

## The President's Power of the Purse

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Eloise Pasachoff, [The President's Budget as a Source of Agency Policy Control](#), 125 *Yale Law Journal* 2182 (2016).

The younger generation of administrative law scholars is frighteningly good. They provide helpful motivation to step up one's own game but also opportunities to marvel in the work they are doing. One of my favorite scholars to read is [Eloise Pasachoff](#). (A note: we are not friends. I think I have met her briefly in person only once.) Her latest insightful [article](#) examines the president's power of the purse.

Pasachoff focuses on the Office of Management and Budget's (OMB) role in the agency budget process. Specifically, she describes seven levers of OMB control, finds the process lacking on certain normative criteria, and then proposes reforms to the political branches and the administrative state to improve accountability. If OMB's regulatory review worries you, Pasachoff has bad news, arguing that OMB's budget role is more problematic.

There is a cottage industry of scholarship about OMB's role in agency rulemaking through the Office of Information and Regulatory Affairs (OIRA) (to which I have contributed). OMB's budget role is likely more significant. Compared to OIRA, Pasachoff tells us that there are more staff members committed to the budget process, that these officials (some career, some political) are more proactive and have more authority over independent regulatory commissions and boards, and that their attention is not limited to significant rulemaking but rather encompasses anything on which the agency spends money.

The main contribution of the article is descriptive. Pasachoff lays out seven levers wielded by OMB. Three operate during budget preparation: "(1) a *form-and-content lever*, under which OMB sets *ex ante* requirements for the budget and policy proposals that agencies must submit for OMB's review; (2) an *approval lever*, under which OMB must consent to those budget and policy requests *ex post*; and (3) a *confidentiality lever*, under which OMB restricts what agencies may disclose about this process." (P. 2209.) Notably, while almost all independent regulatory commissions and boards do not submit significant regulations to OIRA for review (the Equal Employment Opportunity Commission is an outlier), even agencies that can, by statute, submit their own budgets to Congress must include materials from OMB. And all agency officials, no matter the agency's structure, fall under the confidentiality provisions.

OMB uses two additional levers during the budget execution process: (1) "the formal *specification lever*, through which it 'apportions' and otherwise defines how agencies spend the funds Congress has appropriated"; and (2) "the informal *monitoring lever*, through which it oversees agencies' implementation of their programs." (P. 2288.) If OMB places additional conditions on agency spending through apportionments, those OMB "footnotes are subject to the Anti-Deficiency Act. . . ." (P. 2299.) I have recently started teaching the Anti-Deficiency Act in Administrative Law; it's on the books (unlike the REINS Act, yet), and it is a powerful oversight tool.

Finally, OMB employs two levers in its management agendas: (1) "the *Presidential Management Agenda lever*, which sets forth presidential initiatives ostensibly designed to improve the administration of government but that often have a substantive policy overlay"; and (2) "the *budget-nexus lever*, which connects these management initiatives to the budget process." (P. 2238.) For instance, under President Obama, the Evidence and Evaluation Agenda emphasized "evidence-based policymaking," moving agency funds and influencing program evaluation.

If you have not heard of OMB's Resource Management Offices (RMOs), the entities moving all these levers, you should read Parts I and II right away. They give you necessary background information about OMB and lay out the

specific levers described above, drawing on details from OMB documents and examples. Pasachoff has considerable mastery of complicated institutions and processes yet still is clear in her explanations.

The article also makes a normative contribution. In Part III, although Pasachoff notes some benefits from OMB's budgetary control (including its legality and coordination), she concludes that there are "troubling challenges to accountability." (P. 2289.) Pasachoff seems most troubled by the lack of transparency—of how the budget process operates, who meets with the RMOs, the existence and extent of disagreements between RMOs and agencies, and the details of final execution decisions. In Part IV, Pasachoff makes a series of proposals for reforming OMB's role in the budget process. The most realistic have grounding in OIRA practices (at least as those practices are supposed to occur): specifically, calling for information on the budget process (as an abstract matter) and who meets with RMOs. It also seems sensible for final execution decisions (such as apportionment footnotes) to be disclosed. Her proposals to disclose pre-decisional budget information and to make some RMO officials subject to Senate confirmation (to increase their accountability) are, however, significantly more controversial.

There is more we should want to know about agency budgets. Pasachoff could not take on everything, providing us critical information about OMB. There are both horizontal and vertical components of the agency budgeting process. The President submits a budget to Congress, but Congress appropriates the funds (with presentment to the President, of course). Thus, there is the horizontal relationship between the White House and Congress to consider, where the type of agency likely plays a role (for instance, the alignment between the agency's interests and presidential objectives (or congressional ones)). Congress has a budget agency too, the Congressional Budget Office (CBO). Lisa Schultz Bressman and Abbe Gluck have done some interesting work on how CBO scoring affects legislative delegations to agencies. How does CBO constrain what OMB can do (and vice-versa)? In addition, the Office of Legal Counsel (OLC) at DOJ plays an important role in assessing potential violations under the Anti-Deficiency Act. How do OLC's obligations interact with OMB's? I hope scholars continue to follow the money.

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