Challenging Agency Closure: The Department of Education

February 2025

Issue Brief

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I. INTRODUCTION

The Trump administration, reportedly acting at the behest of the U.S. DOGE Service and Elon Musk, has repeatedly sought to shutter federal agencies unilaterally.[1] It first targeted the U.S. Agency for International Development ("USAID"), freezing the grants it administers,[2] seeking to place the vast majority of its staff on administrative leave, and directing much of its work overseas to stop.[3] Next was the Consumer Financial Protection Bureau ("CFPB"). Agency leadership ordered CFPB employees largely to stop work,[4] requested zero dollars in funding,[5] and fired some number of so-called "probationary" employees.[6] Litigants moved quickly to challenge these efforts, and while they have won some (at least momentary) concessions from the government as to the CFPB, a court declined to convert a temporary restraining order as to USAID into a preliminary injunction.[7]

The Department of Education may be next on the administration's list. Consistent with the advocacy of Project 2025, the Trump campaign promised to eliminate it.[8] And a prominent Trump ally recently debuted the latest iteration of that plan—"spin[ning] off" the Department's student loan portfolio to another agency, converting federal funding for elementary and secondary education to block grants, and "shut[ting] down the Department of Education's" so-called "centers for ideological production," including its Office of Civil Rights.[9] It appears efforts to dismantle the Department have started. DOGE has already moved to "terminate" many of the Department's contracts,[10] and many probationary employees have apparently been fired.[11] While the Trump administration and its allies have

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[1] *See, e.g.*, Bobby Allyn & Shannon Bond, *Elon Musk is Barreling into Government with DOGE, Raising Unusual Legal Questions*, NPR (Feb. 3, 2025).

[2] Yonette Joseph et al., *Trump's Foreign Aid Freeze Has Created Chaos. Here Is What to Know*, N.Y. Times (Feb. 9, 2025)

[3] Humeyra Pamuk, *Trump Administration Puts on Leave USAID Staff Globally in Dramatic Aid Overhaul*, Reuters (Feb. 4, 2025).

[4] Stacy Cowley, *Confusion Reigns as 'a Wrecking Ball' Hits the Consumer Bureau*, N.Y. Times (Feb. 10, 2025).

[5] Megan Messerly et al., *Vought Cuts off CFPB Funding, Saying It's not Necessary to Run the Agency*, Politico (Feb. 9, 2025).

[6] Douglas Gillison & Chris Prentice, *US Consumer Watchdog Fires Some Probationary Staff, Sources Say*, Reuters (Feb. 12, 2025).

[7] *See* *Global Health Council v. Trump*, No. 25-cv-402 (D.D.C.) (USAID); *Nat'l Treasury Emps. Union v. Vought*, No. 25-cv-381 (D.D.C.) (CFPB).

[8] *See* 2024 GOP Platform: Make America Great Again!, at 13 ("We are going to close the Department of Education in Washington, D.C.").

[9] Christopher F. Rufo, *How to Dismantle the Department of Education*, City J. (Feb. 11, 2025).

[10] Zach Montague & Dana Goldstein, *Musk Team Announces Millions in Cuts to Education Dept. Amid Legal Pushback*, N.Y. Times (Feb. 11, 2025).

[11] Shannon Bond et al., *Sweeping Cuts Hit Recent Federal Hires as Trump Administration Slashes Workforce*, NPR (Feb. 13, 2025).

previously acknowledged that closing the Department would require congressional action,[12] they nonetheless appear increasingly emboldened to close agencies by unilateral executive action.[13]

That is unlawful. The President has no power to close an agency outright. Nor may he, as a general matter, direct agencies to stop disbursing funds appropriated by Congress, stop an agency from fulfilling its statutory duties, or reorganize agencies at will.

This Issue Brief explains those principles, with a focus on the campaign against the Department of Education. First, it lays out the constitutional and statutory reasons why a President may not unilaterally close or restructure a federal agency created by Congress. Then it lays out a series of claims litigants may consider asserting against presidential or agency action to shutter the Department.

At the outset, we note two provisos. First, while we focus on the Department of Education, the reasoning in this Issue Brief should largely apply to efforts to close other agencies too[14] — and perhaps also to efforts to shutter unilaterally offices within agencies.[15] Second, our analysis — in particular, of potential legal claims — is highly provisional. Uncertainty surrounding the Trump administration's plans makes it hard to predict the specifics of the claims that may be asserted. Instead, we describe a framework for broad categories of claims that litigants might pursue.

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[12] *See* Mackenzie Wilkes & Rebecca Carballo, *Linda McMahon Explains Donald Trump's Plan for the Department of Education*, Politico (Feb. 13, 2025).

[13] *See, e.g.*, @realchrisrufo, X (Feb. 11, 2025, 5:57 p.m.) ("[Congressional action to close the Department of Education is] the ideal, but the president has shown that there is a larger amount of discretion than many had assumed (see USAID experience)").

[14] For instance, President Trump has floated "getting rid" of FEMA. Will Weissert et al., *Trump Proposes 'Getting Rid of FEMA' While Touring Disaster Areas*, Associated Press (Jan. 24, 2025). And, as explained, his administration is already taking action against USAID and the CFPB.

[15] *See, e.g.*, Donald Judd & Katelyn Polantz, *White House Orders Government DEI Employees to be Placed on Leave*, CNN (Jan. 22, 2025).

II. THE PRESIDENT HAS NO AUTHORITY TO CLOSE THE DEPARTMENT OF EDUCATION

As a general matter, the power to create and abolish agencies lies with Congress. As the Supreme Court put it nearly a century ago, "[t]o Congress under its legislative power is given the establishment of offices [and] the determination of their functions and jurisdiction."[16] "Administrative agencies," in other words, "are creatures of statute."[17]

Indeed, Congress has asserted its prerogative to organize agencies since the founding. The first Congress rejected a proposal to leave the organization of the executive departments up to the President, instead enacting legislation establishing and structuring agencies, down to specific offices and officers.[18] This historical understanding, which has persisted over the centuries, supports that Congress, not the President, has the inherent authority to establish, organize, reorganize, and abolish agencies. As the Supreme Court has explained, "long settled and established practice is a consideration of great weight in a proper interpretation of the constitutional provisions regulating the relationship between Congress and the President."[19]

Congress has, on occasion, authorized the President to reorganize agencies—a practice consistent with Congress's ultimate say over them. Repeatedly during the twentieth century, Congress enacted Reorganization Acts allowing the President to restructure agencies through expedited procedures.[20] The most recent of these expired in 1984.[21] Vivek Ramaswamy, a Trump administration ally formerly associated with DOGE, has argued that a provision of the 1977 Reorganization Act remains in effect and authorizes the President to

[16] *Myers v. United States*, 272 U.S. 52, 129 (1926).

[17] *Nat'l Fed. of Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022); *see Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

[18] *See* Peter M. Shane, *Presidents May Not Unilaterally Dismantle Government Agencies*, The Atlantic (Feb. 12, 2025).

[19] *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (internal quotation marks omitted) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

[20] *See* Henry B. Hogue, *Executive Branch Reorganization* 6–7, R44909, Cong. Rsch. Serv. (Aug. 3, 2017). These reorganization laws frequently provided that presidential reorganization plans would take effect subject to either House of Congress's veto. *Id.* at 6. In 1983, the Supreme Court held such legislative vetoes unconstitutional. *INS v. Chadha*, 462 U.S. 919 (1983). The 1984 Reorganization Act therefore required Congress to approve any plan submitted by the President by joint resolution before such a plan could take effect. *See* Pub. L. 98-614, 98 Stat. 3192 (1984).

[21] *See id.*

restructure agencies at will.[22] But that provision merely authorizes the President to "from time to time examine the organization of all agencies" and "determine what changes in such organization are necessary to carry out" Congress's reorganization policy.[23] The President's authority to actually execute a reorganization plan has long since expired.[24]

Since the expiration of the most recent Reorganization Act, Presidents wishing to alter agencies have recognized that they need Congress's permission to do so. Presidents George W. Bush and Barack Obama called, unsuccessfully, for the enactment of reorganization legislation.[25] Similarly, the Heritage Foundation has acknowledged that "to accomplish major reorganization objectives" at federal agencies, the President "will need explicit statutory authority from Congress."[26] Congress's decision to withhold that authority should be understood as disapproving of any general presidential authority to reorganize what Congress has made.

Pursuant to its constitutional authority, Congress established the Department of Education and many of its offices by statute in 1979 with the enactment of the Department of Education Organization Act, which made express findings about the importance of the Department's mission.[27] Over the years, Congress, through other statutes, vested the Department with numerous other duties. For example, pursuant to statutory mandates the Department disburses essential funds to support low-income elementary and secondary students[28] and students with disabilities,[29] manages federal postsecondary student aid programs,[30] assesses educational achievement across the nation,[31] and administers Title IX programs through its Office of Civil Rights.[32]

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[22] See Untitled Ramaswamy Campaign White Paper 2–3, *linked in* Chris Cameron & Charlie Savage, Ramaswamy Says He Would Fire Most of the Federal Work Force if Elected, N.Y. Times (Sept. 13, 2023).

[23] 5 U.S.C. § 901(d).

[24] *Id.* § 905(b) ("A provision contained in a reorganization plan may take effect only if the plan is transmitted to Congress . . . on or before December 31, 1984.").

[25] *See* Hogue, *supra*, at 7.

[26] Paul J. Larkin & John-Michael Seibler, *The President's Reorganization Authority*, Heritage Foundation (Jul. 12, 2017).

[27] Department of Education Organization Act, Pub. L. 96-88, 93 Stat. 669 (1979) (codified as amended at 20 U.S.C. § 3401 *et seq.*); *see also* 20 U.S.C. §§ 3411–3427 (offices); *id.* §§ 3401–3402 (findings and purpose).

[28] The largest source of funding for this purpose is the Title I program, 20 U.S.C. § 6301–6304. *See* Elementary and Secondary Education Act, tit. I, Pub. L. 89-10, 79 Stat. 27 (1965), as amended by Every Student Succeeds Act, Pub. L. 114-95, 129 Stat. 1802 (2015).

[29] *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1411–1419 (providing for federal financial assistance for the education of students with disabilities).

[30] *See* 20 U.S.C. §§ 1070–1099d (providing for a range of grant and loan programs for postsecondary students).

[31] *See id.* §§ 9501–9631 (providing for research and statistical programs including the National Assessment of Educational Progress).

[32] *See id.* § 1681. For an overview of statutes the Department administers, see Rebecca R. Skinner et al., *A Summary of Federal Education Laws Administered by the U.S. Department of Education*, Cong. Rsch. Serv. (Dec. 12, 2024).

Because Congress has established and empowered the Department of Education by statute, the President has no authority to unilaterally abolish it, dismantle it, or otherwise take it apart. Any presidential action to close the Department, stop it from disbursing funds, or impair its statutory duties would be squarely "incompatible with the expressed . . . will of Congress," a circumstance in which the President's power "is at its lowest ebb."[33] Since the nation's early days, the Supreme Court has maintained that "the obligation imposed on the President to see the laws faithfully executed" prohibits him from "dispensing" with Congress's laws by "forbid[ding] their execution."[34]

Moreover, hostility toward the Department is not new. There have been numerous attempts to abolish it — all of which have been based on proposed legislation, not presidential authority. Shortly after the Department was established, President Reagan pushed to close it — by seeking legislation, which Congress did not pass.[35] Since then, numerous bills have been introduced to shutter the Department and, likewise, none became law.[36] Each of these efforts reflects the uncontroversial understanding that only Congress may abolish an agency it created.

To be sure, Congress has granted the Secretary of Education — though not the President — the authority to modestly restructure the Department.[37] That power is generally limited to "allocat[ing] or reallocat[ing] functions among the offices of the Department."[38] While the Secretary may "establish, consolidate, alter, or discontinue . . . organizational entities within the Department as may be necessary or appropriate," that authority is narrow.[39] The Secretary generally may not abolish offices or departmental units established

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[33] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[34] *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 613 (1838).

[35] *See* Ronald Reagan, Address Before a Joint Session of the Congress Reporting on the State of the Union (Jan. 26, 1982) ("The budget plan I submit to you . . . will realize major savings by dismantling the Departments of Energy and Education.").

[36] *See, e.g.*, Mona Vakilifathi, *Why Trump is Trying to Reduce the Status of the Department of Education*, Brookings Inst. (Jul. 16, 2018) (laying out a series of bills introduced in Congress to abolish or defund the Department of Education in the 2010s).

[37] *See* 20 U.S.C. § 3473(a).

[38] *Id.* § 3473(a).

[39] *Id.*

by law,[40] or transfer or alter functions statutorily assigned to a particular entity or officer.[41] The authority to "reallocate" statutory functions among Department offices does not permit the Secretary (or the President) to eliminate those functions, much less the Department as a whole. And Congress's provision of a modest reorganization power implies that more dramatic moves are not authorized.[42]

Any attempt to use the statutory reorganization power to accomplish the dramatic restructuring or elimination of the Department that the Trump administration appears to have planned would likely run afoul of the major questions doctrine. Under that doctrine, courts require "clear congressional authorization" of executive action addressing questions of major "economic and political significance."[43] The doctrine is based on the inference that Congress does not use longstanding, modest statutory provisions to authorize novel and sweeping exercises of power — that it does not hide "elephants" in "mouseholes."[44] Using a statutory provision authorizing narrowly defined reorganizations (that must be consistent with the Department's statutory structure and duties) as a tool to abolish or dismantle the Department as a whole would surely trigger major questions scrutiny.[45]

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[40] *See id.* § 3473(a)(1), (a)(2) (the Secretary's reorganization authority does not extend to "any office, bureau, unit, or other entity transferred to the Department and established by statute" or permit "the abolition of organizational entities established by this chapter"). The next subsection of the statute lists fourteen offices and programs that may be "consolidate[d], alter[ed], or discontinue[d]," or have their "functions" "reallocate[d]" by the Secretary. *Id.* § 3473(b)(1). Even then, the Secretary must give the congressional committees of jurisdiction "a full and complete statement of the action proposed to be taken pursuant to this subsection and the facts and circumstances relied upon in support of such proposed action" and then wait ninety days before acting. *Id.* § 4373(b)(2).

[41] *See id.* § 3473(a)(1), (a)(3) (the Secretary's reorganization authority does not extend to "any function vested by statute in" "any office, bureau, unit, or other entity transferred to the Department and established by statute" or permit "the alteration of the delegation of functions to any specific organizational entity required by this chapter").

[42] *Cf. Halvorson v. Slater*, 129 F.3d 180, 185–86 (D.C. Cir. 1997) (analyzing an agency's claim of authority in light of "the statutory construction principle, *expressio unius est exclusio alterius*, that is, the mention of one thing implies the exclusion of another thing" (internal quotation marks omitted)).

[43] *West Virginia v. EPA*, 597 U.S. 697, 721, 723 (2022).

[44] *Id.* at 746–47 (Gorsuch, J., concurring).

[45] *Cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2369 (2023) ("The authority to 'modify' statutes and regulations allows the Secretary [of Education] to make modest adjustments and additions to existing provisions, not transform them.").

III. POTENTIAL CLAIMS

Litigants may bring a number of claims to challenge an attempt by the Trump administration to abolish or dismantle the Department of Education or its statutory functions.

General challenges to agency closure

In general, litigants might be able to rely upon the principles described above to assert challenges to either presidential or agency action to close the Department of Education.

Challenging presidential action. Litigants might challenge presidential action to dismantle the Department of Education as *ultra vires* — that is, contrary to law. In light of "a long history of judicial review of illegal executive action," litigants have "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers."[46] Litigants challenging presidential action might point out both that the President has no authority to abolish an agency unilaterally and that the Constitution's mandate that the President "shall take Care that the Laws be faithfully executed" creates an affirmative obligation to execute the statutes establishing the Department and its functions.[47] Along similar lines, they might allege violations of those statutes to show that the President's action is *ultra vires*.

Challenging agency authority. Litigants might also challenge agency action implementing a presidential directive to shutter the Department of Education under the Administrative Procedure Act ("APA"). Several APA claims might lie, depending on how the relevant agency — presumably the Department — proceeds. Litigants might start by arguing that the agency lacks statutory authority to shutter itself or cease particular functions[48] and that, in fact, such action is contrary to the relevant statutes, which require the Department to exist and operate.[49]

[46] *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 327–28 (2015), including the President, *see, e.g.*, *Youngstown*, 343 U.S. at 583–84; *see generally* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. Chi. L. Rev. 1743 (2019).

[47] U.S. Const. art. II, § 3; *Trump v. United States*, 603 U.S. 593, 626–27 (2024) ("Of course, the President's duty to 'take Care that the Laws be faithfully executed' plainly encompasses enforcement of federal . . . laws passed by Congress.").

[48] *See* 5 U.S.C. § 706(2)(C) (directing reviewing courts to set aside agency action "in excess or statutory jurisdiction, authority, or limitations").

[49] *See id.* § 706(2)(A) (directing reviewing courts to set aside agency action "not in accordance with law"); *supra* nn.28–33 (listing statutes establishing the Department and its duties).

Challenging agency decisionmaking. Depending on how things play out, challengers may bring additional APA claims. The APA proscribes "arbitrary" and "capricious" agency action,[50] meaning that agency action must be "reasonable and reasonably explained."[51] "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[52] Agency action shuttering or restructuring the Department or halting some or all of its activities might be arbitrary and capricious in several respects. The agency might have:

- Failed to consider the factors Congress requires it to consider before taking a particular action, or considered prohibited factors.[53] Litigants may assert such claims (in addition to the contrary to law claims described above) where the agency acts in violation of one or more statutes, or even where it gives undue weight to considerations other than those prescribed by statute;[54]
- Failed to consider "an important aspect of the problem,"[55] such as the disruptive consequences of curtailing Department activities or any reasons in favor of continuing the Department's statutory missions;
- Ignored evidence weighing against closure,[56] as seems to have been the case with the Trump administration's sudden and essentially unreasoned actions to close other agencies;[57]
- Inadequately considered the numerous, strong reliance interests — from, say, state and local education agencies, low-income students and students with disabilities, or postsecondary students reliant on federal aid — implicated by an action;[58]
- Failed to consider less disruptive alternatives to its chosen course;[59]

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[50] 5 U.S.C. § 706(2)(A).

[51] *FCC v. Prometheus Radio Proj.*, 592 U.S. 414, 423 (2021).

[52] *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

[53] *Id.* ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider[.]").

[54] *See Gresham v. Azar*, 950 F.3d 93, 101 (D.C. Cir. 2020), *vacated sub nom. Arkansas v. Gresham*, 142 S. Ct. 1665 (2022).

[55] *State Farm*, 463 U.S. at 43.

[56] *Id.* (agency action arbitrary and capricious where it "offered an explanation for its decision that ran counter to the evidence before the agency").

[57] *See* Pls.' Mot. & Mem. of Law in Supp. of TRO & Prelim. Injunction 27–30, *Global Health Council v. Trump*, No. 25-cv-402 (D.D.C. Feb. 11, 2025) (arguing that agency action to shutter the U.S. Agency for International Development is arbitrary and capricious).

[58] *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020).

[59] *State Farm*, 463 U.S. at 50–51.

- Insufficiently explained its change in position on relevant issues;[60] or
- Given a pretextual reason for its action — that is, hidden its true motivations, in violation of the APA's requirement that an agency "disclose the basis" for its action.[61]

Challenging agency procedures. The APA generally requires that certain rules — so-called "legislative rules" — be issued only after notice and an opportunity for public comment.[62] Agency action to dismantle, reorganize, or stop the work of the Department may, in some circumstances, carry the "force of law" and thus qualify as a legislative rule subject to notice and comment requirements.[63] For instance, a directive to stop work on a statutorily required function might affect the rights of private parties or have the effect of amending existing regulations.[64] If the Department took such actions without taking comments, that might be the basis for an APA claim. And, even if the agency did allow for comments, an arbitrary and capricious claim might lie if it failed adequately to respond to weighty and compelling concerns those comments would likely raise.[65]

Challenges to specific actions

The Trump administration may also choose to close or dismantle agencies in ways that give rise to more specific legal claims. For example, litigants might bring challenges to efforts to stop the disbursement of funds appropriated by Congress, cut agency staff, and halt work on important agency functions.

Challenging unlawful impoundments of federal funding. Much of the Department of Education's work involves disbursing funding. For example, the Department administers the Title I program, through which Congress makes funding available to schools and districts serving students from low-income backgrounds; the IDEA program, which provides funding for the education of students with disabilities; and numerous postsecondary grant and loan programs. If the President or the Department moved to cut off any of these funding streams, the recipients and beneficiaries of such funds might have standing to sue in federal court.[66]

There are multiple substantive claims that could be asserted to challenge the suspension of federal funding. The Executive Branch has no inherent constitutional authority to

[60] *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

[61] *Dep't of Commerce v. New York*, 588 U.S. 752, 784–85 (2019).

[62] 5 U.S.C. § 553(b)–(c); *see, e.g., Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 94 (2015).

[63] *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979).

[64] *See Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109–11 (D.C. Cir. 1993) (discussing attributes of legislative rules).

[65] *Pub. Citizen, Inc. v. FAA*, 988 F.2d

[66] "For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017); *see also Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("[T]he amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes.").

withhold — "impound" — appropriated funds.[67] And Congress has reinforced that constitutional principle by limiting the President's ability to impound funds through the Impoundment Control Act. Litigants may assert that actions to cut off education funding violate that Act.[68] The underlying appropriations statutes may also mandate certain spending.[69] Along similar lines, the Antideficiency Act permits the executive branch to reserve appropriated funds "only . . . to provide for contingencies," "to achieve savings made possible by or through changes in requirements or greater efficiency of operations," or "as specifically provided by law."[70] Litigants may argue that impounding appropriated funds creates an impermissible reserve. Governing for Impact has elsewhere described in greater depth certain claims against unlawful impoundments.[71]

Challenging personnel policies. The Trump administration has wielded power over agency staffing and personnel to gut federal agencies. For example, it is moving to place much of USAID's staff on administrative leave[72] and has fired junior, probationary employees at the CFPB.[73] The White House recently directed agencies to prepare plans for large-scale "reductions in force" ("RIFs").[74] Separately, the administration has adopted a policy commonly known as Schedule F, which is intended to strip numerous nonpartisan civil servants of their job protections;[75] asked agencies to submit lists of probationary employees to the Office of Personnel Management;[76] encouraged agencies to liberally use administrative leave to sideline staff;[77] and purported to fire senior government officials with statutory tenure protections.[78]

The Trump administration's efforts to dismantle the Department of Education may involve some or all of these personnel policies, particularly a large-scale RIF.[79]

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[67] *See, e.g.*, *In re Aiken Cnty.*, 752 F.2d 255, 261 n.1 (D.C. Cir. 2013) (Kavanaugh, J.).

[68] *See* Pub. L. No. 93-344, 88 Stat. 333 (codified as amended at 2 U.S.C. § 682 *et seq.*).

[69] *See, e.g.*, *Train v. City of New York*, 420 U.S. 35 (1975) (interpreting appropriations statute to require agency to spend appropriated funds).

[70] 31 U.S.C. § 1512(c)(1).

[71] *See* Challenging Unlawful Impoundments, Governing for Impact (Feb. 2025).

[72] *See* Pamuk, *supra.*

[73] *See* Gillison & Prentice, *supra.*

[74] *See* Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative, Exec. Order 14,210, 90 Fed. Reg. 9669 (Feb. 11, 2025).

[75] *See* Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce, 20 Fed. Reg. 8625 (Jan. 20, 2025).

[76] Memorandum from Charles Ezell, Acting Director 1, U.S. Off. of Pers. Mgmt. (Jan. 20, 2025).

[77] *Id.* at 2.

[78] *See, e.g.*, Andrea Hsu, *Trump Fires EEOC and Labor Board Officials, Setting Up Legal Fight*, NPR (Jan. 28, 2025); Manu Raju et al, *Trump Fires Inspectors General from More Than a Dozen Federal Agencies*, CNN (Jan. 25, 2025).

[79] *See* Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative, *supra.*

Litigants looking to challenge moves related to the federal workforce may need to overcome a procedural hurdle to be heard in federal court. Courts have held that claims challenging federal personnel actions, and even broader personnel policies, generally must be heard by the Merit Systems Protection Board, an Executive Branch adjudicative body, before proceeding to federal court.[80] The Trump administration, however, appears set to weaken the MSPB. It recently purported to remove one of the MSPB's members, possibly as a first step toward depriving it of a two-member quorum.[81] Without a quorum, the MSPB would be unable to hear or decide federal employees' claims. This was the result when, from 2017 until 2022, the MSPB lacked a quorum.[82]

Ironically, though, that strategy may make recourse to federal court easier. The Supreme Court has explained that when Congress creates a statutory system to adjudicate certain types of claims (like the MSPB review scheme), that might implicitly deprive the federal courts of jurisdiction over those claims.[83] But a crucial premise of that so-called "channeling" doctrine is that Congress's remedial scheme is, in fact, capable of affording claimants "meaningful judicial review."[84] Courts have held that, in general, those challenging federal personnel policy may obtain meaningful relief by going to the MSPB (whose decisions are subject to plenary review in the U.S. Court of Appeals for the Federal Circuit).[85] But that reasoning breaks down if the MSPB, deprived of a quorum, grinds to a halt. Then, federal employees' only option for any judicial review would be through an action in federal district court. That consideration could weigh in favor of federal jurisdiction.[86] After all, as the Supreme Court has explained, "Congress rarely allows claims about agency action to escape

[80] *See, e.g.*, *Fed. Law Enforcement Officers' Ass'n v. Ahuja*, 62 F.4th 551, 558, 560 (D.C. Cir. 2023).

[81] Parker Purifoy, *Trump Fires Democratic Member of Federal Staff Appeals Board*, Bloomberg Law (Feb. 11, 2025).

[82] Merit Sys. Protection Bd., Frequently Asked Questions About the Lack of Quorum Period and Restoration of the Full Board (Feb. 27, 2023). From March 2019 until March 2022, the MSPB lacked any members at all. *See* Merit Sys. Protection Bd., Board Members' Service.

[83] *See Axon Enters. v. FTC*, 598 U.S. 175, 185–188 (2023) (explaining, in general, that "[a] special statutory review scheme . . . may preclude district courts from exercising jurisdiction over challenges to federal agency action"); *see id.* at 187 (explaining that "federal employees challenging discharge decisions" must "seek review in the MSPB and then, if needed, in the Federal Circuit").

[84] *Elgin v. Dep't of Treasury*, 567 U.S. 1, 15–16 (2012).

[85] *Id.*; *Am. Fed'n of Gov't Emps. v. Trump*, 929 F.3d 748, 755–59 (D.C. Cir. 2019).

[86] *See McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 484 (1991) (allowing a claim to proceed in federal court because, among other things, were plaintiffs required "to avail themselves of the limited judicial review procedures set forth [by statute], meaningful judicial review of their statutory and constitutional claims would be foreclosed")

effective judicial review."[87] Nevertheless, federal courts may remain reluctant to take jurisdiction over claims arising out of federal personnel actions.[88]

The specific claims litigants might be able to bring depend on how the Trump administration elects to eliminate agency personnel, including whether they do so by way of a RIF, the administration's Schedule F proposal, or the widespread use of paid administrative leave.

RIFs. Agencies have discretion in carrying out RIFs, but government-wide regulations set some limits on when they are appropriate. Under those regulations, a RIF may occur, among other circumstances, when "required because of lack of work; shortage of funds; insufficient personnel ceiling; [or] reorganization."[89] Courts have heard claims that RIFs were not instituted for *bona fide* reasons. The Federal Circuit, for instance, has surveyed case law holding that "[a] reduction in force may not be used as a disguised adverse action to remove or demote a particular employee,"[90] and has held that at least a specific kind of RIF provided for in statute "does not include actions to separate current occupants from their positions simply to make room for others to be installed in the positions instead."[91] The MSPB has taken a similar tack, holding that "the agency has the burden to prove by preponderant evidence that it properly invoked and implemented the pertinent regulations during a RIF" by "coming forward with evidence showing a RIF was undertaken for one of the approved reasons."[92] Courts frequently review, and scrutinize, RIFs.[93] Beyond that, it is not certain how

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[87] *Axon Enters.*, 598 U.S. at 186. Litigants might also argue that the MSPB, even under ideal conditions, is incapable of providing an effective remedy when executive action purports to eliminate an agency or office altogether.

[88] One district court concluded (albeit with little analysis in a *pro se* case), that the MSPB's lack of a quorum did not give rise to district court jurisdiction under the Uniformed Services Employment and Reemployment Rights Act. *Jolley v. United States*, 549 F. Supp. 3d 1, 6 (D.D.C. 2021) ("The court sympathizes with Plaintiff's predicament and understands his frustration. But it finds no basis, statutory or otherwise, to say that a court's subject matter jurisdiction can turn on the presence or absence of political gridlock."). Litigants may develop the argument that a quorumless MSPB entitles them to go to district court despite this decision. Along similar lines, a separate statutory review provision requires claimants, in some circumstances, to exhaust the MSPB process before going to federal court. Some courts have held that the lack of an MSPB quorum does not excuse this exhaustion requirement. *King v. Barrett*, 2020 WL 2750268, at *2 (D.S.C. Feb. 24, 2020); *Greenlaw v. Acosta*, 2019 WL 2163000, at *5 (N.D. Cal. May 17, 2019), *vacated*, *Greenlaw v. Su*, 2023 WL 3055227 (9th Cir. Apr. 2023).

[89] 5 C.F.R. § 351.201(a)(2).

[90] *Gondola v. FTC*, 773 F.2d 308, 312 (Fed. Cir. 1985) (citing *Horne v. MSPB*, 684 F.2d 155, 159 (D.C. Cir. 1982).

[91] *Tippins v. United States*, 93 F.4th 1370, 1374–75 (Fed. Cir. 2024) (interpreting the term "reduction in force" as used in 14 U.S.C. § 357(j), but drawing an equivalence to the use of the term "in provisions related to federal civilian employment," *id.* at 1375)).

[92] *Abakan v. Dep't of Transportation*, 98 M.S.P.R. 662, 665 (2005).

[93] *See, e.g.*, *Welch v. Dep't of Army*, 323 F.3d 1042, 1046 (Fed. Cir. 2003) (rejecting argument that RIF was product of animus, reasoning that "[a] reorganization . . . is a permissible reason for a RIF and the [MSPB] lacks authority to review the management considerations underlying the exercise of the agency's discretion, including the decision to preserve or abolish a particular position." (internal quotation marks omitted)); *Dancy v. United States*, 668 F.2d 1224, 303 (Fed. Cl. 1982) ("An agency is accorded wide discretion in conducting a reduction in force; absent a clear abuse of that discretion, a substantial departure from applicable procedures, a misconstruction of governing statutes, or the like, we do not upset a final agency action. The good faith of those taking administrative action is

the requirement that RIFs be undertaken for a legitimate reason would apply to the apparently unprecedented scope of the RIFs the Trump administration is contemplating. Litigants might use that uncertainty to develop arguments that a RIF occasioned by an unlawful reorganization or curtailment of agency activities, motivated by hostility to an agency's statutory mission, is not legitimate, and instead a pretext to take action against disfavored groups of personnel and government functions.[94]

Schedule F. Many federal civil servants may be removed only "for . . . cause" and after an opportunity to be heard.[95] The Schedule F policy, now termed "Schedule Policy/Career," is designed to strip federal servants who perform substantive work of those protections by classifying their jobs as "confidential" or "policymaking"—a class of positions fireable at will.[96] Litigants might be able to advance two principal arguments why Schedule F is unlawful. First, the "confidential" and "policymaking" designation, as a matter of text and custom, applies only to political appointees—senior officials who serve only in the administration that hired them. Expanding the term's meaning to make career staff fireable at will is thus contrary to law. Second, both the civil service statutes and the Constitution's Due Process Clause prohibit the government from summarily stripping civil servants of job protections. Governing for Impact has written at length on Schedule F's legal vulnerabilities elsewhere.[97]

Administrative leave. The Office of Personnel Management ("OPM") has encouraged agencies to place employees subject to the Trump administration's dismantling actions on "administrative leave."[98] Several agencies have done so—most notably USAID, which is seeking to place nearly all of its staff on leave.[99] Employees working on diversity and inclusion initiatives have been put on leave as well.[100] And the "fork in the road" initiative claims to offer federal employees several months of paid administrative leave. That all-purpose deployment of seemingly indefinite administrative leave may be unlawful. The Administrative Leave Act provides that "an agency may place an employee in administrative leave for a period of not more than a total of 10 working days."[101] And the Act defines "administrative leave" as a broad, catch-all term: "leave without loss of or reduction in pay;

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presumed." (citations omitted)); *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 478–79 (6th Cir. 2003); *Bacon v. Dep't of Housing and Urban Dev.*, 757 F.2d 265, 268–69 (Fed. Cir. 1985).

[94] For a more detailed orientation to RIFs, see Nick Bednar, *A Primer on Reductions in Force*, Lawfare (Feb. 20, 2025).

[95] 5 U.S.C. § 7513.

[96] *See* Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce, 20 Fed. Reg. 8625 (Jan. 20, 2025); 5 U.S.C. § 7511(b)(2).

[97] *See* *Legal Vulnerabilities of Schedule F*, Governing for Impact (Jan. 2025).

[98] Memorandum from Charles Ezell at 2, *supra.*

[99] *See* Pamuk, *supra.*

[100] Judd & Polantz, *supra.*

[101] 5 U.S.C. § 6329a(b)(1).

leave to which an employee is otherwise entitled under law; or credit for time or service; and that is not authorized under any other provision of law."[102] That plain text would seem to preclude the Trump administration's use of administrative leave to further its efforts to close agencies. During the Biden administration, however, OPM issued a regulation purporting to apply the Administrative Leave Act's ten-day limitation only to leave "for the purpose of conducting an investigation," not "administrative leave for other purposes."[103] Litigants might argue, as part of a challenge to the Trump administration's administrative leave practices, that this regulation is contrary to law.[104]

Challenging failures to fulfill statutory functions. More generally, any move either by the President or the agency to cease certain agency functions — by, for instance, instructing particular officers or units to stop their work, purporting to move the Department of Education's functions to other agencies, or, of course, by closing the Department outright — could be the basis for claims overlapping with those described above. For instance, litigants might argue that doing so amounts to an unlawful impoundment of funds appropriated by Congress for particular agency functions.

To be sure, to the extent an agency failing to fulfill its statutory duties takes the form of a failure to act, that can be difficult to challenge. Agencies, for instance, enjoy broad discretion over whether to bring enforcement actions[105] or issue rules.[106] But when an agency flouts a statutory duty outright — as action to disassemble the Department of Education might — litigants might bring claims. For instance, a court may compel an agency to perform a statutorily required act.[107] Likewise, a court may review an agency nonenforcement policy "so extreme as to amount to an abdication of its statutory responsibilities."[108] Beyond that, an agency's failure to meet its statutory obligations may manifest in certain affirmative acts — like freezing of funds or directions that a particular office cease its work — that may be subject to challenge along the lines described above.

Potential plaintiffs. Uncertainty over the administration's plans makes it hard to predict what claims litigants might bring and also who proper plaintiffs might be. For the moment, potential litigants may consider who currently benefits from Department of Education

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[102] *Id.* § 6329a(a)(1) (subsection headings and hyphens omitted).

[103] 5 C.F.R. § 630.1404(a).

[104] For an argument that the OPM regulation violates the Administrative Leave Act, see Nick Bednar, *The Use and Abuse of Administrative Leave*, Lawfare (Feb. 13, 2025).

[105] *See Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985).

[106] *See Coinbase, Inc. v. SEC*, 126 F.4th 173, 187–88 (3d Cir. 2025) ("Absent a specific congressional mandate, agencies have broad discretionary powers to promulgate (or not to promulgate) rules." (internal quotation marks and alteration omitted)). *But see id.* at 198–203 (holding that an agency insufficiently justified its decision not to issue a rule).

[107] *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) ("action legally required" "can be compelled under the APA").

[108] *United States v. Texas*, 599 U.S. 670, 682–83 (2023) (quoting *Heckler*, 470 U.S. at 844 n.4).

functions likely on the chopping block. State and local governments receive funding from the Department, for the benefit of students — including low-income students and students with disabilities. Postsecondary institutions and students rely on the Department's grant and loan programs. Students at all levels benefit from protections enforced by the Department's Office of Civil Rights. And students, schools, governments, and researchers all depend on the Department's assessment and data-gathering activities. These interests might furnish bases for standing in potential litigation.

IV. CONCLUSION

Under fundamental separation of powers and rule of law principles, the executive branch has no unilateral authority to shut down agencies — including by refusing to spend appropriated funds, dismissing or sidelining personnel, or curtailing work on statutory responsibilities, or by outright abolition. Litigants might bring a range of claims against Trump administration efforts to shut down the Department of Education or any other agency established by law.

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