Mark R. Paoletta
Senior Fellow
Center for Renewing America

Written Testimony

House Committee on the Budget

Hearing on
PROTECTING OUR DEMOCRACY: REASSERTING CONGRESS' POWER OF THE PURSE
April 29, 2021

Chairman Yarmuth, Ranking Member Smith, and Members of the Committee:

Thank you for the invitation to testify today on the bill to amend the Impoundment Control Act (ICA). This bill has been described as an effort to strengthen Congress' power of the purse and to prevent impoundments.

It is ironic that as this bill is being considered, President Biden is holding, that is impounding, all funds for the construction of a wall along the southern border, including $1.4 billion specifically appropriated for that purpose.[1] Based on the Government Accountability. Office (GAO)'s opinion on funds for Ukraine, President Biden's hold is clearly illegal, violating the ICA. But the Democrats on this Committee and in Congress have been silent on this direct assault on Congress' power of the purse. In fact, Senator Leahy has supported this impoundment. President Biden's hold is 100 days and counting, which is twice as long as the Trump Office of Management & Budget (OMB) 50-day hold on funding for Ukraine.

Even after the Trump OMB released the funds for Ukraine after 50 days, Chairman Yarmuth and Chairwoman Lowey stated that OMB's unilaterally delaying the funding was "an abuse of the authority provided to the president to apportion appropriations," and sent sweeping document and information requests to OMB. Why has not the Chairman or Democrats on this Committee issued any statements or sent document requests to the Biden Administration asking about this ongoing hold? Your interest in asserting control over Congress' power of the purse seems to depend on who the President is. If you truly cared about preventing impoundments or asserting control over the power of the purse, you would be looking into this action now.

[1] The March 17, 2021 letter from 40 Republican Senators to GAO requesting a review on President Biden's hold on border wall funds notes that "[t]hese line-item appropriations . . . are quite specific, providing the permissible design of the barrier to be constructed and the location of its placement. . . In short, Congress intentionally left little discretion to the executive branch over how it would execute the funding for border wall construction." Letter attached.

President Biden's decision to impound these funds, combined with his reversal of other Trump Administration policies on immigration and border security, has led to catastrophic consequences – and a true crisis of human suffering at the border. These policies have tragically facilitated increased human trafficking and other crimes. This crisis was avoidable given the good work done by President Trump and his Administration to address the border security issues.

Based on GAO Ukraine Opinion, President Biden's 100 Day Hold on Border Wall Funds Is Illegal

In defending its hold on funding for Ukraine to run a policy process, the Trump OMB stated that it was permissible for OMB to pause funds for a programmatic delay due to policy development in order to determine the best and most effective use of those funds, consistent with the intent of the statute.

In its opinion on OMB's pause on funding for Ukraine, GAO rejected the Trump OMB argument: "The ICA does not permit deferrals for policy reasons. . . Faithful execution of the laws does not permit the President to substitute his own policy priorities for those that Congress has enacted into law."

President Trump's OMB vigorously disagreed with GAO's opinion, and set forth its views in the attached January 19, 2021 letter to this Committee, which stated:

> 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. . . 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.

Consistent with the legal reasoning of the pause on Ukraine funds, President Trump paused the funding to the World Health Organization (WHO) because he had concerns about that organization's role with respect to the spread of COVID-19. The relevant appropriations provided that these funds be obligated to "international organizations," but did not specifically identify the WHO in the law. The pause facilitated a policy review to determine to which other international organization the Administration would send the funding. The Trump State Department obligated the funds to another international organization consistent with the scope of the appropriation and with the President's foreign policy agenda.

In contrast, President Biden's hold is designed to thwart a lawfully enacted Congressional appropriation to build a border wall. Under GAO's interpretation, this is clearly illegal.

President Biden stated during the campaign that, if elected, "there will not be another foot of wall constructed in my administration." But Congress appropriated $1.4 billion last year specifically for the construction of the border wall. Nevertheless, on his first day in office, President Biden issued an Executive Order ordering the holding of all funds, and stating that building the wall was "not a serious policy solution . . . and a waste of money." Reports are that all funds are being held and construction has stopped. The White House Press Secretary stated in February that the President "took formal steps to follow up on his Executive Order to end the declaration so that no more American tax dollars could be wasted on a border wall that does nothing to address or reform issues in our immigration system." In fact, in President Biden's FY22 "Discretionary Request," President Biden proposes to rescind the very wall money that he is currently holding. President Biden has not sent up any deferral or rescission special message to Congress, as required by the ICA. It appears that the Administration is now intentionally under-executing congressionally appropriated funding in order to later rescind it.

Biden Administration Arguments Defending Impoundment of Funds are Wrong

The Biden Administration has tried to argue that this hold is a permissible "programmatic delay" under the ICA. But, per GAO's analysis, this is wrong. "Programmatic delay occurs when an agency is taking steps to implement a program but because of *external factors* to the program, funds go temporarily unobligated." (emphasis added). There is no external factor at issue here. President Biden's announcement that he is ending the national emergency declaration and re-directing funds are all Executive-branch created - not external - factors.

Furthermore, GAO has stated that programmatic delay is only permissible when it is part of a genuine effort to faithfully execute the funding, which, based on the Administration statements and documents, is not the case here.

The Democrats applauded GAO's analysis and conclusion that the Trump OMB hold on funds for Ukraine was unlawful. But now that the Biden Administration is impounding funds in direct defiance of a Congressionally enacted policy decision to build the wall along the southern border, the Democrats are noticeably silent.

GAO Should Have Begun Reviewing Biden Hold Much Sooner

GAO delayed examining President Biden's hold despite publicly announcing he was holding all funds. GAO waited more than two months, until Republican Senators and Members of Congress sent a letter to GAO requesting that GAO look into this hold. Under the ICA, GAO has an independent obligation to conduct an inquiry if GAO believes funds are being impounded and report to Congress. After the media attention and GAO's own work on the legality of holds on funding during the Trump Administration, why did GAO not immediately request information from the Biden Administration as to whether they were impounding funds that

were specifically appropriated for building the border wall? This delay raises concerns about GAO's impartiality and whether they will conduct a rigorous and timely review. [2]

The ICA Has Undermined Effective Stewardship of Federal Spending

The bill's provisions will only make a bad law worse. In a January 19, 2021 letter I co-signed with then-OMB Director Russ Vought, I laid out my views on why the ICA has undermined effective stewardship of federal funds. In sum, the ICA disincentivizes any effort to run programs more effectively to achieve savings by mandating onerous procedures to make it all but impossible to save unnecessary funds. It used to be well-established policy to faithfully implement federal programs with the least amount of money necessary, even if was less than the full appropriated amount. Now the ICA makes that effort potentially unlawful. The ICA overthrew 200 years of how the Executive and Legislative Branches worked together.

In 1942, President Franklin Roosevelt stated: "The mere fact that Congress, by the appropriations process, has made available specified sums for the various programs and functions of government is not a mandate that such funds be fully expended. Such a premise would take from the Chief Executive every incentive for good management and the practice of commonsense economy."

In 1943, the House Appropriations Committee issued similar views: "Appropriations of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expected for that activity" and 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."

That doesn't mean that congressional appropriations are a mere ceiling on spending authority, and few argue as such. The Executive has the responsibility to faithfully execute on congressional intent. The Executive must seek to fully fulfill the tasks the Congress has authorized and mandated through both authorizing bills and appropriations within the funds Congress has provided. But there are cases where congressional intent can be met and yet where savings could be found and returned to the taxpayer. Instead of this legislation, which seeks to further restrict opportunities for the Executive to find savings, Congress should consider additional tools that encourage the Executive to find savings consistent with congressional intent.

[2] It is not unusual for GAO and the Executive Branch to disagree on the legality of Executive branch actions. After all, GAO is merely an instrumentality of Congress. GAO determined many times that the Obama Administration broke the law, including the Anti-Deficiency Act. For example, GAO found that the Obama Administration broke the law when President Obama failed to give advance notice to Congress before he released five Guantanamo detainees in exchange for Bowe Bergdahl, an Army soldier who was being held captive by the Taliban. The Obama Administration disagreed with GAO's conclusion.

As set forth in the Trump OMB January 19th letter:

> 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 hundreds of laws that have expired. Well-crafted laws authorizing federal program 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. But under the ICA, it is a flexibility that the President does not have. Reforming the ICA to return to 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.

<u>Bill's Provisions Would Further Undermine Effective Stewardship of Federal Spending</u>

The bill's provisions are all meant to increase the micro-managing of the daily operations of the Executive Branch, and they will further undermine the effective stewardship of government spending. For example, the provision that requires funds to be made available for obligation within 90 days of the end of the period of availability is wrongheaded. By shortening the timeline by when appropriations must be apportioned, this bill will only further undermine Presidential decision-making and exacerbate wasteful spending. There may be discretion within that appropriation on how to spend those funds, and the President, through OMB, may want to make those funds available only in a manner to be spent on his policy preferences and consistent with the law. This takes away the tools for Presidential supervision on spending.

This provision's adverse consequences are only exacerbated by Congress' inability to do its most fundamental job – enact appropriations in an orderly way to fund the government. Congress is incapable of enacting a legitimate budget, an individual appropriations bill, or re-authorizing dozens of programs. We live with a dysfunctional Congress enacting monstrous omnibus appropriations in an untimely manner, which significantly undermine the efficient and effective implementation of government programs. This provision shortens the window by taking away the last quarter of the fiscal year by which a President – be it Trump or Biden or any President – can decide how best to spend those funds. That's reckless.

The bill also provides more powers to GAO to demand information and interviews of federal employees and to sue to enforce this request. This is another effort to undermine the separation of powers. When Congress requests that the Executive Branch produce information, the two branches enter a negotiation based on the constitutionally rooted separation of powers principles. Numerous Supreme Court rulings, including most recently in *Trump v. Mazars* (2020), noted, "Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.' Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel) . . . Such longstanding practice 'is a consideration of great weight' in cases concerning 'the allocation of power between [the] two elected branches of government,' and it imposes on us a duty of care to ensure that we not needlessly disturb 'the compromises and working arrangements that [those] branches. . . themselves have reached.'" (Internal citations omitted).

I served for ten years as the Chief Counsel for Oversight & Investigations for the House Energy & Commerce Committee and went through that process of accommodation many times with the Clinton and Bush 43 Administrations. It has happened with every Administration, including the Obama and Trump Administrations. That's our system of government.

This bill literally tries to throw that process out by empowering the GAO, a mere instrumentality of Congress, to be able to require the President of the United States to turn over any information the Comptroller General deems necessary within 20 days, or the President will be in violation of the law. The bill also empowers the Comptroller to make similar demands, including requests for interviews of any other officer or employee in the Executive Branch. If the documents or interviews are not provided within 20 days, GAO is authorized to file suit in federal district court. This is an astonishing provision and may be unconstitutional if GAO tried to enforce it.[3]

[3] As pointed out in the January 19th letter, "GAO's ability to avail itself of the ICA authority to bring suit against officials of the Executive Branch is questionable at best." In a 1987 signing statement amending the ICA, President Reagan wrote "The 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

The bill requires the publishing of the positions of OMB officials who have apportioning responsibility. That will include listing career staff positions and given how one can match up a position with a name on the internet, this will result in the doxing of federal civil servants. That does not seem to be productive. It is also odd, as this is ultimately the authority of the President himself, which has been delegated to OMB and within OMB through the years. The Committee's obsession with who signs these documents belies the fact that the decisions behind them are ultimately made by political officials, OMB leadership, and ultimately the President, regardless of who signs them. This isn't just micromanagement, it is an attempt to dictate the proper paper flow within the Executive Office of the President.

The bill requires the publishing of OLC opinions, which will chill the rigor and candidness of attorneys' advice.

The bill adds administrative penalties to Executive Branch officials found to have impounded funds. There are inherent problems with likening a violation of the ICA with a violation of the Anti-Deficiency Act (ADA), which is essentially what this provision tries to accomplish. While there are certainly grey areas in ADA law, particularly when determining for what purpose specific funds may be spent, the grey areas in ICA implementation are far greater. The January 19th letter notes:

> [A]gencies, 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. 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. 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.

Nobody who has ever executed on a budget plan has spent the exact amount budgeted for a year to the exact penny. Such a requirement would put budget managers 1 penny away from either violating the ADA on one side or violating the ICA on the other, with severe penalties on both sides.

---

resolution, which purports to 'reaffirm' the power of the Comptroller General to sue the executive branch under the [ICA], is unconstitutional."

My understanding is that GAO proposed criminal penalties last year for such conduct. As OMB General Counsel, I sent a letter in December 2019 to GAO regarding the hold on Ukraine funds, and I provided a list of more than 300 instances spanning three fiscal years where Members of Congress and their staff demanded that the State Department not spend funding that had been apportioned. These holds ranged from 10 days to 321 days. Many times these holds are completely unrelated to the program and it is simply Congress strong-arming an agency to take an action on another matter. These certainly seem to be impoundments, but curiously, GAO, perhaps because they are an instrumentality of Congress, has been fine with these types of holds.

There are many more objections that I have to this bill but in the interest of time I will leave it at these concerns.

I am happy to answer your questions.

United States Senate

WASHINGTON, DC 20510

March 17, 2021

The Honorable Gene L. Dodaro
Comptroller General
Government Accountability Office
441 G St., NW
Washington, DC 20548

Dear Mr. Dodaro,

On January 20th, in one of the first official acts of his presidency, Joseph Biden suspended border wall construction and ordered a freeze of funds provided by Congress for that purpose. In the weeks that followed, operational control of our southern border was compromised and a humanitarian and national security crisis has ensued. The President's actions directly contributed to this unfortunate, yet entirely avoidable, scenario. They are also a blatant violation of federal law and infringe on Congress's constitutional power of the purse. We write regarding these actions. We believe they violated the Impoundment Control Act (ICA), as interpreted by your office, and we request your legal opinion on the matter. Prompt action to end these violations is required to restore order at the border.

BACKGROUND

In response to an alarming and sustained increase in the rates of illegal border crossings, Congress appropriated funds for the construction of a barrier along the country's southern border. These line-item appropriations were the subject of protracted congressional negotiation and are quite specific, providing the permissible design of the barrier to be constructed and the location of its placement. In the Department of Homeland Security (DHS) appropriations bills for fiscal years 2020 and 2021, for example, Congress provided nearly three billion dollars "for the construction of barrier system along the southwest border" which "shall only be available for barrier systems that— (1) use— (A) operationally effective designs deployed as of the date of enactment of the Consolidated Appropriations Act, 2017…; and (2) are constructed in the highest priority locations as identified in the Border Security Improvement Plan."[1] Similarly, in the DHS appropriations bills for fiscal years 2018 and 2019 Congress provided funds "for the construction of primary pedestrian fencing, including levee pedestrian fencing".[2] In short, Congress intentionally left little discretion to the executive branch over how it would execute the funding for border wall construction.

Once provided, this funding was quickly operationalized. By the end of calendar year 2020, DHS had used its appropriations to build and repair or replace 112 miles of border wall across a majority of the country's southern border sectors. Not coincidentally, and in conjunction with a

[1] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2511; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260.
[2] Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13; Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348.

number of other important immigration policy reforms, the rate of illegal border crossings fell substantially and operational control of the border increased dramatically.[3]

Despite this progress, on January 20, 2021, in one of his first official actions, President Biden issued a Proclamation directing DHS, in consultation with the Office of Management and Budget (OMB), to "pause immediately the obligation of funds related to construction of the southern border wall" and to "pause work on *each* construction project on the southern border wall."[4]

The Proclamation provides as justification for its mandates only a policy-based rationale – namely, that "building a massive wall that spans the entire southern border is not a serious policy solution" and that this congressionally mandated project is "a waste of money that diverts attention from genuine threats to our homeland security."[5]

The Proclamation was not just empty political rhetoric. We understand from DHS that it has suspended its border wall projects, that the continued obligation of funds for those purposes has been halted, and that both are a direct consequence of the Proclamation. News reports confirm this is true.[6] As these unlawful pauses have proceeded, the rate of illegal crossings has surged, creating a crisis across our southern border,[7] at times with tragic consequences.[8] Meanwhile, billions in lawfully appropriated dollars, which were provided by Congress to address precisely this issue, sit unused by the Biden Administration.

---

[3] In the Yuma area, for example, illegal border crossings fell 87% from FY19 to FY20 in areas where border wall was constructed.

[4] "Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction," *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/ (*hereinafter* "Proclamation"). The Proclamation specifies that this "pause . . . shall apply to wall projects funded by redirected funds," which we understand to refer primarily to defense and military construction appropriations that were transferred to fund certain border wall projects, "as well as wall projects funded by direct appropriations," which we understand to refer to appropriations provided directly to DHS specifically for border wall construction. *Id.* at section 1(b). Our request focuses only on this latter category of funding. Furthermore, we understand that DHS did not commingle redirected funds and direct appropriations in funding border wall construction projects. Accordingly, our request focuses only on the suspension of border wall construction that was funded with appropriations provided directly to DHS for that purpose.

[5] *Id.*

[6] *See, e.g.,* John Burnett, *With Border Wall Construction Finally on Hold, Activists Worry About What's Next*, NPR (February 1, 2021) https://www.npr.org/2021/02/01/962761279/with-border-wall-construction-finally-on-hold-activists-worry-about-whats-next (last visited March 10, 2021) (indicating that "Biden's Homeland Security Department and the U.S. Army Corps of Engineers confirmed to NPR that every wall construction project has been suspended from San Diego to the Rio Grande Valley").

[7] *See* Zolan Kanno-Youngs and Michael D. Shear, *Biden Faces Challenge From Surge of Migrants at the Border*, NY TIMES (March 8, 2021) https://www.nytimes.com/2021/03/08/us/politics/immigration-mexico-border-biden.html.

[8] *See* Miriam Jordan, *Migrants in Deadly Crash Had Crossed Through Border Wall, Officials Say*, NY TIMES (March 3, 2021) https://www.nytimes.com/2021/03/03/us/migrants-border-crash-el-centro.html.

DISCUSSION

At issue is whether President Biden's Proclamation directed an impoundment of funds in violation of the ICA.

The Constitution specifically vests Congress with the power of the purse, providing that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[9] The President is not vested with the power to ignore or amend a duly enacted law.[10] Instead, he must "faithfully execute" the law as Congress enacts it.[11]

An appropriations act is a law like any other; therefore, the President must take care to ensure that appropriations are prudently obligated in the manner they were provided by Congress.[12] The Constitution grants the President no unilateral authority to withhold funds from obligation.[13] Instead, Congress has vested the President with strictly circumscribed authority to impound, or withhold, budget authority only in limited circumstances. These circumstances are expressly provided in the ICA and separated into two exclusive categories—deferrals and rescissions.[14]

With a deferral, the President may temporarily withhold funds from obligation only in a limited range of circumstances: 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.[15] The deferral of budget authority for any other purpose, including to advance a policy disagreement, is unlawful.[16]

With a rescission, the President may seek the permanent cancellation of funds for fiscal policy or other reasons, including the termination of programs for which Congress has provided budget authority.[17]

In either case, the ICA requires that the President transmit a special message to Congress that includes the amount of budget authority proposed for deferral or rescission and the reason for the

---

[9] U.S. Const. art. I, § 9, cl. 7.
[10] *See Clinton v. City of New York,* 524 U.S. 417, 438 (1998) (the Constitution does not authorize the President "to enact, to amend, or to repeal statutes").
[11] U.S. Const., art. II, § 3.
[12] *See* B-329092, Dec. 12, 2017 (the ICA operates on the premise that the President is required to obligate funds appropriated by Congress, unless otherwise authorized to withhold).
[13] *See* B-135564, July 26, 1973.
[14] *See* 2 U.S.C. §§ 681–688; *see also* S. Rep. No. 93-688, at 75 (1974) (explaining that the objective of the ICA was to assure that "the practice of reserving funds does not become a vehicle for furthering Administration policies and priorities at the expense of those decided by Congress").
[15] 2 U.S.C. § 684(b).
[16] *Id.*
[17] *Id.* at § 683.

proposal.[18] Critically, the burden to justify a withholding of budget authority rests with the executive branch.

The only other circumstance in which the withholding of appropriated funds may be justified is in the case of a "programmatic delay." A programmatic delay occurs when "an agency is taking necessary steps to implement a program, but because of factors *external to the program*, funds temporarily go unobligated. This presumes, of course, that the agency is *making reasonable efforts to obligate*."[19] If there is "no external factor causing an unavoidable delay," but instead the failure to obligate is the result of an agency "on its own volition explicitly barr[ing]" the obligation of funds, then a delay is not programmatic.[20] Instead, such actions are an unlawful impoundment. This is especially true when"[p]rogram execution [is] ... well underway."[21]

Not long ago, in a decision captioned "Office of Management and Budget – Withholding of Ukraine Security Assistance", your agency applied these legal principles to a set of factual circumstances remarkably similar to the ones here. At issue in that matter was a pause in funding provided to the Department of Defense (DOD) for security assistance to Ukraine. There, the Administration did not formally propose a rescission or deferral of the DOD funding by transmitting a special message to Congress. Even if it had proposed a deferral, GAO concluded that it would have been unlawful under the ICA, as the pause had been prompted by policy reasons. And GAO rejected claims then made by the Administration that the pause in funding was programmatic because "there was no external factor causing an unavoidable delay. Rather, OMB on its own volition explicitly barred DOD from obligating amounts."[22]

This body of law and precedents is clear, and their application to the actions directed by the Proclamation is straightforward. In consecutive fiscal years, Congress passed bills appropriating funds to DHS for the construction of a border wall. The President signed those bills into law. Accordingly, the President, through DHS and OMB, must prudently obligate and execute those funds for the purposes for which they were provided. The President now in office is charged with faithfully executing these laws, notwithstanding any policy or political disagreements with his predecessor who signed them.

Nevertheless, this President, by his Proclamation, has directed that funds provided for southern border wall construction be withheld and that related construction be suspended. And, as noted above, those pauses were effected in late January and remain in effect today.[23]

The only lawful justification for these actions would be if the President: (1) transmits to Congress a special message proposing the deferral of the funds; (2) transmits to Congress a special message proposing the permanent rescission of those funds; or (3) can point to a

---

[18] 2 U.S.C. §§ 683–684. These special messages must provide detailed and specific reasoning to justify the withholding. *See id.*; B-237297.4, Feb. 20, 1990 (vague or general assertions are insufficient to justify the withholding of budget authority).
[19] B-331564, Jan. 16, 2020 (emphasis added) (citations in original omitted).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *See, supra*, notes 8-10 and accompanying text.

programmatic delay responsible for the pause in obligation. Failing that, the pauses ordered by the Proclamation are an unlawful impoundment and an assault on Congress's constitutional power of the purse. The Biden Administration has pursued none of these paths.

The Proclamation is not a special message, and it does not purport to be one. Nor does the Proclamation assert that the President will send a special message proposing a deferral or rescission of the border wall funds in question. To date, the Congress has not otherwise received a special message regarding the border wall funding in question. We must therefore conclude that the President – notwithstanding the pauses he ordered – has not proposed a deferral or rescission of DHS's border wall construction appropriations.[24] Importantly, even if the President were to now transmit such a special message, it would not change the fact that these DHS appropriations have been unlawfully impounded since the Proclamation's direction took effect in late January. Whatever actions the President takes going forward, they will not cure the unlawful actions he has taken to date.

Nor is it credible to claim that these funds are the subject of a "programmatic delay." The Proclamation makes no mention of any external factor causing an unavoidable delay in obligating border barrier funding or constructing border wall. To the contrary, at the time of the Proclamation, DHS "had already produced a plan for expending the funds" and the resulting construction of border wall was proceeding apace before the President "on [his] on volition explicitly barred [DHS] from" taking further action by issuing the Proclamation.[25] Now, at least 17 separate wall system projects – each of which was designated by law enforcement officials as a priority to advance operational control of the border – are suspended. The delay caused by the Proclamation clearly is not programmatic.

We note also that the Proclamation limits the pauses it directs "to the extent permitted by law." But this bit of lawyering does not save the Proclamation or the pauses it directs. The law *does not allow* the President to suspend construction of the border wall or pause the obligation of funding provided for that purpose in the manner he has directed in the Proclamation. The Proclamation's direction is therefore entirely irreconcilable with the law, and any suggestion to the contrary is illusory.

The delay here is the manifestation of a disagreement between Congress and the President over immigration policy. The President bemoans the border wall system funded by Congress as "not a serious policy solution"[26] and "a waste of money."[27] It is his right to levy those criticisms, and he is free to propose budgets that advance his alternative approach to securing our nation's borders. But he cannot unilaterally impound funding provided by Congress in duly enacted appropriations laws. As has long been recognized, enacted statutes, and not the President's

---

[24] Even if the President did transmit a special message proposing the deferral of DHS's border wall funds, the Proclamation does not articulate any rationale sufficient to justify such a deferral under the ICA, and we are not aware that one exists. *See* 2 U.S.C. § 684(b). Instead, the Proclamation provides only that the pauses it directs are the result of a policy disagreement with Congress. The ICA, of course, does not permit deferrals for policy reasons. *See* B-331564, Jan. 16, 2020; B-237297.3, Mar. 6, 1990.

[25] B-331564, Jan. 16, 2020.

[26] Biden Border Wall Proclamation.

[27] *Id.*

policy priorities, necessarily provide the animating framework for all actions agencies take to carry out government programs.[28]

GAO has rightly concluded that "[f]aithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law."[29] Yet, with his Proclamation, the President has done just that. The legal result of those actions is an impoundment of funds in violation of the ICA. The practical result is a growing crisis across our southern border. We will abide neither. A President, regardless of the administration and regardless of the purposes for which the underlying funds are provided, must be held accountable for violations of the ICA. If he is not, "we will open the floodgates for this and future Administrations to violate the ICA with impunity"[30] and that – as we are seeing now – will have real consequences for our nation.

We look forward to your timely response and we thank you in advance for your efforts.

Sincerely,

Shelley Moore Capito
United States Senator

Richard Shelby
United States Senator

Mitch McConnell
United States Senator

John Thune
United States Senator

[28] *Louisiana Public Service Commission 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."); *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (a federal agency is "a creature of statute" and "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress").

[29] B-331564, Jan. 16, 2020.

[30] Letter from Senator Chris Van Hollen to Gene Dodaro, Comptroller General, Government Accountability Office (Dec. 23, 2019) *available at* https://www.vanhollen.senate.gov/imo/media/doc/Letter%20to%20GAO%20on%20Ukraine%20withholding%20and%20Impoundment%20Control%20Act%20SIGNED%2012-23-19.pdf.

Thom Tillis
United States Senator

Bill Hagerty
United States Senator

Jim Risch
United States Senator

John Kennedy
United States Senator

James M. Inhofe
United States Senator

Marco Rubio
United States Senator

Marsha Blackburn
United States Senator

Deb Fischer
United States Senator

Cindy Hyde-Smith
United States Senator

Roy Blunt
United States Senator

John Hoeven
United States Senator

Jerry Moran
United States Senator

Rand Paul M.D.
United States Senator

John Barrasso M.D.
United States Senator

Richard Burr
United States Senator

Lindsey O. Graham
United States Senator

James Lankford
United States Senator

Mike Braun
United States Senator

Joni K. Ernst
United States Senator

Pat Toomey
United States Senator

Mike Crapo
United States Senator

Roger W. Marshall
United States Senator

Roger F. Wicker
United States Senator

Rick Scott
United States Senator

John Boozman
United States Senator

M. Michael Rounds
United States Senator

Steve Daines
United States Senator

Rob Portman
United States Senator

Cynthia M. Lummis
United States Senator

Susan M. Collins
United States Senator

Tommy Tuberville
United States Senator

Kevin Cramer
United States Senator

Mitt Romney
United States Senator

Todd Young
United States Senator

John Cornyn
United States Senator

Tom Cotton
United States Senator

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.

Statement on Signing H.R.J. Res. 324 into Law, 23 WEEKLY COMP. PRES. DOC. 1091 (Oct. 5, 1987).

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.