121. Spending, Coercion, and Commandeering

How far can the federal government go to force local and state governments to help enforce federal law? Sooner rather than later, the Supreme Court will almost certainly have to answer that question.

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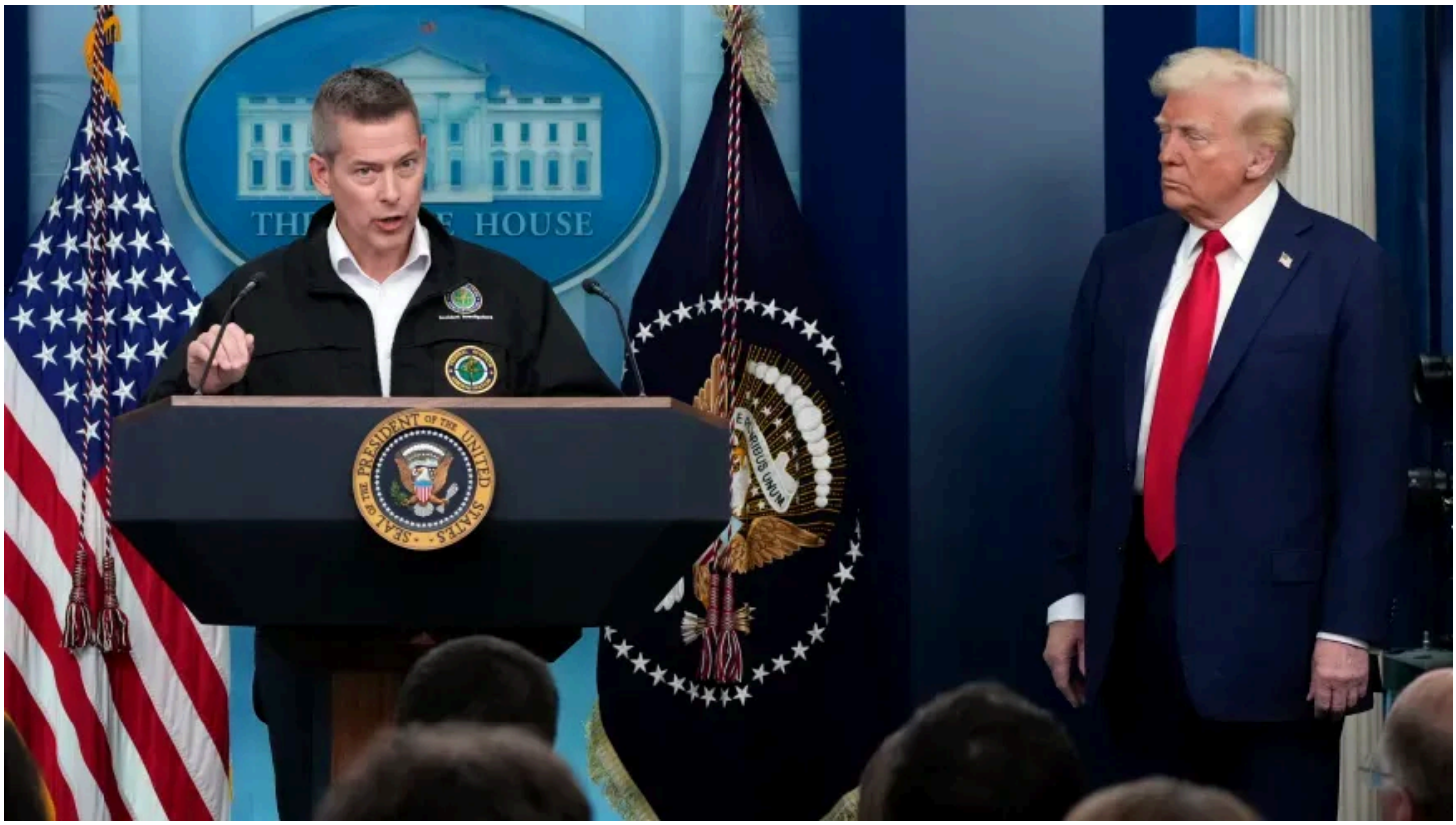
Welcome back to "One First," a weekly newsletter that aims to make the U.S. Supreme Court more accessible to all of us.

Every Monday, I'll be offering an update on goings-on at the Court ("**On the Docket**"); a longer introduction to some feature of the Court's history, current work, or key players ("**The *One First* 'Long Read'**"); and some Court-related trivia. If you're enjoying the newsletter, I hope you'll consider sharing it (and subscribing if you don't already):

It's hard to know where to even start with all of the … stuff … coming out of the Trump administration. But the one flashpoint at the heart of a number of different pieces of the news cycle is federal government spending. I wrote last week about "impoundment," and the well-settled lack of inherent presidential power to refuse to spend appropriated funds. That story, alas, hasn't gone away—with more action in federal court scheduled for later today.

Beyond impoundment, though, the federal government's spending power, more generally, has been a dominant theme of these developments—including whether, as the Department of Transportation last week suggested that it will start doing, the government can condition funds to local and state governments on those governments' agreement to help enforce federal immigration law. A similar (if much smaller-scale) dispute over "sanctuary cities" had just reached the Supreme Court during the first Trump administration when it was mooted by the 2021 presidential transition. It

seems inevitable that the question will get back to the justices this time around—and, at the rate things are going, sooner rather than later.



But first, the (Supreme Court-specific) news.

On the Docket

As expected, the Court made very little news last week—the first week of its annual, if informal, mid-winter recess. Monday's regular Order List included no new grants of certiorari and only a single separate writing—a dissent from a denial of Ohio's petition for a writ of certiorari in a post-conviction case by Justice Thomas, joined by Justice Alito. I'll have more to say about Thomas's dissent (which plays rather fast-and-loose with what's happening in these kinds of cases in the Sixth Circuit) in a future post.

Later on Monday, the Court added one more case to the docket for the October 2024 Term—granting the petition in *Martin* v. *United States*, a case raising nerdy but important legal questions about when the federal government itself can be held liable for a mistaken raid by an FBI SWAT team.

Other than appointing lawyers to argue two cases in which the federal government is no longer defending the judgment below (an odd but not uncommon occurrence), the only other order out of the full Court last week was the denial of emergency relief to South Carolina death-row prisoner Marion Bowman, who was executed on Friday.

There's nothing on the justices' calendar for this week or next week. Thus, the only orders we'd get are either miscellaneous housekeeping orders relating to upcoming oral arguments, or rulings on pending motions or emergency applications. Given the growing number of lower-court orders blocking Trump administration initiatives, this may be the calm before the storm. But, at least for now, the calm is prevailing.

The *One First* "Long Read": The Power of the Purse (Strings)

The federal government spends money on all kinds of things and in all kinds of ways. I wrote last week about impoundment, and the lack of authority the President has to decline to spend money Congress has appropriated. But a lot of the drama coming out of new administration extends to the other side of the coin (sorry): the conditions the government imposes on the money it spends.

Indeed, controversy over spending conditions has arisen in two separate contexts over the first two weeks of the second Trump administration. The first is whether the government can *use* spending conditions as a way to effectively compel local and state governments (that might otherwise not want to) into aiding federal law enforcement. (So, for instance, can the federal government condition funds to public schools on those schools providing access to immigration officers?) The second is Elon Musk's claim, made much louder (and, forgive me, more stupidly) over the weekend, that government funding of non-governmental organizations is "a scam to get around the laws passed by Congress to protect the people," part of a broader effort to justify

mounting refusals by the federal government to issue payments it is legally required to issue. (It's going to be quite a time to be a government contracts lawyer.)[1]

This latter argument is as patently meritless as it is ironic. Taking the meritless-ness first, government funding of non-governmental organizations (like USAID) comes *through* "laws passed by Congress." Indeed, it is unlawful for the government to spend money that *hasn't* been appropriated by Congress. As for the Bill Ackman tweet Musk was quote-tweeting, using the Spending Clause to encourage behavior the federal government can't compel is … much of the purpose of Spending Clause statutes. So long as the money is not *coercing* the non-federal behavior (more on that in a moment), the idea is that the recipient is choosing to engage in the underlying conduct, and so it doesn't matter whether or not the federal government could have achieved the same result directly. As the Supreme Court put it in 1936, "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[2] Don't get me wrong—there are some hard questions at the margins of the Spending Clause (Justice Barrett, for instance, wondered about the scope of preemption of state laws under the Spending Clause in her concurrence in the EMTALA case.) But the basic principle that the substantive sweep of Spending Clause statutes is not limited to the scope of Congress's other powers has become a bedrock feature of constitutional law.

The former argument, about using spending conditions to compel state enforcement of federal law, is trickier—and may remind readers of the litigation over "sanctuary cities" during the first Trump administration. To summarize a whole lot of Supreme Court doctrine in a few sentences:

1. The Constitution bars the federal government from "commandeering" state legislative or executive policymaking. (State courts are different because the Supremacy Clause expressly requires them to follow federal law.)

2. As the Supreme Court held in *New York v. United States*, that means that Congress can't tell a state what its policy on a particular topic will be (it can say what it can't be, but that's not the same thing; there's a difference between a minimum wage of $10/hour and a mandatory wage of the same).
3. And as the Court held in *Printz v. United States*, that means that Congress can't require local or state law enforcement officers to enforce federal law; as a matter of federal law, at least, they're free to choose whether or not to do so.
4. The Constitution *allows* the federal government to impose conditions on spending—even against local and state governments.
5. But as the Court held in *South Dakota v. Dole*, there are four general requirements for such conditions: they must be (a) clearly expressed in law; (b) related to the money; (c) not "coercive"; and (d) not in violation of any other constitutional provision.

Note how the idea of "anti-commandeering" dovetails with the bar on coercive spending conditions: the reason why a spending condition that isn't truly voluntary is not permitted is because, at that point, the federal government is effectively dictating state policy—rather than giving the state a financial incentive to choose a specific policy. The line between choice and coercion isn't always obvious. But it is undeniably one of constitutional significance, because it's the line that identifies who really has set the underlying policy being carried out by state officers: the state, or the federal government?

Thus, when the first Trump administration started withholding certain funds from local and state governments that refused to agree to assist in the enforcement of federal immigration law, that led to a whole lot of litigation—and a 4-1 circuit split. The First, Third, Seventh, and Ninth Circuits all concluded that the Trump administration was acting unlawfully—not because the spending conditions were unconstitutionally coercive, but because they weren't clearly authorized by statute in the first place. After all, the executive

branch can't impose its own spending conditions without statutory support for doing so. The Second Circuit, on the other hand, upheld the withholding of funds—concluding that the conditions were authorized by statute and were not unconstitutional.

The parties that lost in the courts of appeals filed cert. petitions—which were pending in the Supreme Court when President Biden came to office and changed the underlying policy. The petitions were thus dismissed, and the Supreme Court, as with a number of challenges to first-term Trump administration policies, never conclusively resolved the merits. [3]

This time around, it likely won't have a choice. We've already seen a bunch of movement from the administration with respect to these kinds of spending conditions, but perhaps the most significant to date has come out of the Department of Transportation. As Emily Badger summarized over the weekend in a helpful *New York Times* story, the new Secretary of Transportation, Sean Duffy, issued an order last week that. among lots of other things, provides that, "to the maximum extent permitted by law, DOT-supported or -assisted programs and activities . . . shall prioritize projects and goals that . . . require local compliance or cooperation with Federal immigration enforcement and with other goals and objectives specified by the President of the United States or the Secretary." In other words, DOT is effectively threatening to prioritize spending money in jurisdictions that compel local compliance with immigration and other federal law enforcement —at the literal expense of those jurisdictions that don't. [4]

As Badger reports, "The Department of Transportation sends billions of dollars annually to states and local governments to fund highways, transit systems, airports, bridges, commuter rail and ports, as well as road safety projects." And the memo appears to threaten those states and local governments that don't voluntarily support federal immigration enforcement with the loss of … all of it.

I'm quoted in the story suggesting that there are two things that make what DOT is threatening more legally dubious than what DOJ did during the first administration—the amount of money at issue, and the intervening Supreme Court decisions that only narrow DOT's ability to rely upon statutes that don't clearly authorize these conditions. But the more I dig into this, the more it strikes me that there's also a *third* problem—a lack of relatedness. Here are some quick thoughts on each:

1. **The Amount of Funds**: In *South Dakota* v. *Dole*, where the Court upheld a statutory condition that states raise their drinking age to 21 or else lose 5% of their federal highway money, a significant part of why the majority held the condition to be constitutional was because of how modest it was. This was also a big part of the Second Circuit's analysis in upholding the DOJ conditions from the first Trump administration. But here, as in the Affordable Care Act case (where the Supreme Court held the Medicaid expansion invalid under the Spending Clause statute largely *because* of how big it was), you have a truly *massive* amount of money. That's quite a cudgel for the Department of Transportation—and an obvious way in which these conditions are much more coercive than anything we saw during the first Trump administration.
2. **Intervening Supreme Court Decisions**: It is not immediately clear what statute even *authorizes* the conditions outlined in Duffy's memo. But assuming he eventually points to one, it's going to be harder to argue for statutory authorization today than it was four years ago. That's because, in the four years since the end of the first Trump administration, the Supreme Court has turned an ever-more skeptical eye on agency claims of authority without clear statutory authorization. Indeed, it's not hard to make the argument that the amount of funding at issue suffices to make what Secretary Duffy is proposing the type of "major question" for which the Department would need *clear* congressional authorization. And even if it's not a major question, the Department wouldn't be entitled to any deference in interpreting language of an ambiguous statute. Thus, before getting to coercion (which comes into play only if the conditions are

authorized), challenges would have a darn good argument that no statute even authorized the Secretary to take this step—the same ground that led three of the four circuits to strike down the DOJ conditions during the first Trump administration.

3. **(Un-)Relatedness**: Finally, perhaps the biggest structural difference between what Duffy is proposing and what DOJ attempted during the first Trump administration is the lack of relationship between the spending condition and the appropriated funds. It wasn't at all difficult to relate funds for training local and state law enforcement officers to immigration enforcement. But the same can't be said for federal transportation funds. The argument that money for highway maintenance, improving mass transit systems, and other transportation-related priorities bears any relationship to local and state law enforcement officers' participation in federal immigration enforcement is a stretch, at best—far more so than the argument the Supreme Court embraced in *South Dakota* v. *Dole*, about the relationship between the legal drinking age and drunk driving on federally funded highways.

Of course, the point of these conditions may not be to ultimately prevail in court, but merely to impose a chilling effect on those jurisdictions that are still debating whether (and how much) to cooperate with federal immigration enforcement operations. But for those local and state governments with the political support to stand up to the federal government on these issues, the law, at least in the Department of Transportation case, certainly appears to be on their side.

Given everything that's going on, it might seem odd to focus this week's "Long Read" on a technical fight over spending conditions. But (1) it's very easy to see this fight heading to the Supreme Court, and pretty quickly, at that; and (2) at a more systemic level, one of the real organizing principles of what the Trump administration is up to appears to be a fundamental seizure of control over government spending. That's clearly unlawful (and, indeed, unconstitutional) in the impoundment space; and it's going to be unlawful in at least some of

the spending conditions cases, too—especially this one. And the broader point—that we shouldn't be as horrified by the federal government using money to encourage behavior it can't compel—is one that we could all use a reminder of. Sometimes, the federal government really *is* here to help us, at least when it's spending money the way that Congress has instructed.

SCOTUS Trivia: Birthdays in Common

Consecutive days last week brought with them Chief Justice Roberts's 70th birthday (on Monday) and Justice Amy Coney Barrett's 53rd birthday (on Tuesday).

Because I'm a huge nerd (and desperate for distractions from doom-scrolling), the near-overlap got me wondering as to (1) which birthdays have been most-represented on the Court; and (2) whether any justices with the *same* birthday have ever served together. (They don't call it "trivia" for nothing.)

With one small caveat, [5] the answer to the first question is that there are 12 birthdays in common among the 116 people to serve on the Supreme Court of the United States. The clubhouse leaders, with four justices each, are April 17 (Blair, Samuel Chase, Day, and Van Devanter); and September 17 (John Rutledge; L.Q.C. Lamar; Burger; and Souter). [6] November 4 shows up three times (Thomas Johnson; Curtis; and Field); and there are nine days with two justices each. (July, by the way, is the month in which the fewest justices—five—were born; March has the most with 16). No two justices were born on the exact same *day*.

As for the second question, as noted above, Justices Day and Van Devanter were both born on April 17, albeit 10 years apart (they served together from 1911 to 1922). And Justices Owen Roberts and James Byrnes were both born on May 2, albeit seven years apart (they served together for all of Byrnes's brief tenure in 1941—42). The only current justice with a birthday twin is Justice

Jackson, whose September 14 birthday is the same as Justice James Wilson, albeit … 228 years apart.

I hope that you've enjoyed this installment of "One First." If you have feedback about today's issue, or thoughts about future topics, please feel free to e-mail me. And if you liked it, please help spread the word!

If you're not already a paid subscriber and are interested in receiving regular bonus content (or, at the very least, in supporting the work that goes into this newsletter), please consider becoming one! This week's bonus issue for paid subscribers will drop on Thursday. And we'll be back with our regular content for everyone no later than next Monday, although the way things are going…

Until then, please stay safe out there.

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1 For what it's worth, Musk's argument that he's stopping payments to root out fraud and corruption doesn't persuade, either, because even if there were a factual basis supporting it, those efforts should be happening at the agency-specific level, not at the final payment stage—where all the government is doing is refusing to pay its bills.

2 The irony is Musk complaining about a scam to evade laws enacted by Congress while he appears to be exercising all kinds of authority that seems designed to … evade laws enacted by Congress.

3 The same fate befell the other major litigation challenging spending conditions during the first Trump administration—the Department of Health and Human Services' rule authorizing the revocation of *all* HHS funding, including Medicaid, from entities that were found to have committed even one violation of federal statutory protections for "conscience"-based objections to abortion. Those conditions were blocked by the three district courts to consider them, and appeals were pending when the Biden administration came to office and rescinded them.

4 There's a separate bucket of issues arising from the Department of Justice's threat to criminally prosecute local and state officials who don't comply with federal immigration authorities. For a fantastic overview of why those threats are almost certainly empty, see this *Just Security* post by UCLA law professor Ahilan Arulanantham.

5 There is no good source for the exact birthday of Justice James M. Wayne. There's widespread agreement that he was born in 1790, but not much more beyond that. Thus, the data in this post does *not* include or otherwise account for Wayne.

6 Yay, Constitution Day!

Discussion about this post

Michael Scheinberg 1d

" challenges would have a darn good argument that no statute even authorized the Secretary to take this step"

Good arguments don't seem to matter anymore. Major questions, the newly invented doctrine of a supposedly textualist court, only applies to environmental regulations that the Court doesn't like. Anything supported by the right wing will not be a major question. And while Courts no longer need to defer to the expertise of administrative agency if they don't like the regulation, they will uphold a right wing regulation.

I think it's bizarre that the Court and so-called "conservatives" forget the definition of "executive," that is, a person that executes the policies of a board or of Congress, not someone who makes up policy and sets the law. The Court decided that the President doesn't even need to follow the law, let alone execute it.

Even if Roberts and Barrett vote to uphold the constitution and democracy, will Trump ignore them and the Republicans complain privately but let him get away with it?

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Jeff Jude 1d

Quick question regarding your footnote one and (mostly Musk's) efforts to not pay people like Lutheran Family Services (domestically) and USAID (internationally):

Does this implicate the public debt clause of the 14th Amendment as viewed broadly by SCOTUS in Perry v. US?

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