



# HOUSE COMMITTEE ON THE BUDGET

Chairman John Yarmuth

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## Protecting Congress' Power of the Purse and the Rule of Law

The Founders knew that money – and who controls it – is fundamentally important in a democratic government. They [saw](#) in the “power of the purse . . . the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.” That is why the Constitution gave the power of the purse to Congress. It vested the people’s representatives with control of the people’s tax dollars and how they are spent. Yet Congress’ ability to fulfill that responsibility has been increasingly challenged by an executive branch that, regardless of party, has sought to claim control of the nation’s purse for itself. This potential collapse of our separation of powers is a direct threat to the American experiment that transcends presidents, parties, or politics.

During the [hearing](#) “Protecting Congress’ Power of the Purse and the Rule of Law,” the House Budget Committee heard testimony from expert witnesses on the critical importance of congressional control over federal spending and the affirmative steps Congress can take to protect the separation of powers. Committee members from both sides of the aisle and all four witnesses underscored the need for Congress to reassert itself and discussed ways it might do so.

### Congressional Control of Spending Protects the People

**“[T]he fact that Congress—and in particular the House of Representatives—would control the flow of money into and out of government coffers was the strongest Federalist response to Anti-Federalist arguments that the presidency was too powerful.”** — Drawing on his book, *“Congress’s Constitution,”* Cornell Law School Professor Josh Chafetz [explained](#) that our nation’s Founders saw control over spending as an essential bulwark against monarchy. While opponents of the U.S. Constitution were concerned that it could open the door to a tyrannical President, the Founders [responded](#) that the Constitution protected against monarchy by separating powers: “where the purse is lodged in one branch, and the sword in another, there can be no danger.” Professor Chafetz discussed numerous constitutional provisions giving Congress the power of the purse, including the mandate of the Appropriations Clause that “No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.”

**“The Constitution is clear that . . . the president must spend those dollars appropriated by Congress for the purposes that we intend. People in communities across the country rely on that.”** — Representative Dan Kildee addressed the everyday importance of congressional

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control over spending for Americans who rely on the programs Congress funds, and for the rule of law. Witnesses agreed. Congressional control over the purse not only provides a simple yet incredibly important check on the executive, but also **ensures that “the government remain[s] directly accountable to the will of the people,”** as explained by Government Accountability Office (GAO) General Counsel Tom Armstrong in his [testimony, since Congress answers to the people through elections](#).

## **Tools the Executive Branch Has (Mis)used to Gain Control of Federal Spending**

Witnesses described how the executive branch has used or contemplated tools, such as apportionments, near-expiration rescissions, Antideficiency Act exceptions, and self-policing, to influence spending despite – or even in contravention of – the law.

**Our laws limit agencies’ discretion over the spending of Congressionally appropriated funds** — Congress has crafted longstanding, foundational laws that aim to prevent federal agencies from misusing their ability to spend money. Mr. Armstrong explained that two of the most important budget and appropriations laws are the Antideficiency Act and the Impoundment Control Act, both of which are **“permanent fiscal statutes [that] implement Congress’ power of the purse.”** The [Antideficiency Act](#) prohibits agencies from overspending or promising to pay funds they do not have. The [Impoundment Control Act](#) (ICA) requires agencies to spend the funds Congress has provided to them by law and limits the President’s ability to interfere with agencies’ faithful execution of the law. And a series of laws empower GAO – a nonpartisan legislative agency under Congress’ jurisdiction – to investigate and report on violations of these statutes to ensure compliance with the law.

**Apportionment** — Georgetown Law Professor Eloise Pasachoff explained one obscure but influential statutory tool that Congress gave the President: the responsibility to apportion funds (or “apportionment”). However, over time the executive branch has increasingly used and abused this tool to control spending and infringe on Congress’ power of the purse. Apportionments were created to better control the flow of money and prevent agencies from running out of money before the fiscal year is over. In the Antideficiency Act, Congress delegated the responsibility to apportion appropriations enacted into law to the President. Under this law, apportionments are issued by the Office of Management and Budget (OMB) and are legally binding on agencies. The authority to issue apportionments that Congress gave the executive branch is, by law, a limited, bureaucratic one, but Professor Pasachoff explained how OMB has increasingly used this authority to impose its own policy goals over those of the agencies and even Congress: **“[Apportionment is] not an independent source of executive policy development, but the current administration seems to be developing an expansive view of the apportionment power as a tool of presidential control.”** The withholding of aid to Ukraine is just one example of such use of the apportionment process as a tool of presidential control over spending. That withholding was implemented by OMB largely through

apportionments, despite reluctance from the agencies responsible for spending the funds. While GAO [found](#) that use of the apportionment process to withhold funding to have been unlawful under the ICA, the law does not currently impose any penalties on unlawful apportionments – or even automatically allow Congress or the public to see the apportionments in question.

**Near-expiration rescissions** — Mr. Armstrong addressed another tool of control over spending that the executive branch has asserted by misreading a statutory authority: near-expiration rescissions, especially in the form of end of year rescissions without Congressional approval. The ICA prohibits presidents from refusing to spend funds appropriated by Congress. But in recent years, OMB has tried to claim that it can avoid spending time-limited appropriations by proposing a “rescission” under the law in the last two months of the fiscal year and withholding funds until they expire. There have been reports that the Administration was seeking to propose these “backdoor rescissions” in each of the past two fiscal years, only to be stymied by bipartisan congressional opposition.

In 2018, in response to a request by Chairman John Yarmuth and Ranking Member Steve Womack, GAO addressed OMB’s belief that it can abuse the ICA process to rescind funds without congressional approval, holding that this practice violates the law. But that has not dissuaded OMB; Professor Pasachoff explained that **“OMB has persisted in its legal interpretation, even though GAO has concluded that OMB’s interpretation is wrong,”** and that “GAO has the better argument here.”

**Antideficiency Act exceptions** — Mr. Armstrong described a third tool of presidential control: the ability to decide which programs to operate during a shutdown and which to shutter. While that decision is supposed to be controlled by Congress and governed by the Antideficiency Act, Mr. Armstrong noted that during the fiscal year 2019 shutdown, agencies repeatedly violated that law by continuing operations despite the lack of appropriations. **“[T]he executive branch’s disregard for the Antideficiency Act and other fiscal statutes during the lapse tore at the very fabric of Congress’ constitutional power of the purse,”** he explained. Professor Pasachoff pointed to the broad readings of exceptions in the Antideficiency Act by the Office of Legal Counsel (OLC) in the Department of Justice as contributing to this problem. And Professor Chafetz noted that the executive branch’s increasing broadening of its interpretations of those exceptions has further strengthened executive power.

**Transfers and reprogramming** — Members asked several questions about an additional category of tools of presidential control over spending, namely, transfers and reprogramming. A “transfer” takes place through a provision of law that permits an agency to move funds from one appropriation to another. A “reprogramming” takes place where an agency may shift funding within an appropriation from one allowable purpose to another that departs from what was intended at the time of enactment. Professor Pasachoff explained how the controversial

use of these authorities to fund the construction of a wall along the southern border is not an isolated example: **“The administration’s use of transfer and reprogramming to build the wall at the southern border has received the most attention, but it has also used transfer and reprogramming to support many other goals in both domestic and foreign policy. It has done so even in the face of bipartisan congressional opposition.”** Moreover, she explained that **“[t]here is no comprehensive collection of transfers and reprogramming. This lack places Congress at an information disadvantage as compared to the executive branch.”**

**Self-policing** — All of the witnesses noted ways in which the executive branch has asserted for itself the power to enforce and interpret appropriations and budget laws. This inevitably creates the risk that duly enacted statutes will be circumvented with the aid of self-serving interpretations issued by inherently conflicted executive-branch lawyers. Professor Pasachoff, discussing OMB’s view of the apportionment authority, explained that **“OMB’s reading would also mean that the administration is the only one policing itself for compliance with the Impoundment Control Act... That is just not how the rule of law operates.”** Mr. Armstrong noted recent unprecedented actions by OMB encouraging agencies to defy GAO’s judgments about the lawfulness of their actions. Relatedly, GAO has **“warned agencies that their reluctance to provide fulsome responses to GAO’s questions can have constitutional significance.”** And Professor Chafetz pointed out the Department of Justice’s similarly troubling practice of instructing agencies to ignore any legal commands its OLC deems unconstitutional, regardless of whether a court of law has ruled upon that question. Moreover, OLC’s legal opinions informing agencies to disregard the law are often not even disclosed to the public or Congress, operating in practice as a secret, interpretive veto that supplants the rule of law. Witnesses concurred that external enforcement of budget and appropriations laws—not self-policing—is necessary if Congress is to maintain and reassert its power of the purse and protect and strengthen the rule of law.

## **Steps Congress Can Take to Reassert Control**

Witnesses identified concrete, tailored steps Congress can take to reassert control over spending while leaving a proper place for executive discretion in implementing spending programs. These centered around building deterrents into appropriations and budget laws, making apportionments public, promoting transparency and oversight in the use of other executive spending tools, and empowering congressional institutions such as GAO.

**Establish deterrents** — Mr. Armstrong noted the asymmetry between an agency spending in violation of the law, which can lead employees or officers to face penalties, and an agency refusing to spend as required by law or failing to report to GAO or Congress as required by law, which does not. **“The Antideficiency Act is the only fiscal statute which carries penalties for violation of the Act.”** Professor Pasachoff and Mr. Armstrong both agreed that penalizing all violations of budget and appropriations law is important not only – or even primarily – to

punish those who get caught, but to also create a deterrent to lawbreaking. Indeed, Mr. Armstrong noted that “[i]t has long been understood that the threat of criminal and civil penalties serves as an important deterrent for government officials and employees even though the Department of Justice has never brought charges against a government official or employee for a criminal violation.” Both witnesses recommended that penalties be added to the Impoundment Control Act, and Mr. Armstrong recommended Congress consider “imposing penalties or a reporting requirement on agencies that fail to respond to GAO.”

**Specify that near-expiration rescissions without Congressional approval are unlawful** — Mr. Armstrong offered a simple solution to clarify that the law does not empower the executive branch to cancel funds appropriated by Congress by proposing to rescind them in the last two months before their expiration. While it is already clear that the law does not give the executive branch this power, it could be amended specifically to preclude such use of end-of-year rescissions.

**Make apportionments public** — “Congress could require that signed apportionments 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 non-disclosed status in a rule of law regime.” Professor Pasachoff explained that making apportionments transparent is a first step in making sure OMB follows the law in its use of this powerful, legally binding tool. “[B]ecause apportionments aren’t disclosed as a matter of course,” it is “difficult for Congress and the American people to know what is going on unless the apportionment at issue happened to hit the news.” As a result, “we don’t know what other apportionments may have resulted in other policy-driven holds, in this or any other administration.”

**Require greater transparency** — Witnesses highlighted ways in which all of the executive spending tools they described – apportionments, end-of-year rescissions without Congressional approval, Antideficiency Act exceptions, transfers and reprogramming, the rejection of GAO’s investigatory authority inherent in self-policing, and OLC instructions to agencies to ignore laws OLC deems unconstitutional – are exacerbated by a lack of transparency surrounding their use. This lack of transparency makes it difficult for Congress and the public to know how or if money is being spent – or whether or not the executive branch is complying with legal requirements. They recommended reporting requirements, compilations, and other measures to restore transparency in the spending of the people’s tax dollars.

**Provide GAO with legal authorities to force agency cooperation** — A theme echoed throughout the hearing was the fact that, given the size and complexity of the modern administrative state, Congress cannot hope to fulfill its constitutional charge to control the nation’s spending without the institutional expertise and resources necessary to understand and counter-balance executive action. As University of Maryland Professor Philip Joyce [put it](#), “[t]he support agencies that the Congress has established – CBO, GAO, and CRS – are important tools that the Congress needs to exercise its constitutional power.” In particular,

Mr. Armstrong recommended legislation mandating that agencies promptly and fully cooperate with GAO investigations into their compliance with appropriations and budget laws, and also mandating that agencies report violations discovered by GAO to Congress. He explained that **“strengthen[ing] GAO’s existing role” would “support and advance Congress’ constitutional prerogatives.”**

## **Conclusion**

Budget and appropriations law is complex, and fundamentally important. The testimony of the hearing witnesses, available [online](#), revealed ways that the executive branch has, over time, leveraged that complexity to take control of the nation’s purse – a power that our Founders and our Constitution gave to Congress. Importantly, the hearing culminated in the discussion of several concrete steps that Congress can take to reassert its constitutional role and thereby protect the taxpayers and the rule of law. Taking these steps would help restore the separation of powers the Founders knew to be essential to a resilient, enduring, democratic government.

Chairman Yarmuth and the House Budget Committee will continue to examine possible legislative proposals and reforms to rein in executive overreach, deter abuse of the apportionment process, and strengthen budget and appropriations law.