access, conditionality, and third-party validation requirements into each statutory credit line at the ‘code’ level, partially through the use of “smart contracts”—software programmed to execute real-world functions based on pre-articulated conditions and inputs, similar to

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<sup>305</sup> Currency, by contrast, is a transferable legal instrument, denominated quantitatively in a unit of account, and materially instantiated in a physical object (including a digital device) or recorded on an accounting ledger. It is spent into public circulation, and retired upon redemption through taxes or other public dues. *See, e.g.,* L. Randall Wray, *Understanding Modern Money: How a Sovereign Currency Works*, LEVY ECON. INST. (2009), [https://www.levyinstitute.org/pubs/Wray\\_Understanding\\_Modern.pdf](https://www.levyinstitute.org/pubs/Wray_Understanding_Modern.pdf) (distinguishing ‘money’ as an abstract ‘unit of account’ from ‘money-things,’ which are “representations of ‘money’ with a physical existence”).

<sup>306</sup> *See, e.g.,* Warren Mosler, *MMT to Washington: There is No Long-Term Deficit Problem*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/mmt-to-washington-there\\_b\\_2822714](https://www.huffpost.com/entry/mmt-to-washington-there_b_2822714) (“Congress has appointed the Fed as scorekeeper for the dollar. And just like any other scorekeeper it neither has nor doesn’t have any dollars. It just has a ‘scorecard’ – a giant spreadsheet – with all of our bank accounts tied to it . . . the federal government therefore doesn’t actually ‘get’ anything when it taxes or ‘use up’ anything when it spends”).

<sup>307</sup> Following the earlier presentment of the proposed edit to the President.

<sup>308</sup> U.S. CONST. ART. I, § 7.

a vending machine—to (semi) automate the apportionment process.<sup>309</sup> These, in turn, accommodate self-expiring spending laws, as well as integration of external ‘oracles’ that transform real-world data—including adjudicative determinations and public statistics—into functional legislative inputs through the use of third-party intermediaries and trusted data feeds.<sup>310</sup>

The Record is also designed dynamically to incorporate spending reauthorization laws through inter-temporal tracking of unique statutory element identifiers.<sup>311</sup> This contrasts with the existing U.S. Code, which only includes ‘general and permanent’ laws and thus definitionally excludes appropriations.<sup>312</sup> At the same time, it allows for ‘budget-remote’ legislation to be flagged and ring-fenced, while remaining part of the general Fiscal Record database system. In doing so, it ‘flips’ the classification of new legislation from being presumptively non-budgetary to presumptively budgetary by default, while leaving the determination of specific statutes and provisions up to Congress on a case by case basis, just as is the case today.<sup>313</sup>

As noted above, it is not constitutionally required for Congressional appropriations to specify or restrict *ex ante* either the specific amount of money that the executive can or must spend, or the decision-making process they must employ.<sup>314</sup> Rather, Congress is required merely to designate the “objects for which [the funds] may be used.”<sup>315</sup>

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<sup>309</sup> See generally, Chief Financial Officers Association, *Harnessing Blockchain in the Federal Government: Key Considerations for Financial Management & Information Systems*, JOINT FIN. MANG. IMPROV. PROG. JFMIP-24-01 (Dec. 2023), <https://www.cfo.gov/assets/files/JFMIP-24-01.pdf>. But see also Danielle D’Onfro, *Smart Contracts and the Illusion of Automated Enforcement*, 61(1) WASH. U. J. OF L. & POL. 173 (2020) (noting that the “essential problem” with use of smart contract technologies is that “consumers and regulators expect the parties to be imperfect and then expect flexibility around those imperfections,” and consequently “no one actually wants perfect enforcement of contracts, especially not consumer financial contracts”).

<sup>310</sup> This can include disbursing funds on the basis of either pre-determined parameters, the occurrence of specific external world conditions, or interpretative resolution by a delegated third-party entity, such as the GAO. Grimmelmann, *supra* note 214. It can also include multi-party verification, third-party auditors, backups, and ‘failsafes,’ thereby improving rather than reducing resilience and security.

<sup>311</sup> See generally Jörn von Lucke, Fotios Fitsilis & Jan Etscheid, *Using Artificial Intelligence for Legislation - Thinking About and Selecting Realistic Topics*, CONFERENCE PAPER DELIVERED AT EGOV-CEDEM-EPART 2022, SEPT 9 (2022), <https://asgp.co/wp-content/uploads/2023/10/Academic-article-on-using-AI-for-legislation.pdf> (surveying government interest in new legislative technologies, including ‘machine-readable’ statutory text, and ‘smart legislation’)

<sup>312</sup> *Frequently Asked Questions and Glossary—U.S. Code*, SEPT U.S. HOUSE OF REPS. OFFICE OF L. REV. COUNSEL(2025), <https://uscode.house.gov/faq.xhtml>.

<sup>313</sup> Laws deemed “non-budgetary” would be recorded on the Congressional Fiscal Record as having no active credit lines—i.e. as ‘fiscal orphans’—similar to laws with expired funding authority.

<sup>314</sup> See Community Financial, *supra* note 30 at 436 (2024) (noting that “at least in some circumstances, Congress can make standing appropriations”); see also *id.* at 435, 1486 (finding constitutional the CFPB’s funding structure, which authorizes the director to discretionarily draw funds it deems “reasonably necessary” to “pay the expenses of the Bureau in carrying out its duties and responsibilities.”)

<sup>315</sup> *Id.* at 1483, 1495. See also *U.S. v. Wells Fargo*, *supra* note 130 at 15 (holding funds used by the Fed to conduct emergency lending, which it creates *ex nihilo* as its own balance sheet reserved liabilities, are legally “drawn from Treasury”).

Consequently, under the NDFR, Public Credit is extended to the executive branch by default not through discrete sum allocations but through the extension of qualitative ‘credit lines’—numbered accounts attached to discrete legislative ‘units’ whose size, scope, and complexity can range from a single sub-clause to multiple acts. Public credit lines can be both nested fractally (i.e. discrete ‘sub-lines’ within a general ‘parent’ line, all attached to the same legislative unit) and super-positionally (multiple separate credit lines attached to part or all of the same legislative unit). They are defined qualitatively, but can also be ‘hardcoded’ to include ‘hard’ quantitative caps and automatic time-release access conditions.

This design flexibility affords Congress broad discretion in determining the substance and form of spending delegations: at one end of the spectrum, a one-time discrete sum earmarked for a specific purpose; at the other, an indefinite, uncapped institutional “open line,” available based on the agency’s self-determined programmatic need.<sup>316</sup>

*ii) Congress’s Treasury ATM*

“The only thing useful banks have invented in 20 years is the ATM”  
- Paul Volcker<sup>317</sup>

After the Congressional Fiscal Record, the next technological layer of the NDFR is the Congress’s Treasury ATM.<sup>318</sup> The Treasury ATM is a secure physical terminal hosted within the legislative branch, that maintains a central ledger connected via a trusted network to a series of agency-level, locally hosted, ‘offline-capable’ peer-to-peer ‘ePurse’ devices. It processes digital

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<sup>316</sup> CFPB v. Community Financial, *supra* note 30 at 15 (holding constitutional an appropriation law authorizing CFPB financing in such amounts as the agency deems necessary to “pay [its expenses] in carrying out its duties and responsibilities”) In reaffirming the constitutionality of the CFPB’s “open but capped” funding structure, the Supreme Court did not reach the bigger question of the constitutionality of delegations of indefinite, uncapped, discretionary budget authority, such as that of the Federal Reserve. See Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 Y. J. REG. 257 (2015) (arguing the Fed’s gradual accumulation of effectively unlimited budgetary independence and capacity is contrary to its original statutory design and intent). Justice Kagan’s concurrence instead relied upon the commonly repeated but anachronistic statutory description of the Fed’s funding structure as being based on assessing fees on member commercial banks. Community Financial, *supra* note 30, Kagan, J., Concurrence at 4. Justice Alito’s dissent similarly incorrectly locates the source of Fed funding as “earnings of Federal Reserve Banks,” rather than the inherent monetary powers afforded by its balance sheet control. *Id.*, Alito, J., Dissent at 21, fn. 16. He goes even further, however, arguing that the Fed’s funding structure, which emerged out of an “intensely-bargained compromise” between competing visions of public and private-centric monetary system governance, represented a “special arrangement sanctioned by history” and thus should “not be seen as a model for other Government bodies.” *Id.*

<sup>317</sup> Opinion, *The Only Thing Useful Banks Have Invented in 20 Years is the ATM*, N.Y. Post (Dec. 13, 2009), <https://nypost.com/2009/12/13/the-only-thing-useful-banks-have-invented-in-20-years-is-the-atm>.

<sup>318</sup> This server functions as the physical (albeit virtual) embodiment of the metaphorical constitutional ‘Treasury’ from which all appropriated funds must be drawn under the Appropriations Clause.

dollar currency ‘draw’ requests from the Congressional Treasury by executive branch actors and other public agents based on valid and unexpired Public Credit draw lines, formalized operationally as ‘Public Credit Cards.’

#### a) Public Credit Cards

Just as Congressional e-signatures function as ‘Budget Keys’ allowing for the ‘editing’ of new laws, Public Credit Cards function as ‘Purse Keys’, defining precise access and use restrictions—the ‘Terms and Conditions’—that prefigures Public Credit’s ultimate spendable form as quantified digital dollar eCoin balances.<sup>319</sup> In doing so, they effectuate the legal and digital commodification—or more precisely, codification—not of spending itself, but of the spending *power*.<sup>320</sup>

Public Credit Cards are ‘issued’ virtually in the form of customized sets of legal and operational access rights, permissions and conditions, which specify the limits under which specific executive branch actors can access the Congressional Treasury ATM server to ‘withdraw’ new eCoin balances onto their local ePurse devices.

These limits, like credit lines themselves, can be designed broadly—i.e. a total government-wide spending cap—or narrowly at the individual program or agency level. Individual caps can also be embedded in larger budget contingency processes that specify alternative emergency funding sources and/or prescribe spending triage priorities in the event of a full or partial legislative financing freeze.

Credit Card issuance and oversight is practically administered by a combination of Congressional committees and offices and independent organs of the legislative branch, including the GAO, CBO, and Library of Congress, as well as possible new institutions.<sup>321</sup> Together these entities are responsible for determining the specific limits of delegations of spending authority associated with specific ‘Cards’, as well as timing or prioritization considerations, upon negotiation with the executive branch through a

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<sup>319</sup> For example, many extensions of Constitutional Credit will continue to specify ‘hard’ quantitative constraints, including aggregate caps and timed usage restrictions. Importantly, however, even will be articulated as direct restrictions and conditions imposed on the initial extension of Constitutional Credit, rather than indirectly through the rationing of a finite source of end-dollars held by other executive actors, as happens today. Equally importantly, such limits and restrictions are structured and approached as optional features, superimposed over the basic default practice of granting funding requests on an as-needed basis at the agency’s discretion, within the defined outer limits of the statutory authority itself.

<sup>320</sup> See KARL MARX, *DAS KAPITAL*, VOL. 1, Ch. 7 (1861) (“The capitalist buys labour-power in order to use it; and labour-power in use is labour itself”).

<sup>321</sup> See, e.g., Bridget Dooling, *Into the Void: The GAO’s Role in the Regulatory State*, 70 AM. U. L. REV. 387, 388-394, 416 (2020) (noting that political science and administrative law have “largely overlooked” legislative (i.e. non-executive branch) agencies such as the GAO, which has evolved from the government’s “fiscal watchdog” to its general-purpose “congressional watchdog”—and is today responsible for executive branch audits and budget evaluation, policy analysis, investigations, bid protest adjudications, and most importantly, the issuance of legal opinions concerning the legality of rules and regulations promulgated under the Administrative Procedure Act—while simultaneously questioning its ultimate lack of remedies in the event of outright executive defiance of legislative process).



formalized process.<sup>322</sup> These negotiations are, in turn, ultimately governed and disciplined by the general terms of the “ATM Access Protocol”, encoded at the software layer into the Congressional Treasury ATM itself, which operationally governs when and how Public Credit Cards can be used to withdraw new spendable eCoins.<sup>323</sup>

The Access Protocol is edited by Congress through a bare majority vote of both chambers. It is thus not itself a law. Instead, it is a parliamentary financing process embedded within a larger inter-branch legislative spending process. It gains legal force via a ‘super statute’ requiring all public fiscal activity be conducted through the ATM server, in accordance with terms established by the ATM Access Protocol.<sup>324</sup> This requirement is baked into the Congressional Fiscal Record at the ‘firmware’ level, sitting atop and across all regular laws, and takes constitutional priority over conflicting executive branch interpretations of its appropriations authority.<sup>325</sup>

## b) eCoinage

Executive agency draw requests made against the Congressional Treasury ATM using a valid Public Credit Card with unexpired financing authority are typically granted by default. Upon approval, they effectuate the transfer of the requested amount of eCoins into the agency’s ePurses instantaneously,

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<sup>322</sup> Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEORGE WASH. L. REV. 451, 451, 504-6 (2017) (noting that agencies are already “deeply involved in drafting and reviewing statutory text before enactment,” with Congress “often rel[ying] heavily on agencies’ significant legislative resources and expertise,” in addition to engaging in ongoing post-ratification dialogue with relevant Committees and leadership).

<sup>323</sup> The specific conditions under which draw requests are made and considered, in turn, are first specified upstream through the budget process, including through ongoing engagement with Congressional offices and legislative branch offices. *Id.*

<sup>324</sup> One foreseeable criticism of this framework is that it implicates Congressional ‘veto’ of administrative action, and thus likely violates the Court’s holding in *INS v. Chadha* 462 U.S. 919 (1983) that a one-house veto unconstitutionally violated either Article II’s delegation of executive power to the executive branch, or the Presentment clause requirement that bills be presented to the President prior to passage into law. As a preliminary matter, *Chadha* is bad law and should be reversed, if not outright rejected, by Congress as an impermissible judicial impingement of its own constitutionally vested powers. More practically, *Chadha*, in addition to lacking a constitutional enforcement mechanism, has since been largely rendered irrelevant through a combination of creative workarounds and persistent executive acceptance of effective veto points at the legislative committee level. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56(4) L. CONTEMP. PROBL. 273 (1993) (noting that more than 200 legislative vetoes had been enacted in the decade since *Chadha*, in part as a ‘practical accommodation’ by the executive branch); Curtis Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13(1) J. L. ANAL. 439 (2021).

<sup>325</sup> This allows Congress to establish distinct mechanisms for overseeing its executive delegations of both spending authority and financing capacity, while resolving any ostensible tension between conflicting directives through clear hierarchical prioritization of financing restrictions over spending permissions. Notably, Congress deciding to clarify the interpretation of its own previously delegated financing authority—i.e. Public Credit—is legally and operationally distinct from the overriding the executive branch’s own policy determination of its substantive spending authority. The former remains a purely intra-legislative determination, while the latter pertains to executive action.

providing digital dollar funding access to the executive branch on an immediate, continuous, 24/7 basis.<sup>326</sup> Once ‘drawn’ onto the agency’s hardware wallet—which functions as a locally self-hosted ‘fiscal agent’—these dollars can then if necessary be separately converted into other forms of digital public money, as well as retail bank money, on an at-par basis, much as coins and notes are today.<sup>327</sup>

eCoins are bearer-instruments and general legal tender obligations of the United States, equivalent to physical coins, instead of accounting liabilities of the drawing entity.<sup>328</sup> The act of drawing eCoins from the ATM server adds to the total amount of circulating digital dollars *de novo* and *ex nihilo*,<sup>329</sup> while dollars redeemed or collected are ‘deleted’.<sup>330</sup> In this respect, it functions as a

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<sup>326</sup> Historically, the Fed offered real-time digital payment settlement processing only through its Fedwire service, a wholesale system that operated only on business days. In 2023, after considerable delay and controversy, it launched ‘FedNow,’ a 24/7 system intended to accommodate smaller, pass-through consumer payments. Currently, this system remains open only to licensed depository institutions, however the Fed has indicated its intent to eventually open it to non-bank “fintechs” as well as to involve bank-affiliated payments system experts, known as “core providers” in the system development and maintenance process. Lynne Marek, *Fed Courts Nonbanks for FedNow Growth*, PAYMENTS DIVE (Apr. 22, 2024), <https://www.paymentsdive.com/news/fednow-courts-fednow-fintechs-nonbanks-instant-payment-s/713851>.

<sup>327</sup> It is beyond the scope of this paper to go into detail on the specific technological design of the executive branch-side of this wallet system. However, at its basic level, it would involve locally held, hardware-secured devices, connected to a federated network built on an open-source software protocol standard, capable of holding, receiving, and transferring digital dollars sourced directly from the Congressional ATM, and then either “paying” or “depositing” it with other public agents, as well as private financial intermediaries, and eventually, the public, directly on a peer-to-peer basis without any central intermediary involvement or larger ‘network’ connectivity. See, e.g., Cyrus Minwalla et al, *A Central Bank Digital Currency for Offline Payments*, BANK OF CANADA (Feb. 2023), <https://www.bankofcanada.ca/2023/02/staff-analytical-note-2023-2/>; *The ECash Act* (2025), <https://ecashact.us>; Erin English, *Finding a Secure Solution for the Offline Use of Central Bank Digital Currencies*, VISA ECON. EMPOWERMENT INST. (Mar. 2021), <https://usa.visa.com/dam/VCOM/global/sites/visa-economic-empowerment-institute/documents/veei-secure-offline-cbdc.pdf>; Thomas Kudrycki, *Blockchain is the wrong technology choice for delivering Central Bank Digital Currency (CBDC)*, E-CURRENCY MINT (Apr. 24, 2020), <https://www.ecurrency.net/post/blockchain-is-the-wrong-technology-choice-for-delivering-central-bank-digital-currency-cbdc>; Jonathan Dharmapalan & Rohan Grey, *The Case for Digital Legal Tender - The Macroeconomic Implications of Digital Fiat Currency*, E-CURRENCY MINT (2017), <https://www.ecurrency.net/post/the-case-for-digital-legal-tender-the-macroeconomic-policy-implication-of-digital-fiat-currency>. At the institutional level, system maintenance would be administered by an independent digital currency technology office, established within the legislative branch but structured to engage closely with the executive. This office would be responsible for managing the underlying protocol, hardware, network, and institutional/individual account permissions in accordance with the Constitution and Congress’s statutory instructions.

<sup>328</sup> Bearer instruments are spent and exchanged through transferring physical possession and ownership of legally recognized ‘monetary data objects’, such as coins, notes, and sticks. See generally, David Fox, *Bona Fide Purchase and the Currency of Money*, 55(3) CAMBR. L. J. 57 (1996). eCoins, in addition to their legal and nominal (i.e. quantitative) properties, are secured through cryptography, software, and hardware design.

<sup>329</sup> This remains true operationally and legally even when spending authority is ‘linked’ conceptually or practically to revenue through “pay-fors” or other funding arrangements.

<sup>330</sup> Of course, it is possible to automate the granting of new Public Credit authority to an agency upon its redemption of digital dollars collected from the private sector through taxes and other

literal and physical—albeit computerized—embodiment of the constitution’s metaphorical ‘Treasury.’ What is impossible to practically imagine in physical life—all public monies funneling in and out of One Giant Public Purse in the Sky—becomes technically trivial to achieve in the Cloud.

The Congressional Treasury draw system, in turn, functions like a virtual intra-governmental “ATM”—an ‘Automated Treasury Machine,’ or perhaps ‘Appropriations Transfer Mechanism’—by directly ‘loading up’ locally held agency wallets with newly-created digital public currency sourced directly from Congress.<sup>331</sup> In doing so, it simultaneously replaces both the Fed reserve-centric digital public payments processing regime, and the Treasury-debt centric deficit financing regime.

### *1. ...and Regulating the Value Thereof*

Similar to how the Fed previously took over paper currency issuance by introducing its own functionally equivalent version of then-still circulating Treasury notes,<sup>332</sup> the NDFR empowers the Fed to assume full responsibility for the issuance and management of public debt.<sup>333</sup> Specifically, the Fed is authorized to buy and sell (and lend and borrow) its own interest-paying, positive-duration securities in such amounts and quantities, and at such maturities and interest rates, as it deems necessary to achieve its monetary policy objectives.<sup>334</sup>

These securities are designed as special-purpose, limited circulation digital dollars—‘silver’ e-coins, to complement the ‘gold’ e-coins used in general circulation discussed above.<sup>335</sup> The Fed, in turn, implements monetary policy by regulating the supply, price, and convertibility conditions between these two systems, as well as access by private actors. This two-tier design preserves central bank independence and enhances the Fed’s fine-grained

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duties. This would function as-if the entity retained the collected funds locally, while ensuring all public money flows pass through the singular datasystem nexus of Congress’s Treasury.

<sup>331</sup> This reduces the need for entities to hold excess digital dollar balances beyond day-to-day needs, while simultaneously allowing them to pre-negotiate their full ‘appropriations allocation’ upfront in the form of an activated and ‘programmed’ Public Credit Card, attached to an open credit line.

<sup>332</sup> *History of U.S. Currency*, U.S. CURRENCY ED. PROGRAM (2025),

<https://www.uscurrency.gov/history> (“Because United States notes no longer served any function not already adequately met by Federal Reserve notes, their issuance was discontinued and, beginning in 1971, no new United States notes were placed into circulation”).

<sup>333</sup> See generally, Nathan Tankus, *We Should Authorize the Federal Reserve to Issue Its Own Securities and #MintTheCoin*, NOTES ON THE CRISES (April 16, 2020),

<https://www.crisisnotes.com/we-should-authorize-the-federal-reserve> (arguing for the Fed to take over the issuance of securities from the Treasury as part of its larger monetary policy framework).

<sup>334</sup> See, e.g., Andrew Mellon, *Annual Report on the Finances of the U.S. Department of the Treasury No. 3024*, ANN. REP. OF THE SEC. OF THE TSY. 39 (1930) (arguing that proper coordination of budget financing and public debt management necessitated the Treasury be granted “complete freedom in determining the character of securities to be issued...[without being confronted by] any arbitrary limitation”).

<sup>335</sup> See, e.g., Kelton, *supra* note 221, at 41-2 (“What we call government borrowing is nothing more than Uncle Sam allowing people to transform green dollars into interest-bearing yellow dollars”).

control over monetary policy, without empowering it to interfere with or exert control over the core fiscal e-coin infrastructure in any way.<sup>336</sup>

*iii) The Federated Federal Ledger*

“Every capitalist economy can be described in terms of sets of interrelated balance sheets”

- Hyman Minsky<sup>337</sup>

The third and final primary layer of the NDFR is the ‘Federated Federal Ledger’ (“Federal Ledger”). The Federal Ledger is a semi-centralized, semi-decentralized federated network of local ‘trusted’ server nodes running common account management and recordkeeping software, that in turn connect and (partially) sync with a central, Congressionally managed ‘super-node’, the “Public Statement and Account.”<sup>338</sup> It tracks all digital dollar balances drawn, held, spent, received, obligated, and due across the federal government, while maintaining local autonomy and data protection through separation of agency-level budget data from program-level end-recipient payment data.

Importantly, this budget management system, while stacked ‘on top’ of the aforementioned Fiscal Record and Congressional Treasury ATM systems, plays no operational role in processing or settling digital dollar transactions. Thus, it is best understood as a complementary financial data management system, not an intrinsic part of the payments architecture.

Nevertheless, its role within the NDFR remains critical. This is because the ePurses, out of concern for systemic resiliency and data privacy, are designed as an offline, hardware-secured peer-to-peer device-based network.<sup>339</sup> Consequently, the only central transactional ledger data directly maintained by Congress is the aggregate number of digital dollars ‘withdrawn,’ ‘redeemed’ and ‘currently outstanding’.<sup>340</sup> The Federal Ledger thus provides a separate, distinct process for the collection and reporting of sub-federal budget data as deemed necessary for Congressional and President budget preparation processes.

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<sup>336</sup> See, e.g., Nathan Tankus, *Federal Reserve Issued Securities: Not Such a Crazy Idea After All*, NOTES ON THE CRISES (April 6, 2023),

<https://www.crisisnotes.com/federal-reserve-issued-securities-not-such-a-crazy-idea-after-all/> (noting that many Federal Reserve officials have historically argued that central bank assumption of responsibility for all debt issuance and management so would be “superior to the current monetary policy framework”).

<sup>337</sup> Hyman Minsky, *On the Non-Neutrality of Money*, 18 MODERN Q. FED. RSRV. BANK. N.R. 77, 78 (1993).

<sup>338</sup> Notably, final syncing happens automatically at the server level. Consequently, in contrast obtaining a Public Credit Card and/or withdrawing eCoins from the Congressional ATM, this system does not require active day-to-day interbranch coordination.

<sup>339</sup> See note 329 *supra*.

<sup>340</sup> These figures are central to proper accounting of total public spending, revenue, and deficit figures.

## C. Constitutional Implications

Adopting the NDFR would have far-reaching legal, political, and practical repercussions.<sup>341</sup> The remainder of this section (briefly) summarizes three major effects that together positively reinforce the constitutional separation of powers against attack and compromise by the imperial presidency and unitary executive fisc: 1) strengthening agency budget autonomy, 2) unbundling fiscal operations, and 3) modernizing the appropriations process.

### *i) Strengthening Local Budget Autonomy*

The most immediate and direct way in which the NDFR hardens the legal and operational security of fiscal administration against Presidential co-option is through affording agencies exclusive, decentralized control over their own appropriated funds, payments technology, and digital affairs. It does so by establishing a new standardized network of locally-maintained public agency hardware ePurses, into which dollars are directly created into existence. This relieves agencies of the need to issue or intra-governmentally launder their own ‘debt’ to finance statutorily authorized deficits.

Instead, under the NDFR, Congress effectively digitally consolidates the entire executive branch fiscal financing and fund disbursement apparatus currently jointly administered by the Fed and Treasury, and runs it locally *within* the Congressional legislative process as a virtual mirror—an automated-Treasury ‘Virtual Machine,’ if you will. In the process, it renders the metaphorical constitutional Treasury legally and practically equidistant to all public agents. This in turn, harmonizes and simplifies the disbursement process, reducing executive entanglement and increasing intra-legislative branch fiscal administrative capacity.<sup>342</sup>

In doing so, it solves the constitutional ‘hardware’ problem of Presidential weaponization of intra-governmental fiscal infrastructure by dematerializing the entire process onto a digital platform under Congress’s physical custody and control. This precludes the possibility of the President operationally taking over the entire federal administrative apparatus via the payments IT layer, as is currently being attempted with DOGE at the BFS.<sup>343</sup>

Separately, it strengthens the interdependence of executive and legislative branch agencies in the fiscal administrative process, thereby making Presidential assertions of unitary executive control over agency budgetary activities more difficult to achieve and sustain. Simultaneously, it provides

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<sup>341</sup> See generally, Lawrence Rosenthal, *The Statement and Account Clause as a National Security Freedom of Information Act*, 47 LOY. U. CHI. L. J. 1 (2015).

<sup>342</sup> Importantly, the NDFR structure is designed to unify the *front-end* of the fiscal administrative process, over which Congress is responsible (and which is unavoidably centralized by nature of the Constitutional process), while remaining agnostic on the ultimate *back-end* (or last-mile consumer level), over which the executive is ultimately responsible.

<sup>343</sup> See *supra* Part I.

new opportunities to shrink, or at least counterbalance, the currently outsized and overly-discretionary managerial powers of the OMB through unbundling and reabsorbing part of its apportionment responsibilities back into the legislative branch.<sup>344</sup>

### *ii) Unbundling Fiscal Operations*

The NDFR also hardens the fisc against unitary executive overreach by unbundling and reorganizing fiscal operations into discrete, harmonized, and clearly defined sub-systems, each corresponding clearly to specific big-C constitutional fiscal processes. These, in turn, are administered through small-c constitutional technologies resistant to centralized operational attack by the President.<sup>345</sup>

Under the NDFR all government deficits are funded directly by Congress through the issuance of new eCoins. Fiscal policy administration is separated entirely from public debt management, eliminating the operational and constitutional contradictions that emerge from their conceptual and practical entanglement, most notably around debt ceiling negotiations.

Congress exercises tight control over executive fiscal activity through two key legislative-administrative processes: ‘authenticating’ Public Credit Cards on the basis of credit lines drawn on the Fiscal Record;<sup>346</sup> and ‘approving’ Treasury ATM withdraw requests.<sup>347</sup> Importantly, Congress’s governance over the substantive design and technical hosting of the Fiscal Record and Treasury ATM are not in themselves ‘executive’ fiscal functions. Rather, they are grounded in Congress’s lawmaking and recordkeeping powers, modernized and reformulated to meet the constitutional and intragovernmental needs and

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<sup>344</sup> This would be achieved through a combination of new adjudicative and oversight processes conducted by various internal organs of the legislative branch, as well as partial digital automation via new legislative and digital currency technologies. Alternatively, to the extent Congress wished to grant OMB direct administrative but not operational control over agency budgets, it could just as easily do so at the agency-specific *spending* level through granting it operational override powers over the specific agency’s ePurse device under certain policy-determined circumstances, rather than generally at the systemic *funds disbursement* level. Doing so would clarify and delineate the process through which Congress negotiates and processes disbursements of appropriations authority to agencies, from the distinct political process through which the OMB oversees and centrally manages agency spending activity in accordance with statutory obligations and Presidential priorities.

<sup>345</sup> Technology is no substitute for political organizing or public action, and cannot alone prevent or defend against constitutional crises. Nevertheless, technological systems can be more or less resiliently designed, and thus susceptible to attack in the service of broader constitutionally subversive ends.

<sup>346</sup> Card authentication and oversight services could be delegated to an independent technical agency within Congress, tasked with clarifying and harmonizing the card’s operational ‘Terms and Conditions’ with Congress’s statutory directives, based on interpretative guidance and oversight by Congress itself. Given its primary technical focus on intra-legislative data management and system access, such an agency would be as remotely sheltered from executive branch encroachment as possible.

<sup>347</sup> Public debt management, by contrast, is fully delegated to the independent Federal Reserve and absorbed into its monetary policy operations, mirroring the function and institutionally independent position of the Founders’ early Sinking Fund Commission. *See generally, supra* note 34.

challenges of the modern era.<sup>348</sup> In both cases, it is the executive that must initiate and ultimately conduct the acts of ‘drawing,’ ‘coining,’ ‘borrowing,’ and ‘spending’ public money, in the form of digital legal tender eCoins, in accordance with legislative and administrative procedure specified by Congress.

Separately, the Federated Federal Ledger, as a ‘back-end’ legislative oversight system, actively tracks discrepancies between Congress’s statutory budget directives and the executive branch’s ultimate budgetary actions, improving public accountability. The automatic synchronization and consolidation of individual agency accounts into Congress’s consolidated Public Statement and Account makes budgetary obfuscation and Presidential secrecy harder to maintain. At the same time, by vesting Congress with the final power over the ‘One Big Ledger’, it structurally favors the legislature in the event of interpretative or even deeper political disputes over the validity of conflicting sets of financial accounting data, as well as delegations of fiscal authority more broadly.

The arrangement—which balances legislative consolidation and executive disintermediation on one level, and technological standardization and operational decentralization on another—reduces the potential for intra-governmental obstruction and political gamesmanship. Both the Treasury and Fed are rendered incapable of weaponizing their balance sheets to second-guess the statutory spending commitments of other agencies under the pretext of public debt management or government-wide financing constraints. Instead, Congress effectively delegates currency creation and payments management authority to individual agencies directly under its ongoing direct supervision, while limiting the substantive jurisdiction of any entity responsible for developing the underlying digital dollar technologies and standards to narrow, technical issues of systems maintenance and improvement.

### *iii) Modernizing Appropriations*

Procedurally, the NDFR neutralizes concern over ‘financing’ by making all public spending money-financed by default through the issuance of new eCoins. At the same time, it preserves Congress’s power to impose aggregate-level budgetary targets and constraints as super-spending limits that take foreground priority over conflicting background appropriations authority.

This, in turn, renders explicit any contradictions between the two sets of directives by resolving them in Congress’s favor, in the process rendering it ultimately politically responsible for any fallout—to its potential glory or shame. It also reorients Congress’s macroeconomic focus away from

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<sup>348</sup> See, e.g., Emily Berman *Weaponizing the Office of Legal Counsel*, 62(2) BOST. COLL. L. REV. 527-8, 531 (2021) (describing “inter-branch information disputes” as a “political tug-of-war” and “an iterative game, where the playing field is constantly shifting under the participants’ feet while simultaneously being shifted by those participants,” and noting that “when a “dispute over the scope of Congress’s authority or the reach of executive privilege arises...it is the people, rather than the courts, that serve as principal referee”).

temporally acute ‘resuspension’ crises, and towards a more consistent, stable process of harmonizing macro-level concerns with micro-level institutional and programmatic priorities.<sup>349</sup>

Under the NFDR regime, laws not otherwise expressly excluded as ‘non-budgetary’ are presumptively treated as containing their own inherent ‘duty to fund’ any spending obligations implied by their substantive mandates.<sup>350</sup> In turn, it is assumed that the ‘source’ of those funds is, unless otherwise specified, the conventional mechanism through which all Public Credits are redeemed into spendable digital dollar e-coins by executive actors—that is, going to the Congressional Treasury ATM.

In doing so, it flips upside down the aggregate number-centric logic of the existing filibuster and Byrd Rule-centric parliamentary procedural regime. Rather than treating ‘budget-related’ legislation as the 51-vote ‘exception’ to the 60-vote norm, the procedural default is that all legislative authority is budgetary unless formally indicated otherwise.<sup>351</sup> Final determination of the limits of specific spending authority, including whether it can, by causal extension, be used in the furtherance of tangentially related or ancillary supporting legal duties, is returned by default to Congress, with the passage of a bill upon a simple majority being proof in itself of Congress’s classification of its budgetary significance.<sup>352</sup>

Of course, Congress remains free to subject specific categories or pieces of legislation to a 60-vote passage requirement, or otherwise create ‘carve-out’ categories of non-budgetary authority that are presumptively ineligible to be relied upon by the executive when attempting to draw on Public Credit. But as with the legislative imposition of caps and timed restrictions on executive spending authority discussed above, these restrictions would be understood as deliberate deviations from the norm, inviting public scrutiny and greater accountability.

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<sup>349</sup> See generally Kelton, *supra* note 211 (arguing for the reorientation of Congressional budgeting away from singular focus on numeral deficit estimates, to evaluating the real economic and inflationary risk and potential of budget proposals on an empirical, case-by-case basis).

<sup>350</sup> Section IIC *supra*.

<sup>351</sup> Beyond procedural clarity, this shift has potentially significant implications for how we legally understand the limits of spending authority vis-a-vis specific legal mandates. By initially situating all statutory authority within the realm of a “budget,” subject only to initial carveout, it encourages a more holistic and sophisticated understanding of the material resource uses and needs involved in judicial, legislative, and executive action. Put simply, if “turning off the lights” makes it impossible to enforce any law, then all laws are, in a sense, partially “funded” by the light budget even if that connection is not made explicitly in each individual authorizing statute. Under the NDFR, there is a presumption of interconnectedness, removable only upon the assertion of a deliberate and special-purpose legal fiction that formally can be at odds with general reality without reinforcing mistaken perceptions about general reality along the way.

<sup>352</sup> The parliamentarian is, of course, still able to remain in essentially its current role, however by clarifying it as ultimately advisory, Congress would retain final responsibility for any decision to follow the parliamentarian over its own independent determination on the merits.



## ) Smart Appropriations, Dumb Disbursement

By setting the terms of Public Credit Card issuance and overseeing their ongoing use, Congress is positioned to exercise final authority over both *ex ante* permission and *ex post* discipline in public spending levels. Together, they function as an intra-legislative counterparts to the OMB's intra-executive apportionment process. Specifically, Congress effectively assumes the OMB's current role of processing or 'compiling' qualitative spending authority into concrete, practically executable (but crucially not yet executed) quantitative form.<sup>353</sup>

Currently, Congress issues vague and/or contradictory legal and spending directives and relies on the executive to practically interpret and resolve their meaning. By contrast, under the NDFR, the legislative branch is empowered to directly address frictions, ambiguities, and errors in the day-to-day operationalization of its general directives—that is, to debug the legislative source code upon which its fiscal digital IT infrastructure is constructed.

It could do so, for example, by authorizing Congressional agents like the GAO to issue interpretative and adjudicative declarations, published in machine-readable format. These declarations would then be automatically 'read' by 'oracles'—mini-programs embedded into the digital/legal code of the Fiscal Record that are designed to issue different outputs based on external, real-world trigger events and trusted data streams. The Record, in turn, remains the final authority governing the terms and conditions under which the executive may legally (and operationally) draw on the public "Credit" and turn it into spendable public "money".<sup>354</sup>

This would allow Congress to reabsorb dominion over infra-legislative clarification and harmonization through an expanded, two-level appropriations process. In doing so, it reframes interbranch budget disputes from debates over *how to pay* for government spending, to the more meaningfully underlying issue of *whether to spend* public money. This, in turn, shifts the locus of the budget debate away from executory process and toward the legislative process, practically and symbolically recentering Congress as the beating fiscal heart of the federal government.

Doing so minimizes the emergence of gaps, ambiguities, and contradictions between statutory spending and executive financing directives. It also reduces the risk of constitutionally catastrophic default, as well as separation of powers crises that emerge when the President or their cabinet relies on personal interpretations of the government's financing constraints to justify 'non-discretionarily' violating Congress's clear and unambiguous spending directives.

At the same time, it takes advantage of the fact that in a newly reimagined digital dollar regime, law—in the material sense of digitally encoded, 'smart'

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<sup>353</sup> This is distinct from both purely executive policymaking functions, and the non-discretionary mechanical disbursement functions, the latter of which would be "virtualized" into the Congressional Treasury ATM system.

<sup>354</sup> See note 321 *supra*.

legislative text—can serve as a critical *technological* as well as substantive input in a larger, multi-layer process of monetary creation and payments administration. Whether or not code is law in any general sense, payments technology certainly can be, at least partly.<sup>355</sup> This, in turn, offers new possibilities for practical and legal reintegration of various legislative fiscal processes presently delegated (or ceded) by the legislative branch to the President and a few key agencies.

Restructuring the Congressional record and budget process this way repurposes the medium of law itself into a practical payments mechanism. In doing so, it recenters Congress in the process of fiscal policy clarification and harmonization, and resists the centralizing fiscal encroachment of the President and OMB.<sup>356</sup>

Strategically, it does so by clearly establishing Congress as legally and physically responsible for stewarding the core data and IT systems that define, record, track, and control executive delegations of public fiscal authority. To borrow a line, under the NDFR Congress can have its ‘Marbury’ moment and “emphatically” assert the exclusive “province and duty” of the legislative department to ‘say what the fisc *is*.’<sup>357</sup>

This, in turn, encourages greater investment in upgrading parliamentary process and intra-legislative branch institutional capacity, including notably through independent legislative fiscal agencies like the GAO and Congressional Budget Office.<sup>358</sup> In doing so it promotes legislative accountability, as Congress can be held directly responsible when agencies cannot access funding that it already ostensibly approved.

#### b) The Parliamentary Finger on the Button

Finally, the NDFR empowers Congress to exert more fine-grained and dynamic control over its executive delegations of financing authority, by requiring all executive agencies to use both the Public Credit and Congressional Treasury ATM systems. Both systems are administered by legislative organs, with the ATM Access Protocol functioning as Congress’s own ‘intra-legislative’ process for defining, clarifying, and adjudicating disputes over its own prior spending directives.

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<sup>355</sup> See, e.g., *Brinton v. Haight*, 125 Idaho 324 (Idaho Ct. App. 1994) (the legal act of ‘tendering’ payment for a debt consists of being ‘willing and *able*’ to ‘*deliver*’ payment) (emphasis added).

<sup>356</sup> As noted above, Congress retains the power to delegate responsibility over aspects of this process to other sub-entities or agents, including Congressional committees and legislative branch agencies such as the Government Accountability Office. Alternatively, as also noted above, Congress can also at least partially automate these processes.

<sup>357</sup> Adapted from *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>358</sup> William Yeatman, *The Case for Congressional Regulatory Review*, CATO INST. POL. ANAL. NO. 888 (Apr. 14, 2020) (“[I]nvestment in congressional oversight capacity is essential to any strategy for reining in the administrative state. Without such investment, Congress simply doesn’t have the means to compete with the presidency for managerial primacy over the administrative state. And without this competition, we lose a structural check on government overreach”); see generally Dooling, *supra* note 318.

Most significantly, Congress could increase its negotiating leverage against the President during budget disputes by replacing the debt ceiling with an intra-legislative parliamentary financing review process, over which the executive branch would have no power to initiate. Specifically, Congress could embed financing handbrakes (or kill-switches) in spending laws that, if activated, would allow Congress to partially or fully freeze access to new digital dollar funding at the Credit Card Terms & Conditions, Access Protocol, or even ATM hardware layer itself.

These switches would be off by default, but capable of being activated and ‘resuspended’ unilaterally by Congress via Joint Resolution.<sup>359</sup> If activated, the President could then veto, inviting Congress to override via supermajority.<sup>360</sup>

Crucially, this process flips upside down the procedural logic and political dynamics of the current debt ceiling resuspension process. Instead of the Treasury Secretary running out of funds and threatening imminent default—in the process potentially forcing Congressional budgetary compromise on terms dictated by the executive branch—the discretion to revoke financing authority is granted solely to Congress, not the President. It thus constitutionally secures the budget process by eliminating the risk of executive branch-led financing and debt crisis. Specifically, it requires all financing ‘freezes’ to be first initiated by Congress, in keeping with its constitutional and historic parliamentary prerogative over the origination of spending and revenue bills.<sup>361</sup>

In doing so, the NDFR situates Congress as both the *first*, and ultimately—through the supermajority veto override—*final* say in both the legal and operational delegation of spending capacity to the executive branch. Goodbye unitary executive fisc, hello parliamentary fiscal supremacy—thanks to the magic of legislatively automated intra-governmental impoundment.<sup>362</sup>

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<sup>359</sup> See, e.g., Sean Stiff, *Congress’s Power Over Appropriations: Constitutional and Statutory Provisions*, CONG. RSCH. SERV. 57-60 (Jun. 16, 2020), <https://crsreports.congress.gov/product/pdf/R/R46417> (“While the executive branch generally recognizes Congress’s power to withhold funds needed to implement legislation, the executive branch does not concede to Congress a similar power to withhold funds necessary for the President to carry out power or duties conferred by the Constitution branches’ performance of their separate constitutional duties”)

<sup>360</sup> This process is modelled on the Congressional Review Act, under which Congress has the option, prior to a proposed agency regulation’s passage into enforceable law, to pass a motion of disapproval, which if not vetoed invalidates that rule. See also Loren Adler & and Shai Akabas, *Raising the Debt Ceiling—Let’s Do That Again Real Soon!*, BIPARTISAN POLICY CENTER (Oct. 26, 2011), <https://bipartisanpolicy.org/blog/raising-debt-ceiling-lets-do-again-real-soon> (discussing Republican Senator McConnell’s debt-ceiling deal with President Obama in 2011, in which President Obama was authorized to request a statutorily pre-authorized funding extension, which could then be blocked by Congressional resolution, only for that to be then vetoed by the President, thereby allowing the President to take responsibility/blame for the additional spending over Congress’s ostensible objection).

<sup>361</sup> See generally, *supra* note 265.

<sup>362</sup> The NDFR places automated-impoundment within the *technical and administrative* capacity of Congress to enact upon meeting the supermajority procedural criteria. See generally, Yeatman, *supra* note 355 (arguing for the creation of a general Congressional regulatory review process); *Oversight and Insight: Legislative Review of Agencies and Lessons from the States*, 121(2) HARV. L. REV. 613 (Dec., 2007) (arguing that the federal government uniquely—contra

## CONCLUSION

“The dogmas of the quiet past are inadequate to the stormy present...As our case is new, we must think anew and act anew. We must disenthrall ourselves, and then we shall save our country.”

- Abraham Lincoln<sup>363</sup>

“Technology will change, and so must we. Lest we remain the last leaf on a dead branch, the others having decided to fly with the wind.”

- Christine Lagarde<sup>364</sup>

The United States is at the crux of another major historical juncture. President Trump’s vision for the unitary executive fisc uniquely threatens the constitutional separation of powers by combining the assertion of total executive control with the even more extreme assertion of near-total fiscal supremacy. But the roots of the problem go well beyond the immediate crisis, or even Trump. Rather, they lay in Congress’s chronic failure to adequately maintain and upgrade its fiscal systems and administrative infrastructure to meet the needs and pressures of the rapidly evolving legal, economic, social, and technological order. This neglect has, in turn, led to excessive intra-governmental entanglement, procedural bottlenecks, and conflicting goals and directives at multiple phases of the fiscal process.

In addition to their immediate practical and broader constitutional implications, Trump’s actions have revealed a glaring fiscal blindspot at the heart of the contemporary dollar digitization debate. Public payments systems are the beating heart of the economy, and their smooth operation is of utmost constitutional and political importance. And yet, they remain persistently overlooked and largely ignored in discussions over digital dollar design.

The three main fiscal technologies this Article proposes as part of the NDFR—the Congressional Fiscal Record, Congress’s Treasury ATM, and the Federated Federal Ledger—together empower Congress to reclaim and defend its political and practical fiscal powers from accelerating encroachment by the imperial Presidency. By adopting a ‘centralized legislature, decentralized approach’, it pushes budgetary control down to local agencies, unbundles and streamlines fiscal operations, and modernizes the legislative budget process to allow Congress final oversight over the day-to-day appropriations administration and financing process.

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states—uniquely lacks a procedural mechanism for legislative review of executive branch regulatory decisions); Robert Sarvis, *Legislative Delegation and Two Conceptions of the Legislative Power*, 4 PIERCE L. REV. 317 (2006) (arguing for the need to preserve Congressional control over the legislative power against its own attempts to delegate to the executive, and criticizing judicial review as insufficient on its own to protect the separation of powers).

<sup>363</sup> Abraham Lincoln, *Annual Message to Congress: Concluding Remarks* (Dec. 1, 1862).

<sup>364</sup> Christine Lagarde, *Winds of Change: The Case for New Digital Currency*, SPEECH AT THE SINGAPORE FINTECH FESTIVAL, NOV. 14, 2018, <https://www.imf.org/en/News/Articles/2018/11/13/sp111418-winds-of-change-the-case-for-new-digital-currency>.

This blueprint is still incomplete and, at this stage, primarily provocative. Further fine-grained legislative and institutional analysis will be required before practically commencing anything like such a comprehensive reform program. Nevertheless, as U.S. policymakers inch ever closer to the formal adoption of digital public money of some kind, they can no longer afford to ignore fiscal administrative infrastructure or the constitutional dimension of digital dollar design.

Reconstructing the constitutional separation of fiscal powers and reinforcing it against future Presidential attack requires more than mere incremental reforms and defensive resistance. Nothing less than a wholesale reimagining of the public spending process and underlying technological architecture is required. Put differently, we must digitize the fisc.