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Irregular Order, Part II

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What it will take to break the Deep State.

Editors' Note

The second part of this essay considers three approaches to irregular order. You can read the first part here.

In part I, we explored why America First cannot put its hopes in personnel alone; why we also need "irregular order" that exploits Deep State weakness; and "force multiplier" techniques for a relatively small

cadre of America First political personnel.

Now we turn to the irregular order approaches themselves. All three use the bureaucracy's critical vulnerability—funding—but at different points in the government funding process. None will be easy to execute. But any would be preferable to the status quo, where the Constitution's Appropriations Clause has been reduced to an annual ritual of humiliation for the political branches of government.

These three approaches need not be used in the order presented below; rather, they could be used in a sequence or combined in a hybrid approach—e.g., constitutional impoundment for agencies that are amenable and soft impoundment for those that are not. Ultimately, however, "how" and "when" are questions of prudence for those who will pay the price and reap the rewards of irregular order.

1. **Shutdown** operates at the level of *appropriation*. The legal authority for it relies on the president's veto (or threat thereof) to block appropriations, causing a government shutdown. It then uses existing "lapse of appropriations" procedures to shape negotiations with Congress. This approach would be straightforward and relatively quick; with appropriate planning, it could be executed even with relatively few America First politicals in power. It would be the most politically difficult approach of the three discussed here, but success would transform shutdowns from the bureaucracy's shield into the president's sword. This approach also could be adapted for situations where the government reaches its borrowing limit, should one happen during the next America First administration; this would be easier politically, but would not set the same useful precedent.
2. **Constitutional impoundment** operates at the level of *apportionment*, the Office of Management and Budget (OMB)'s approval of a government agency's plan to obligate appropriated funds. It uses impoundment, the practice of blocking the obligation or expenditure of appropriated funds, for certain government activities that are within the president's authority. It is straightforward and could be executed with relatively few America First politicals in power. However, it would lead to significant political and legal fights over constitutional questions that likely would take some months to resolve. This approach probably could not be used to gain control over all executive branch agencies, but it could be used over some key Left-globalist strongholds in the bureaucracy.
3. **Soft impoundment** operates at the level of *obligation*, as government agency heads would conduct a very thorough and deliberate review of all proposed obligations. This is the least confrontational approach, politically and legally, so it might appear to be the easiest. In fact, the absence of open conflict would make it the hardest to execute, because it must be conducted as a kind of sustained guerrilla warfare. Since formal action is decentralized at the agency level, it would require the help of most America First politicals spread across the

executive branch. Further, this approach would rely to the highest degree on their personal qualities—above all, their firmness in saying "no."

Approach 1: Control Via Appropriation—Shutdown

Ahead of a potential shutdown, agencies normally coordinate with OMB to prepare contingency plans for orderly suspension of "routine" operations and continuation of "essential" (or "excepted") operations. When a shutdown begins, essential activities (and associated employees) continue, with some restrictions. Routine activities (and associated employees) are suspended and "furloughed" after performing "orderly shutdown activities." Furloughed employees may be "recalled" to work if activities they perform become essential during the shutdown.

How it works. Rather than allow bureaucrats to formulate such shutdown plans, America First agency heads would control this exercise politically, designating and justifying as essential those activities (and associated employees) the administration wishes to continue. All other activities would be called routine and suspended. (For this, agency heads will of course need the help of a coordination cell, as discussed in part I.) The White House and OMB would provide informal direction on these choices for agency shutdown plans, as well as spine-stiffening to help agency heads resist countervailing pressure from the bureaucracy and its external allies and clients. Agency lawyers and the Department of Justice would help with legal justifications.

In addition to the shutdown plans, agency heads would also prepare Reduction in Force (RIF) plans that include as many feds as possible. Under RIF regulations, after 30 days of furlough, agencies may formally notify furloughed employees that they are subject to separation from government service according to agency RIF plans. After another 60 days, agencies can begin firing employees who received such notices and who have not found new positions in the agency. To facilitate this, the director of the Office of Personnel Management (OPM) must revisit its

current guidance to eliminate its extralegal distinction between "administrative furloughs," which trigger RIFs after 30 days, and "shutdown furloughs," which do not.

What is "essential?" In designating and justifying essential activities, agency heads must remember that shutdown is not the goal. Rather, it is a means to set conditions for negotiations over the future shape of the bureaucracy. This means looking to the desired end-state: What should the statue look like when all the unwanted material is removed from the block? The activities the administration wants to see in a smaller, more controllable bureaucracy dedicated to America First must be designated and justified as essential. Further, to strengthen its negotiating position as much as possible, the administration must seek to sustain the shutdown—politically, financially, and legally—as long as possible:

Sustaining the shutdown politically means, in the first place, minimizing inconvenience for regular Americans in general and America First supporters in particular. (Ideally, they would not know the shutdown is happening unless they happen to watch news reports in an airport.) In preparing their shutdown plans, agency heads and their lawyers must find ways to avoid the "pain points" we saw in recent shutdowns—where, for example, the Department of Health and Human Services continued existing Social Security and Medicare payments, but was unable to process new applications for them. To facilitate this, the attorney general must revisit the Department of Justice's existing lapse of appropriations guidance to permit a broader understanding of what constitutes an "imminent threat to human life or the protection of property." Further, to help agency heads determine what is "imminent," OMB should advise them, "as a matter of prudent planning," to expect a shutdown of at least 120 days.

Sustaining the shutdown politically also means staying focused. There will be plenty of media sob stories and congressional fulmination, fed by the bureaucracy, about the suspension of "vital" programs. These are attempts to gain concessions outside of formal negotiations, as well as tests of the administration's unity and will. Agency heads should suspend media relations and legislative affairs as routine and refer such inquiries to the White House. This will help maintain tactical discipline administration-wide. The administration's friends and allies must understand that the scope of this initiative and exercise appropriate self-control—this is *not* the time to attempt comprehensive entitlement reform!

Sustaining the shutdown financially means finding funds to continue essential activities, particularly salaries for associated employees, after their normal appropriations expire. Ahead of a likely shutdown, agency bureaucrats will rush to obligate expiring funds on the activities they "own." In addition to scrutinizing proposed obligations to prevent this, agency heads should borrow this trick, looking for unspent funds across their agency's accounts and obligating them for essential activities before they expire. Also, OMB and agency shutdown planning

should include the use of funds that do not expire at the end of the fiscal year (e.g., multi-year and "no-year" appropriations, as well as reserves in "non-appropriated" accounts from fee collections), along with the necessary transfer authorities. Presidential emergency declarations might be required to access them.

Sustaining the shutdown legally means protecting agency shutdown plans from judicial injunctions or other frustrations. Courts cannot appropriate money, and "precedents" based on what was considered essential in previous shutdowns are in no way binding. Nevertheless, the bureaucracy's external clients and allies will bring suits seeking the restoration of certain activities on the basis that the *process* for designating them routine was unfair or lacking. Agency heads must have colorable justifications for their decisions, and OMB and the Department of Justice must ensure their formal "lapse of appropriations" guidance is flexible enough to cover them. Even if lower courts entertain such suits, they will fail at higher levels should the cases proceed that far before the shutdown ends. Agency heads and their lawyers must also ensure that any personnel actions are legally sound, particularly RIF plans, as offended feds are certain to bring suits based on these.

How long does it last? The administration would need to sustain the shutdown as long as possible because Congress likely will not be ready to negotiate seriously until its allies in the bureaucracy feel directly and personally threatened. This will take some time. Due to the normal operation of the payroll system, government employees will not miss a full paycheck for at least two weeks, and most shutdowns have been far shorter. Further, existing law provides they will receive back pay after the shutdown whether or not they were furloughed, so many feds have come to regard shutdowns as a kind of paid vacation.

That will change when agency heads start implementing RIF plans around day 31 of the shutdown. At that point, all furloughed (i.e., non-essential) employees will receive notice of their separation from government service in a further 60 days (i.e., day 91 of the shutdown). However, the administration should seek to continue the shutdown at least through day 91, when hundreds of thousands of feds would be laid off, reshaping the bureaucracy according to the administration's views of what is essential and presenting Congress with a *fait accompli*.

How does it end? The administration's position in negotiations with Congress should flow directly from its shutdown plans: *any activity that was not essential should be permanently de-authorized, not just de-funded.* The logic behind this is straightforward: If a government activity was

suspended and no one other than the bureaucracy, its allies, or its clients felt the absence, then it really wasn't important enough to do in the first place. Applying this simple test will cut through the meaningless semantics about "critical," "vital," and "indispensable" activities; further, it will make negotiations about particular activities explicitly political.

From this baseline of what the administration deems essential, any activity that Congress wishes to re-authorize should have a price in the form of permanent authorities (not appropriations) that increase political control over the bureaucracy, such as reforms to the structure of federal employment. If Congress doesn't want to "buy" anything, that's fine, too—shrinking the bureaucracy is both good in itself and simplifies the management burden for the administration's relatively small cadre of politicals. Once the administration has regained the authorities it needs to manage the bureaucracy properly, it might consider other substantive priorities.

Ending the humiliation ritual. Investing the time and effort to achieve a successful shutdown would fundamentally change the dynamic in Washington described in part I. At the beginning of each subsequent budgeting cycle, the administration could announce that it will not consider bills that authorize and appropriate government activities beyond what it considers essential. Adding anything to this baseline, even activities that were "purchased" in previous years, would have a cost in the form of additional new, permanent authorities for the president.

Pitfalls. The success of this approach depends on the administration's ability to sustain a veto. The longer the shutdown lasts, however, the greater the chance of defections to support an override, particularly among establishmentarians and those vulnerable in their next election. They are right to be concerned. The media will go after them viciously, and there are likely to be short-term economic effects as a result of the

shutdown; but midterm punishment for the president's party is a given anyway. If a veto is necessary and is overridden, the other irregular order approaches remain available to the administration.

Approach 2: Control Via Apportionment—Constitutional Impoundment

Conventional wisdom says impoundment was outlawed, or at least drastically restricted, by the 1974 Impoundment Control Act (ICA). Putting aside whether that is correct in general, there are two areas in particular where the ICA is constitutionally suspect: the president's role as commander-in-chief of the armed forces and his authority to conduct foreign relations.

How it works. The administration would re-assert these authorities to regain political control of activities in these areas and exercise them for America First purposes. Further, the administration should understand these areas broadly to include any foreign intelligence activities, as well as any activity of non-foreign affairs agencies that touches on the conduct of foreign relations (e.g., participation by Environmental Protection Agency staff in international conferences on "climate change").

In impounding appropriated funds for these areas, the administration would ignore the ICA's rescission procedures as irrelevant to the president's exercise of his constitutional authorities. Instead, the president would simply announce that his administration will not spend appropriated funds on certain activities because, in his judgement, those activities are contrary to sound policy. Exactly which activities and programs will be suspended should be coordinated in advance between OMB and agency heads, and the details incorporated into OMB's apportionment guidance to agencies.

Agency heads will be responsible for enforcing this OMB guidance within their bureaucracies. To accomplish this, the agency heads should withdraw all delegations of authority to subordinate personnel, as described in part I, then simply deny any requests inconsistent with OMB guidance. (Agency heads will of course need the help of a coordination cell, also described in part I, for this.) Bureaucrats can be kept busy winding down all programs not funded under OMB apportionment guidance, including their own jobs, if necessary.

Since this approach relies on the president's authority, the locus of decision is the White House, not the relevant agencies. This is constitutionally correct and will give agency heads political cover, relieving pressure on them and helping to maintain discipline. Agencies should refer all congressional and media inquiries to the White House. Still, agency heads will be called to the Hill and be berated on television, as described above. They must stick to their talking points.

Pitfalls. Impeachment is possible, particularly if the administration goes after the intelligence agencies. An effort to curb foreign adventurism and control the Deep State would be popular, particularly if it happens right after an election. Impeachment proceedings would provide an opportunity akin to that of the Church Committee to demonstrate the depths of wastefulness and corruption in these corners of the bureaucracy. When the attempt to impeach or remove fails—or, more likely, never starts—the administration's understanding of the ICA's limits, and the president's authority over these activities, will be confirmed. Then, the administration can start the work of reforming these bureaucracies in detail.

The bureaucracy's external client and allied organizations will undoubtedly sue, claiming ICA violations among other things. The administration should assert that this is a non-justiciable political question and defend its position as long as necessary. While these challenges are pending, the administration must preserve the funding

suspensions. If they last long enough, even a temporary suspension of funding will change facts on the ground in helpful ways (e.g.,: withdrawal of U.S. forces from Syria is unlikely to be reversed later). When the administration ultimately wins, this approach might be expanded to additional areas.

One might ask here: Why wait? That is, if the president is willing to risk impeachment over these areas, why not "go big" by asserting the general unconstitutionality of the ICA and impounding funding across the executive branch? We do not deny this possibility, but whether to pursue it is a prudential question that depends on a number of contingent factors, including the president's temperament, his popularity, and the composition of Congress and the Supreme Court.

Approach 3: Control Via Obligation—Soft Impoundment

The president has an Article II responsibility to "take care that the laws be faithfully executed," including appropriations laws. However, most appropriations language does not direct funds to individual recipients. Rather, it makes funds available for, or "for necessary expenses" of, a general purpose, an activity, or an office within an agency. Congress thus relies on the discretion of its allies in the bureaucracy (sometimes supplemented with extra-legal guidance, such as explanatory statements, committee reports, or informal staff consultations) to distribute appropriated funds via obligation.

How it works. The next America First administration should reclaim this discretion and exercise it against the bureaucracy and its allies and clients. Unless appropriations *legislation* specifies a particular recipient, agency heads should assume maximum discretion in directing appropriated funds consistent with the named activity or office. This includes *not* spending appropriated funds on programs they consider contrary to sound policy; unnecessary for the named purpose, activity or office; or simply ineffective. OMB should give agency heads some cover by issuing guidance directing them along these lines.

Agency heads should withdraw all delegations of authority to subordinate officials, as discussed in part I; they will have to consider all financial obligations along with all of their other work, including policy decisions. Naturally, they will prioritize requests for programs that the administration regards as important and worthwhile (i.e., the activities it would consider essential in a shutdown), as well as "keeping the lights on" (e.g., employee salaries, office lease payments, and necessary travel). It will be some time before they can consider other requests, including the ones that the bureaucracy uses to fund its allied and client organizations.

When such requests finally get considered, agency heads of course will not be in a hurry to approve them. But neither should they definitively deny them; without an alternative use for the funds, denial would mean unobligated appropriations (i.e., impoundment) and thus litigation. Instead, requests for such programs must be placed "under review" in a very thorough and deliberate process.

"Under Review." To begin, agency heads should subject all requests to a "zero-baseline" review. That is, nothing will be approved simply because it was approved in the past. Instead, the bureaucrats who "own" a program or office will have the burden of demonstrating that (1) their request is necessary for the purpose or activity stated in the appropriation, (2) it is the most effective means for accomplishing that purpose or activity, and (3) all of its included expenses are themselves necessary. Senior bureaucrats usually are persuasive salesmen who love to talk about "their" programs, so agency heads should require them to substantiate all of their claims in detail, in writing.

This documentation will of course take time to produce. Agency heads should scrutinize it to make sure they understand everything—no detail is too small—and then send it back for clarification and rewriting when

it is filled with the usual bureaucratic vagaries, euphemisms, and overstatements. Agency heads also should keep bureaucrats busy working on very important, but difficult, questions. For example:

> *How are you sure this program is having the desired effect? Show evidence of effectiveness.* Bureaucrats will respond with some specious "monitoring and evaluation metrics," which their offices generate to impress Congress and inspectors-general. Agency heads can and should question all aspects of these (e.g., the measure of "effectiveness" was inappropriate, the study measured outputs rather than outcomes, the evaluator was not impartial, the survey size was too small, the results are contradicted by this press report, etc.), then send the bureaucrats away to find more "evidence."
> *Is this program really the best way to conduct the purpose or activity named in the appropriations law?* Many programs have been around so long that the original analysis of alternatives, if one was ever prepared, is unavailable or out-of-date. And because this asks bureaucrats to prove a negative (i.e., there exists no better way), exploring this question can go on for a *long time.*
> *Did you consider the environmental impact?* Even if not required by law, agency heads might require such analyses as a matter of discretion. Washington-area bureaucrats who listen to NPR on their morning commutes are mentally unprepared to object. Of course, their offices lack the in-house expertise to conduct such analyses, so they will need to consult with other offices.
> *I want some innovative alternatives. Go back to the drawing board.* Bureaucrats will respond by trying to push the work back on to agency heads—"What are you looking for?"—who must keep putting it back on the bureaucrats—"You're the experts, do your jobs."

Do not overlook the value of this exercise for documenting the sloppy thinking of "career experts," puncturing their pretensions and setting expectations for greater clarity in their future work. (Agency heads should be creative and have fun with it—e.g., tell feds they are not allowed to use "partner" as a verb.) This process also will establish a defense against the inevitable accusations from the bureaucracy itself, allied and client organizations, and members of Congress that this is impoundment by inaction. Agency heads must therefore document in detail this review, particularly the failure by bureaucrats to answer the agency head's questions in a satisfactory manner.

How long does it last? Agency heads should not hesitate to extend or repeat this review as long as is necessary to be satisfied *personally* that the request should be approved. Naturally, this will take some time, particularly for programs the administration regards as non-essential. At the end of the fiscal year, the money that would have been obligated for that program "expires" and is returned to the Treasury. When no one

besides the bureaucracy, its allies, or its clients misses the program, the administration will have established that the program really was not important enough to do in the first place, which can be reflected in subsequent budget requests.

Meanwhile, the bureaucracy's external ally and client entities that rely on government contracts and grants have their own financial obligations. They will face cash-flow problems unless they can find other sources of revenue—and there will be a great deal of competition for such alternatives when Washington's bureaucratic patronage suddenly dries up. Even if these entities do not starve to death, they will be distracted with existential fundraising issues and decisions about prioritizing their activities, and be left significantly weakened.

Handling Congress. There will be plenty of congressional complaints about "illegal stealth impoundment." In response, agency heads should play hardball, as described in part I. When the hearing finally happens and members of Congress start fulminating about why the funds they appropriated have not yet been released for "critical," "vital," or "indispensable" programs, the agency head can reply with variations of: "My job is not simply moving money out the door. It includes being a good steward of government funds and making sure they are spent wisely and effectively. I want to be personally satisfied that is the case for every single expenditure, just as taxpayers must do with their own money."

The agency head need only stand his ground and stick to his talking points. Congress cannot make him re-delegate his authority to subordinate officials. Even if its members become so frustrated they resume old-school earmarking for certain recipients, that would be a victory because it acquiesces to the administration's position about the authority and discretion of agency heads. It also would force Congress

to “do the work” for spending that its members really care about, rather than delegating to its allies in the bureaucracy. Both of these strengthen the political elements of government against the bureaucracy.

Handling the courts. To avoid unnecessary litigation, agency heads should leave existing obligations untouched. These can be handled when they come up for periodic review or renewal. Instead, agency heads should intervene as early as possible in the program management process, ideally when bureaucrats seek approval for the program design or propose the means by which they will select proposals. At that point, there are no particular parties who might suffer harm by the denial or cancelation of a contract, grant, or cooperative agreement.

Still, the administration should expect dozens of lawsuits from the bureaucracy’s clients who believe they have a right to government money. Courts cannot obligate funds, so these suits will have to allege some process flaw. Here, the agency head’s documentation of his review will show that there is a reasonable process, however slow, for obligating funds, and that he is not being arbitrary or capricious.

Some judges might not like the agency head’s demanding standards for what is “necessary” or “effective,” but they are not in a position to substitute their own views. (Indeed, in a bit of legal jiu-jitsu, the administration might argue that the president’s Article II duty of faithful execution *requires* that agency heads adopt such an approach.) Lower judicial rulings might point to timelines and procedures that agencies used previously, as if they constituted some kind of administrative common law, but they cannot compel the agency head to re-delegate his authority to subordinate officials, and the agency head should disregard them while the administration appeals to a win.

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