

Exclusive: Unredacted Ukraine Documents Reveal Extent of Pentagon's Legal Concerns

by **Kate Brannen**

January 2, 2020

“Clear direction from POTUS to continue to hold.”

This is what Michael Duffey, associate director of national security programs at the Office of Management and Budget (OMB), told Elaine McCusker, the acting Pentagon comptroller, in an Aug. 30 email, which has only been made available in redacted form until now. It is one of many documents the Trump administration is trying to keep from the public, despite congressional oversight efforts and court orders in Freedom of Information Act (FOIA) litigation.

Earlier in the day on Aug. 30, President Donald Trump met with Defense Secretary Mark Esper and Secretary of State Mike Pompeo to discuss the president's hold on \$391 million in military assistance for Ukraine. Inside the Trump administration, panic was reaching fever pitch about the president's funding hold, which had stretched on for two months. Days earlier, POLITICO had broken the story and questions were starting to pile up. U.S. defense contractors were worried about delayed contracts and officials in Kyiv and lawmakers on Capitol Hill wanted to know what on earth was going on. While Trump's national security team thought withholding the money went against U.S. national security interests, Trump still wouldn't budge.

Thanks to the testimony of several Trump administration officials, we now know what Trump was waiting on: a commitment from Ukraine to investigate Joe Biden.

But getting at that truth hasn't been easy and the Trump administration continues to try to obscure it. It is blocking key officials from testifying and is keeping documentary evidence from lawmakers investigating the Ukraine story. For example, this note from Duffey to McCusker was never turned over to House investigators and the Trump administration is continuing to try to keep it secret.

Last month, a court ordered the government to release almost [300 pages of emails](#) to the Center for Public Integrity in response to a FOIA lawsuit. It released a first batch on Dec. 12, and then a second installment on Dec. 20, including Duffey's email, but that document, along with several others, were partially or completely blacked out.

Since then, *Just Security* has viewed unredacted copies of these emails, which begin in June and end in early October. Together, they tell the behind-the-scenes story of the defense and budget officials who had to carry out the president's unexplained hold on military aid to Ukraine.

The documents reveal growing concern from Pentagon officials that the hold would violate the [Impoundment Control Act](#), which requires the executive branch to spend money as appropriated by Congress, and that the necessary steps to avoid this result weren't being taken. Those steps would include notifying Congress that the funding was being held or shifted elsewhere, a step that was never taken. The emails also show that no rationale was ever given for why the hold was put in place or why it was eventually lifted.

What is clear is that it all came down to the president and what he wanted; no one else appears to have supported his position. Although the pretext for the hold was that some sort of policy review was taking place, the emails make no mention of that actually happening. Instead, officials were anxiously waiting for the president to be convinced that the hold was a bad idea. And while the situation continued throughout the summer, senior defense officials were searching for legal guidance, worried they would be blamed should the hold be lifted too late to actually spend all of the money, which would violate the law.

The emails also reveal key decision points, moments when senior officials hoped the hold might be lifted. This includes Vice President Mike Pence's September meeting with Ukrainian President Volodymyr Zelenskyy, which a senior defense official expected would resolve the funding issue, raising the question: Why? What was supposed to come out of that meeting that would pave the way for Trump to lift the hold? What was Pence expected to communicate?

But, the hold wasn't immediately lifted after Pence's meeting with Zelenskyy. Instead, the president finally released the money on Sept. 11, just as the whistleblower complaint was about to break into the open.

As for how the story begins, it was in mid-June when Defense Department officials first heard the president had questions about the Ukraine money.

June: “Do you have insight on this funding?”

According to [new reporting from the *New York Times*](#), on June 19, Robert Blair, senior adviser to acting White House Chief of Staff Mick Mulvaney called Russell Vought, the acting head of OMB and said, “We need to hold it up” in reference to the Ukraine military aid.

That same day, Michael Duffey, the associate director of National Security Programs at OMB, emailed Elaine McCusker, a career civil servant who serves as acting Pentagon comptroller, about a [Washington Examiner story](#) on the \$250 million the Defense Department had just [announced](#) it was sending to Ukraine.

“The President has asked about this funding release, and I have been asked to follow-up with someone over there to get more detail. Do you have insight on this funding?”

Mark Sandy, OMB’s deputy associate director for national security programs, was copied on the email and told the House Intelligence Committee that he remembered receiving it and being made aware that the president had questions about the Ukraine funding on June 19.

As Laura Cooper, who oversees Ukraine policy at DoD, [testified](#) to the House Intelligence Committee, the president wanted to know if U.S. companies would be providing Ukraine any of the equipment, what other countries were doing to contribute, and where the U.S. funding came from. Defense Department officials collected the answers and sent them back up the food chain and then over to the White House.

They explained that the vast majority of companies providing the equipment were American. They told the White House that the United Kingdom, Canada, Lithuania and Poland all contribute military training and equipment to Ukraine, and that the European Union also provides an enormous amount of economic support. As for the third question, it was the trickiest to answer because of its “strange phrasing,” Cooper said. Her office answered: The money comes from Congress and it has strong bipartisan support.

The questions didn't stop there. Blair wanted to know the status of the funding, meaning: Was the money out the door already?

On June 25, McCusker answered:

“Only \$7M of the \$250M has been obligated to date.”

An attachment showed the equipment the money was going to buy, including counter-artillery radars, sniper rifles, grenade launchers, secure communications and cyber support, night vision devices, humvees and medical equipment. It also listed the U.S. companies expected to supply it.

According to the *Times*, Blair emailed Mulvaney on June 27, telling him the Ukraine money could be held but to “expect Congress to become unhinged.”

July: “Given the sensitive nature of the request ...”

Hours after Trump concluded his infamous July 25 call with Zelenskyy, during which he asked the Ukrainian president to investigate Biden, Duffey sent an email to top senior defense officials, which was released in full to the Center for Public Integrity. The letter advised the Pentagon to suspend any future military aid for Ukraine.

“Based on guidance I have received and in light of the Administration’s plan to review assistance to Ukraine, including the Ukraine Security Assistance Initiative, please hold off on any additional DOD obligations of these funds, pending direction from that process. I understand that DOD will continue its planning and casework during this period and that this brief pause in obligations will not preclude DOD’s timely execution of the final policy direction.

We intend to formalize the pause with an apportionment footnote to be provided later today.

Given the sensitive nature of the request, I appreciate your keeping that information closely held to those who need to know to execute the direction. Please let me know if you have any questions.”

McCusker followed up in an email to OMB asking if this had gone through the Defense Department's general counsel, indicating an early concern about the legality of these actions. When it released this email to the Center for Public Integrity, the Justice Department redacted this simple question from McCusker.

Message (Digitally Signed)

From: McCusker, Elaine A HON OSD OUSD C (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=(b) (6)]
Sent: 7/25/2019 3:05:04 PM
To: Sandy, Mark S. EOP/OMB (b) (6)
Subject: FW: Ukraine Foreign Assistance
Attachments: smime.p7s

Mark

(b) (5)

EM

It was on July 25 that Sandy implemented the first hold on the Ukraine funding by inserting a footnote in a budget document. This first hold extended through Aug. 5. The Pentagon made clear that this first pause would not jeopardize its ability to spend the money by the end of the fiscal year.

The next day, July 26, John Rood, head of policy at the Defense Department, sent his boss, Defense Secretary Mark Esper, a readout from the "Ukraine Deputies Small Group" meeting. This is the meeting convened by the National Security Council where we know, thanks to [Cooper's congressional testimony](#), that the national security community voiced its "unanimous support" for resuming the funding and Cooper raised the Defense Department's concern about the urgency of the matter due to the legal requirement to spend all of the money by the end of the fiscal year.

The readout includes this line, which makes it clear the hold on Defense and State Department Ukraine funding came at the president's direction:

OMB noted that the President's direction via the Chief of Staff in early July was to suspend security assistance to Ukraine including by blocking the \$115 [Foreign Military Financing] congressional notification and by halting execution of the \$250M FY19 USAI programs.

An assistant to Esper let officials know the secretary had read the summary of the meeting and “has no further questions.”

August: “What is the status of the impoundment paperwork?”

As August began, the Defense Department had told OMB and the White House its concerns about the legality of the hold and how, as the clock ticked toward the end of the fiscal year, it would become increasingly difficult for the Pentagon to spend the Ukraine funding in time. If it wasn’t all spent by Sept. 30, in violation of the law, the money would return to the U.S. Treasury, in what is known as an “impoundment.” While pressure was mounting as the month began, that red line had not yet been crossed, but it would be soon.

On Aug. 6, Duffey sent McCusker an email telling her he planned to extend the hold on the Ukraine funding by reinserting the same footnote into the budget document. The footnote still noted that the pause would not prevent the Defense Department from spending the money before the fiscal year ended, if the hold was lifted.

McCusker wrote back asking to whom Duffey spoke to confirm that the additional pause would not affect the ultimate execution of the program.

“Good catch,” Duffey wrote back and then asked with whom he should check in.

On Aug. 9, McCusker wrote to senior OMB officials, including Sandy and Duffey:

“As we discussed, as of 12 AUG I don’t think we can agree that the pause ‘will not preclude timely execution.’ We hope it won’t and will do all we can to execute once the policy decision is made, but can no longer make that declarative statement.”

The Pentagon’s warning: We’re running out of time.

The Justice Department chose to black this out when it released the email last month:

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>>
>> -----Original Message-----
>> From: McCusker, Elaine A HON OSD OUSD C (USA) (b) (6) >
>> Sent: Friday, August 9, 2019 5:32 PM
>> To: Duffey, Michael P. EOP/OMB (b) (6); Sandy, Mark S. EOP/OMB
(b) (6) >
>> CC: Dilworth, Monique L SES OSD OUSD C (USA) (b) (6); Ney, Paul C Jr HON OSD
OGC (USA) <(b) (6)>
>> Subject: USAI
>>
>> Mike, Mark
>>
>> Attached info on the USAI execution. Number 5 has the general info on the steps - (b) (5)
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
>>
>> EM
>>
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Duffey followed up with a number of questions, mostly about whether the money could be shifted to other programs if the decision was made not to spend it on Ukraine. McCusker told him that reprogramming was possible but that it was very unlikely to get approved on Capitol Hill because Congress had not only approved the Pentagon’s request for \$200 million for Ukraine military assistance, but had added \$50 million, indicating that bipartisan support for the program was overwhelming.

On Aug. 12, understanding that the hold on Ukraine funding was going to be extended again, McCusker sent Duffey proposed language to be included in the next footnote to reflect the growing risk to the program. It read:

“Based on OMB’s communication with DOD on August 12, 2019, OMB understands from the Department that this additional pause in obligations may not preclude DOD’s timely execution of the final policy direction *but that execution risk increases with continued delays.*” (emphasis added)

But the next time the hold was extended, the footnote did not include any text that indicated the growing risk to the funding — the language that the Defense Department thought should be included. It was also redacted in the documents publicly released last month.

The emails show there was supposed to be an Aug. 16 meeting between Trump, Secretary of State Mike Pompeo and Esper at Trump’s New Jersey golf resort where they would discuss Ukraine. Talking points were prepared and shared among officials.

Media reports show Trump met with his national security team that day in Bedminster to discuss Afghanistan. For those talks, Trump and Pompeo were joined by Vice President Mike Pence, National Security Adviser John Bolton, Joint Chiefs Chairman Gen. Joseph Dunford and CIA Director Gina Haspel.

While there was an expectation that it would be on the day's agenda, an Aug. 17 email from Duffey to McCusker says,

“Sounds like Ukraine was not discussed.”

As the month wore on, the emails show officials bending over backwards to make every conceivable accommodation to keep the process moving without actually being able to obligate the funding. The idea was that as soon as the funds were given the green light, there would be zero delay, and presumably, impoundments could be avoided.

But tension began to build between the Defense Department and OMB toward the end of August as the funding hold complicated all of the contractual processes that needed to take place in order to buy the equipment for Ukraine. OMB was pushing the Defense Department to micromanage down to the lowest level — the field contracting offices — in an apparent effort to buy time and keep the process on track even though the hold was upending everything. The Pentagon was growing frustrated.

On Aug. 20, OMB issued another footnote, extending the hold through Aug. 26. It did not include any language flagging the growing risk.

In an Aug. 21 email to her DOD colleagues, McCusker notes that members of the House Appropriations Committee traveled to Ukraine earlier that month and sent the Pentagon a request for information regarding the funding.

On Aug. 26, Duffey let McCusker know that the funding hold was being extended again.

McCusker responded, “What is the status of the impoundment paperwork?”

To which Duffey, replied, “I am not tracking that. Is that something you are expecting from OMB?”

McCusker: “Yes, it is now necessary — legal teams were discussing last week.”

The Justice Department redacted McCusker's side of this exchange.

Message (Digitally Signed)

From: McCusker, Elaine A HON OSD OUSD C (USA) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=(b) (6)]
Sent: 8/26/2019 10:29:15 AM
To: Duffey, Michael P. EOP/OMB (b) (6)
Subject: RE: USAI
Attachments: smime.p7s

(b) (5)

EM

From: Duffey, Michael P. EOP/OMB (b) (6) >
Sent: Monday, August 26, 2019 5:47 AM
To: McCusker, Elaine A HON OSD OUSD C (USA) (b) (6)
Subject: Re: USAI

I am not tracking that. Is that something you are expecting from OMB?

Sent from my iPhone

On Aug 26, 2019, at 5:38 AM, McCusker, Elaine A HON OSD OUSD C (USA) <(b) (6)> wrote:

(b) (5) ?

EM

In an email to Duffey later that morning, McCusker's frustration is palpable. For starters, DOD still hasn't gotten the footnote extending the hold, so technically the Pentagon should start obligating the money. Plus, Mark Paoletta, OMB's general counsel, "appears to continue to consistently misunderstand the process and the timelines we have provided for funds execution," McCusker said. (Again, this detail was redacted by the Trump administration in its court-compelled FOIA release.)

McCusker asks Duffey: "Are you working with him and can you help? Starting on 19 AUG, the footnotes have put our ability to execute at risk."

She also tells Duffey that the Senate Armed Services Committee (SASC) is now asking questions, in addition to House Appropriators. The question from SASC is:

“Has OMB directed DOD/DSCA to halt execution of all or any part of FY19 funds for the Ukraine Security Assistance Initiative? If so, when, and what was the reason given?”

On Aug. 27, Eric Chewning, Esper’s chief of staff, shares with McCusker an Aug. 26 email he received from L3 Harris Technologies, one of the defense contractors waiting on the Ukraine money. The company has learned of the “hold” and wants to know what’s going on.

McCusker responds to Chewning saying,

“Recognizing the importance of decision space, but this situation is really unworkable **made particularly difficult because OMB lawyers continue to consistently mischaracterize the process** — and the information we have provided. They keep repeating that this pause will not impact DOD’s ability to execute on time.” (emphasis added)

Her response was redacted by the Justice Department:

Message (Digitally Signed)

From: McCusker, Elaine A HON OSD OUSD C (USA) [/O=SD/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN/(b) (6)]
Sent: 8/27/2019 12:02:31 AM
To: Chewning, Eric SES SD [/O=SD/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN/(b) (6)]
CC: Norquist, David HON SD [/O=SD/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN/(b) (6)]; Rood, John C HON OSD OUSD POLICY (USA) [/O=SD/OU=First Administrative Group/cn=Recipients/cn/(b) (6)]
Subject: RE: [Non-DoD Source] Ukraine (USAI funding)
Attachments: smime.p7s

(b) (5)



Wr,
EM

From: Chewning, Eric SES SD (b) (6) >
Sent: Monday, August 26, 2019 7:50 PM
To: McCusker, Elaine A HON OSD OUSD C (USA) (b) (6) >
Cc: Norquist, David HON SD (b) (6); Rood, John C HON OSD OUSD POLICY (USA) (b) (6) >
Subject: FW: [Non-DoD Source] Ukraine (USAI funding)

FYI.

As frustration mounted, the Pentagon considered ratcheting up its warnings and prepared a draft letter from Deputy Defense Secretary David Norquist to Vought, the acting director of OMB. McCusker shared the letter with Duffey on Aug. 27 just to let him know it was in the works. The entirety of the one-page letter was redacted in the emails released to CPI. Here are the key sections:

“As you know, in a series of footnotes to its apportionment documents, the Office of Management and Budget has directed the Department to pause its obligation of USAI funding temporarily, pending completion of an ‘interagency process to determine the best use of such funds.’ These footnotes make the affected funding legally unavailable for obligation during the period of the directed pause. **As a result, we have repeatedly advised OMB officials that pauses beyond Aug. 19, 2019 jeopardize the Department’s ability to obligate USAI funding prudently and fully, consistent with the Impoundment Control Act.**

The latest OMB-directed pause ended on August 26, 2019, and has not been extended. Accordingly, the Department is resuming its obligation of USAI funding. We believe that OMB’s imposition of any further delays in obligating USAI funding will trigger the ICA’s requirement to transmit to Congress a special message proposing rescission or deferral of funding for the USAI.”

A new footnote was signed by Duffey later that day, extending the hold yet again.

In the meantime, after weeks of trying to keep the president’s hold on the Ukraine money within a tight circle of administration officials, word of it was getting out. It had now reached Capitol Hill, U.S. defense contractors and officials in Ukraine.

Finally, on Aug. 28, the situation burst into the open, when POLITICO [broke the story](#).

Talking points were hashed out and Paoletta, the OMB general counsel, forwarded them around. The final talking point read:

“No action has been taken by OMB that would preclude the obligation of these funds before the end of the fiscal year.”

When McCusker read this, she wrote to Duffey,

“I don’t agree to the revised TPs — the last one is just not accurate from a financial execution standpoint, something we have been consistently conveying for a few weeks.”

Her reaction to the talking points was redacted in the FOIA release last month:

Message (Digitally Signed)

From: McCusker, Elaine A HON OSD OUSD C (USA) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=(b) (6)]
Sent: 8/29/2019 10:49:47 PM
To: Duffey, Michael P. EOP/OMB (b) (6)
Subject: RE: Agreed TPs
Attachments: smime.p7s

Mike

(b) (5)

Just got out of another long session on (b) – things evolved again. Will try to reach you in a bit.

EM

The talking points were also discussed internally at the Defense Department. McCusker told a group of senior defense officials:

OMB continues to ignore our repeated explanation regarding how the process works. We can not release funds for obligation until they can obligate, so the process has stopped for those cases whose lines are ready to execute.

The draft [deputy secretary of defense] memo to the OMB director says: ‘Although we will proceed to take all necessary preparatory steps, please be advised that we can no longer confirm that USAI funds will be fully and prudently obligated before they expire on September 30, 2019.’

This is due to OMB actions. I am sure I am missing some nuance here?

On Aug. 29, Chewning let McCusker know:

“Sec State and Sec Def will discuss with POTUS tomorrow. We should wait on communicating anything more privately.”

On Aug. 30, after the meeting with the president took place, Duffey told McCusker, “Clear direction from POTUS to hold.” He let her know that he’d soon be sending new paperwork extending the hold.

September: “You can’t be serious. I am speechless.”

Meanwhile, Chewning told senior defense officials that Esper had told him that no decision came out of his meeting with Trump. The Defense Department had prepared another strongly worded letter to OMB, to be signed by David Norquist, the deputy defense secretary, that would again remind OMB that DOD could no longer guarantee that it could spend all of the Ukraine money before it expired on Sept. 30.

“Hi All,

I spoke to the boss. No decision on Ukraine. VP meeting with Zelensky in Poland is next step. We can discuss further on Tuesday. Until then, hold on the USAI memo to OMB.”

With news that another extension was coming, McCusker emailed Chewning:

“Do you believe DOD is adequately protected from what may happen as a result of the Ukraine obligation pause? I realize we need to continue to give the WH has [sic] much decision space as possible, but am concerned we have not officially documented the fact that we can not promise full execution at this point in the [fiscal year].

Chewning wrote back:

The Ukrainian PM speaks with VPOTUS on Tuesday. We expect the issue to get resolved then. If not, I think we need to send the letter.

Pence met with Zelenskyy in Poland on Sept. 1. While Trump reportedly instructed Pence to communicate that U.S. military aid was still being withheld and to push for more aggressive action on corruption, Pence’s staff has claimed the vice president did not understand corruption to mean “investigate Joe Biden” as other officials in the administration understood at the time. Pence’s visit came and went and another extension of the hold was implemented on Sept. 5.

On Sept. 7, McCusker asked Duffey again, “When will impoundment paperwork be processed?”

On Monday morning, Sept. 9, McCusker sent Duffey another email.

“The amounts identified as not being able to ‘fully’ obligate by the end of FY total ~\$120M based on the current hold. If the hold continues this amount will grow.”

Duffey, adding OMB and Pentagon lawyers to the recipients list, and in a formal and lengthy letter that was quite different from the way he’d addressed McCusker all summer, chastised her and the Defense Department for dropping the ball, saying that if and when the hold is lifted, and DOD finds itself unable to obligate the funding, it would be DOD’s fault.

“As you know, the President wanted a policy process run to determine the best use of these funds, and he specifically mentioned this to the SecDef the previous week. OMB developed a footnote authorizing DoD to proceed with all processes necessary to obligate funds. If you have not taken these steps, that is contrary to OMB’s direction and was your decision not to proceed. If you are unable to obligate the funds, it will have been DoD’s decision that cause any impoundment of funds.”

Essentially: You guys screwed up. Not us.

McCusker responded:

“You can’t be serious. I am speechless.”

This exchange, as well as the larger trove of unredacted emails, raises new questions about the Dec. 11 [letter](#) from OMB General Counsel Paoletta to the General Accountability Office (GAO), a congressional investigative office. The unredacted emails show the Pentagon’s repeated and clear warnings to OMB that by mid-August it could no longer guarantee that the funds could be fully executed within the fiscal year. But, Paoletta’s letter stated, “at no point during the pause in obligations did DOD [Office of General Counsel] indicate to OMB that, as a matter of law, the apportionments would prevent DOD from being able to obligate the funds before the end of the fiscal year.”

What’s more, McCusker shared with Duffey the draft letter from the deputy defense secretary to OMB’s acting director informing OMB of the Pentagon’s concern that the law required notification to Congress through “a special message proposing rescission or

deferral of funding.” In contrast, Paoletta’s letter to GAO claimed the suspension was “not a deferral of funds,” but instead simply “a pause in spending to assess facts and ensure programmatic effectiveness.”

Finally, on Sept. 11, Duffey emailed McCusker to tell her: The hold is lifted. When she asked him why, Duffey responded, “Not exactly clear but president made the decision to go. Will fill you in when I get details.”

With the hold lifted, McCusker’s team worked fast to get the money out the door, but, in the end, \$35.2 million of the Ukraine funding lapsed and [required new congressional legislation](#) to make it available again.

“Glad to have this behind us,” Duffey told McCusker.

About the Author(s)

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