



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

January 19, 2021

The Honorable John Yarmuth
Chairman
Committee on the Budget
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Yarmuth,

This letter responds to the report and accompanying statements, released by the House Budget Committee (the Committee) on November 20, 2020, concerning the Office of Management and Budget's (OMB) exercise of its statutory and delegated authorities to manage Executive Branch spending over the past four years. The purpose of this letter is to correct the false and misleading record portrayed by the Committee's statements, place OMB's actions over the course of this Administration in their proper context, and call on Congress to address the serious inadequacies of the current legislative framework for federal spending.

This letter makes four separate but related arguments. First, over the past four years, OMB used its authorities aggressively, but lawfully, to ensure that Executive Branch spending decisions were consistent with the President's domestic and foreign policies. Second, the Committee and Government Accountability Office (GAO) take an over-expansive and incorrect view of Congress's power of the purse, which infringes upon the President's own constitutional authorities. Third, the Committee's and GAO's view on the proper balance of power between the Legislative and Executive Branches is historically inaccurate. And fourth, the Impoundment Control Act of 1974 (ICA) is unworkable in practice and should be significantly reformed or repealed.

Constitutional and Statutory Framework for Federal Spending

As a starting point, under our constitutional republic, Congress holds the power of the purse. The Constitution provides that "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law."¹ Congress also has the power to "provide . . . for the general welfare" and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers."² It is thus clear that Congress has the power to determine the amounts of budget authority to grant and the conditions under which public funds may be spent.

¹ U.S. CONST. art. I, § 9.

² U.S. CONST. art. I, § 8.

The Constitution does not end at Article I, however, and Congress's Article I powers do not supersede the President's own constitutional authorities, including his authorities as Commander-in-Chief and over foreign affairs, and his obligation to "take care that the laws be faithfully executed."³ The Supreme Court has endorsed this view outside of the spending context, including this past term.⁴

Moreover, absent clear evidence to the contrary, appropriations laws do not displace other permanent statutes that the Executive Branch is required to carry out.⁵ As a prime example, Congress's mere enactment of an appropriation does not override the President's authority to apportion that appropriation as he "considers appropriate" as required by the Anti-Deficiency Act.⁶ The President must faithfully execute all of the laws, and where those laws provide discretion or are ambiguous as to implementation, the Constitution grants the President exclusive authority to determine the best and most efficient manner in which to implement such laws.

The Impoundment Control Act

The ICA requires that the President notify Congress whenever an official of the Executive Branch impounds (i.e. withholds) budget authority. There are two types of impoundments under the ICA: the temporary deferral of budget authority, which is a delay in the obligation of funds; and the proposed rescission of budget authority, which permanently reduces spending. The Act prescribes the rules that must be followed whenever the Executive Branch impounds funds.

The ICA defines deferrals as the withholding or delaying of obligations or expenditures of budget authority provided for projects or activities, or any other Executive action or inaction that effectively precludes the obligation or expenditure of budgetary resources.⁷ Deferrals are permitted 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.⁸ The Act requires that the President submit to Congress a special message when the President intends to defer funding.⁹

The ICA also provides a rescission authority that allows the President to identify unnecessary funds and submit details of the potential rescission to Congress for consideration.¹⁰

³ U.S. CONST. art. II, §§ 2-3.

⁴ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (holding that the Consumer Financial Protection Bureau's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the Constitution's separation of powers); *see also Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that the Balanced Budget and Emergency Deficit Control Act of 1985 violates the Constitution insofar as it permits an officer of Legislative Branch to play a direct role in the execution of the laws).

⁵ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (stating that "[t]he doctrine disfavoring repeals by implication 'applies with full vigor when . . . the subsequent legislation is an appropriations measure.'") (quoting *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 785 (D.C. Cir. 1971)) (emphasis in original).

⁶ 31 U.S.C. § 1512(b)(2). As discussed further below, OMB regularly uses its apportionment authority to temporarily pause agency spending to obtain additional information that will help OMB determine the best possible use of the funds consistent with the President's agenda and the law.

⁷ 2 U.S.C. § 682(1).

⁸ 2 U.S.C. § 684(b).

⁹ 2 U.S.C. § 684(a).

¹⁰ 2 U.S.C. § 683(a).

Under the statute, the President may then withhold those funds from obligation for 45 days of continuous congressional session.¹¹ The rescission proposal is entitled to certain fast-track procedures, should Congress choose to consider the proposal.

Discussion

At the outset, we note that while the ICA significantly curtailed the President's authority to impound funds, the ICA did not (and could not) alter his constitutional duty to faithfully execute the spending laws. Faithful execution occasionally requires the President to make determinations as to the legality, constitutionality, and most efficient and effective uses of the funds appropriated for the various Executive Branch programs. These determinations are often weighty and require input from multiple stakeholders within the Executive Branch. In such circumstances, the President may need to temporarily pause expenditures to allow the process for making such determinations to play out. As explained in greater depth below, these temporary pauses constitute programmatic delays, not impoundments.

I. OMB's Actions to Control Agency Spending Were Lawful

Given its mission and position within the Executive Office of the President, OMB plays the lead role in developing and directing the execution of the President's budget priorities across the Executive Branch. Despite the Committee's claims to the contrary, over the past four years OMB consistently carried out its duties in accordance with the law, and no court has ruled otherwise. It is of no moment that congressional committees and the GAO, which is an instrumentality of Congress, have issued reports and opinions disagreeing with OMB's work. The Executive Branch and Legislative Branch routinely disagree.

OMB's efforts over the past four years were aimed at providing the President with sufficient flexibility to implement his programs in the most effective manner possible, consistent with the law. The Committee falsely claims that OMB has abused its apportionment authority. In fact, OMB used its apportionment authority in a manner consistent with past administrations. And where the law provided discretion as to how and when to spend funds, OMB used its apportionment and other authorities to ensure that the President had maximum flexibility to implement programs effectively, efficiently, and in accordance with Administration priorities. For example, with respect to foreign aid, OMB used its apportionment authority to re-examine, within the discretion afforded by the relevant foreign aid statutes and appropriations, the manner in which such aid was provided, as well as ensure that foreign aid programs were executed consistent with the President's foreign policy objectives.

Another approach OMB explored to provide the President with maximum flexibility in achieving his policy goals was the use of a "pocket rescission" to deliver a massive savings to the taxpayers.¹² Prior to this Administration, the President's authority to propose a pocket rescission was generally not in dispute. Congress and GAO long ago recognized the President's authority

¹¹ 2 U.S.C. § 683(b).

¹² Under the Impoundment Control Act, a pocket rescission occurs when the President submits a rescission proposal under the Act within 45 days of the end of the fiscal year and Congress fails to act on the proposal, causing the funds to lapse.

under the ICA to propose funds for rescission within 45 days of their expiration and to withhold those funds absent congressional action through their expiration. In reviewing a rescission package proposed by President Ford in 1975, GAO definitively stated that the funds at issue would lapse nearly a month prior to the expiration of the 45-day period prescribed by the ICA.¹³ In a subsequent report on the status of such funds, GAO confirmed that the funds had indeed lapsed and issued the following recommendation:

In our opinion, having to wait 45 days of continuous session before it can be determined that a proposed rescission has been rejected is a major deficiency in the Impoundment Control Act. We believe Congress should ... chang[e] the Act to prevent funds from lapsing where the 45-day period has not expired. In the case of [two recent rescission proposals], Congress was unable, under the Act, to reject the rescission in time to prevent the budget authority from lapsing.¹⁴

OMB is still unclear as to why GAO suddenly jettisoned its own decades-long precedent and declared that such proposals now violate the ICA.¹⁵

In addition, OMB was operating entirely in accordance with the law when it took certain steps to temporarily pause funds. The ICA does not categorically prohibit the President from temporarily pausing funds to determine the best way to run a program within the scope of the law. Such an interpretation defies the spirit of the ICA as well as separation of powers principles, and runs counter to longstanding Executive Branch and Legislative Branch legal opinions interpreting the ICA.

For example, OMB employed daily rate apportionments for certain programs when it was necessary to obtain a current accounting of funds available for those programs and the purposes for which they were preliminarily reserved. These daily rate apportionments fall squarely within OMB's authority to apportion funds by "other time periods" as OMB "considers appropriate."¹⁶ OMB's daily rate apportionments made clear that the unobligated balances subject to the daily rate were to be obligated at rates sufficient to ensure that the remaining funds would be obligated by the end of the year. These apportionments also expressly permitted the affected agencies to request a higher apportionment level if necessary for programmatic reasons. In no instance did OMB's use of a daily rate apportionment result in funds not being fully obligated before the end of their period of availability.

In addition, for decades, Members of Congress and their staff have directed agencies to withhold funds for months at a time—without any statutory or constitutional authority whatsoever—often for purely political reasons entirely unrelated to the program at issue. GAO long approved of this practice. Yet Members of Congress (and GAO) now suddenly cry foul if the President legally pauses funds to determine their best use.

¹³ GAO B-115398, Aug. 12, 1975.

¹⁴ GAO B-115398, December 15, 1975.

¹⁵ See GAO *Impoundment Control Act—Withholding of Funds through Their Date of Expiration*, B-330330.1 (Dec. 10, 2018), overturning GAO B-115398, Aug. 12, 1975.

¹⁶ 31 U.S.C. § 1512(b).

The President, and by extension the Executive Branch, should have the flexibility to run government programs in the most effective and efficient manner possible. Unfortunately, the ill-conceived ICA makes this nearly impossible. But though the ICA presents a barrier to efficient and effective spending, OMB's actions over the past four years should be viewed as exemplars of the thoughtful and innovative ways an Administration can deploy the statutory authorities available to it to achieve its policy goals while still faithfully executing the law.

II. GAO's Interpretation of the ICA Infringes Upon the Constitutional and Statutory Authorities of the President

GAO's recent opinions finding that OMB violated the ICA have no basis in the statute and, if taken to their logical extremes, the Constitution. The first such opinion was issued in December 2018, a few months after President Trump proposed what was at that point the largest rescissions package ever submitted under the ICA.¹⁷ In that opinion, which is mentioned above, GAO reversed a four decades old legal opinion recognizing that the ICA's rescissions provisions would permit funds to lapse if they expired during the 45-day withholding period permitted by the ICA. GAO did so despite the fact that (1) the ICA's rescission provisions clearly authorize the withholding of budget authority within the statutorily prescribed 45-day period, regardless of when it occurs;¹⁸ and (2) prior GAO opinions acknowledged without objection that Presidents Carter and Ford allowed funds to lapse using the ICA rescission provisions.

More egregious, however, was GAO's recent opinion on OMB's temporary pause in obligations for the Ukraine Security Assistance Initiative (Ukraine Opinion).¹⁹ In its Ukraine Opinion, GAO blurred the aforementioned distinction between deferrals based on policy disagreements, which are prohibited by the ICA, and deferrals due to programmatic delay, which are not. GAO effectively adopted the position that agencies are prohibited from ever pausing spending to determine the best uses of those funds, even where the law grants the Executive Branch discretion in how to implement the particular program.

In GAO's view, the ICA, at least as applied to actions initiated by the Executive Branch, would supersede any discretion or affirmative authority granted an agency through its authorizing statutes or appropriations language to determine the best, most efficient, or even lawful uses of the funds. This interpretation goes much too far. As noted above, the ICA's deferral provisions cannot be read in a manner that negates statutory authority that an agency derives elsewhere.²⁰ Furthermore, temporary pauses in spending that take place within the discretion or positive authorities conferred by a statute are a quintessential form of programmatic delay. Moreover, interpreting the ICA in a manner so as to preclude all such temporary pauses would sanction a Legislative encroachment upon the President's constitutional authority to faithfully execute the

¹⁷ GAO *Impoundment Control Act—Withholding of Funds through Their Date of Expiration*, B-330330.1 (Dec. 10, 2018), reversing B-115398, Aug. 12, 1975.

¹⁸ This view is buttressed by the fact that the ICA's deferral provisions expressly forbid the President from deferring funds through the end of a fiscal year. 2 U.S.C. § 684. Thus, if Congress wanted to similarly prevent the President from withholding funds under a rescission proposal through their expiration, it certainly knew how to do so.

¹⁹ GAO *Office of Management and Budget—Withholding of Ukraine Security Assistance*, B-331564 (January 16, 2020).

²⁰ Acts of Congress are to be construed harmoniously so as to give effect to each. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662–63 (2007).

laws. It is axiomatic that to faithfully execute the law, the President must be permitted to take time to consider how to best execute such spending within the confines of all applicable laws. If that requires a temporary pause in spending, it must be permitted.

Contrary to GAO's view, the ICA's bar on "policy deferrals" does not mean that the Executive Branch may *never* pause spending to make policy decisions. Such an interpretation borders on the absurd, leading to a scenario whereby agencies would be forced to spend taxpayer funds before they had even determined, as allowed within their statutory discretion, how to do so. GAO conflates: (1) the ICA's prohibition on deferring funds in cases where the Executive Branch *disagrees* with the policy of a statute; and (2) the Executive Branch's discretion to delay spending for even a very short period so that it may determine the best policy in order to *comply* with the statute. If the latter is prohibited, the Executive Branch simply cannot function.²¹

GAO's Ukraine Opinion did not address the longstanding practice of Members of Congress and their staff placing holds on agency funds—even after OMB pointed out in its December 2019 letter that such practice has long been recognized by GAO as legal—even though such inter-branch courtesy is not based on any constitutional or statutory authority.²² Indeed, OMB provided GAO with several examples over the past four years of Members of Congress demanding that agencies withhold funds for months beyond the congressional notification period required by statute.²³ GAO has never found fault under the ICA with agencies accommodating these requests, even though such Members have no legal authority to direct the obligation of funds after Congress has appropriated them. If compliance with non-binding directives from Member of Congress and their staff to "hold" funds is not a deferral under the ICA, then a President deciding to temporarily pause spending so that he can determine the most appropriate and efficient uses of the funds within his statutory or constitutional authorities is likewise not a deferral.

Pausing before spending is a necessary part of program execution. Before obligating appropriated funds, it is incumbent upon the President, acting through the Executive Branch, to understand how an agency intends to execute a program—and whether that option is the best use of those funds within the program authorization—before granting it the authority to spend

²¹ This is not the first time in recent history that GAO has issued an illogical opinion that, if followed by the Executive Branch, would result in unnecessary harm to its employees. In B-330935 (May 20, 2019), GAO incorrectly applied appropriations law to prohibit employee transit benefits for Federal employees. GAO later withdrew its opinion after reviewing a counter legal opinion from the Department of Transportation, the Executive Branch agency with primary subject matter expertise on the matter of transit benefits. However, GAO's reliance on its own faulty legal opinion and the advice of its General Counsel directly contributed to a violation of labor law, as GAO's Personnel Appeals Board found that GAO had committed an Unfair Labor Practice by refusing to negotiate in good faith with its union over such transit benefits. The Personnel Appeals Board ultimately imposed sanctions on GAO for its "blatant disregard" for the laws governing labor disputes between GAO and its employee. These sanctions included the imposition of attorney's fees and retroactive application of any agreement reached pursuant to the bargaining order entered in the case. GAO Employees Organization, IFPTE Local 1921 v. GAO, Docket No. LMR 2019-02 (Nov. 26, 2019).

²² OMB notified GAO that it was aware of almost 300 examples of congressionally directed holds on agency funding that were from 10 to 321 days in fiscal years 2017-2019 alone. *Office of Management and Budget—Withholding of Ukraine Security Assistance*, B-331564 (January 16, 2020) at 8-9.

²³ OMB General Counsel Letter to GAO, re: B-331564, *Withholding of Ukraine Security Assistance* at 8-9 (Dec. 11, 2019).

taxpayer resources. Interpretations of the ICA that hinder or outright proscribe such a practice foster a culture of wasteful and unaccountable spending at the federal level, and impinge upon the President's ability to ensure, to the greatest extent possible, the faithful execution of the laws.

III. The Committee's and GAO's Interpretation of the ICA Ignores History

Recognizing that Congress's Article I powers only go so far, Administrations going back as far back as the early 1800s have temporarily deferred or even outright rejected spending mandates for a variety of reasons.²⁴ In fact, every Administration from the Great Depression Era through the Nixon Era impounded funds.²⁵ This history is important because it exposes a critical flaw in GAO's interpretation of the ICA, which is that GAO's criticism of OMB's recent actions is rooted not merely in the ICA, but in the appropriations power itself.

In its Ukraine Opinion, GAO categorically stated that "The Constitution grants the President no unilateral authority to withhold funds from obligation. Instead, Congress has vested the President with strictly circumscribed authority to impound, or withhold, budget authority only in limited circumstances as expressly provided in the ICA."²⁶ Further, in his testimony before the House Budget Committee, GAO's General Counsel defended GAO's opinion by stating that "[t]he Impoundment Control Act is the only authority that a president has to withhold funds from obligation. The president doesn't have any constitutional authority to withhold, doesn't have any inherent authority to withhold."²⁷ In other words, GAO takes the position that the ICA did not *constrain* any pre-existing, inherent Presidential authority to defer funds within the discretion provided him under a statute. Rather, in GAO's view, the ICA was a *grant* of authority—indeed, it is the sole source of authority—allowing the President to delay obligations of funds. This conclusion not only ignores the historical reality surrounding the ICA (which was clearly an attempt to constrain Executive power, not add to it) but it also implies that decisions such as

²⁴ The first known instance of a Presidential impoundment was in 1801, when President Thomas Jefferson refused to spend funds appropriated for the construction of several navy yards on the grounds that such navy yards were wasteful and not essential to the Nation's security. This was not a one-off occurrence as two years later, President Jefferson refused for more than a year to spend \$50,000 appropriated for the acquisition of gunboats for the U.S. Navy. In that instance, President Jefferson claimed that the gunboats were no longer needed due to the successful negotiation of the Louisiana Purchase. President Jefferson did subsequently spend the funds the following year.

²⁵ For example, between 1940 and 1943, President Franklin D. Roosevelt invoked his authority as Chief Executive and Commander-in-Chief to refuse to spend more than \$500 million in public works funding because such expenditures would hinder defense-related spending priorities necessary to the ongoing war effort. Likewise, each of the three Presidents that immediately succeeded President Roosevelt—Presidents Truman, Eisenhower, and Kennedy—withheld funds designated for defense-related purposes such as increases in Air Force personnel, strategic aircraft, and long-range bombers. Outside of the national defense sphere, President Grant refused to spend more than half of an appropriation for river and harbor improvements because such funds were for "works of purely private or local interest, in no sense national" and the Treasury had insufficient revenues to pay for such improvements. During the depth of the Great Depression, President Hoover told his administration to slow down the pace of program implementation and establish an annual reserve, which resulted in a ten percent cut in government expenditures. And most recently, Presidents Lyndon Johnson and Nixon impounded funds for a variety of education, agriculture, highway construction, flood control, and other domestic programs.

²⁶ GAO B-331564, at 5.

²⁷ Testimony of Thomas H. Armstrong, General Counsel, GAO before the House Budget Committee, March 13, 2020.

OMB's, acting on behalf of the President, to temporarily pause funds violated not only the terms of the ICA, but the Constitution itself.

Under this view of the balance of powers under the Constitution, because there is no authority to defer funds except as granted by the ICA, any violation of the ICA is tantamount to a violation of the Congress's constitutional power of the purse. But if this were true, then every pre-ICA decision of a prior Administration to pause spending, spend less money than Congress appropriated, or refuse to spend at all, also violated the Constitution, regardless of their stated reasons for doing so. Such an interpretation strains credulity and inaccurately reflects how the Legislative and Executive Branches viewed their respective constitutional roles and authorities prior to the ICA.

In fact, President Franklin Roosevelt wrote that "the mere fact that Congress, by the appropriation process, has made available specified sums for the various programs and functions of the Government is not a mandate that such funds must be fully expended. Such a premise would take from the Chief Executive every incentive for good management and the practice of commonsense economy."²⁸ That same year, the House Committee on Appropriations issued a report that stated, "Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expected for that activity," adding that the person in the Executive Branch responsible for spending an appropriated sum is obligated to render "all necessary service with the smallest amount possible within the ceiling figure fixed by Congress."²⁹ In addition, legacy Attorney General opinions endorsed the view that appropriations bills are of a "permissive nature and do not in themselves impose upon the executive branch an affirmative duty to expend the funds."³⁰ Until the ICA came along, few people seriously thought that Congress's appropriation of amounts for specified programs foreclosed all discretion on the part of the Executive Branch to implement those programs in the most efficient way possible.

The GAO's interpretation of the ICA has turned these once well-understood notions on their head. We agree that Congress has the constitutional responsibility to authorize and provide appropriations for Federal programs and activities. But Congress's role in determining the amount of appropriated funds that the Executive Branch may spend on a program should not mean that in every case Congress also determines the minimum amount of taxpayer dollars that must be spent on a program.³¹

IV. The Impoundment Control Act Has Failed

In the wake of the events of Watergate, at the moment when Presidential power was at its lowest ebb in modern history, Congress enacted the ICA in an attempt to wrest decision-making authority from the President with respect to the administration of federal programs. In passing the

²⁸ Franklin D. Roosevelt, Letter to Sen. Russell (1942).

²⁹ 89 Cong. Rec. 10362 (1943).

³⁰ See, e.g., *Federal-Aid Highway Act of 1956—Power of President to Impound Funds*, 42 Op. Att'y Gen. 347, 350 (1967) ("[t]he duty of the President to see that the laws are faithfully executed, under Article II, section 3 of the Constitution, does not require that funds made available must be fully expended").

³¹ The Executive Branch, which is the branch of government that has the constitutional responsibility over the day-to-day execution of the laws, has far better information and thus is better situated than Congress to make and act on such determinations.

ICA, Congress desired to curtail the ability of the President to push back against unreasonable or inefficient spending decisions of Congress, even when programs can be executed for far less money than Congress appropriated. To make matters worse, Congress also empowered GAO, an arm of the Legislative Branch, to bring suit against the Executive Branch and render judgments on its actions.³² The end result of the ICA has been a law that micromanages the President's execution of the laws with predictably terrible results.

The ICA has plagued Administrations for nearly a half-century now due to uncertainty and confusion as to its interpretation and execution. The ICA limits the Executive Branch's ability to spend appropriations effectively, or to avoid spending where either Congress appropriates more than is necessary to carry out the congressionally authorized objectives or such spending would not be a prudent use of taxpayer resources. Further, the ICA fosters a Federal culture of wasteful and inefficient spending by incentivizing agencies to spend as much as appropriated, regardless of whether such spending is necessary to run a program. It does so by imposing burdensome and counterproductive requirements on the President's ability to stop—or even slow—such spending, and by failing to include any mechanism to ensure that Congress reviews needed spending cuts that are identified after appropriations Acts are signed into law. The breadth of the statute is especially ill-suited for addressing specific funding decisions by the President and promotes the very opposite of what good government should be. Members of Congress often bemoan the “use-it-or-lose-it” mentality of the Executive Branch, but under GAO's view of the ICA, federal agencies are forced to adopt an even more problematic “use it, *or else*” approach.

A. The ICA's Onerous Requirements for Achieving Savings Create Perverse Spending Incentives that Discourage Efficiency, Transparency, and Accountability

Instead of encouraging savings in the administration of federal programs, the ICA places onerous restrictions on the President in situations where he can achieve savings by carrying out a program for less money than Congress appropriated. In such a situation, the ICA requires the President to either find another authorized use for those savings or transmit a special message to the Congress notifying it of his deferral of budget authority. Yet, the ICA prohibits the deferral of funds beyond the fiscal year in which the deferral is proposed, and so the President must release the excess funds within a reasonable timeframe to ensure their prudent obligation before they expire.

³² GAO's ability to avail itself of the ICA authority to bring suit against officials of the Executive Branch is questionable at best. See *Moore v. United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring), *cert denied*, 469 U.S. 1106 (1985) (stating that “we sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers”). In a signing statement for legislation that amended an earlier version of the ICA, President Reagan wrote:

[T]he Supreme Court's recent decision in *Bowsher v. Synar* . . . makes clear that the Comptroller General cannot be assigned executive authority by Congress. In light of this decision, section 206(c) of the joint resolution, which purports to “reaffirm” the power of the Comptroller General to sue the Executive branch under the Impoundment Control Act, is unconstitutional. It is only on the understanding that section 206(c) is clearly severable from the rest of the joint resolution . . . that I am signing the joint resolution with this constitutional defect.

The only other alternative under the ICA is for the President to transmit a special message to the Congress proposing a rescission of any funds that are not required to carry out a congressionally authorized program. Under the ICA's rescission provisions, funds may be withheld from obligation for up to 45 days, but if Congress fails to act on the rescission, the President must make the funds available for obligation. Shepherding a formal deferral or rescission proposal through the Executive Branch is an arduous task, and Administrations have undoubtedly found it easier to simply find unnecessary or redundant uses for excess funds rather than go through the ICA's deferral and rescission processes. This is especially so because the President has no assurance that Congress will actually act on his proposals.

B. Even When the President Follows the ICA's Requirements, Congress has Proven to be an Unreliable Partner

Predictably, Congress has been inconsistent at best in entertaining rescission proposals submitted by sitting Presidents. For example, President Reagan saw mixed results with the use of the rescission procedures. He was successful in fiscal years 1981-1982, when Congress approved almost 70% of his proposed rescissions. However, during fiscal years 1983-1988, Congress approved less than two percent of his proposed rescissions. Presidents after Reagan have found the tool similarly ineffective, and its use has been limited since that time.

In May 2018, President Trump proposed what was at the time the largest single ICA rescissions package ever by sending a request to cut approximately \$15 billion of spending that was no longer needed.³³ Congress failed to enact any of those rescission proposals even though in some cases, funding had been sitting in agency coffers for years with no plans to spend it. Congress's inaction on these proposals effectively turns every appropriation made by Congress into a minimum amount that must be spent, regardless of what it actually costs to administer the program. This promotes inefficient and wasteful government spending, when good government requires the opposite.

C. The ICA's Definition of "Deferral" is Exceedingly Broad

The ICA also suffers from a lack of precision, rendering interpretation incredibly unwieldy. To illustrate, the ICA's definition of "deferral of budget authority" includes "withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or . . . any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law."³⁴ This definition is so broad that one could conclude that it includes any

³³ Russ Vought, *The White House Announces its Rescission Package*, Wall Street Journal, (May 7, 2018), <https://www.wsj.com/articles/the-white-house-announces-its-rescission-package-1525731938>. On January 14, 2021, President Trump proposed the largest rescission package ever submitted under the ICA, totaling more than \$27 billion.

³⁴ 2 U.S.C. § 682(1).

action taken by OMB under its statutory authority to apportion funds.³⁵ As noted above and below, such a broad interpretation would be incorrect.

In fact, GAO identified this concern for Congress shortly after the ICA was enacted. In its review of the ICA shortly after its enactment, GAO noted ways in which the ICA is flawed, and recommended amending it, including to amend the definition of deferral, “to eliminate coverage of all temporary impoundments. Rather, the definition should specify that deferrals to be reported under section 1013 should only be those temporary impoundments that are without statutory basis....”³⁶ Unfortunately, Congress never took GAO up on its suggestion to amend the ICA’s definition of deferral.

As a result, over time, OMB and GAO came to an agreement that, despite the breadth of the ICA’s definition for deferral of budget authority, there must necessarily be a distinction between “deferrals,” which require the President to report to Congress pursuant to the ICA, and what have come to be known as “programmatic delays,” which do not. This is because the ICA’s restrictions do not—and, logically, cannot—extend so far as to preclude Executive Branch officers from performing the Executive Branch’s statutorily required duty to ensure the effective management of funds.³⁷ Since 2002, using this interpretation, OMB has not notified Congress when it routinely makes funds unavailable for certain time periods as part of OMB’s day-to-day apportioning of funds, because such apportionments are not “deferrals” under the ICA.³⁸

The programmatic delay/deferral distinction is only helpful, however, when both parties agree on what constitutes a programmatic delay and what constitutes a deferral. And as the past few years have demonstrated, one person’s programmatic delay may very well be another person’s deferral. Due to the ambiguity of the ICA’s definition of a deferral, the Executive and Legislative Branches are forced to engage in tedious and, ultimately, fruitless back and forth arguments over whether certain Executive Branch actions constitute programmatic delays or deferrals. This is not a productive use of taxpayer money and does not set clear rules of the road for Congress or the Executive Branch. Unfortunately, this is exactly what GAO’s Ukraine

³⁵ 31 U.S.C. §§ 1512, 1513. OMB is charged by law to assist the President in carrying out this constitutional duty by apportioning funds to Executive branch agencies. When funds are appropriated by Congress, they are provided for particular purposes, for a specified time period, and in a specified amount. Consistent with 31 U.S.C. §§ 1512 and 1513, OMB is required to apportion funds appropriated for a definite period to ensure that they last for the entirety of the period for which they were appropriated by Congress, and to apportion funds appropriated for an indefinite period to achieve the most effective and economical use. Those same laws provide OMB with the authority to apportion funds for any time period (e.g., days, months, quarters) or purpose authorized by the appropriation.

³⁶ GAO, Review of the Impoundment Control Act of 1974 After 2 Years, 11 OGC-77-20 (June 3, 1977).

³⁷ GAO has long recognized this reality:

There is also a distinction between deferrals, which must be reported, and ‘programmatic’ delays, which are not impoundments and are not reportable under the Impoundment Control Act. A programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency’s reasonable and good faith efforts to implement the program....

GAO, Principles of Federal Appropriations Law, 4th ed., 2016 rev., ch. 2, p. 2-50, GAO-16-464SP (Washington, D.C.: Mar. 2016) (internal citations omitted).

³⁸ OMB’s longstanding apportionment practice includes occasionally pausing obligations to obtain information needed to determine the best possible use of the funds within the scope of the law.

Opinion threatens to perpetuate by fundamentally upsetting the balance described above that has been in place for the better part of two decades.

D. The ICA's Deferral Provisions Invite Impermissible Third-Party Scrutiny into Executive Branch Decision-Making

Despite OMB and GAO devising, up until the GAO's Ukraine Opinion, a meaningful interpretation of deferral to exclude programmatic delay, a practical problem remains: whether or not a deferral is legally permissible under the ICA turns not on objective facts, but rather on the intent of the Executive Branch. Did the Executive Branch, in deferring funds, intend to delay funds for programmatic reasons (e.g., because of implementation challenges or to answer legal and policy questions surrounding carrying out the law), was the delay intended to create reserves, or was it due to policy objections to the law itself? What if the intent involved a combination of such factors?

Such a subjective inquiry is not a helpful tool for Congress's oversight of Federal spending. Having congressional committees or GAO engage in after-the-fact examinations of whether, in its estimation—and despite not knowing all relevant facts—the Executive “intent” was consistent with the statute is not conducive to efficient spending. To the extent that true “intent” can be determined at all, any efforts to glean such intent necessarily involve a post hoc, extensive factual investigation that clashes with the constitutional principle of separation of powers and with Executive Branch privileges, including the deliberative process privilege.

The deferral provisions of the ICA also ignore a practical reality: agencies, striving to avoid obligating funds in excess of the amount available in their appropriations in violation of the Anti-Deficiency Act, lapse a significant amount of funding every fiscal year. Prudent accounting requires that in many accounts some cushion be provided to ensure sufficient funds are available to cover unforeseen obligations. Often, such funds lapse.³⁹ In such instances, has the agency unlawfully impounded funds when they lapse? If the agency does not report this to Congress, has the agency also violated the deferral provisions of the ICA? GAO has said no in both instances—despite the fact that funds that were appropriated were not spent during those funds' period of availability—notwithstanding the broad definition of deferral under the ICA.⁴⁰ Yet when an agency similarly pauses obligations simply to decide how to spend funds within the law, GAO concludes that such is an ICA violation. Conflicting and inconsistent opinions such as these cannot be followed, and places the Executive Branch, which is constitutionally charged with executing the laws, in an impossible position.⁴¹

³⁹ These routine annual lapses are not insignificant, either. In fiscal year 2019 alone, the Executive Branch lapsed nearly \$50 billion. In fiscal year 2018, the Executive Branch lapsed more than \$19 billion.

⁴⁰ GAO B-229326, Aug. 29, 1989. Such a position is, of course, at odds with GAO's other view that there is no inherent Presidential authority to delay the obligation of funds except pursuant to the ICA, and that “programmatic delay” can only refer to delays that are outside the Executive Branch's control. In countless cases, however, agencies could have prevented the lapse of funding, but did not. GAO excuses such lapses because it—a Legislative Branch agencies with no first-hand knowledge of the facts—deems the “intent” of the Executive Branch to be proper and thus not violative of the ICA.

⁴¹ GAO's General Counsel, “Thomas Armstrong, Esq.,” recently testified that GAO supports amendments to the ICA that would impose criminal penalties on federal employees who violate its provisions. *Testimony before the House Committee on the Budget—Congress's Constitutional Power of the Purse and the Government Accountability Office's*

V. Congress Should Reform the ICA to Allow the Executive Branch to Effectively Manage Taxpayer Dollars

It is clear that the ICA has failed to achieve meaningful spending objectives. As pointed out above, the ICA is an albatross around a President's neck, disincentivizing the prudent stewardship of taxpayer money and inviting detractors in Congress to second-guess complex program implementation decisions. This results in a culture of federal spending that is inconsistent with faithful stewardship of public funds.

Our spending laws should encourage responsible and transparent spending decisions, with an aim toward saving taxpayer money whenever possible. This means that if Congress appropriates more money than what it costs to fully but efficiently execute government programs, the funds should be permitted to lapse. The ICA comes woefully short in each of these regards. Congress should use its powers under Article I of the Constitution to focus on passing detailed authorizing laws, or re-authorizing the dozens of such laws that have expired. Well-crafted laws authorizing Federal programs are critically important to ensuring that the Executive can effectively fulfill congressional intent. Such laws should clearly detail the functions and scope of the government programs that Congress wants carried out. In contrast, appropriations laws (which are later provided to carry out authorizing laws) should be more general in nature.

It is that structure—robust and unambiguous authorizing laws that plainly articulate the will of Congress, followed by general appropriations in amounts that permit the President to execute the authorizing laws—that provides the proper balance of powers between the Executive and Legislative Branches. The proper balance is not Congress deciding precisely how much must be spent on a program and attempting to force the Executive to serve in a mere check-writing capacity. Rather, the proper balance involves Congress explaining in law what it wants done, providing sufficient appropriations to achieve those ends, and allowing the President—who, from his or her vantage point in the Executive Branch, necessarily has superior knowledge of agency operations—to carry out those mandates with less money than appropriated, if possible.

This is not a radical approach. This is common sense, and it is good government.⁴² But under the ICA, it is a flexibility that the President does not have. Reforming the ICA to return to

Role to Serve that Power, B-331902, GAO-20-495T (Mar. 11, 2020). Given the shifting and highly subjective inquiry that GAO engages in to determine whether or not the ICA has been violated, imposing criminal penalties on employees for violation of the law would be draconian. It also serves as further evidence that GAO lacks even a basic understanding of the complexities involved in implementing Federal programs, and the challenges in navigating a law as poorly structured as the ICA. But if Congress were to pursue this type of penalty, it is only appropriate to subject Members of Congress and their staff to similar criminal sanctions when they demand and even threaten agency officials to hold funds. These congressional actors are clearly an accessory to an such agency withholding of funds.

⁴² These recommendations are also not new. The 1949 Commission on Organization of the Executive Branch of the Government (also known as the Hoover Commission), in its Report on Budgeting and Accounting in the Executive Branch, implored the Congress to clarify what the law at that time allowed in terms of budget execution and affirmatively grant the President the authority to spend less money than what Congress appropriated if the full amount was not needed to fully implement the statutory objectives. As the report stated:

a more equitable division of power between Congress and the President with respect to the expenditure of appropriated funds would allow prudent financial management to flourish.

Conclusion

Despite the Committee's misguided attempt to paint OMB as a "systemic rule-break[er]," the true record of the past four years reflects the fact that OMB worked diligently and creatively to lawfully carry out the President's domestic and foreign policy agenda while also trying to deliver meaningful savings to the American taxpayers. Unfortunately, the ICA, and the manner in which it has been interpreted, makes merely pursuing these savings an exacting task, which only promotes more inefficient and wasteful spending. Good government demands transparency, efficiency, and accountability in the administration of government programs. This entails not only temporarily pausing spending to determine the best manner in which to lawfully execute a program—which the President is absolutely permitted to do under the ICA—but also allowing funds to lapse if they are not necessary to fully effectuate Congress's intent, which the ICA currently prohibits. Congress should reform the ICA to more fully empower the Executive Branch, with its vast expertise in administering government programs, to efficiently and effectively manage taxpayer dollars.

Sincerely,



Russell T. Vought
Director



Mark R. Paoletta
General Counsel

cc: The Honorable Jason Smith, Ranking Member, House Budget Committee
Thomas H. Armstrong, General Counsel, Government Accountability Office

Present law and practice are not clear on whether or not the Budget Bureau and the President have the right to reduce appropriated amounts during the year for which they were provided . . . We recommend that it is in the public interest that this question be clarified and, in any event, that the President should have authority to reduce expenditures under appropriations, if the purposes intended by the Congress are still carried out.