

**Testimony of Eloise Pasachoff
Professor of Law
Georgetown University Law Center**

**before the U.S. House of Representatives
Committee on the Budget**

**Hearing on
Protecting Congress's Power of the Purse and the Rule of Law
March 11, 2020**

Chairman Yarmuth, Ranking Member Womack, and Members of the Committee:

Thank you for the invitation to testify before you today. My name is Eloise Pasachoff. I am a Professor of Law at the Georgetown University Law Center, where I hold an Agnes N. Williams Research Professorship and am currently serving as Associate Dean for Careers. I am also a public member of the Administrative Conference of the United States, an independent federal agency charged by Congress with convening experts from the public and private sectors to recommend improvements to administrative process and procedure. I am here today speaking for myself, however; the views I will share during my testimony are my own and are not attributable to any institution with which I am affiliated.

My scholarship focuses on the administrative law of federal funding—especially, as relevant for today's hearing, executive branch tools to shape federal spending after the appropriations process has come to an end in Congress and appropriations have been signed into law. I have published on this topic in the *Yale Law Journal*, in the *Columbia Law Review*, and in a forthcoming edited volume with the Brookings Institution Press.¹ I am honored to be invited to discuss these critical issues with you at this hearing.

I want to make three points this morning:

First, presidents have many tools with which they can shape federal spending during the process of “budget execution,” the implementation process after appropriations have been signed into law. These presidential budget tools play an important role in a well-functioning government. It is not possible for Congress to anticipate every need that will arise over the course of a fiscal year. Presidents therefore need some degree of flexibility to respond in timely, sensible ways to ensure efficient and effective spending of taxpayer dollars within the bounds of appropriations law and budget statutes.

¹ I am drawing on two of these publications for my remarks today. See Eloise Pasachoff, *The President's Budget Powers in the Trump Era*, in *PRIORITIZING PRESIDENTIAL POLICIES: HOW DOES THE OFFICE OF MANAGEMENT AND BUDGET INFLUENCE EXECUTIVE POLICY MAKING?* (eds. Bose and Rudalevige, forthcoming Brookings Institution Press 2020); Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 *YALE LAW JOURNAL* 2182 (2016).

Second, like any tool of implementation, these presidential budget tools can be misused. They can be misused by offering interpretations of statutory language that stretch its plain meaning; by disregarding the clear intent of Congress as demonstrated by the context in which Congress originally enacted the law and decades of practice that has grown up around it; and by generally aggrandizing presidential authority as compared to congressional authority over spending.

Third, there are a number of opportunities for Congress to cabin the misuse of presidential budget tools while recognizing the value of these tools in the ordinary case. Several amendments to the two key statutes, the Antideficiency Act and the Impoundment Control Act, would help promote transparency and close loopholes. So would ongoing attention in appropriations acts to cabin executive branch authority to reprogram and transfer funds for purposes other than the ones Congress originally authorized. It would be better for everyone of both parties and both branches to clarify these subjects of recent debate.

In the rest of my time, I want to walk through three presidential budget tools that are especially pervasive, consequential, and opaque. I'd like to briefly explain what they are, why they are important, how they have recently been misused, and how Congress could usefully adjust them to recalibrate the balance between executive and legislative control over spending, both now and for any future administration.

Presidential Budget Tool #1: Apportioning Appropriated Funds

Legal framework. 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.² The Office of Management and Budget (OMB) has long been delegated this task, which is typically conducted by a senior civil servant.³ The purpose of apportionment is effective funds management.⁴ The Antideficiency Act dates back to 1870, when Congress tried to stop what had been a common executive branch practice of intentionally spending appropriations quickly and then coming back to Congress to demand more.

Today’s apportionment authority gives the White House 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.⁵ 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.⁶

At the same time, this control is not unfettered. Apportionment may not be used to

² 31 U.S.C. § 1513(b).

³ OMB Circular A-11 § 120.1.

⁴ 31 U.S.C. §§ 1512(a), (b)(2).

⁵ 31 U.S.C. § 1512(d).

⁶ 31 U.S.C. §§ 1349, 1350.

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.⁷ 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.⁸ 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.⁹

Current issues. While OMB exercises its apportionment authority all the time, and most uses reflect unremarkable authority to ensure efficient funds management in agencies, the current administration seems to be developing an expansive view of the apportionment power as a tool of presidential control. The most significant and controversial effort to use apportionment to further the administration’s goals occurred last summer, when OMB placed holds on State, USAID, and Department of Defense foreign aid funding, including to Ukraine.

As you know, these apportionments, and debates about the underlying reasons for them, ended up giving rise to the impeachment votes in the House and Senate. But the relevance of the apportionments for impeachment is a completely different question from the one that concerns us today: the administration’s broad view of its apportionment power.

In defending the apportionments, OMB attempted to place the President’s statutory apportionment authority in the context of his constitutional duty to “take Care that the Laws be faithfully executed.”¹⁰ OMB called “pausing before spending a necessary part of program execution” so that OMB can confirm and approve agencies’ plans. In so doing, OMB seemed to contemplate the use of apportionment authority for policy reasons, ignoring Congress’s Nixon-era rejection of this rationale.¹¹ But as GAO correctly explained, “Faithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law.”¹² GAO cited for this proposition a Supreme Court case that had rejected President Clinton’s efforts to unilaterally decline to spend money Congress had appropriated.¹³

To my mind, ensuring that presidents don’t abuse the apportionment power is not a partisan issue. And in fact, as you know, while Republicans and Democrats in Congress ultimately divided on the relevance of the President’s actions to the question of impeachment, there was immediate bipartisan congressional opposition to the administration’s holds on the Ukraine aid, and the funding was ultimately released.

⁷ 31 U.S.C. § 1512(c).

⁸ GAO, *Principles of Federal Appropriations Law* 3d ed. Vol. II (2006, updated 2015), at 6-122–6-125.

⁹ 31 U.S.C. §§ 712, 3526, 3529; GAO, *Principles of Federal Appropriations Law* 4th ed. (2016), at 1-12–1-17.

¹⁰ Letter from General Counsel of OMB to General Counsel of GAO (hereinafter 2019 OMB Letter), Dec. 11, 2019, at 3.

¹¹ *Id.* at 5.

¹² GAO, B-331564, *Office of Management and Budget—Withholding of Ukraine Security Assistance*, January 16, 2020 (hereinafter GAO Ukraine Decision), pp. 1, 5.

¹³ *Clinton v. City of New York*, 524 U.S. 417 (1998).

For me, the key legal takeaway from this episode is the importance of transparency. It is only because these apportionments happened to become public that Congress eventually learned about them. We don't know what other apportionments may have resulted in other policy-driven holds, in this or any other administration. In this way, the potential for abuse of the apportionment power is not simply about the current administration. Any future administration, Democratic or Republican, could also try to use the apportionment power as a regular tool of presidential control. And because apportionments aren't disclosed as a matter of course, it would be difficult for Congress and the American people to know what is going on unless the apportionment at issue happened to hit the news.

Potential reforms. To avoid these problems, several amendments to the Antideficiency Act would be helpful. To limit efforts to use apportionment to support presidential policymaking or partisan gain, Congress could clarify that the apportionment authority is not a general delegation of authority but is only for the purposes of efficient funds management. Congress could further explain what actions would and would not constitute efficient funds management. Further, to ensure that apportionments are kept within these bounds, 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.

Presidential Budget Tool #2: Rescinding, Deferring, and Impounding Funds

Legal framework. There is a second statute in addition to the Antideficiency Act that limits apportionment and the 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.¹⁴ In an effort 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.

Under rescission, the President proposes to cancel certain spending, and the reasons for doing so may include policy disagreements with Congress.¹⁵ 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 45 days, the administration must make the funds available as Congress had previously specified.¹⁶

Under deferral, the President proposes to delay spending specific sums of money; here, however, the proposed reasons may not include policy disagreements.¹⁷ The President must again transmit a special message prepared by OMB explaining the reasons for the proposed deferral.¹⁸ Congress then has the opportunity to consider an "impoundment resolution" through

¹⁴ Pub. L. No. 93-344, tit. X, codified at 2 U.S.C. § 681 et seq.

¹⁵ 2 U.S.C. § 683(a).

¹⁶ 2 U.S.C. §§ 682(3), 683(b).

¹⁷ 2 U.S.C. § 684(b).

¹⁸ 2 U.S.C. § 684(a).

streamlined procedures under which it “expresses its disapproval” but does not stop the delay, although the delay may last no longer than the current fiscal year.¹⁹

Current issues. The current administration is engaging in expansive interpretation of presidential authority under this Act, under two different lines of reasoning. One argument involves interpreting rescission implicitly to permit the President to unilaterally cancel any spending he wishes if Congress does not have enough time to act on a rescission proposal before the end of the fiscal year. OMB has asserted that because the Impoundment Control Act doesn’t explicitly say that the President can’t run out the clock on the fiscal year, he can.²⁰ In both of the last two summers, the administration took steps towards preparing a rescission package without enough time for Congress to act before the end of the fiscal year, both times targeting foreign aid accounts, with the idea of letting the funds expire. In both years, bipartisan congressional opposition led the administration to drop the effort. But OMB has persisted in its legal interpretation, even though GAO has concluded that OMB’s interpretation is wrong.²¹

GAO has the better argument here. The plain text of the Impoundment Control Act provides only one circumstance under which the administration can entirely decline to spend appropriated funds: if Congress has agreed to rescind the funds in question within the 45-day window. To read the Act to allow the administration to cancel spending without congressional approval is to ignore the limits the law clearly places on presidential efforts to impound funds. OMB’s reading imagines that Congress would give away its fundamental power of the purse without saying so explicitly. But this reading is just not plausible. In Justice Scalia’s memorable words, which GAO quotes at the end of its analysis, Congress does not “hide elephants in mouseholes.”²²

A second expansive argument under the Impoundment Control Act offered by the administration concerns deferral. GAO has long recognized a category of delay in spending funds that doesn’t count as an unlawful deferral: what it calls “programmatic delays.” “A programmatic delay,” GAO explains, “is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency’s reasonable and good faith efforts to implement the program.”²³ OMB’s current attempt to expand this category includes two different points: that the executive branch’s assertion that it is engaging in a permissible programmatic delay should be taken at face value, without further probing intent or underlying circumstances, and that internal executive branch policy considerations can justify a programmatic delay.²⁴ This was the argument the administration offered in an attempt to justify the apportionment holds on the Ukraine funding. These weren’t unlawful deferrals, the

¹⁹ 2 U.S.C. §§ 682(4), 688.

²⁰ Letter from General Counsel of OMB to General Counsel of GAO, Nov. 16, 2018.

²¹ GAO B-330330, Letter to The Honorable Steve Womack, Chairman, Committee on the Budget, House of Representatives, and The Honorable John Yarmouth, Ranking Member, Committee on the Budget, House of Representatives, *Impoundment Control Act—Withholding of Funds through Their Date of Expiration*, Dec. 10, 2018, at 1–2.

²² *Id.* at 12 (citing *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001)).

²³ GAO, *Principles of Federal Appropriations Law*, *supra* note 9, at 2-50.

²⁴ 2019 OMB Letter, *supra* note 10, at 7–9.

administration argued, but rather simply programmatic delays to ensure consistency with the President’s foreign policy.²⁵

GAO rejected this reading both as a matter of law and as applied to the facts of the Ukraine holds. Again, GAO has the better argument. As a matter of law, GAO explained that programmatic 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.”²⁶ This is correct. To allow otherwise would let the category of programmatic delay—which is not even mentioned in the Impoundment Control Act at all—eclipse the tight controls on executive branch delays in spending money that Congress put in place in that Act. OMB’s reading would also mean that the administration is the only one policing itself for compliance with the Impoundment Control Act, where a hold on spending money becomes an acceptable programmatic delay just because the administration says so. That is just not how the rule of law operates. GAO thus correctly concluded that the holds on the Ukraine apportionments did not constitute permissible programmatic delays 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.²⁷

Potential reforms. Just as amendments to the Antideficiency Act would help avoid—in this or any future administration—presidential misuse of apportionment, so would amendments to the Impoundment Control Act help avoid abuses of rescission and deferral. To avoid unilateral administrative cancellation of funds, Congress could 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 could develop a clear definition of that term that distinguishes it from a deferral. To make violating the Impoundment Control Act just as serious as violating the Antideficiency Act, Congress could import into the former Act the potential administrative and criminal penalties currently reserved for the latter.

Presidential Budget Tool #3: Transferring and Reprogramming Funds

Legal framework. 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.²⁸ 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.

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

²⁵ *Id.* at 9.

²⁶ GAO Ukraine Decision, *supra* note 12, at 7.

²⁷ *Id.*

²⁸ GAO, *Principles of Federal Appropriations Law*, *supra* note 9, at 2-38–2-47; Congressional Research Service, *Transfer and Reprogramming: An Overview of Authorities, Limitations, and Procedures*, June 6, 2013.

transfer moves funds between different appropriations, and an agency may transfer funds only with specific statutory authority.²⁹ 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 and any other legal requirement specific to that funding.³⁰ There is one set of these restrictions that acts as a restriction only by custom rather than by law: the practice of requiring committee approval before a reprogramming can take place. After the Supreme Court's 1983 decision *INS v. Chadha*, committee approval can be a strongly encouraged *practice* as part of the relationship between the executive and legislative branches, but as a *requirement* it would not be consistent with the Constitution's framework for legislation.³¹

Current issues. Exercising reprogramming and transfer authority always reflects centralized executive branch control, in that OMB oversees agency efforts to transfer and reprogram funds. But the current administration is taking a particularly broad view of this presidential authority in size, in scope, and in rejecting congressional oversight. 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. After reaching an agreement on fiscal 2019 appropriations that ended last year's 35-day government shutdown—an agreement that did not include \$5 billion the President had requested for the wall—the President went on to use transfer and reprogramming to obtain even more than he had originally requested for the wall, in part through a declaration of emergency but in part through ordinary use of transfer and reprogramming authority. After Congress voted to overturn the President's emergency declaration, the President vetoed the resolution, and there were not enough votes to override the veto.

One of the reasons that congressional limits on transfer and reprogramming authority have bite is that it is generally understood that an executive branch that disregards congressional limits will face repercussions in the next appropriations cycle. The administration seems to have been gambling that it would not face repercussions in the 2020 appropriations process. That gamble seems to have paid off. For example, the 2020 appropriations acts signed into law in December did not contain any further restrictions on the administration's actions around the wall. And shortly after that deal was signed, the administration announced a new plan to shift an additional \$7 billion in the Pentagon's 2020 appropriations towards building the wall.

This is a dangerous precedent for Congress's power of the purse. It shows any future administration, Democratic or Republican, that it is possible to make a budget request, have that budget request be denied, accomplish the purposes of that budget request anyway by moving money around through transfer and reprogramming, and then face no consequences in the next year's appropriations cycle.

²⁹ 31 U.S.C. § 1532; GAO, *Principles of Federal Appropriations Law*, *supra* note 9, at 2-38.

³⁰ *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); GAO, *Principles of Federal Appropriations Law*, *supra* note 9, at 2-44.

³¹ 462 U.S. 919, 944–51 (1983).

Moreover, the lack of transparency around transfers and reprogramming makes it difficult to monitor the executive branch's actions. Different committees have different notification requirements and different practices with respect to sharing information about transfers and reprogramming with all of Congress and with the public at large. There is no comprehensive collection of transfers and reprogramming. This lack places Congress at an informational disadvantage as compared to the executive branch.

Potential reforms. The underlying rationale for transfer and reprogramming—the need for executive flexibility as circumstances change—remains valid, so a generalized set of limits is not what is needed. Instead, Congress could impose more specific restrictions on different accounts in annual appropriations laws. When the executive branch acts to exceed these restrictions, it would make sense for the subsequent year's appropriation to respond in a meaningful way. Congress could also require regular and public disclosure of all administration reprogramming and transfer actions in some centralized fashion. As with apportionments, these final decisional documents ought not to be relegated to occasional, piecemeal, targeted releases.

Conclusion

There are a number of important steps that Congress can take to protect its power of the purse and the rule of law while maintaining the flexibility required for executive discretion in a healthy system. Thank you for the opportunity to share my views with you today.