



Organizing Executive Branch Agencies: Who Makes the Call?

Jared P. Cole

Legislative Attorney

June 27, 2018

In a series of [executive orders](#), [directives](#), and publicly released [recommendations](#), the Trump Administration has proposed reorganizing the executive branch. The reorganization proposals range from restructuring entities within an existing agency, to moving entities from one existing agency to another, to consolidating existing agencies into newly created departments, to privatizing certain government agencies. The Administration has [indicated](#) that it considers some of these proposals to be within its existing authority, while others may require new legislation authorizing such action. These orders and proposals have prompted a [recurring question](#) concerning the composition of the federal government: who decides how to organize agencies and departments within the executive branch? The ultimate answer to this question is Congress. Legislative enactments create executive agencies and delegate authority to those entities to carry out various statutory functions and duties. But executive branch agencies also typically enjoy some discretion in determining how best to structure themselves to carry out their statutory responsibilities, provided that reorganization does not conflict with their governing statutes or legislative funding restrictions. This Legal Sidebar lays out the applicable legal considerations relevant to analyzing potential agency reorganizations; for consideration of the potential policy implications of such executive branch action, see this [CRS Insight](#).

Constitutional Principles

As an initial matter, the respective constitutional authorities of the political branches guide any discussion of the organization of executive branch agencies. Agencies within the executive branch are established [pursuant to legislation](#) enacted by Congress. In particular, Congress may act pursuant to its specific, [enumerated](#) authorities to establish such agencies. Congress's power to establish agencies may be enhanced by the [Necessary and Proper Clause](#), which [permits](#) Congress to enact laws that are convenient, useful, or conducive to the [exercise](#) of Congress's enumerated powers. The Necessary and Proper Clause also enables Congress to enact legislation to assist in the execution of other provisions of the Constitution,

Congressional Research Service

7-5700

CRS Legal Sidebar

www.crs.gov

Prepared for Members and

LSB10158

Committees of Congress

including aiding the President in carrying out his own constitutional duties (e.g., the establishment of the [Office of the Pardon Attorney](#) in the Department of Justice to assist the President in carrying out the pardon power). Agencies created by Congress generally are [limited](#) to taking actions authorized by law and must comply with [statutory restrictions](#) placed on those agencies' structure and scope of authority. This means that efforts to reorganize executive branch entities must locate power to do so within existing statutory authority or additional legislation permitting the action.

The Constitution also separates the power to create executive branch offices from the power to appoint the leadership of those entities. The [Appointments Clause](#) of the Constitution provides that those principal "officers" not expressly mentioned in the Constitution (i.e., individuals who exercise [significant authority](#) and report directly to the President), but "established by law," must be appointed by the President and confirmed by the Senate. Congress "may by law" place the power of appointment for "inferior officers" with the President alone, a department head, or a court of law. The Constitution thus provides that Congress establishes executive branch offices via enacted legislation (other than those executive branch components expressly created by the Constitution), but places the power of appointment of the heads of executive branch departments with the President, subject to Senate confirmation. The Appointments Clause therefore offers another constraint upon the executive branch's ability to reorganize itself without congressional authorization. Any reorganization plan that aims to unilaterally create a [free-standing](#) constitutional "office" likely requires additional legislation to implement, and that office must be headed by an officer appointed by the President and confirmed by the Senate. Notably, the executive branch itself has [concluded](#) that the President generally lacks independent power to create a new federal office headed by a principal officer.

Further, Congress enjoys the power of the purse on account of its [spending power](#) and the prohibition the [Appropriations Clause](#) places upon the spending of money drawn from the Treasury except pursuant to an authorizing statute. And under the [Anti-Deficiency Act](#), federal officers and employees are barred from spending money that exceeds appropriated funds. The consequence of these statutory and constitutional constraints upon agencies' use of federal funds not only affects how those entities may spend allocated money, but also limits executive discretion to transfer functions performed by one executive branch component to another. If Congress appropriates funds to a specific executive branch entity to implement a particular function or duty, the executive branch may not reassign those funds to a different entity to carry out those authorities without further legislative authorization.

Nevertheless, Congress's authority over the structure and functions of executive agencies and departments is not all-encompassing. External constraints found elsewhere in the Constitution may place some limits on congressional control over agency functions. For example, Congress [cannot compel](#) the State Department to perform functions which contravene the President's exclusive power to recognize a foreign state. The Constitution also [vests](#) the President with the power to execute the laws and permits the appointment of executive branch officers, confirmed by the Senate, to help him do so. And while the Appointments Clause restrains the ability of the executive branch to unilaterally create and appoint its own principal officers, it also bars Congress from [creating](#) an agency headed by a principal officer over whom Congress, rather than the President, retains control.

More generally, because delegations of statutory authority are often written broadly, at least some residuum of [discretion](#) is typically inherent in the execution of the law. In fact, some statutes [explicitly](#) allow certain agencies to reorganize within circumscribed limits; others [authorize](#) agencies to [manage their own affairs](#), which may include establishing offices or delegating authority; and another [authorizes](#) the President to delegate powers statutorily granted to him. In sum, statutory grants of authority to executive branch agencies often expressly or impliedly confer those agencies with some discretion over how they organize themselves to carry out their responsibilities under the law.

Reorganization Practice for Executive Agencies

As a practical matter, individual agencies often reorganize themselves within the statutory limitations placed by Congress. Statutory authorizations to an agency often do not precisely specify a particular entity that must carry out a function or duty. What might be referred to as an “intra-agency” reorganization could include delegating, re-delegating, or even sub-delegating duties and functions within an agency as [authorized by statute](#). Likewise, an intra-agency reorganization might [involve](#) the establishment, modification, or transfer of various entities pursuant to discretionary authority conferred by statute. For example, pursuant to its [statutory authority](#) to organize the Department of Homeland Security (DHS), the Secretary of DHS [moved](#) the Federal Air Marshal Service from the Transportation Security Administration (TSA) to another DHS component, Immigration and Customs Enforcement, in 2003, and then moved it back to TSA in 2005. Moreover, as previously noted, the President is authorized by [statute](#) to delegate functions and duties expressly vested in him by Congress from one agency to another. For instance, the President has sometimes [authorized](#) the Secretary of the Treasury to carry out the powers vested to President by the [International Emergency Economic Powers Act](#) when declaring a national emergency.

Authorizing legislation has been understood as necessary for government-wide reorganizations which involve, for example, transferring entities from one agency or department to another, or combining two or more agencies into a newly created department. In some instances, details of an executive reorganization were largely established via legislation that did not delegate notable reorganization authority to the President, such as the [National Security Act of 1947](#) (and its amendment in 1949), which, among other things, created the Department of the Air Force and reorganized the military branches into the Department of Defense. In other instances, Congress has explicitly granted the President substantial reorganization authority. For example, under a since-expired [statute](#), the President was authorized to submit [wide-ranging](#) reorganization plans to Congress that would go into effect unless one or both houses of Congress passed a resolution rejecting the plan (a procedure known as a “legislative veto”). This process was [used](#) to [create](#) the Environmental Protection Agency. However, Congress allowed that reorganization authority to expire shortly after the Supreme Court, in a different context, [ruled](#) that legislative vetoes were unconstitutional. More recently, Congress [expressly](#) permitted the President to transfer certain executive branch functions and duties into the newly established DHS, subject to a joint resolution of disapproval (that reorganization authority also has since expired).

The extent of discretion afforded under various historical reorganization authorities conferred by Congress has typically remained untested. This is perhaps because of difficulties establishing [standing](#) in federal court to challenge a reorganization. When disputes have arisen between Congress and the executive branch concerning agency reorganization, such disputes often have been [worked out](#) between the political branches through accommodation and compromise.

The limited number of cases that address delegations of agency authority have typically involved an agency head’s delegating power to a lower-level official. Courts [generally](#) have [upheld](#) such delegations of authority [unless](#) a statute has precluded the action. Courts have also observed that agencies often possess statutory authority to [establish entities](#) within those agencies to carry out their statutory duties and functions. That said, agencies cannot contradict the terms of a governing statute or a relevant appropriations measure.

Application to the Trump Administration’s Proposed Executive Branch Reorganization

The Trump Administration has [indicated](#) that it considers some of its reorganization proposals to be within its existing administrative discretion, although “more significant changes” will require

congressional action. As discussed above, determining the extent of the executive branch's power to reorganize requires consideration of the scope of a particular agency's statutory authority. In other words, how much discretion has Congress bestowed on an agency to reshape itself?

Some, though not necessarily all, of the Trump Administration's reorganization proposals appear likely to require authorizing legislation from Congress. For instance, proposals to transfer an entity or function vested by Congress in a particular agency to another agency, or to combine statutorily created entities into a new department, likely require new legislation authorizing the action. Likewise, a proposal to privatize an agency and eliminate it from the federal government would require congressional authorization (privatization of federal government agencies may raise additional [constitutional questions](#) not addressed in this Sidebar). Whether a proposed reorganization that would transfer functions or duties *within* an agency to another part of the same agency requires congressional authorization would depend on the particular governing statute and appropriations specific to that agency. And a plan that would redelegate authority that is statutorily vested in the President from one agency head to another is unlikely to require new legislation authorizing the move given existing [statutory authorization](#) (assuming the plan does not violate a relevant appropriations provision). Executive authority to implement any reorganization proposal ultimately will depend on the circumstances of the particular plan at issue and the precise scope of authority delegated by Congress.
