Forthcoming in EXECUTIVE POLICYMAKING: THE ROLE OF OMB IN THE PRESIDENCY
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Chapter 4

The President's Budget Powers in the Trump Era

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Presidents are often portrayed as bit players in the budget process. Congress has the constitutional power of the purse, it is said, so presidents are relegated to two basic jobs when it comes to the budget: proposing budgets that then tend to be pronounced dead on arrival in Congress, and occasionally threatening to veto appropriations legislation over a major policy disagreement. On this logic, the Office of Management and Budget sounds like an office for bean-counting technocrats, but not much more.[1]

This view is incorrect. The Trump administration's actions are revealing a little understood fact about the budget process: Through the work of OMB, the budget process provides many tools for presidents to control the executive branch and to effectuate their goals.

The goal of this chapter is to disaggregate the tools of the executive budget power in distinct legal frameworks and to illustrate the ways in which the Trump administration is making use of each one. While every president uses these tools, and, indeed, their proper use is a critical part of the administrative state's operation, the story told in the first part of this chapter is not a run-of-the-mill one. More than simply using generally available budget tools, political officials in this administration are pushing some of them to their statutory limits and beyond, while suggesting off the record that these actions are "part of a broader effort to defend the president's authority to spend money at any time and in any manner that he determines appropriate."[2]

The administration has not articulated a fleshed-out constitutional argument for unbounded executive authority over the budget, but it may be heading in that direction. Such an

argument would be dangerous, subverting democracy, accountability, and our system of checks and balances.[3] It would also be wrong.[4] As it is, some of the administration's statutory arguments and application of those arguments to the facts at hand seem questionable at best.

But while many have suggested that courts can and should police the boundaries of the executive budget power, experience and logic point in the other direction. The second part of the chapter takes up this issue. After identifying the limits of judicial oversight, this part identifies potential legislative responses to the assertion of broad executive budget authority, seeking ways to curb presidential overreach while still leaving room for the executive budget discretion a functioning government requires. The chapter takes a long view in this regard. Political alignments change, turning the politically implausible into the institutionally obvious.

The Trump Administration's Use of Presidential Budget Levers

The 1921 Budget and Accounting Act created OMB's predecessor, the Bureau of the Budget, and set forth the basic contours of the presidential budgeting regime to rationalize what had previously been a disjointed process driven by individual agencies.[5] The 1974 Congressional Budget Act provides the currently operative version of the process.[6] Under this act, the president must present to Congress by the first Monday in February a proposal for the national budget for the next fiscal year, which starts on October first.[7] In anticipation of this deadline, agencies spend the spring and summer preparing budget proposals to submit to OMB, which then spends the fall considering and revising them. This is the budget preparation process. After the congressional appropriations process works its course, agencies must implement whatever appropriations deal has been reached. OMB oversees this process, too: the process of budget

execution. OMB also administers management initiatives throughout the executive branch, including through the President's Management Agenda.

As the largest component of the Executive Office of the President (EOP), in recent years between 435 and 465 employees, OMB is unusual in the EOP because the vast majority of its employees are civil servants, with only a thin layer of political officials on top.[8] The high caliber and professionalism of this office is important, for OMB's work in putting together the president's budget, overseeing the execution of appropriations, and implementing management initiatives plays a valuable role in coordinating the work of the executive branch, at its best making it more efficient and more effective. At its best, this work also locates accountability for government operations in the White House, as budget preparation, budget execution, and the management agenda provide OMB, and the White House more generally, with a variety of tools for centralized control of decisionmaking, in a "buck stops here" manner. But these same tools of control can also lead to executive aggrandizement, obfuscation, and partisan politicization in a way that is harmful to the national interest.

This part of the chapter shows how the Trump administration is capaciously, and controversially, using these tools. When it comes to budget preparation and management initiatives, it is largely just the policies the administration is pursuing that are controversial, not the use of the tools themselves. When it comes to budget execution, however, the administration has been not only pushing controversial policies but also engaging in controversial uses of these tools, straining their statutory basis and using them to the president's own personal political advantage.

Budget Preparation

When President Trump has sent his budget proposal to Congress, a common refrain has been that it is "dead on arrival."[9] After Congress and the president have finally reached a budget deal lacking features the president had requested, it is said that the latter has been "rebuked."[10] But this view is too simplistic. The budget preparation process includes a variety of ways to control agency priorities—indeed, this was part of Congress's goal in creating the centralized presidential budgeting process in the first place—and the president's focus helps set the agenda for congressional action. This is as true in the Trump administration as it is in any other.

OMB's directives are generally issued through OMB Circular A-11, The Preparation, Submission, and Execution of the Budget, and memoranda from the OMB director. The Trump administration's revisions to the former include, for example, deletion of references to agency climate change plans that are no longer required.[11] As examples of the latter, consider President Trump's first OMB director Mick Mulvaney's instructions to agencies seeking research and development funds, directing them to focus on such familiar presidential priorities as "American Military Superiority" and "American Manufacturing."[12]

To maximize the chances that OMB will approve an agency's budget requests, agencies give their component parts budget instructions that reflect the administration's policy agenda. For example, in 2017, the Department of Health and Human Services instructed its offices to avoid the words "vulnerable, diversity, [and] entitlement" in their budget requests.[13] When employees at the Centers for Disease Control and Prevention asked whether they could use the words "transgender," "fetus," "evidence-based," and "science-based" in their budget proposals, HHS officials suggested it might be wise to avoid those words to obtain budget approval in this administration.[14]

To be sure, not all instructions will result in the requested policy effects, either because agencies convince OMB and the president not to follow through on a certain demand, or because Congress ultimately rejects the budget proposal. But even though initial instructions do not always become final policy, it does not diminish the power of the instructions to begin with. The need to get OMB's approval for congressional budget justifications works to secure overall policy conformity; if agencies do not comply with OMB budget instructions, OMB may simply provide the answers it requested in the first place.[15] Agencies may spend so much time working toward an ultimately fruitless presidential goal that they sideline other aspects of their mission.[16] OMB's approval authority is strengthened by its rules on the confidentiality of internal budget deliberations, which restrict agencies from talking to Congress and the public about different budget priorities they may have.[17] This is not to say this requirement is never breached but, rather, that it is a powerful baseline tool of control.[18]

More generally, a president's budget proposal sets the terms of the debate. President Trump's focus on building a wall at the Mexican border has elevated it to a major issue Congress must attend to. His persistence in demanding the creation of a Space Force led to the funding of the first new military branch in over seventy years.[19] His embrace of deficit spending (over the contrary views of his OMB directors) has become the mainstream Republican position, leaving the Tea Party days behind.[20] The budget preparation process has, thus, played an important role in elevating President Trump's policy vision.

Budget Execution

Budget execution is not simply ministerial. There is room in budget execution to make discretionary decisions of substance. This section focuses on four tools of control in budget execution on which the Trump administration has been relying: apportioning appropriated funds;

proposing rescissions and deferrals of funds, and avoiding doing so; transferring and reprogramming funds; and managing the government shutdown.[21]

APPORTIONING APPROPRIATED FUNDS

One of the central tools of budget execution is apportionment, the authority to specify by time period and by project how agencies may spend their appropriations. The governing law for apportionments is the Antideficiency Act, which provides that the president "shall apportion in writing" appropriations before agencies have access to any funds.[22] OMB has long been delegated this task, which is typically conducted by a senior civil servant.[23] The purpose of apportionment is effective funds management. For annual appropriations, OMB is tasked with apportioning spending to prevent running out of funds, while for indefinite appropriations (such as for certain public health emergency and disaster relief programs), OMB's job is to apportion them "to achieve the most effective and economical use."[24] To further these goals, the OMB official making the apportionment has the authority to specify by time period or by project in whatever combination "the official considers appropriate."[25]

Apportionment is a powerful tool of control over agencies because of the regularity with which OMB must review apportionments—at least four times each year—and because OMB may use its discretion to specify how the agency must spend its appropriation in more detail than Congress did.[26] Moreover, OMB's apportionments have the force of law under the Antideficiency Act, which spells out administrative or even criminal consequences for government employees who violate the act.[27]

At the same time, this control is not unfettered. Apportionment may not be used to withhold sums from programs the administration does not like. The Antideficiency Act specifies

narrow grounds on which an apportionment may reserve funds, and all reserves must be reported to Congress.[28] Nor does the Antideficiency Act treat the power to apportion as an independent source of executive policy development. In fact, Congress narrowed the apportionment power in the wake of President Nixon's efforts to do just this.[29] Moreover, Congress has tasked the Government Accountability Office (GAO) with issuing decisions on the propriety of certain executive branch actions under appropriations law in light of the Antideficiency Act and other statutes.[30]

While OMB exercises its apportionment authority all the time, and most uses reflect unremarkable authority over agencies to ensure efficient funds management, the Trump administration is developing a broad view of the apportionment power as a tool of presidential control. For example, one of the administration's early arguments for opposing the Consumer Financial Protection Bureau's (CFPB) status as an independent agency is that the CFPB ought to be "subject to OMB apportionment" to "facilitate additional oversight by the President."[31] Separately, the administration floated the idea of using its apportionment authority to support its efforts (as discussed further later) to reorganize the executive branch without going through Congress, although it did not, in the end, rely on apportionment in this way.[32]

The most significant and controversial effort to use apportionment to further the administration's goals occurred in July and August 2019, when OMB placed holds on State, USAID, and Department of Defense foreign aid funding, including to Ukraine, with no immediately discernable funds management reasons, and in a way that ultimately jeopardized the agencies' ability to spend at least some of the money before it was to have expired at the end of the fiscal year on September 30. In each instance, a political appointee took over the apportionment decisions from the career official who would normally have signed the

apportionments.[33] For fifteen separate accounts, the appointee issued a reapportionment totaling somewhere between $2 and $4 billion, instructing the agencies to freeze spending on those programs until three days after the agencies provided OMB with an accounting of all unobligated funds.[34] Reports emerged that this reapportionment targeted foreign aid programs the administration did not like while protecting programs favored by administration insiders.[35] Separately, the same appointee reapportioned all the available amounts appropriated for the Ukraine Security Assistance Initiative.[36] While OMB eventually offered as justification for the reapportionment the need to go through an interagency process before releasing the funds in light of endemic corruption in Ukraine, a CIA whistleblower detailed concerns that the president had himself demanded the funds be withheld until the Ukrainian president agreed to investigate President Trump's Democratic political rival Joe Biden.[37]

This whistleblower complaint became the basis for impeachment hearings during the fall of 2019, culminating in a House vote in December 2019, almost entirely along party lines, to impeach the president for abuse of power in soliciting foreign interference in the United States presidential election to benefit his reelection and conditioning American aid on that support.[38] In February 2020, the Senate voted to acquit the president, almost entirely along party lines as well.[39] But while the parties ultimately divided on the relevance of the president's actions to impeachment, there was immediate bipartisan congressional opposition to the reapportionments that withheld this foreign aid, and all of the temporarily withheld funding was ultimately released.[40]

Releasing the funding did not ease concerns about the legality of the apportionments at issue; as one observer noted, it appeared the administration "created an irregular budgetary process to match its irregular foreign policy process with respect to Ukraine."[41] It later emerged

that career officials inside OMB and the affected agencies had strenuously raised legal objections.[42] Two OMB staff members, including a lawyer, appear even to have resigned over concerns that the use of apportionment authority in the Ukraine situation was illegal.[43]

In December 2019, days before the House impeachment vote, OMB General Counsel Mark Paoletta issued a letter responding to a request from the GAO general counsel Thomas Armstrong to offer an opinion about the legality of the Ukraine apportionments. While the Paoletta letter did not fulsomely make the constitutional case for the president's ability to override statutory limits on presidential spending, the Paoletta letter nonetheless placed the president's statutory apportionment authority in the broad context of his constitutional duty to "take Care that the Laws be faithfully executed."[44] Calling "pausing before spending a necessary part of program execution" so that OMB can confirm and approve agencies' plans, the letter seemed to contemplate a broad use of apportionment authority for policy reasons, ignoring Congress's Nixon-era rejection of this rationale.[45] The letter also asserted that the apportionment action was appropriate in light of the need "to ensure that funds were not obligated prematurely in a manner that could conflict with the President's foreign policy," again gesturing toward the president's constitutional role as commander-in-chief.[46]

GAO rejected this view in a January 2020 decision concluding that OMB's Ukraine apportionments were illegal. "Faithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law," the decision held, citing *Clinton v. City of New York*, the Supreme Court's 1998 decision that struck down the Line Item Veto Act on the ground that nothing in the Constitution allows the president to unilaterally amend a statute.[47] GAO raised the constitutional stakes further, noting that OMB and the State Department had failed to provide sufficient information to allow GAO to assess the

legality of a subset of the Ukraine apportionments that ran through the State Department rather than the Department of Defense, and stating, "We consider a reluctance to provide a fulsome response to have constitutional significance" in light of GAO's own role in "ensuring respect for and allegiance to Congress' constitutional power of the purse."[48] The president's legal brief in the Senate impeachment trial did not address these appropriations law issues.[49]

A conflict is thus brewing between OMB and GAO about the scope of presidential budget powers under the Constitution and relevant statutes, not only on apportionment but far more broadly. Indeed, Paoletta has recently reiterated in another context the executive branch's view that none of GAO's legal opinions on appropriations law are binding on the executive branch, as GAO is a legislative agency.[50]

RESCINDING, DEFERRING, IMPOUNDING FUNDS

There is a second statute in addition to the Antideficiency Act that limits apportionment and presidential spending power more generally: the Impoundment Control Act. Congress passed this act in 1974 as part of an overhaul of the federal budget process in response to the Nixon administration's widescale refusal to spend appropriated funds.[51] To limit "policy impoundments"—presidential attempts to withhold funds based on a policy disagreement with Congress—the Impoundment Control Act contains only two mechanisms for a president to withhold funds or delay spending: rescission and deferral.[52] Under rescission, the president proposes to cancel certain spending, for reasons that may include policy disagreements.[53] But he cannot do so unilaterally; he must transmit a "special message" prepared by OMB to Congress, and if Congress does not pass a rescission bill within forty-five days, the administration must make the funds available as Congress had previously specified.[54] Under deferral, the administration proposes to delay spending specific sums of money; here, however, the proposed

reasons may not include policy disagreements.[55] The president must again transmit a special message prepared by OMB explaining the reasons for the proposed deferral.[56] Congress then has the opportunity to consider an "impoundment resolution" through streamlined procedures under which it "expresses its disapproval" but does not stop the delay, and the delay may last no longer than the current fiscal year.[57]

The Trump administration is both reinvigorating and engaging in expansive interpretation of presidential authority under this act.

As to reinvigorating, the Trump administration attempted to use the rescission procedure for the first time since the Clinton administration.[58] In May 2018, shortly after signing an omnibus appropriations bill in March to which the president objected as including too much domestic spending, he submitted a special message to Congress proposing rescission of $15.4 billion from thirty-eight separate, largely domestic, programs, slightly revised a month later.[59] When Congress narrowly rejected the proposal, however, the administration followed the procedures required by the Impoundment Control Act and released the funds for obligation.[60]

As to expansive interpretation, the administration is pursuing two different lines of reasoning. One argument involves interpreting rescission implicitly to permit unilateral cancellation if Congress does not have enough time to act on a rescission proposal before the end of the fiscal year. In both summer 2018 and summer 2019, the administration took steps to effectuate such a result, both times targeting foreign aid accounts (including the accounts in State and USAID whose apportionment a political appointee had taken over in 2019).[61] In both years, bipartisan congressional opposition led the administration to drop the effort.[62] But it did not drop the legal interpretation of its authority to run out the clock on rescission. To the contrary, when GAO issued a legal opinion concluding that the Impoundment Control Act did not allow

presidents to withhold funds through their date of expiration and thereby cancel funds without congressional approval, OMB disagreed.[63] Instead, OMB offered a reading of the act that took silence as a grant of presidential authority.[64]

A second expansive argument offered by the administration reads deferral to exclude the non-statutory category of "programmatic delay." On this reading, as explained in the Paoletta letter on the administration's withholding of funds to Ukraine, while the executive branch may not engage in "policy deferrals" to avoid implementing a law with which it disagrees, it may engage in temporary programmatic delays "to determine the best policy for the efficient and effective use of funds *consistent with* the intent of the statute."[65] Noting that GAO has itself recognized this category as being distinct from deferral, the Paoletta letter nonetheless distanced itself from GAO's view that the agency's intent in delaying spending is relevant to the question of legality, implying that where the executive branch says its delay is programmatic rather than a policy deferral, that ends the matter.[66]

This reading contributed to the growing dismay of civil servants in OMB and elsewhere that the administration's hold on Ukraine funds without notifying Congress through a special message with a valid justification violated the deferral provisions of the Impoundment Control Act.[67] GAO's January 2020 decision agreed with the civil servants' view, holding that the Ukraine apportionments constituted an unlawful deferral. GAO also rejected OMB's definition of programmatic delays. As a matter of law, GAO explained that such delays are permissible only "because of factors external to the program," and where the agency is otherwise "taking necessary steps to implement" it. Such delays are not permissible where the executive branch delays spending "to ensure compliance with presidential policy prerogatives."[68] As applied to the facts of the Ukraine apportionments, GAO concluded there was no programmatic delay because

it was OMB's own direction, not any external factor, that caused the delay, and because the program's execution was already underway when OMB decided to halt it.[69]

The administration's actions and its interpretation of its authority under the Impoundment Control Act indicate another inflection point toward an even broader assertion of presidential spending powers, and another conflict with GAO over the proper scope of such powers.

TRANSFERRING AND REPROGRAMMING FUNDS

If the Impoundment Control Act represents congressional limits on the executive's ability to withhold money, the appropriations concepts of "transfer and reprogramming" represent congressional authority for the executive to change the terms on which appropriations are made.[70] The idea behind this authority is that Congress cannot always specify with enough knowledge of future events exactly how funds should be spent, and so the executive branch needs some ability to modify spending as circumstances change.[71] Exercising this authority always reflects centralized executive branch control, in that OMB oversees agency efforts to transfer and reprogram funds.[72] But the Trump administration is taking a particularly broad view of this presidential authority in size, in scope, and in rejecting traditional congressional oversight in this arena.

Both transfer and reprogramming involve changing the funding allocations set forth in a given appropriations law, but the two terms have different definitions and legal frameworks. A transfer moves funds between different appropriations, and an agency may transfer funds only with specific statutory authority.[73] In contrast, a reprogramming changes the allocation of funds within a single appropriation, and an agency is generally free to reprogram funds as long as it does so consistent with the relevant appropriations act's restrictions.[74] Common, uncontroversial restrictions include how much an agency may move, permissible purposes for which funds may

be moved, and a timeframe for moving funds or for using moved funds.[75] Also common, but more controversial, are requirements and practices around committee notice and approval. Some committees expect advance notification when transfers or reprogramming above a certain amount are planned, while others expect that no transfers or reprogramming will take place without advance approval, sometimes not only by the appropriations committees but by the authorizing committees as well.[76]

President Trump is not the first president to reject congressional claims that committee approval can be legally required before funds may be transferred or reprogrammed.[77] As President Obama and others asserted before him, the idea that a single congressional committee can veto an executive action violates the modern understanding of the separation of powers.[78] In the 1983 decision *INS v. Chadha*, the Supreme Court held that a law permitting one House of Congress to invalidate an executive action violates the Constitution's framework for legislation, which requires the agreement of both Houses of Congress ("bicameralism") and subsequent presidential action ("presentment").[79] After *Chadha*, as the GAO explains, "statutory committee approval or veto provisions are no longer permissible. However, an agency may continue to observe committee approval procedures as part of its informal arrangements."[80]

Appropriations act statements that an agency must receive committee approval before transferring or reprogramming funds thus serve as a political limit rather than a legal one. These statements are part of an ongoing relationship between agencies and their congressional appropriators and authorizers, in which it is understood that transferring or reprogramming funds against the committee's wishes may have negative consequences in the next year's appropriation or in other aspects of the administration's relationship with Congress. Although the Trump administration has not (yet) made an across-the-board decision to fully ignore committee

expectations of obtaining approval, it seems increasingly willing to accept the risk of those consequences. At the same time, Congress seems increasingly unwilling to impose them.

The Trump administration used transfers and reprogramming to support its policy goals well before its large-scale reliance on that strategy to begin construction on a border wall in 2019. For example, in the summer of 2018, the Trump administration used these tools to support its immigration policies, shifting hundreds of millions of dollars from other Homeland Security programs to Immigrations and Customs Enforcement (ICE),[81] and from other HHS programs to its Unaccompanied Alien Children program.[82] The administration also used these tools that summer to accomplish foreign aid priorities, moving hundreds of millions of dollars away from the West Bank and Gaza[83] and away from civilian support in Syria.[84] Although Democrats in Congress decried these actions, Congress did not take action to stop them.

The largest assertion of presidential authority in transfer and reprogramming, however, has unfolded under the administration's efforts to build the border wall. In December 2018, President Trump refused to sign a budget that did not include $5 billion he had requested for wall funding, beginning a shutdown that lasted for thirty-five days, the longest in the nation's history.[85] When he and congressional Democrats finally agreed on a budget, it included only $1.375 billion for the construction of limited fencing at the border.[86] Yet on the same day he signed the budget in February 2019, he announced he would obtain the rest of the funds he wanted for the wall, and more, through executive action.[87] He identified three additional sources of funds. He would tap over $600 million from the Treasury Forfeiture Fund, whose statutory authorization includes the ability to transfer funds "in connection with the law enforcement activities of any Federal agency or of a Department of the Treasury law enforcement organization."[88] He would transfer up to $2.5 billion in Department of Defense funds under a

statutory provision providing "support for counterdrug activities and activities to counter transnational organized crime," including via "Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States."[89] Finally, he would reprogram $3.6 billion from Department of Defense military construction projects by using the National Emergencies Act to declare an emergency at the southern border.[90]

These actions provoked immediate opposition, but none was successful in stopping the administration's use of these funds. The Democratic-led House Appropriations Committee denied the reprogramming plans, to no avail.[91] In a rare bipartisan formal rejection, both the House and Senate voted to overturn the president's emergency declaration, but the president vetoed the resolution in the first veto of his administration, and there were not enough votes to override.[92] A contentious supplemental appropriations battle over additional funds for humanitarian needs at the border during the summer of 2019 did not address the reprogramming.[93] And although fiscal year 2020 began with two continuing resolutions rather than an actual budget, the appropriations law that President Trump finally signed in December 2019 contained no repercussions for his actions to build the wall; it provided the same amount of funding for limited fencing and did not include any additional restrictions on his ability to transfer or reprogram funds for the wall.[94] The administration almost immediately announced new plans to shift an additional $7.2 billion in the Pentagon's 2020 budget toward building the wall.[95]

Nor were any of the numerous legal challenges to the president's authority successful in stopping the wall's construction throughout the course of 2019. Despite some isolated injunctions over the course of the year, none was kept in place by an appeals court, and several

lawsuits foundered on "standing" grounds—that is, plaintiffs had difficulty establishing a legally cognizable injury that would be redressable by a favorable decision.[96] Moreover, on the merits, in a rare instance of GAO's approval of OMB's assertions of presidential budget authority, GAO issued a decision in September 2019 concluding that the administration's wall-directed transfer of funds for counterdrug activities was permissible.[97]

The challenges to the president's transfer and reprogramming authority did not stop the administration from using those tools more broadly to support its policy goals in areas beyond the wall. As 2019 unfolded, for example, the State Department announced plans to redirect foreign assistance away from the Latin American countries the president blamed for the flow of migrants, while the Department of Homeland Security announced its intention to shift money away from its other work into ICE.[98]

The Trump administration has thus used transfer and reprogramming to support its policy goals even where Congress seems to have taken steps to stop it, through persistence that seems to have resulted in Congress's eventual tacit approval of the status quo, and in a manner that courts have been unable to control.

MANAGING THE GOVERNMENT SHUTDOWN

It may seem counterintuitive to identify a government shutdown as a site of presidential control over agencies, as there may seem to be little left to control if the government is shut down. In actuality, however, because of OMB's role in managing a shutdown, shutdowns provide an opportunity for presidential control.[99] The Trump administration's assertion of presidential budget power through a shutdown is notable in three ways: because it presided over the longest shutdown in history and then maneuvered its way to victory on the issue over which it had shut

down the government even though the shutdown ended without Congress providing that money; through expansive interpretations of both the law governing shutdowns and the applicable facts; and through escalating responses to GAO's determination that its actions during the shutdown violated the Antideficiency Act. Given the attention in the previous section to the administration's border wall maneuvers, this section focuses on the second two issues.

The legal authorities governing a shutdown are both constitutional and statutory. When Congress and the president are unable to reach agreement on a budget deal, as has been increasingly frequent, the end result is a gap in funding, which, if it lasts long enough, results in a government shutdown.[100] This is because the government cannot operate without appropriations. As the Constitution states, "No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law."[101] The Antideficiency Act effectuates the Appropriations Clause by forbidding government officials from making commitments to pay without appropriations.[102] It also provides important exceptions to this restriction. While in general a government "officer or employee . . . may not" commit the government "for the payment of money before an appropriation is made," such an action is possible where "authorized by law."[103] In addition, the act provides an "except[ion] for emergencies involving the safety of human life or the protection of property."[104] In news accounts, this second exception is often described as whether an employee is "essential" and can therefore be called to work without pay during a shutdown, but the formal legal term is whether the employee is "excepted" on one of these grounds.[105]

Defining which activities are "authorized by law" and which employees and activities are "excepted" is an important means of executive branch control during shutdowns. Typically, the job of making these determinations falls to OMB. While there is discretion embedded in the determination of who goes to work to do what tasks during a shutdown, the discretion is bounded

both by longstanding interpretations from the Office of Legal Counsel (OLC) and the text of the Antideficiency Act itself. OLC has identified several categories of activities as "authorized by law," including not only those that are expressly authorized but also those that are "authorized by necessary implication."[106] As for the emergency exception, the Antideficiency Act further clarifies that "the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."[107]

Different administrations have made different decisions about what to keep running during shutdowns. Some differences are due to the extent, timing, and length of the shutdown. For example, the circumstances of the complete two-day shutdown of the government over a weekend in the January 2018 were quite different from the thirty-five-day shutdown the following year, when some agencies had been funded in a previous appropriations law.[108] Other differences are influenced by political considerations, as every administration is involved in a negotiation with Congress over the terms of the budget deal prompting the shutdown in the first place, while also trying to win public support. Contrast, for example, President Trump's Acting OMB director's description of the administration's goal during the 2018–2019 shutdown ("to make this shutdown as painless as possible, consistent with the law") with President Clinton's OMB director's reflections about the administration's goal during the 1995 shutdown ("We were trying to emphasize the pain so it would be over").[109] Decisions about what to shut down that are sensitive to the political environment while still within the bounds of the law are to be expected.

At the same time, budget insiders across party lines questioned whether the Trump administration's decisions in the 2018–2019 shutdown crossed the line from politically aware but permissible to politically driven and illegal. As the Associated Press summarized, "if you're a

sportsman looking to hunt game, a gas company planning to drill offshore or a taxpayer awaiting your refund, you're in luck: This shutdown won't affect your plans."[110] One former Clinton OMB official suggested that the Trump administration's "focus on services that reach rural voters, influential industries, and voters' pocketbooks is intended to protect Republicans from blowback" about the shutdown.[111] A former Republican budget committee aide had a similar interpretation: The Trump administration's strategy for what to keep running during the shutdown "does not sound legal, and it is so transparent what they're doing. . . . It's pretty obvious the entire agenda is political."[112] This inference was strengthened by the president's tweets emphasizing his belief that most of the furloughed government workers were Democrats and therefore in need of no sympathy.[113]

The Antideficiency Act serves as something of a deterrent against the executive branch making patently illegal decisions during a shutdown. In addition to the potential for individual liability already mentioned, the act requires agency heads to "report immediately" any violation of the act to the president and to Congress with an explanation of "all relevant facts and a statement of actions taken."[114] But if the agency heads and the president are the ones pushing the boundaries of the Antideficiency Act, such requirements are not likely to be effective. Reports to Congress will have an effect only if Congress is willing to rebuke the president at the time of the report. And it appears that no one has ever actually been criminally charged under the act.[115]

The limits of relying on the Antideficiency Act as a backstop to assertions of presidential authority during a shutdown became apparent in a series of conflicts between OMB and GAO throughout the last half of 2019. As GAO began to investigate the legality of the administration's shutdown decisions in response to requests from congressional Democrats, OMB revised the reporting obligations under the Antideficiency Act that it had previously required of agencies.

For decades, OMB had required agencies to report to the president and Congress any such violations of that act that the GAO had identified, along with the agencies' views, regardless of whether the agencies agreed with the GAO's determinations.[116] In June 2019, however, OMB changed the instruction. Now, agencies no longer needed to report any GAO determination unless, "in consultation with OMB," the agencies agree with GAO.[117] Agencies need not articulate any response at all if they (or, it appears, OMB) disagree.

This new rule became immediately relevant as GAO issued a series of decisions over the course of fall 2019, finding numerous Antideficiency Act violations during the shutdown, including Interior's decision to keep the national parks open, Treasury's decision to process tax refunds, and even OMB's own decision to continue reviewing certain regulations.[118] GAO directed the agencies not only to report the violations but also to update their accounting and explain how they will avoid such violations going forward, further noting that GAO would treat future similar violations as "knowing and willful" and thus subject to the Antideficiency Act's provisions for fines and imprisonment.[119] GAO followed these decisions with a memorandum directly to all agency general counsels objecting to OMB's new interpretation of their Antideficiency Act reporting obligations and emphasizing that GAO would notify Congress of any agency's failure to report a violation found by GAO.[120]

It was in this context that OMB's general counsel Paoletta issued what he termed a "reminder" to agency general counsels that GAO's legal opinions are not binding on them.[121] Citing OLC precedent, Paoletta defended OMB's revisions to Antideficiency Act reporting requirements as "better reflect[ing] the separation of powers," and in compliance with the plain text of the law.[122] Agencies *can* respond to Congress, but there is no need for them to affirmatively comment on GAO's determinations if they (or, again, it appears, OMB) disagree.

The Trump administration has thus indicated a broad interpretation of the law governing shutdowns to accommodate its political interests and to favor executive authority, including the role of OMB, in determining whether Antideficiency Act violations exist. The conflict over shutdown management and the Antideficiency Act reflects continued tension between OMB and GAO over the scope of the executive budget power.

The President's Management Agenda

The renaming of the Bureau of the Budget as OMB under President Nixon underscored the importance of the office's work on supervising the executive functions of the administrative state—the "M" for "Management." Congress has recognized the value of OMB's focus on management by continually delegating responsibility for new management programs to that office.[123] At the same time, the President's Management Agenda (PMA) can provide an opportunity for an administration to accomplish substantive goals through the budget process without going through Congress. This is because the budget process incorporates OMB's management work; many management initiatives reflect substantive policy goals; and these initiatives provide another lever for centralized control over agency action.[124] (As President Nixon's political advisers explained privately in justifying OMB's new name, the "M" was to stand for "management in the get-the-Secretary-to-do-what-the-President-needs-and-wants-him-to-do-whether-he-likes-it-or-not sense."[125])

For an illustration of the Trump administration's assertion of policy control through its management agenda, consider its proposals for government reorganization. While the administration has not succeeded in all of its reorganization goals, it has nonetheless accomplished some reorganizations with policy implications by avoiding, and in some cases ignoring, Congress.

Two months after taking office, President Trump issued an executive order calling for a "Comprehensive Plan for Reorganizing the Executive Branch."[126] Shortly thereafter, OMB director Mulvaney followed up with an implementing memorandum that called for agencies to participate in the development of reorganization plans through the budget process, and required agencies to undertake a series of actions, including meeting with OMB officials to obtain approval of their plans.[127] After a long, behind-closed-doors process, the administration announced thirty-two major reorganization proposals in the summer of 2018.[128] Among the most controversial were merging the Departments of Education and Labor, moving the food stamp program out of the Department of Agriculture and into a newly renamed "welfare" agency with other human service programs in HHS, privatizing the postal service, and dismantling the Office of Personnel Management (OPM), moving its policy shop on federal employees into the EOP.[129]

Some of the reorganization proposals sounded familiar to nonpartisan "good government groups" who work on public administration, and, indeed, OMB explained that many came from GAO proposals, either directly or modified.[130] But others sounded policy-driven in various ways, including the proposal to merge the welfare programs, which was based on a Heritage Foundation proposal and raised the potential of ultimately cutting or eliminating the programs once merged, and the proposal to bring federal employee policy into the White House, which struck some observers as part of a broader presidential plan to politicize civil service hiring.[131] For some, even the proposals that sounded more technocratic than others, like civil service reform, were troublesome because of the president's self-promotion as "dismantler-in-chief" out to "drain the swamp."[132]

Proposed legislation in the fall of 2018 to authorize the White House to move forward with presenting the reorganization plans to Congress did not get very far.[133] In contrast, Congress

acted in a series of appropriations laws to place limits on executive branch reorganization.[134] But these limits were placed on individual agencies or individual programs rather than the executive branch as a whole.[135] The limits were not all bans; some of them, echoing reprogramming language, simply said that the relevant congressional committee must be notified, or must give approval, for any agency move to take action on a particular reorganization proposal.[136] Some limits were general enough that not everyone agreed about what restrictions they actually placed.[137]

The White House continued to push forward on reorganization in a number of ways in 2018 and 2019 in spite of these restrictions. OMB asserted that many of the reorganization proposals could be entirely accomplished administratively, without any new authority from Congress.[138] An independent assessment by the Congressional Research Service suggested that this was partially true.[139] As to the appropriations restrictions, when a 2019 Inspector General report concluded that a planned agency move violated a 2018 appropriations act requirement to receive congressional committee approval before spending any money on agency relocation, the administration disagreed, citing *Chadha* for the proposition that requiring committee approval is unconstitutional, and announced its intention to continue with its plans.[140]

While the administration eventually dropped its effort to move part of OPM into the White House as a result of bipartisan resistance, after almost two years of taking increasingly controversial steps to do so, other efforts to reorganize were more successful.[141] The Federal Labor Relations Authority closed two of its seven regional offices.[142] The Education Department consolidated several offices and elevated the Office of Nonpublic Education, which promotes private school options, to report directly to the secretary.[143] The EPA revealed plans to consolidate various science offices.[144] The Citizenship and Immigration Services explained that

it planned to close all of its overseas offices.[145] The Interior Department announced a plan to relocate the headquarters of the Bureau of Land Management from D.C. to west of the Rockies.[146] The Department of Agriculture began to move the Economic Research Service and National Institute of Food and Agriculture out of D.C. to Kansas City.[147]

It is not difficult to see how these reorganization proposals embed substantive policy choices on every issue represented by the agencies in question, topics on which the president has staked out public and controversial positions. The elements of these proposals also suggest another lever of control over policy through management choices: changing the composition of the workforce through attrition by making it unpleasant for employees who disagree with the choices to stay. This interpretation gained traction when Mulvaney, by this point the acting White House chief of staff, highlighted as a positive example of "draining the swamp" the decision to quit made by more than half the workforce in the Department of Agriculture offices slated to move.[148] Some observers suggested further that particular agency efforts to reorganize were designed to retaliate against units that had conducted research with findings that ran counter to the administration's policies by pushing the offending civil servants out.[149]

Law, Politics, and Accountability

As the flurry of lawsuits filed after the president's emergency declaration indicates, some have expressed optimism in the ability of the courts to constrain executive overreach on budget issues. As time goes on, however, it should be clear that such optimism is misplaced. Given the unceasing nature of the executive budget process and the slow pace of litigation, there is no way for courts reliably to police executive budget decisions. Many actions, especially in the reprogramming and transfer space, are committed to executive discretion, with no justiciable

issue at all. The more courts get involved in what are essentially political disputes, the more the public loses faith in the impartiality of courts, a true crisis for a country committed to the rule of law. And, of course, those seeking to enlist the courts to police the bounds of the budgeting power may well be disappointed as a practical matter. The concerns about standing mentioned earlier are only one reason courts are not a fruitful source of control in this arena. Even should a decision get to the merits, the Supreme Court may end up blessing expanded presidential action, as it did in *Trump v. Hawaii*, the case upholding the president's travel ban, or weakening the tools for congressional oversight, as it did in *Chadha*.[150]

Instead, the only realistic source of regular control over the presidential budget process rests with political actors in Congress, as bolstered by the public and other civic institutions.[151] To be sure, in the highly polarized post-impeachment era, with President Trump in office and the Senate in Republican control, it may be difficult to envision effective congressional resistance to expanded executive budget power. The stark divide between congressional Republicans and Democrats throughout the impeachment proceedings is one indicator of these difficulties. Congress's failure to respond to the president's 2019 wall reprogramming in the 2020 budget is another.

But the story told in this chapter actually indicates a number of instances in which there was bipartisan congressional agreement to reject expanded executive action and where, as a result, the administration complied. Consider the bipartisan pushback on the administration's apportionment foreign aid holds, which resulted in the release of the funds; the bipartisan rejection of the administration's efforts to run out the fiscal year clock and avoid the requirements of the Impoundment Control Act, which resulted in the administration's decision not to pursue that path; and the bipartisan rejection of the administration's efforts to move OPM

into the White House, which resulted in the administration's dropping that effort. Even in these polarized times, Congress has acted to limit executive budget authority. Over time, as political alignments change, more opportunities to do so seem likely.

There are many ways in which Congress could usefully act to cabin executive overreach in budget execution. Several amendments to the Antideficiency Act would be helpful. To limit efforts to use apportionment to support presidential policymaking or partisan gain, Congress should clarify that the apportionment authority is not a general delegation of authority but is only for the purposes of efficient funds management. To ensure that apportionments are kept within these bounds, Congress should further require that signed apportionments ought to be disclosed as a matter of course on OMB's website; they are final decisional documents with the force of law, and it is difficult to justify their current nondisclosed status in a rule of law regime. To cabin shutdown management choices, Congress should require that agencies report not only actual Antideficiency Act violations but also external allegations or decisions on violations, along with a written response.

Several amendments to the Impoundment Control Act would also be valuable. To avoid unilateral administrative cancellation of funds, Congress should clarify that the act does not permit rescission proposals that would allow funds to expire at the end of the fiscal year if Congress does not act in time. To cabin administrative efforts to avoid the act by labeling any apportionment hold a programmatic delay, Congress ought to develop a clear definition of that term that distinguishes it from a deferral. To bolster civil servants' motivation and ability to refuse to violate the act at the behest of a political official, Congress should import into the act the potential administrative and criminal penalties currently reserved for the Antideficiency Act.

As to reprogramming and transfer authority, the underlying rationale for those concepts—the need for executive flexibility as circumstances change—remains valid, so Congress should not attempt any generalized overhaul. In light of the administration's rejection of notice and approval requests, however, Congress ought to impose more specific limitations in appropriation laws. It also ought to require regular and public disclosure of all administration reprogramming and transfer actions; as with apportionments, these final decisional documents ought not be subject to occasional, piecemeal, targeted releases.

Finally, Congress ought to strengthen its capacity to analyze budget matters by expanding its staff with such expertise. Just as the 1974 overhaul to the federal budget process created the Congressional Budget Office and the House and Senate Budget Committees to develop the ability to push back at the Nixon administration's assertion of presidential budgeting power, so another expansion is in order.[152] GAO's decisions on appropriations law are instructive but not self-executing, and Congress itself has a further role to play. While congressional staff members will never be as numerous as the staff in OMB and agency budget offices, the extent of the current imbalance makes it difficult to review and respond to administrative budgeting actions in a timely fashion.[153] Such an expansion would be especially important if the president articulates the broad constitutional view of executive budget authority toward which he has been gesturing and if the Supreme Court ends up blessing it. The president can only take actions that politics will bear, and congressional analysis of disclosed information will help determine those limits.

Conclusion

None of these reforms would undercut OMB's valuable role. Instead, they would protect OMB's ability to conduct what is valuable about its work in support of the presidency and the nation by

limiting the potential for executive aggrandizement and partisan hackery. Historically, when presidents have used OMB in such a dangerous manner, Congress has responded by cabining such misuse and restoring the balance of powers.[154] This time should be no different.

I received helpful comments during presentations at Hofstra, UC-Hastings, the American Bar Association annual administrative law conference, the American Political Science Association annual conference, and the Association of American Law Schools annual conference; from current and former OMB and congressional appropriations staff members; and from Matthew Lawrence and David Vladeck. Thanks also to Matthew Angelo, Brooke Schwartz, and Sara Divett for research assistance.

[1] I set forth this standard view along with the framework for some of the views expressed in this chapter in Eloise Pasachoff, "The President's Budget as a Source of Agency Policy Control," *Yale Law Journal* (2016).
[2] Emily Cochrane and Annie Karni, "Administration Threatened Veto over Ukraine Aid in Spending Package," *New York Times*, December 20, 2019.
[3] Peter Shane, *Madison's Nightmare* (Chicago: University of Chicago Press, 2009).
[4] Zachary S. Price, "Funding Restrictions and Separation of Powers," *Vanderbilt Law Review* 71 (March 2017), pp. 357–464.
[5] Public Law No. 67–13, 42 Stat. 20 (1921).
[6] Public Law No. 93–344, tit. I–IX, codified at 31 U.S.C. §. 1101 et seq.
[7] 31 U.S.C. § 1102.
[8] Administrative Conference of the United States, Sourcebook of United States Executive Agencies, 2nd edition (2018), pp. 20–24; Pasachoff, "The President's Budget," p. 2195.
[9] Susan Ferrechio, "Trump's Budget Dead on Arrival in the House, Says Democratic Appropriator," *Washington Examiner*, March 11, 2019; Gabrielle Levy, "Lindsey Graham: Trump Budget 'Dead on Arrival' in Congress," *U.S. News & World Report*, February 28, 2017.
[10] Julie Hirschfeld Davis, "Spending Plan Passed by Congress is a Rebuke to Trump. Here's Why," *New York Times* March 22, 2018; Charles S. Clark, "The 19 Agencies Trump Tried to Kill Aren't Going Away," *Government Executive*, March 22, 2018.
[11] Compare Circular A-11, at §31, p. 6 (2016) with Circular A-11 (2018).
[12] M-17-30, FY 2019 Administration Research and Development Budget Priorities, August 17, 2002, p. 2; M-18-22, FY 2020 Administration Research and Development Budget Priorities, July 31, 2018, p. 3.
[13] Elizabeth Cohen, "The Truth about Those 7 Words 'Banned' at the CDC," *CNN.com*, January 31, 2018.
[14] Ibid.
[15] Pasachoff, "The President's Budget," pp. 2213–23.
[16] Lisa Rein and Josh Dawsey, "After Bipartisan Pushback, Trump Ditches Effort to Kill Major Federal Agency," *Washington Post*, December 11, 2019.
[17] Pasachoff, "The President's Budget," pp. 2224–27.
[18] Valerie Strauss, "Education Department Threatens to Suspend Employee Who Provided *The Post* with Budget Data," *Washington Post*, September 11, 2019.
[19] Robert Burns, "Space Force Will Start Small but Let Trump Declare a Big Win," *AP News*, December 21, 2019.
[20] Robert Costa, "'It's Depressing, Isn't It?': With Little Protest, GOP Succumbs to Trump on Spending," *Washington Post*, December 19, 2019; Joseph Zeballos-Roig, "The New Federal Budget Shows How Republicans Went From Being Thrifters to Big Spenders on Deficits in the Trump Era," *Business Insider*, August 3, 2019.
[21] There are initial signs that the administration will begin to rely on another tool, Administrative PAYGO, to cut spending connected to regulations. Executive Order on Increasing Government Accountability for Administrative Actions by Reinvigorating Administrative PAYGO, October 10, 2019; M-20-06, Revoking OMB Memorandum M-05-13 and Providing Other Information on Administrative PAYGO Implementation Guidance, December 16, 2019. Language in these documents seems to suggest the administration may use this mechanism to impound funds in a way that may violate the Impoundment Control Act, discussed later in this chapter. This is an area to watch in 2020.

[22] 31 U.S.C. § 1513(b).
[23] OMB Circular A-11 § 120.1; Pasachoff, "The President's Budget," pp. 2199–201.
[24] 31 U.S.C. § 1512(a).
[25] 31 U.S.C. § 1512(b)(2).
[26] 31 U.S.C. § 1512(d); Allen Schick, *The Federal Budget: Politics, Policy, Process*, 3rd edition (Brookings: 2007), p. 277.
[27] 31 U.S.C. §§ 1349, 1350.
[28] 31 U.S.C. § 1512(c).
[29] GAO, *Principles of Federal Appropriations Law,* Volume II, 3rd edition (2006), pp. 6-122–6-125.
[30] 31 U.S.C. §§ 712, 3526, 3529; GAO, *Principles of Federal Appropriations Law*, 4th edition (2016), pp. 1-12–1-17.
[31] U.S. Department of the Treasury, *A Financial System that Creates Economic Opportunities*, June 2017, p. 89.
[32] Nicole Ogrysko, "2020 Budget Sheds Little Light on Details behind the Proposed OPM Reorganization," *Federal News Network*, March 19, 2019.
[33] Andrew Duehren and Gordon Lubold, "White House Shifted Authority Over Ukraine Aid Amidst Legal Concerns," *Wall Street Journal*, October 10, 2019.
[34] Edward Wong, "U.S. Orders Freeze of Foreign Aid, Bypassing Congress," *New York Times*, August 7, 2019.
[35] John Hudson, "U.S. Officials Shield Ivanka Trump's and Mike Pence's Projects in Review of Foreign Aid," *Washington Post*, August 14, 2019.
[36] Eric Lipton, Maggie Haberman, and Mark Mazzetti, "Behind the Ukraine Aid Freeze: 84 Days of Conflict and Confusion," *New York Times*, December 29, 2019.
[37] Ibid.
[38] Art. I, H. Res. 755 (116th Cong. December 15, 2019); House Roll Call Votes 695, 696, December 18, 2019.
[39] Senate Roll Call Votes 33, 34, February 5, 2020.
[40] Lipton and others, "Behind the Ukraine Aid Freeze"; Caitlin Emma, "Trump's Budget Office Ends Foreign Aid Pause," *Politico*, August 9, 2019; Catie Edmondson and Edward Wong, "White House Lifts Mysterious Hold on Military Aid to Lebanon," *New York Times*, December 2, 2019.
[41] Sam Berger, "Trump's Hold on Ukrainian Military Aid was Illegal," *Just Security*, November 26, 2019.
[42] Kate Brannen, "Exclusive: Unredacted Ukraine Documents Reveal Extent of Pentagon's Legal Concerns," *Just Security*, January 2, 2020.
[43] Michael D. Shear and Nicholas Fandos, "White House Budget Official Said 2 Aides Resigned Amid Ukraine Aid Freeze," *New York Times*, November. 26, 2019.
[44] Letter from Mark Paoletta, General Counsel, OMB, to Tom Armstrong, General Counsel, GAO, December 11, 2019, p. 3; Lipton and others, "Behind the Ukraine Aid Freeze."
[45] Letter from Mark Paoletta, General Counsel, OMB, to Tom Armstrong, General Counsel, GAO, p. 5.
[46] Ibid., p. 9.
[47] GAO, B-331564, *Office of Management and Budget—Withholding of Ukraine Security Assistance*, January 16, 2020, pp. 1, 5.
[48] Ibid., p. 9.
[49] Trial Memorandum of President Donald J. Trump, In Proceedings Before the United States Senate, January 20, 2020.
[50] Mark Paoletta, Memorandum for Agency General Counsels, Reminder Regarding Non-Binding Nature of GAO Opinions, November 11, 2019.
[51] Pub. L. No. 93–344, tit. X, codified at 2 U.S.C. § 681 et seq.
[52] Louis Fisher, *Presidential Spending Power* (Princeton, 1975), pp. 175–201.
[53] 2 U.S.C. § 683(a).
[54] 2 U.S.C. §§ 682(3), 683(b).
[55] 2 U.S.C. § 684(b).
[56] 2 U.S.C. § 684(a).
[57] 2 U.S.C. §§ 682(4), 688.
[58] GAO, B-330019, *Rescission Statistics*, September 18, 2018, Enclosure 2, pp. 1–2.
[59] Charles S. Clark, "Trump Readies a Vaguely Nixon-Like Package of Spending Clawbacks," *Government Executive*, April 23, 2018; Letter from Donald J. Trump to the Congress of the United States, May 8, 2018; Letter from Donald J. Trump to the Congress of the United States, June 5, 2018.
[60] Eric Katz, "House Passes Bill to Rescind $15 Billion from Federal Agencies," *Government Executive*, June 7, 2018; Eric Katz, "Senate Rejects Bill to Rescind $15 Billion from Federal Agencies," *Government Executive*, June

20, 2018; U.S. Government Accountability Office, Letter from Thomas H. Armstrong, General Counsel, to the Hon. Michael R. Pence and the Hon. Paul Ryan, B-330045.3, July 3, 2018.
[61] "U.S. Senators Pledge to Fight Trump Push to Cut Aid Funding," *Reuters*, August 16, 2018; Sarah Ferris, "GOP Senators Balk at White House Foreign Aid Cutbacks Tactic," *Politico*, August 21, 2018; Edward Wong, "U.S. Orders Freeze of Foreign Aid, Bypassing Congress," *New York Times*, August 7, 2019; Hudson, "U.S. Officials Shield."
[62] Ferris, "GOP Senators"; Carol Morello and Erica Werner, "Administration Decides Not to Roll Back Foreign Aid Funds," *Washington Post*, August 28, 2018; John Bresnahan and others, "Trump Kills Plan to Cut Billions in Foreign Aid," *Politico*, August 22, 2019.
[63] GAO, B-330330, *Impoundment Control Act*, p. 1–2.
[64] Ibid., p. 8.
[65] Paoletta Letter to GAO, p. 7 (emphasis in original).
[66] Ibid., p. 7 n. 18.
[67] Lipton and others, "Behind the Ukraine Aid Freeze"; Brannen, "Unredacted Ukraine Documents."
[68] GAO, B-331564, p. 7.
[69] Ibid.
[70] Schick, *The Federal Budget*, pp. 281–84.
[71] Fisher, *Presidential Spending Power*, pp. 261–62.
[72] Ibid., pp. 12–13; Pasachoff, "The President's Budget," p. 2231.
[73] 31 U.S.C. § 1532; GAO, *Principles of Federal Appropriations Law*, p. 2–38.
[74] *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); GAO, *Principles of Federal Appropriations Law*, p. 2–44.
[75] Congressional Research Service, *Transfer and Reprogramming*, pp. 9–11.
[76] Schick, *The Federal Budget*, pp. 282–83; 31 U.S.C. § 1534.
[77] Administration of Donald J. Trump, Statement on Signing the Consolidated Appropriations Act, 2017, May 5, 2017, 2017 U.S.C.C.A.N. S22, 2017 WL 8116422, P.L. 115-31, at S24.
[78] Note, "Omnibus Appropriations Act, 2009 – President Obama Issues First Constitutional Signing Statement, Declares Appropriations Bill Provisions Unenforceable," *Harvard Law Review* (2010), pp. 1053–54; Irene Rubin, "Budgeting During the Bush Administration," *Public Budgeting and Finance* (Fall 2009), p. 9.
[79] 462 U.S. 919, 944–51 (1983).
[80] GAO, *Principles of Federal Appropriations Law*, p. 2–46.
[81] Isaac Stanley Becker, "Trump Administration Diverted Nearly $10 Million from FEMA to ICE Detention Program, According to DHS Document," *Washington Post*, September 12, 2018; Department of Homeland Security, FY 2018 Transfer and Reprogramming Notifications, pp. 29–30.
[82] Letter from Secretary of Health and Human Services Alex M. Azar II to the Honorable Patty Murray, Ranking Member, Subcommittee on Labor, Health, and Human Services, Education and Related Agencies, Committee on Appropriations, September 5, 2018; Tal Kopan, "Trump Admin Moves $260M from Cancer Research, HIV/AIDS and Other Programs to Cover Custody of Immigrant Children Costs," CNN.com, September 20, 2018.
[83] Matthew Lee, "U.S. Cuts Aid to Palestinians by More than $200 Million," *AP*, August 24, 2018.
[84] Krishnadev Calamur, "The U.S. Will Spend Billions in Syria—Just Not on Rebuilding It," *The Atlantic*, August 20, 2018.
[85] Andrew Restuccia and others, "Longest Shutdown in History Ends as Trump Relents on Wall," *Politico*, January 25, 2019.
[86] Public Law No. 116-6, 2019 Appropriations Act, February 15, 2019, §230(a)(1).
[87] President Donald J. Trump's Border Security Victory, White House, February 15, 2019.
[88] 31 U.S.C. § 9705(g)(4)(B).
[89] 10 U.S.C. §284(b)(7).
[90] Proclamation 9844 of February 15, 2019, Declaring a National Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (invoking 10 U.S.C. § 2808); 10 U.S.C. § 2808 (providing authority to engage in "military construction projects" once a national emergency has been declared).
[91] Letter from Peter J. Visclosky, Chairman, Defense Subcommittee, House Appropriations Committee, to David L. Norquist, Under Secretary of Defense, Controller, March 27, 2019.
[92] Michael Tacket, "Trump Issues First Veto after Congress Rejects Border Emergency," *New York Times*, March 15, 2019; Erica Werner, "House Fails to Override Trump Veto on Southern Border Emergency," *Washington Post*, March 26, 2019.

[93] Emily Cochrane, "The House and Senate Have Separate Plans for Border Aid. Here's What's Different," *New York Times*, June 24, 2019; Julie Hirschfeld Davis and Emily Cochrane, "House Passes Senate Border Bill in Striking Defeat for Pelosi," *New York Times*, June 26, 2019.
[94] Public Law No. 116-93, 2020 Appropriations Act, December 20, 2019, §§ 209(a), 8005.
[95] Nick Miroff, "Trump Planning to Divert Additional $7.2 Billion in Pentagon Funds for Border Wall," *Washington Post*, January 13, 2020.
[96] *Trump v. Sierra Club*, 140 S.Ct. 1 (2019); *El Paso v. Trump*, No. 19-51144 (5th Cir. January 9, 2020); *U.S. House of Representatives v. Mnuchin*, 379 F.Supp.3d 8 (D.D.C. 2019).
[97] GAO, B-330862, *Department of Defense—Availability of Appropriations for Border Fence Construction*, September 5, 2019.
[98] Teresa Walsh, "Following Review, US 'Will Not Provide New Funds' to Central America," *Devex*, June 18, 2019; Felicia Sonmez and Maria Sacchetti, "Trump Administration Will Divert Disaster Relief Funds to U.S.-Mexico Border Enforcement, Prompting Outcry from Democrats," *Washington Post*, August 27, 2019.
[99] Pasachoff, "The President's Budget," pp. 2232–35.
[100] Congressional Research Service, *Federal Funding Gaps: A Brief Overview*, March 26, 2018, pp. 1–2.
[101] U.S. Const. Art. I, cl. 7.
[102] 31 U.S.C. §§ 1341, 1342, 1349–51, 1511–19.
[103] 31 U.S.C. § 1341(a).
[104] 31 U.S.C. § 1342.
[105] Congressional Research Service, *Shutdown of the Federal Government: Causes, Processes, and Effects*, December 10, 2018, p. 10.
[106] Ibid., p. 6.
[107] 31 U.S.C. § 1342.
[108] Congressional Research Service, *Shutdown of the Federal Government*, Summary; Congressional Research Service, *Past Government Shutdowns: Key Resources*, February 7, 2019, Summary.
[109] Juliet Linderman, "Selective Shutdown? Trump Tries to Blunt Impact, Takes Heat," *AP*, January 13, 2019.
[110] Linderman, "Selective Shutdown?"
[111] Ibid.
[112] Charles S. Clark, "OMB's Shutdown Improvising Draws Fire from Budget and Legal Experts," *Government Executive*, January 15, 2019.
[113] Tom Shoop, "Trump: Most Furloughed Employees Are Democrats," *Government Executive*, December 28, 2019; Tal Axelrod, "Trump: 'I Don't Care' that Most Federal Employees Working Without Pay 'are Democrats,'" *The Hill*, January 5, 2019; Joe Davidson, "Unpaid Federal Employees Recalled So that They Can Pay Federal Contractors," *Washington Post*, January 25, 2019.
[114] 31 U.S.C. § 1351.
[115] GAO, *Principles of Federal Appropriations Law*, p. 6–144.
[116] GAO, B-331295, *Agency Reporting of GAO Determinations of Antideficiency Act Violations*, September 23, 2019.
[117] OMB Circular A-11, § 145.8, June 28, 2019.
[118] GAO, B-330776, *Department of the Interior—Activities at National Parks during the Fiscal Year 2019 Lapse in Appropriations*, September 5, 2019; GAO, B-331093, *U.S. Department of the Treasury—Tax Return Activities during the Fiscal Year 2019 Lapse in Appropriations*, October 22, 2019; GAO, B-331132, *Office of Management and Budget—Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriations*, December 19, 2019.
[119] Eric Katz, "Trump Officials Threatened with Fines, Jail Time over Illegal Spending During Shutdown," *Government Executive*, September 6, 2019.
[120] GAO, B-331295, *Agency Reporting of GAO Determinations*.
[121] Paoletta, *Reminder*.
[122] Ibid.
[123] Pasachoff, "The President's Budget," pp. 2237–38.
[124] Ibid., pp. 2238–43; Eric Katz, "White House to Meet with Agencies to Ensure Enactment of Trump's Agenda," *Government Executive*, April 25, 2018.
[125] Pasachoff, "The President's Budget," pp. 2239.
[126] Executive Order 13781, Comprehensive Plan for Reorganizing the Executive Branch, March 13, 2017.
[127] M-17-22, Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce, April 12, 2017; M-17-28, Fiscal Year (FY) 2019 Budget Guidance, July 7, 2017.

[128] Eric Katz, "Trump's Reorganization of Feds: Relocations and Reskilling, But Not Job Cuts," *Government Executive*, June 21, 2018; Eric Katz, "White House Produces No Evidence It Considered Public Input on Reorganizing Government," *Government Executive*, May 2, 2018.
[129] Eric Katz and Erich Wagner, "Proposed OPM Reorganization Draws Widespread Criticism," *Government Executive*, June 22, 2018; Donald F. Kettl, "Reorganizing Welfare Programs Is a Very Big Deal," *Government Executive,* June 6, 2018; Danielle Douglas-Gabriel, "Merging the Labor and Education Departments Won't Accomplish Much, Say Experts," *Washington Post*, June 21, 2018; Eric Katz, "Groups Launch Six-Figure National Ad Campaign to Oppose Postal Privatization," *Government Executive*, March 11, 2019.
[130] Charles S. Clark, "After a Slow Start, Trump's Civil Service Reformers Connect with Experts," *Government Executive*, September 24, 2018.
[131] Charles S. Clark, "White House Proposes a Massive Reorganization of Federal Agencies," *Government Executive*, June 21, 2018; Helena Bottemiller Evich and Andrew Restuccia, "Trump Seeks to Reorganize the Federal Government," *Politico*, June 6, 2018.
[132] Paul C. Light, "It's Dismantlers v. Rebuilders on the Government Reform Front," *Government Executive*, August 27, 2018; Katz and Wagner, "Proposed OPM Reorganization."
[133] Reforming Government Act of 2018, H.R. 6787 (introduced September 12, 2018), S.3137 (reported out of committee November 26, 2018).
[134] Eric Katz, "Omnibus Puts Kibosh on White House Efforts to Unilaterally Reorganize Agencies, Shed Workers," *Government Executive*, March 22, 2018; Eric Katz, "Congress Begins Formally Blocking Trump's Government Reorganization Plan," *Government Executive*, September 12, 2018.
[135] Katz, "Congress Begins Formally Blocking."
[136] Ibid.; "Congress Weighing Restrictions on Agency Reorganizations," *Fedweek*, June 5, 2018.
[137] Eric Katz, "Bipartisan Senate Group Demands Trump Team 'Immediately Cease' Shrinking of Federal Labor Relations Authority," *Government Executive*, May 1, 2018.
[138] Eric Katz, "Tempers Flare as White House Defends Reorg Proposal against Accusations of Stonewalling," *Government Executive*, July 18, 2018.
[139] Eric Katz, "These Are the 15 Trump Reorganization Proposals Agencies Can Advance Without Congress," *Government Executive*, October 16, 2018.
[140] USDA Office of Inspector General, *USDA's Proposal to Reorganize and Relocate the Economic Research Service and National Institute of Food and Agriculture*, August 2019, pp. 6–10.
[141] Rein and Dawsey, "After Bipartisan Pushback"; Nicole Ogrysko, "Trump Administration Takes Another Baby Step to Advance OPM-GSA Merger," *Federal News Network*, July 30, 2019; Eric Yoder and Lisa Rein, "Trump Abruptly Replaces Federal Personnel Director after Just 7 Months," *Washington Post*, October 5, 2018; Eric Katz, "Behind the Trump Administration's 'Brutal' Decision to Remove Its Federal Personnel Chief," *Government Executive*, October 9, 2018; Eric Katz, "OPM Begins Planning Its Reorganization Despite Pushback From Lawmakers," *Government Executive*, July 23, 2018.
[142] Nicole Ogrysko, "Rent Costs, Caseloads Prompt FLRA to Close Second Regional Office," *Federal News Network*, November 2, 2018; Katz, "Bipartisan Senate Group Demands."
[143] Maria Biery, "Betsy DeVos Poised to Reorganize, Consolidate the Education Department," *Washington Examiner*, October 31, 2018.
[144] Josh Siegel, "EPA Announces Major Reorganization Plan for Science Research Office," *Washington Examiner*, March 7, 2019.
[145] Yeganeh Torbati and Mica Rosenberg, "U.S. Immigration Agency to Close Its Overseas Offices," *Reuters*, March 12, 2019.
[146] Juliet Eilperin and Lisa Rein, "Interior to Move Most of Bureau of Land Management's D.C. Staff Out West as Part of Larger Reorganization Push," *Washington Post*, July 15, 2019; John Sadler, "Environmentalists Express Worry over BLM Reorganization; Bureau Downplays Concerns," *Las Vegas Sun*, August 14, 2019.
[147] Ben Guarino, "USDA Research Agencies Will Move to Kansas City Despite Oppositions," *Washington Post*, June 13, 2019; Erich Wagner, "Lawmaker on USDA Office Relocations: 'This Fight is Not Over'," *Government Executive*, August 7, 2019.
[148] Ben Guarino, "USDA Science Agencies' Relocation May Have Violated Law, Inspector General Report Says," *Washington Post*, August 6, 2019.
[149] Maya Earls, "Whistle-Blower Complaint Highlights CDC Turmoil on Climate," *Scientific American*, August 14, 2019; Sam Fossum, "USDA Moving Ahead with Reorganization Plan Opponents Argue Would 'Eviscerate' Research Units," *CNN.com*, May 31, 2019.
[150] *Trump v. Hawaii*, 138 S. Ct. 2392 (2017).

[151] Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (New Haven: Yale University Press, 2017); Mariano-Florentino Cuéllar, "From Doctrine to Safeguards in American Constitutional Democracy," *UCLA Law Review* 65 (2018), pp. 1398–1428.
[152] Chafetz, *Congress's Constitution*, pp. 63–64.
[153] Official Congressional Directory, 115th Congress (2017), pp. 349–51; Pasachoff, "The President's Budget," p. 2195.
[154] Pasachoff, "The President's Budget," pp. 2286–86.