



Federal Updates: A Whole New Ballgame?

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Shifts in Power and Powers



Federalism

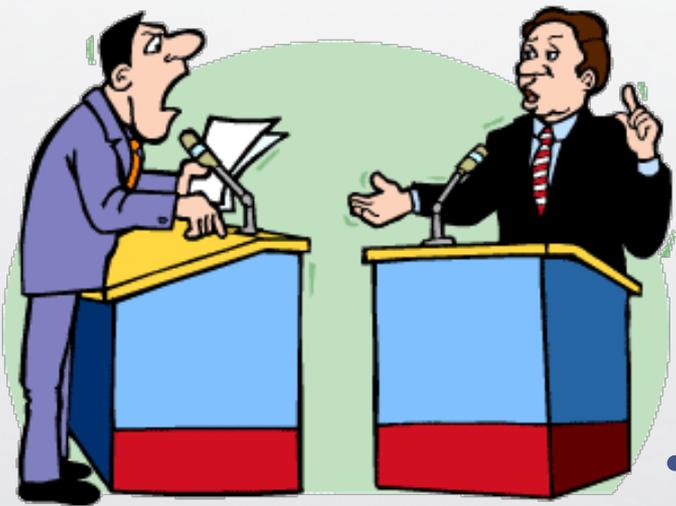
- Concept of shared governance between federal government and States
 - Dates back to early days of Republic when colonies were joined together
- Congressional/Presidential powers explicitly outlined in Constitution
- 10th Amendment: powers not explicitly granted to federal government are reserved for the States

Limits to Federalism

- Congress can enact laws that:
 - Are thought to outline compliance with Constitutional Rights (e.g. Civil Rights Act of 1964)
 - Necessary and Proper Clause
 - Fall under one of the other Congressional powers
 - Interstate Commerce Clause
 - General Welfare Clause
 - Trade compliance for federal funds
 - E.g. Medicaid, ESSA
 - “carrot and stick” federalism



Setting the Stage



- Republicans
 - Limited federal government (in size and scope)
 - Limited regulation/restriction
 - Idea that market controls behavior of corporations/individuals
- Democrats
 - Strong role for federal government in enforcing rights/norms
 - Strong social safety net



Incoming Administration

- President Trump (for the most part) tows Republican party line on limiting government
 - Promised to limit size of federal agencies
 - Promised to take power away from Washington and give it back to “the people”
 - Most likely through State enforcement mechanisms
 - Promised to eliminate or rescind overly restrictive laws and regulations



What to Expect from the Administration

- Executive Order on rulemaking and guidance (1/20)
 - Prohibits agencies from sending any new regulations or guidance for final publication
 - Delays effective date of recently finalized regulations until 60 days post-inauguration
 - Urges agencies to further delay/review individual
 - “Regulations” includes guidance documents of “general applicability and future effect”
 - Exceptions for health/safety/ national security



What to Expect from the Administration

- General instruction for agencies to “review questions of fact, law, or policy”
 - Purpose is to identify changes that can be made with minimal disruption
 - Or rules that can be withdrawn entirely





What to Expect from the Administration

- Close control of
 - Agency social media/ press
 - Responses to inquiries
 - Webinars
 - Correspondence with Congress
- Ability to offer grants (EPA)
- So far applicable to USDA (FNS), EPA, HHS





Impact on ESSA Rollout

- Will impact some regulations:
 - Accountability/ State plan regulations → effective date now March 21st
 - Could potentially affect Impact Aid regulations
- Assessment regulations outside window – effective date had already passed by the time order was issued.



Impact on ESSA Rollout

- No real immediate impact – even with 60-day delay, regulations would still be in place in time for 2017-18 school year
- Delay could interfere with April 3rd due date for State plans
 - 17 States plus DC plan to submit in April
 - Other deadline is in December



Impact on ESSA State Plans

- Biggest impact is uncertainty
 - Agency could potentially change rules at any time
 - Regular rulemaking as “interim final” rule that supersedes existing rule
 - Order to rescind rule
 - Guidance modifying how rule will be enforced/interpreted
 - Could come in time for 2017-18 school year, or not until 2018-19

What to Expect from Congress



- Additional action on regulations
 - Backward-looking: Congress can rescind/nullify regulations through the Congressional Review Act
 - Forward-looking: Congress is considering legislation that would allow it to control new regulations



What to Expect from Congress

- Congressional Review Act
 - Reaches back 60 legislative days
 - New Congress given an additional 15 days
 - Likely means everything issued since May/June 2016
 - Only useful during Presidential transition
 - Rescinds regulation
 - Prohibits agency from ever issuing “substantially similar regulations” on the same legislative text
 - What is “substantially similar?” unclear
 - Only used once on DoL ergonomics regulations in 1996



What to Expect in Congress

- Midnight Rules Relief Act (*proposed*)
 - Allows regulations to be bundled for the purposes of the CRA
 - Could significantly expedite process of rescinding/nullifying rules



What to Expect from Congress

- Regulations from the Executive in Need of Scrutiny Act (REINS Act) (*proposed*)
 - Expands definition of “major rule”
 - Congress has 70 legislative days to vote on new rule
 - If they don’t approve, doesn’t take effect
 - President can require rule to take effect for 90-day period in an emergency
 - Subjects all portions of rulemaking process to judicial review



What to Expect in Congress

- Regulatory Accountability Act (*proposed*)
 - Health and safety standards must also take cost into account, adopt “least costly” rule
 - Agencies must analyze “substantial alternatives” submitted by “interested persons” during rulemaking
 - Ends “Chevron deference”

What to Expect from Congress



- Congress still has the power to render regulations unenforceable through appropriations
 - Uses “power of the purse” to prohibit resources from being spent on certain items



The Holman Rule

- First adopted in 1876, previously eliminated in 1984
- Adopted through change to House rules in January
- Allows lawmakers to bring an amendment on an appropriations bill that may
 - “retrench” agency spending
 - Reduce the number of federal employees in a particular agency or
 - Cut the salary or “compensation of any person paid out of the Treasury of the United States.”

Conflict to Come

- Note pull between executive branch (President/agencies) and Congress over policy
 - President: regulations and executive orders
 - Congress: control over past/future regulations
 - States: role unclear – may shift more authority/responsibility down to the States?





On the Policy Agenda in Congress

Confirmations

- Many more cabinet positions
 - Require hearings, votes
- Non-cabinet political appointee positions
 - Often voted in a package
- Supreme Court nominee





Appropriations

- Fiscal Year 2017
 - Current CR Expires April 28th
 - Likely will not finalize full-year FY 2017 funding until then → continuing uncertainty
 - Will most likely finish out year with full-year CR rather than program-specific appropriations bill
 - Potential for smaller, across-the-board cuts



Budget vs. Appropriations

- Budget
 - 10-year outlook
 - Not binding beyond next fiscal year
 - Only top-line spending numbers government-wide
 - “big ideas” process
 - Process starts in March/April
- Appropriations
 - 1-year outlook
 - Binding for that year
 - Individual program-level funding
 - “detail-oriented” process
 - Process starts in June/July



Appropriations





Appropriations

- Sequestration
 - Still technically operational until 2025
 - Sets caps on budget for Defense and Non-Defense discretionary sectors
 - Does not impact individual accounts (e.g. Labor-HHS-ED) or programs
 - If cap is breached by appropriations bill, sequestration requires an automatic, across the board cut to reach cap



Appropriations

- Sequestration
 - Pressure from Republicans in Congress to increase Defense spending
 - Could mean shifting burden of sequestration from Defense to non-Defense discretionary category
 - Meaning: across-the-board cuts to education programs
 - Or targeted cuts to high-dollar programs



Appropriations

- Fiscal Year 2018
 - President has said that he may or may not send a proposed budget to Congress in February (per tradition)
 - Desire to further cut federal budget through cuts to non-essential social or arts programs
 - NEA, NEH, CPB, etc.
 - Less potential for direct cuts to formula-funded programs like Title I
 - Less potential for direct cuts to mandates like IDEA



Appropriations Issues for Education

- Less money at the LEA level for Title I?
 - After School Improvement set-aside, Direct Student Services
- Less money overall for Title IV
 - Block granting
- Reauthorization of child nutrition programs (temporary extension instead)
- Rider on ESSA regulations?



Other Budgetary Issues

- Potential reform of “entitlements”
 - Medicare/ Medicaid/ Social Security
- Potential repeal of Affordable Care Act
- Need to appropriation additional money for non-budget expenses
 - E.g. border wall

... even if done outside the budgetary process, these will impact amount of available funds

K-12 Education



- ESSA was passed December 2015
 - Bipartisan, called a “Christmas miracle”
 - Little appetite for change
- Little interest in reauthorizing/changing IDEA
 - Focus is on funding law, not law’s requirements
- Potential for action limited here



School Choice?

- Trump/DeVos suggest more money for school choice/vouchers
 - Would require Congressional action
- Recent History not positive
 - A-PLUS Act (which would have allowed States to take ESSA money as block grant)
 - Offered as amendment to ESSA
 - Killed by Republican leadership, including Alexander over worries it would sink bill
 - Has calculus changed now?
 - Lack of time/interest key



Perkins

- House passed legislation to reauthorize the law 405-5 early in September 2016
- Senate markup postponed, reportedly over Democrats' concerns regarding Secretarial authority
- Will be picked up in spring
 - Will Congress have time?
 - Will Senate be able to assuage Democrats' fears of Secretarial restrictions?



Perkins

- Sample Secretarial limitations (more throughout draft Senate bill):
 - Can't promulgate regulations that would:
 - Add new requirements "inconsistent with or outside the scope of this Act"
 - Add new criteria "inconsistent with or outside the scope of this Act"
 - "Be in excess of statutory authority granted to the Secretary"
 - Can't prescribe:
 - Specific performance indicators, targets, or levels of performance
 - Indicators or measures of teacher/faculty education or quality
 - "The role of the Secretary in the identification and dissemination of the State target levels of performance ...shall be limited to providing technical assistance"



Child Nutrition: House

- Partisan legislation passed House Committee in May 2016
 - Controversial issues:
 - CEP threshold from 40% ISP to 60% ISP
 - Rokita: don't want to be giving wealthy kids free meals
 - In exchange for increase in breakfast reimbursement?
 - Fresh fruit and vegetable changes
 - 3 year administrative review cycle → 5 years
 - Loss of carryover?
 - Exempts student group fundraisers from standards
 - Removal of paid lunch equity provision
 - Pelosi: will see House floor "over my dead body"



Child Nutrition

- Senate bill introduced, passed Committee in January 2015
- Legislation passed House Committee in May 2016
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Child Nutrition

- House and Senate Committees both say they want to resume work
 - But is it a priority?
 - Can they come to an agreement with Democrats?





The New Department of Education



Shift in Focus

Equity → Deregulation and
States' Rights

The New Department of Education



- Secretary as an “outsider”
 - Despite “insider” aides
 - Controversy over nominations hurts credibility
- Structural impacts
 - Elimination of ED as cabinet-level agency?
 - Reduce size of federal agencies, including ED
 - Hiring Freeze
 - “Brain drain”



The New Department of Education

- Surrogates have suggested that OCR will be target for shrinkage
 - Especially policies targeting disparate impact, transgender student guidance
 - Place enforcement responsibility on U.S. GAO, States
 - Per December interview with Virginia Foxx (R-NC)



Impact on Policy

- ESSA Rollout
 - Text of statute likely to be unaffected – product of bipartisan compromise
 - “ground game” of implementation may be target
 - Emphasis on State/local autonomy, Secretarial restrictions
 - Review of accountability regulations?
 - Focus on (and take credit for) areas of flexibility
 - Charter school grants
 - Revisit guidance
 - Local funding flex pilot



Future of Regulations?

- ESSA Assessment regulations are final, not subject to executive order on delay
 - But could still be modified
 - Guidance may be issued changing slant of regulations
 - Mode or strength of enforcement?



Future of Regulations?

- Accountability/ State plan Regulations subject to 60-day delay
 - Currently scheduled to take effect March 21st
 - Subject to change
 - Could also be modified by new administration, or nullified by Congress
 - Use as guidelines, but be aware this is a moving target



Future of Regulations?

- Supplement, not Supplant
 - Regulations withdrawn shortly before inauguration
 - Will not go into effect or move forward in rulemaking process
 - Likely withdrawn due to threats of rescission under CRA
 - New administration could draft new regulations on this, but likely won't

Overall

- Uncertainty
 - Regulations/ laws/ funding subject to change
- Less policy work in Congress
- Less money for federal programs
- Turf war over federal powers





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