When the Government Breaks Its Financial Promises

Author : Eloise Pasachoff

Date : July 20, 2020

Matthew B. Lawrence, *Disappropriation*, 120 **Colum. L. Rev.** 1 (2020).

What happens when Congress enacts a permanent commitment to pay for some ongoing activity, but then fails to appropriate the funds necessary to do so? Until recently, this phenomenon was almost unheard of. But contemporary examples abound. For example, Congress failed to fund different two different provisions of the Affordable Care Act that had committed the federal government to pay insurers through the "risk corridors" program and through "cost-sharing reductions"; failed to fund tribes who had elected under the Indian Self-Determination and Education Act to provide services that had previously been provided by the federal government; and failed to fund the Children's Health Insurance Program, a complex cooperative federalism program that is deeply entrenched, albeit in different ways, in states' health care coverage for children. These examples either reflect or generate inter-branch conflict, implicating the executive branch, and often courts, in what may at first glance seem to be simply an intra-legislative breakdown.

We need a vocabulary to identify and describe this phenomenon and a framework through which to understand and assess it. Matthew Lawrence's new article *Disappropriation* does just that.[1]

Disappropriation, as Lawrence defines it, is "legislative failure to appropriate funds necessary to honor a government commitment in time to honor that commitment." Disappropriation results from "the dissonance between Congress's legislative power and its appropriations power." In other words, Congress can enact laws committing the federal government to pay for something, but unless it also designates a source of funds, it has not provided an actual appropriation, as required by the Appropriations Clause.

Sometimes, Congress enacts legislation that harmonizes these powers, providing both a commitment to pay and an ongoing permanent appropriation. Think, for example, of Social Security and Medicare. Other times, however, Congress enacts legislation that reflects dissonance between these powers, committing the government to pay but depending for funding on the annual appropriations process. Food stamps and Medicaid, as "appropriated entitlements," fall into this category.

When the dissonance between Congress's legislative and appropriations powers results in a disappropriation, or even comes close to it, negative consequences can ensue. For example, those relying on the government's anticipated payments can face devastating financial losses, with a particularly burdensome disparate impact on less well-capitalized smaller businesses and individuals without the means to survive the delay associated with a legal or political battle over payment. The rule of law also suffers, in that the executive branch is forced to violate a statutory command because it is without the means to do so. Disappropriation can also result in a problematic kind of delegation, where the executive branch is left to pick and choose how to dole out whatever minimal funds exist to support the commitment in the absence of an intelligible principle, because the law never contemplated this kind of executive discretion.

At the same time, as Lawrence points out, strategic exploitation of dissonance between Congress's legislative and appropriations powers can result in a threat of disappropriation that may have salutary consequences. While permanent commitments shift inter-branch powers towards the executive branch to implement those commitments, annual appropriations pull some of the power back towards Congress. This fact may strengthen Congress's oversight function. For example, Congress can use the threat of disappropriation to extract executive commitments to produce

documents or testify in committee. The threat of disappropriation can also empower blocks in Congress other than party leadership, so that issues of importance to other groups (members of the minority, committees) can rise to salience.

Is there a way to prevent the negative consequences of dissonance that result from an actual disappropriation while retaining the benefits that accrue from strategic exploitation of the threat of disappropriation? Lawrence suggests that there is a category of rules that does just this: rules that "promote durability (the likelihood that a policy will stay in place and so its capacity to engender reliance) but not entrenchment (the difficulty of changing policy for a majority that wishes to do so)." The key, he argues, is to prevent "bargaining failure," where a disappropriation results because of either "uncertainty surrounding the impact of legislative action or inaction" or "private information about the consequences of disappropriation."

In light of this goal, he proposes that courts adopt an interpretive presumption against disappropriation of unambiguous legal commitments; welcome lawsuits by civil servants to enforce disappropriation as a superior alternative to resolving questions about legislative standing; offer expedited declaratory (rather than injunctive) relief when there is a dispute about whether a disappropriation has occurred; and "seek to minimize interference with the political branches and reduce uncertainty surrounding the potential impacts of future disappropriations" when considering claims for damages in any individual disappropriations case. Lawrence's careful analysis of each of these suggestions provides a critical tool for courts and litigants in thinking through the long-term, systemic implications of different paths for resolving discrete legal controversies.

Lawrence's contribution is a welcome addition to the growing body of administrative law scholarship on federal funding. In a world where inter-branch disputes increasingly involve money—building a wall at the southern border with funds that far exceed Congress's appropriations, placing a hold on aid to Ukraine while asking for investigations of political rivals, limiting oversight over Coronavirus relief—insights like the ones Lawrence offers in this excellent article are vital.

1. I commented on a draft of the article for the 2019 Administrative Law New Scholarship Roundtable.

Cite as: Eloise Pasachoff, *When the Government Breaks Its Financial Promises*, JOTWELL (July 20, 2020) (reviewing Matthew B. Lawrence, *Disappropriation*, 120 **Colum. L. Rev.** 1 (2020)), https://adlaw.jotwell.com/when-the-government-breaks-its-financial-promises/.