A Primer on Tools a New Administration May Use to Effectuate Change

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The early stages of a new administration can involve significant and fast-moving change. During this time, a president is typically focused on establishing policies and programs that align with the goals and priorities for his term. In an effort to effectuate timely change, a president may use a variety of tools under the legal framework governing the federal government. These tools establish processes by which the new administration may take action at the federal level in three main areas that impact federal grantees: appropriations, grants, and regulations.

Article II of the U.S. Constitution establishes the president as head of the Executive Branch of the federal government and provides that he "take care" that the laws are faithfully executed. The president oversees all federal agencies, such as the Department of Health and Human Services. The president's role is balanced by the separation of powers in the U.S. Constitution and therefore certain actions may require the president or federal agencies to receive authority from the Legislative Branch or be subject to review by the Judicial Branch.

Appropriations

Under Article I of the U.S. Constitution , the Legislative Branch—Congress—has the "power of the purse" and can direct and control federal spending. Congress exercises this power by enacting legislation, including appropriations acts and other statutes that provide Executive Branch agencies with budget authority. **Budget authority** allows an agency to incur obligations and spend federal funds.[1] Federal funds are referred to with different terms depending on their status: appropriated funds are funds *available* for an agency to use; obligated funds are funds that have been *committed* to be used for a specific purpose; and expended funds are funds an agency has paid to release an obligation.

Agency Discretion to Move Federal Funds

Congress often places conditions or limitations on the use of appropriated funds by federal agencies.[2] In addition to the amount of funds that an agency can obligate and spend, restrictions can also include the time in which the funds must be obligated before they expire (e.g., within one year) or the purpose for which the funds can be used. These restrictions may be found in an appropriations act itself or may appear in agency-specific statutes that set forth the overall purpose of the agency.

Before federal funds are distributed to grantees to use in programming, federal agencies have some flexibility inherent in the execution of budget authority. Congress appropriates federal funds into agency "accounts", which correspond to a paragraph or section of an appropriations act. Agencies often have more than one account and each account can support more than one specific element of the agency's budget—each program, project, or activity (PPA) the agency operates. Within PPAs, agencies have discretion to obligate funds to meet the goals and purposes of that PPA, such as deciding which contracts

to sign, or reallocate funds to specific expenses, such as salaries or rent, within the confines of any restrictions Congress placed on the use of the funds. Agencies typically have internal procedures for determining when and how to reallocate or shift their appropriated funds within the discretion granted by Congress. Unless Congress explicitly provides otherwise, restrictions on appropriated funds "follow" the funds when they are moved or shifted within or between accounts. Certain ways that agencies move their federal funds are referred to with specific terms: reprogramming and transfer.

Reprogramming is when an agency shifts appropriated funds *within* an account from one PPA to a different PPA. There are no government-wide rules on reprogramming and the ability to reprogram funds is considered implicit in an agency's responsibility to manage its funds.[3] Therefore, an agency is generally permitted to reprogram funds unless restricted by an appropriations act or other statute. Sometimes statutes or even informal agreements between an agency and their respective appropriations committee may require that an agency give Congress notice for certain uses of reprogramming, such as the creation or elimination of a program.

Transfer is the term used for when agencies shift funds between accounts. Transfer can occur intra-agency (from Agency A's Account 1 to Agency's A's Account 2) or inter-agency (from Agency A's Account 1 to Agency B's Account 1). Unlike reprogramming, transfers are prohibited unless a statute allows it, but Congress will sometimes grant specific transfer authority to agencies in appropriations acts.

Impoundment

After an appropriations bill passes through Congress, it is sent to the president for signature, if he approves of it, or veto, if he disagrees with it. Once an appropriations bill is enacted, it is binding law. **Impoundment** occurs when a president attempts to prevent federal agencies from exercising the budget authority granted to them by Congress.

The Impoundment Control Act of 1974 (ICA) was intended to standardize and limit when and how the president can temporarily withhold or request that Congress cancel appropriated but unobligated funds.[4] Funds that have already been obligated, whether by an agency as a part of its ongoing operations (e.g., entering into grant agreements) or by operation of law under a statute (e.g., a claim for Social Security benefits) are outside the purview of the ICA.[5] The ICA provides the Executive Branch with two tools: rescission and deferral. **Rescission** is a request for reduction in appropriated funding. **Deferral** is withholding or delaying the ability to obligate appropriated funding.

Both rescission and deferral require the president to send a "special message" to Congress. The ICA then provides certain mechanisms for Congress to approve or disapprove of the president's actions. For a rescission, Congress has 45 continuous session days following the special message to enact a "rescission bill" approving some or all of the proposed rescissions. If Congress fails to act within that time, the ICA requires that the proposed funds be made available to agencies for obligation and the same funds cannot be proposed for rescission again.[6]

While the president may propose rescissions for policy-related or other reasons, deferral is only permissible for enumerated practical considerations listed in the ICA (e.g., to provide for contingencies).[7] Neither deferral nor rescission can be used to force funds to expire by delaying the ability of agencies to obligate funds until after the time limit Congress imposed passes. **Pocket rescission** describes a rescission proposed so close to the end of the fiscal year that agencies do not have time after the 45-day consideration period expires to obligate or spend that portion of appropriated funds. This practice was deemed a violation of the ICA.[8]

Grant Administration

Once appropriated funds are obligated or spent, the president's power to influence the use of those funds is limited. New administrations, at that point, may seek to manage the use of federal funds through the grant administration process.

Recoupment

Federal agencies award grants under contracts such as grant agreements, which include terms and conditions. Terms and conditions typically require grantees to comply with specific laws, regulations, and contractual provisions. If a grantee does not comply with its grant agreement, the federal government may seek repayment of funds through **recoupment**. Recoupment is sometimes referred to as clawback or recapture.

Recoupment begins when the federal government determines that a payment made to a grantee was improper —such as an overpayment or a payment for an expense that was ineligible under the grant agreement.[9] Making this determination involves comparing how the payment in question aligns with the laws and conditions that govern the grant funds, such as the Uniform Guidance cost principles.[10] The grantor agency typically determines whether grantees have used federal funds in an allowable manner through monitoring and audit processes where documentation is submitted by grantees.

Once an agency identifies an improper payment, the agency can recoup that payment following processes laid out in agency-specific regulations as well as federal statutes like the Payment Integrity Information Act of 2019 (PIIA) and Debt Collection Improvement Act of 1996 (DICA).

Termination

Federal agencies have the authority to terminate grants they make to the extent authorized by applicable law. The triggers and processes for termination is generally set forth in funding source-specific laws or guidance, the Uniform Guidance, or a combination of the two. Under the Uniform Guidance, an agency may terminate a grant if certain circumstances exist. For example, if a grantee fails to comply with the governing law and conditions of their grant, the agency can "[s]uspend or terminate the Federal award in part or in its entirety" if "noncompliance cannot be remedied by imposing specific conditions".[11] If the recent executive orders (EOs) issued by the White House are incorporated in the terms and conditions of a grant agreement, a grantee's noncompliance with those EOs could trigger a subsequent suspension or termination of funding.

Another circumstance in the Uniform Guidance that permits agencies to terminate grants in whole or in part is "pursuant to the terms and conditions of the Federal award, including, to the extent authorized by law, if an award no longer effectuates the program goals or agency priorities."[12] This circumstance is particularly applicable if a grant agreement includes a **termination for convenience** provision. This is language that allows an agency to cancel a grant agreement, typically with notice to the grantee, if it is in the best interest of the agency. However, agency-specific laws often have more restrictive rules that apply to termination of funding and require that certain processes be followed.

Regulations

Congress may seek to revoke regulatory actions taken by federal agencies if the actions do not align with the priorities of the House or Senate. This is particularly useful when a new president and Congress align politically and wish to start the new administration without regulations that could work against their policy goals.

The Congressional Review Act (CRA) is a statutory tool Congress can use to overturn certain federal agency actions.[13] The CRA applies to final rules and interim final rules as well as some other agency actions like guidance documents or policy memoranda. A "rule" under the CRA mirrors the definition of a rule in the Administrative Procedure Act except that the CRA does not apply to rules of particular applicability, rules relating to agency management or personnel, and non-substantive rules of agency organization, procedure, or practice.

For Congress to overturn a rule under the CRA, it must go through the legislative process (i.e., approved by both houses of Congress and signed by the president or enacted over a veto) using a **joint resolution of disapproval**. One joint resolution can only be used to invalidate one rule in its entirety. The CRA provides specific time periods within which Congress can act. One of the chambers of Congress must introduce a joint resolution within 60 days of continuous session beginning when the rule is received by Congress, which is typically its publication date in the Federal Register. If Congress receives a rule and then adjourns within 60 session days without specifying a return date (e.g., at the end of a presidential administration), the CRA has a so-called "lookback mechanism" that resets the period for Congress to review the rule once the congressional session resumes.[14]

When a joint resolution is enacted, the rule at issue is nullified; it goes out of effect immediately and is "treated as though such rule had never taken effect."[15] Rules that are disapproved under the CRA cannot be reissued or issued as a new rule in "substantially the same" form unless subsequent legislation specifically permits it.[16]

Conclusion

Many of the tools in this article have been used sparingly across history and their constitutionality is the subject of debates and arguments. Some of these tools arose from inflection points in the balance of the separation of powers that has been consistently in flux throughout the history of the United States. All

laws are subject to interpretation, and while this article represents the legal framework as it is currently understood, the underlying laws are particularly ripe for deeper understanding—including through challenges in the judicial system.

END NOTES

[1] 2 U.S.C. § 622(2)

[2] 31 U.S.C. § 1301(a)

[3] GAO, Principles of Federal Appropriations Law, 4th ed., ch. 2, pp. 47-48

[4] 2 U.S.C § 681 *et seq.*

[5] 2 U.S.C. § 681(4) (the "fourth disclaimer")

[6] 2 U.S.C. § 683(b)

[7] 2 U.S.C. § 684(b): "Deferrals shall be permissible only— (1) to provide for contingencies; (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law. No officer or employee of the United States may defer any budget authority for any other purpose."

[8] Government Accountability Office, Decision B-330330 (Dec 10, 2018)

[9] The general framework underlying the federal government's identification and recovery of improper payments was most recently reestablished by the Payment Integrity Information Act of 2019 (PIIA), 31 U.S.C § 3351 *et seq.* The PIIA defines an "improper payment" to include "any payment that should not have been made or that was made in an incorrect amount" and "any payment for an ineligible good or service," which is "a payment for any good or service that is rejected under any provision of any contract, grant, lease, cooperative agreement, or other funding mechanism."

[10] 2 CFR 200.400 *et seq.* ("Subpart E")

[11] 2 CFR 200.339(c)

[12] 2 CFR 200.340(a)(4)

[13] 5 USC § 801 *et seq.*

[14] Although Congress is the final decision-maker as to the timing of procedures under the CRA, the Congressional Research Service, a research institute within the Library of Congress, has estimated that the lookback period for the 119th Congress will be rules submitted on or after August 1, 2024.

[15] 5 U.S.C. § 801(f)

[16] 5 U.S.C. § 801(b)(2)

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