

**PROTECTING OUR DEMOCRACY:  
REASSERTING CONGRESS' POWER OF THE PURSE**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE BUDGET**  
**HOUSE OF REPRESENTATIVES**  
ONE HUNDRED SEVENTEENTH CONGRESS  
**FIRST SESSION**

HEARING HELD IN WASHINGTON, D.C., APRIL 29, 2021

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**THURSDAY, APRIL 29, 2021**

HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE BUDGET  
*Washington, D.C.*

The Committee met, pursuant to notice, at 1 p.m., via Zoom, Hon. John A. Yarmuth [Chairman of the Committee] presiding.

Present: Representatives Yarmuth, Boyle, Price, Schakowsky, Kildee, Chu, Plaskett, Wexton, Scott, Jackson Lee, Sires; Smith, McClintock, Grothman, Smucker, Burgess, Carter, Cline, Feenstra, Good, and Hinson.

Chairman YARMUTH. The hearing will come to order. We are holding this proceeding virtually in compliance with the regulations for committee proceedings pursuant to House Resolution 965 carried over to the 117th Congress via House Resolution 8. I would like to remind Members that we have established an email inbox for submitting documents before and during committee proceedings and we have distributed that email address to your staff.

Consistent with regulations, the Chair or staff designated by the Chair may mute participants' microphones when they are not under recognition for the purpose of eliminating inadvertent background noise. Members are responsible for unmuting themselves when they seek recognition. We are not permitted to unmute Members unless they explicitly request assistance. If I notice that you have not unmuted yourself, I will ask you if you would like staff to unmute you. If you indicate approval by nodding, staff will unmute your microphone. They will not unmute your microphone under any other conditions.

Members must have their cameras on and be visible on screen in order to be recognized. Members may not participate in more than one committee proceeding simultaneously. I do not know if we have any Members in the hearing room. But if we do, in light of the attending physician's new guidance and his announcement on January 4th, any Members present in the hearing room must wear a mask at all times and are required to keep their masks on when seeking recognition and speaking.

For those Members not wanting to wear a mask, the House rules provide a way to participate remotely from your office without being physically present in the hearing room.

And now I will say what I should have said at the beginning. Good afternoon and welcome to the Budget Committee's hearing on

Protecting our Democracy: Reasserting Congress' Power of the Purse. I want to introduce our witnesses for today. This afternoon, we will be hearing from Dr. Molly Reynolds, Senior Fellow in Governance Studies at the Brookings Institution, Liz Hempowicz, Director of Public Policy at the Project on Government Oversight, Edda Emmanuelli Perez, Deputy General Counsel at the U.S. Government Accountability Office, and Mark R. Paoletta, Senior Fellow at the Center for Renewing America.

I will now yield myself five minutes for an opening statement.

Exactly one year ago yesterday, I introduced the congressional Power of the Purse Act. I said it was an important step in restoring Congress' constitutional spending authority and reinforcing the foundations of our democracy, a responsibility that should be embraced by both sides of the aisle. Today we are in a new Congress, with a new Administration that has taken steps to return to previous longstanding norms. We have a reinvigorated OMB led by an Acting Director with firsthand experience fighting to protect Congress' spending authority. And we are using this Committee's first full hearing to again examine the importance of safeguarding Congress' constitutional authority and the need for the congressional Power of the Purse Act. I believe in this good government reform legislation, and I am fully committed to pursuing its reforms regardless of who is in the White House.

Our founders knew that money, and who controls it, is fundamental to a democratic government. They also knew that, with elections every two years, Congress would be the branch most accountable to the public. So, they gave us the power of the purse as a critical check on the President.

Congress has exercised this power by enacting foundational laws, like the Antideficiency Act and the Impoundment Control Act, and updating them as challenges to its authority arose. To help protect and enforce its spending decisions, Congress established the non-partisan Government Accountability Office, which, as we all know, is charged with investigating and reporting on violations of budget and appropriations laws.

However, Congress' ability to exercise its singular constitutional authority has become increasingly challenged by an executive branch that has sought to seize control of the nation's purse for itself. Presidents and agencies of both parties have pushed the boundaries of their delegated spending powers, exploiting secrecy, a lack of reporting requirements, and limitations on enforcement to push their own agenda and sidestep Congress. Decades of this purposeful infringement on Congress' power of the purse proves that Congress cannot rely on interbranch comity and nonbinding norms in the face of an emboldened executive branch.

For our government to work, the American people need to know that when their representatives in Congress pass a funding bill and it is signed into law, the executive branch will follow the law to ensure their hard-earned tax dollars go where their representatives intended. For Congress to remain a co-equal branch of government and live up to our constitutional charge, we must reassert Congress' control over spending and ensure we are the ones holding the purse strings. That is why I introduced the congressional Power of the Purse Act.

My legislation increases transparency by requiring the executive branch to make apportionments, along with legal justifications and opinions, publicly available. This helps to prevent arbitrary and self-serving decisionmaking, promote legal compliance, and end the use of expansive legal interpretations to exert undue influence on spending decisions. By making apportionments public, Congress and the American people can see exactly how federal resources are being used.

The bill also increases accountability by improving and expanding controls under the Antideficiency Act and the Impoundment Control Act. It strengthens and expedites GAO's ability to obtain information from agencies and requires the executive branch to report to Congress on all violations of the ADA and ICA identified by GAO, a requirement that is unbelievably absent from current law. My bill also authorizes administrative discipline for government employees responsible for violating the law, serving not only as an important deterrent, but also as a tool to empower government employees to push back on political pressure to break the law.

Transparency, accountability, checks and balances—these tenets are at the core of our constitutional republic and a key component of our responsibility as Members of Congress.

A commitment to good government cannot ebb and flow depending on who controls the levers of power. Our Committee has issued reports, held hearings, written to officials in both the Trump and Biden Administrations, and introduced legislation as part of our work to safeguard Congress' spending authority.

We continue this important work with our hearing today. Today presents another opportunity to examine our current framework of fiscal laws, its potential shortfalls, and why Congress must take legislative action to safeguard its constitutional authority, including passing the congressional Power of the Purse Act.

We have assembled an expert panel of witnesses to help us, and I look forward to this important discussion.

And before I recognize the Ranking Member, I ask unanimous consent to enter into the record a letter the Power of the Purse Coalition sent to me and to the Ranking Member applauding the Committee's leadership on this "bipartisan, bicameral issue that impacts accountability and integrity within our governmental system" and enthusiastically supporting reforms in the congressional Power of the Purse Act and its advancement in the 117th Congress.

The Power of the Purse Coalition represents organizations across the ideological spectrum, and this letter of support is signed by Demand Progress, FreedomWorks, the National Taxpayers' Union, Project On Government Oversight, Protect Democracy, R Street Institute, and Taxpayers for Common Sense. I thank these organizations for their strong support and without objection, the submission will be in the record. So ordered.

[The prepared statement of Chairman Yarmuth and letter submitted for the record follows:]

**Chairman John A. Yarmuth**  
**Hearing on Protecting our Democracy:**  
**Reasserting Congress' Power of the Purse**  
**Opening Statement**  
**April 29, 2021**

Exactly one year ago yesterday, I introduced the Congressional Power of the Purse Act. I said it was an “important step in restoring Congress’ constitutional spending authority and reinforcing the foundations of our democracy: a responsibility that should be embraced by both sides of the aisle.” Today we are in a new Congress, with a new Administration that has taken steps to return to previous, longstanding norms. We have a reinvigorated OMB led by an Acting Director with firsthand experience fighting to protect Congress’ spending authority. And we are using this Committee’s first full hearing to again examine the importance of safeguarding Congress’ constitutional authority and the need for the Congressional Power of the Purse Act. I believe in this good government legislation, and I am fully committed to pursuing its reforms regardless of who is in the White House.

Our Founders knew that money – and who controls it – is fundamental to a democratic government. They also knew that, with elections every two years, Congress would be the branch most accountable to the people. So they gave us the power of the purse as a critical check on the President.

Congress has exercised this power by enacting foundational laws—like the Antideficiency Act and the Impoundment Control Act—and updating them as challenges to its authority arose. To help protect and enforce its spending decisions, Congress established the non-partisan Government Accountability Office, which, as we all know, is charged with investigating and reporting on violations of budget and appropriations laws.

However, Congress’ ability to exercise its singular constitutional authority has become increasingly challenged by an Executive Branch that has sought to seize control of the nation’s purse for itself. Presidents and agencies of both parties have pushed the boundaries of their delegated spending powers, exploiting secrecy, a lack of reporting requirements, and limitations on enforcement to push their own agenda and sidestep Congress. Decades of this purposeful infringement on Congress’ power of the purse proves that Congress cannot rely on interbranch comity and nonbinding norms in the face of an emboldened Executive Branch.

For our government to work, the American people need to know that when their representatives in Congress pass a funding bill and it is signed into law, the Executive Branch will follow the law and ensure their hard-earned tax dollars go where their representatives intended. For Congress to remain a co-equal branch of government and live up to our constitutional charge, we must reassert Congress’ control over spending and ensure we are the ones holding the purse strings.

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We have assembled an expert panel of witnesses to help us, and I look forward to this important discussion.

April 27, 2021

The Honorable John Yarmuth  
Chairman, House Committee on the Budget  
U.S. House of Representatives  
204-E Cannon House Office Building  
Washington, DC 20515

The Honorable Jason Smith  
Ranking Member, House Committee on the Budget  
U.S. House of Representatives  
507 Cannon House Office Building  
Washington, DC 20515

Dear Chairman Yarmuth and Ranking Member Smith:

As members of the Power of the Purse Coalition, we would like to thank you for your continued leadership on reasserting the legislative branch's constitutional authority over the nation's tax and spending policy; in other words, the power of the purse. This is a bipartisan, bicameral issue that impacts accountability and integrity within our governmental system. As a coalition of diverse organizations from across the ideological spectrum, we strongly support reforms that will help Congress reassert its rightful prerogative over the power of the purse.

The upcoming April 29, 2021, committee hearing, "Protecting our Democracy: Reasserting Congress's Power of the Purse," is a welcome step toward determining what Congress should do to take back its spending power and to bring more accountability and transparency to the executive branch. We thank you for holding the hearing and examining the relevant issues.

The Congressional Power of the Purse Act, which was introduced on April 28, 2020, is a strong bill that would provide much needed reforms aimed at restoring Congress's power over tax and spending decisions and reining in an increasingly unfettered and unaccountable executive branch. The Founding Fathers purposely separated the power of the purse from the executive branch's power of the sword to ensure that the branch of government closest to the people—Congress—would be the most powerful actor in the system.

We were encouraged to see a number of our coalition's priorities included in the Congressional Power of the Purse Act. Top among these priorities include bringing more transparency to the apportionment process; strengthening the ability of the Government Accountability Office (GAO) to monitor executive branch compliance with budget and appropriations laws; and reining in the nearly unilateral executive authority in the use of emergency powers. We enthusiastically applaud these reforms and support the reintroduction and advancement of the Congressional Power of the Purse Act in the 117<sup>th</sup> Congress.

If enacted, this bill would go a long way toward restoring the proper balance between Congress and the executive branch. Recalibrating the growing imbalance is crucial in moving toward a more accountable and transparent federal government that acts responsibly with the American

people's hard-earned tax dollars and in addressing the public's persistent concern about government corruption.

Thank you for your leadership, and we would be happy to assist you however possible in this effort.

Respectfully,

Demand Progress

FreedomWorks

National Taxpayers Union

Project On Government Oversight

Protect Democracy

R Street Institute

Taxpayers for Common Sense

Chairman YARMUTH. With that, I would like to yield to the Ranking Member Mr. Smith for five minutes for his opening statement.

Mr. SMITH. Mr. Chairman, thank you for convening this hearing. It could not be more relevant given the current State of Congress' performance on budgeting and spending. It also could not be more necessary given the actions of President Biden when it comes to the crisis on our southern border. And specifically, his decision to abandon construction of the border wall after Congress appropriated funding for it. The President's decision to withhold funding on the border wall, along with other actions his Administration has taken, have only fueled a national security and humanitarian crisis at the southern border.

As the Chairman is aware, Republicans on this Committee have called for a hearing on what we view as an unlawful withholding of funding, especially given this Committee's stated oversight responsibilities. I appreciate that the Chairman has chosen this Committee's first hearing to focus on issues that are related to President Biden's decision to freeze funding for the border wall. This is an opportunity to exercise much needed oversight.

Given the Chairman's previous concerns with the actions of President Trump on spending appropriated funds, I look forward to his comments on President Biden's decision to withhold funding, since I would assume there would be a similar concern no matter who sits in the oval office. I also look forward to hearing from our GAO witness about what that agency is doing as it relates to President Biden's withholding of funding.

Members from both the House and Senate have called on GAO to investigate this matter. Frankly, it is very concerning that such a request was needed given GAO's very public interest in this issue area. One has to wonder why GAO was not on the case the day after President Biden abandoned construction of the wall.

I respect the fact that the Chairman will want to discuss the broader issue with Congress. Congress' Article I authorities and the power of the purse. I welcome that discussion. Part of it should center around Congress, their own shortcomings in this matter, and its inability to follow or enforce its own rules, roles, and responsibilities. When it comes to budgeting and spending taxpayer dollars, just look at the historic record. Since 1977, there have been 20 government shutdowns and Congress has had to enact 192 continued resolutions, including four this Fiscal Year because deadlines for completing regular appropriation bills have not been met.

Congress has failed to follow regular order, that is passage of a budget resolution followed by 12 separate appropriation bills before the beginning of the fiscal year, every year since Fiscal Year 1995.

According to the Congressional Budget Office, 1,046 authorizations from 272 laws expired prior to the start of Fiscal Year 2020. And appropriations for the Fiscal Year 2020 included \$332 billion attributable to expired authorizations. As of right now, work on funding for the upcoming fiscal year, Fiscal Year 2022, is not currently on track to look much different. Given delays in the budget process on the part of Congress and the President, there is the growing likelihood Congress starts the Fiscal Year with another CR or massive omnibus spending bill.



In closing, we are holding this hearing on the 100th day the Biden Presidency. A hundred days in which not only did the President withhold appropriated funds while fueling a crisis at our southern border, he also fired thousands of Americans by the stroke of a pen and has proposed or pursued policies that will destroy jobs, drive down wages, and drive up the cost of living for America's working class. I hope this Committee would, at the very least, continue to seek answers from the Administration on how it plans to budget for all the policies its proposed.

Thank you, Mr. Chairman, and I look forward to the testimony from today's witnesses. Mr. Chairman, you are muted.

[The prepared statement of Jason Smith follows:]



**Smith Opening Statement:  
House Budget Committee Hearing on “Protecting our  
Democracy: Reasserting Congress’ Power of the Purse”**

April 29, 2021  
*As Prepared for Delivery*

Mr. Chairman – thank you for convening this hearing. It could not be more relevant given the current state of Congress’ performance on budgeting and spending. It also could not be more necessary given the actions of President Biden when it comes to the crisis on our southern border, and specifically his decision to abandon construction of the border wall after Congress appropriated funding for it.

The President’s decision to withhold funding on the border wall along with other actions his Administration has taken have fueled a national security and humanitarian crisis at the southern border.

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I also look forward to hearing from our GAO witness about what that agency is doing as it relates to President Biden's withholding of funding. Members from both the House and Senate have called on GAO to investigate this matter. Frankly, it is very concerning that such a request was needed given GAO's very public interest in this issue area. One has to wonder why GAO was not on the case the day after President Biden abandoned construction of the wall.

I respect the fact that the Chairman will want to discuss the broader issue of Congress' Article I authorities and the "power of the purse." I welcome that discussion. Part of it should center around Congress' own shortcomings in this matter, and its inability to follow or enforce its own rules, roles, and responsibilities when it comes to budgeting and spending taxpayer dollars.

Just look at the historical record:

- Since 1977, there have been 20 government shutdowns, and Congress has had to enact 192 continuing resolutions – including 4 this fiscal year – because deadlines for completing regular appropriations bills have not been met.
- Congress has failed to follow regular order – that is, passage of a budget resolution followed by 12 separate appropriations bills before the beginning of the fiscal year – every year since fiscal year 1995.
- According to the Congressional Budget Office, 1,046 authorizations from 272 laws expired prior to the start of fiscal year 2020 and appropriations for fiscal year 2020 included \$332 billion dollars attributable to expired authorizations.

As of right now, work on funding for the upcoming fiscal year – fiscal year 2022 – is not currently on track to look much different, given delays in the budget process on the part of Congress and the President. There is the growing likelihood Congress starts the fiscal year with another CR or massive omnibus spending bill.

In closing, we are holding this hearing on the 100<sup>th</sup> day of the Biden presidency – 100 days in which not only did the President withhold appropriated funds while fueling a crisis at

our southern border, he also fired thousands of Americans by the stroke of a pen and has proposed or pursued policies that will destroy jobs, drive down wages, and drive up the cost of living for America's working class.

I hope this Committee will, at the very least, continue to seek answers from the Administration on how it plans to budget for all the policies it has proposed.

Thank you, and I look forward to the testimony from today's witnesses.

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Chairman YARMUTH. Thank you. Thanks to the Ranking Member. I apologize for that. But thank you for your opening statement. In the interest of time, I ask that any other Members who wish to make a statement, submit their written statements for the record to the email inbox we established for receiving documents before and after—before and during the committee proceedings. We distributed that email address to your staff. I will hold the record open until the end of the day to accommodate those Members who may not yet have prepared written statements.

I would like to thank our witnesses for being here this afternoon. The Committee has received your written statements and they will be part of the formal hearing record. You will each have five minutes to give your oral remarks. As a reminder, please unmute your microphone before speaking. Dr. Reynolds, please unmute your microphone and begin when you are ready.

**STATEMENTS OF MOLLY E. REYNOLDS, SENIOR FELLOW, GOVERNANCE STUDIES, THE BROOKINGS INSTITUTION; LIZ HEMPOWICZ, DIRECTOR OF PUBLIC POLICY, PROJECT ON GOVERNMENT OVERSIGHT; EDDA EMMANUELLI PEREZ, DEPUTY GENERAL COUNSEL, U.S. GOVERNMENT ACCOUNTABILITY OFFICE; MARK R. PAOLETTA, SENIOR FELLOW, CENTER FOR RENEWING AMERICA**

**STATEMENT OF MOLLY E. REYNOLDS**

Dr. REYNOLDS. Thank you, Chairman Yarmuth, Ranking Member Smith, and Members of the Committee. My name is Molly Reynolds, and I am a Senior Fellow in the Governance Studies Program at the Brookings Institution. I appreciate the opportunity to testify today on how Congress can better fulfill its constitutional obligation to provide for and effectively oversee the executive branch.

In this context, I want to make four points. First, because the Constitution separates the legislative and executive functions, divergence between Congress' intent and policy outcomes is inevitable. Congress must design and periodically redesign mechanisms to monitor executive branch implementation of policy. It is not possible, nor is it wise for Congress to try to write every policy detail into law. The executive branch has types of expertise that make it better equipped to make certain detailed decisions. As the policy problems facing the nation have become more complex, Congress has increasingly found itself incapable of writing statutes that contain all these specific choices.

In addition, Congress often prefers to leave detailed decisions to the executive branch because they are politically challenging. Together, these circumstances mean that Congress must design ways to monitor this inevitable potential for slippage. Divergence can and does occur regardless of whether the branches are controlled by the same political party. Even in an era of high partisan polarization, the need for monitoring and oversight tools is structural and fundamental to the constitutional system.

Second, because divergence between Congress' intent and the executive branch's implementation is inevitable, so too is the need for Congress to periodically revise its procedures as it has done in the

past. The Antideficiency Act's apportionment requirement was enacted to prevent the executive branch from quickly spending down its allocations and demanding more funds. The Congressional Budget and Impoundment Control Act contain several provisions expressly responding to aggressive assertions of power by the executive branch. Several components of the Power of the Purse Act are natural successors to these earlier budgetary provisions. Importantly, the Presidential powers targeted by these provisions are statutory. If Congress wrote the statute originally, it too should update it periodically in response to changing conditions.

The President is not the only actor whose changing behavior can require a response from Congress. Prior to the Supreme Court's decision in *INS v. Chadha*, legislative veto provisions were an important tool in Congress' arsenal. Because legislative veto provisions often included procedures that expedited consideration of the review legislation, they demonstrate a powerful choice by some individual Members of Congress: cede some of their individual power in order to give the institution a stronger voice. The Supreme Court's decision in *Chadha* disrupted that bargain and Congress would be well-served to adapt its procedures in response as Title III of the Power of the Purse Act does for the National Emergencies Act.

Third, the evolution of Congress' own approach to processing spending bills has also increased the need for new tools to enhance oversight capacity. Relying on continuing resolutions and large omnibus bills breeds brinkmanship because the cost to Congress and its constituents of letting the government shut down is so high, legislators cannot credibly threaten to withhold funding from a specific priority or activity because the president has chosen to stray from congressional intent. When there is a partial shutdown of federal operations, the executive branch has substantial discretion over exactly which activities cease and which ones can continue. This discretion further undermines Congress' power in shutdown confrontations.

A common reaction to this brinkmanship is to call for a return to so-called regular order. But little in Congress' recent experience suggests that is likely. Given this, Congress must turn to new tools like those in the Power of the Purse Act to ensure it gets the information it needs.

Finally, changes in the nature of congressional oversight also mean that reforms to support Congress' work are needed. Historically, Congress' efforts to oversee the executive branch generally followed a model of accommodation. This accommodations process has eroded and Congress has had more difficulty enforcing subpoenas against the executive branch.

Given this, Congress would be well served to strengthen its hand as it seeks information from the executive branch. Several provisions in the Power of the Purse Act aim to do this. The slow speed at which the federal courts move, however, constrains Congress' ability to use them effectively as the mechanism to ensure executive compliance, even in instances where the courts are likely to side with Congress.

The legislative branch must work on its own behalf, just as previous Congresses have done as part of the continual push and pull between the branches.

While other periods of heavy congressional delegations to the executive, like the 1930's and 1960's, were followed by enhancements by Congress of its own capacity to oversee those actions in the 1940's and 1970's, the expansion of executive power that began after September 11th has not been met with a similar assertion of congressional authority. The Power of the Purse Act represents an important part of that necessary effort.

Thank you, again, for the opportunity to testify today, and I look forward to your questions.

[The prepared statement of Molly E. Reynolds follows:]



**Testimony of Molly E. Reynolds<sup>1</sup>**  
**Senior Fellow, Governance Studies, The Brookings Institution**  
**Before the House Committee on the Budget**  
**April 29, 2021**

Chairman Yarmuth, Ranking Member Smith, and Members of the Committee, my name is Molly Reynolds and I am a Senior Fellow in the Governance Studies Program at the Brookings Institution. I appreciate the opportunity to testify today on how Congress can better fulfill its constitutional obligation to provide for, and effectively oversee, the executive branch. My research has explored a range of topics related to congressional rules and procedures, including changes in the congressional budget process since the adoption of the Congressional Budget and Impoundment Control Act. My goal today is to provide context for why and how Congress requires additional tools to effectively monitor the executive branch's execution of congressional decisions.

In this context, I want to make four main points today.

**1. The structure of the U.S. constitutional system and the incentives facing members of Congress mean that Congress needs procedures in place to ensure that that the executive branch is complying with congressional intent.**

Because the Constitution separates legislative functions from executive ones, and because Congress must rely on the executive to implement its policy choices, divergence between Congress's intent and policy outcomes is inevitable; the individuals charged with executing federal programs on a daily basis—from agency heads down to career civil servants—will always encounter situations in which the language of the law does not provide sufficient guidance.<sup>2</sup> Indeed, it is because of this inevitability that Congress must design and, periodically, re-design mechanisms to monitor, as effectively as possible, the activities of the executive branch in response to congressional decisions.

It is not only this constitutional division of labor that creates the need for effective oversight mechanisms. It is also the fact that, as the branch charged with implementing policy, the executive branch has types of expertise that make it better equipped to make certain detailed decisions. As the policy problems facing the nation have become more complex and numerous, Congress has frequently found itself incapable of writing statutes that set forth all of these specific choices.

In addition, as a political matter, Congress often prefers to leave detailed decisions to the executive branch. In some cases, this is due to shared preferences between the congressional majority enacting a policy and the president charged with implementing it. But in other situations, it is because Congress prefers to leave the most politically challenging issues to another branch to resolve.

Together, these circumstances mean that Congress must design ways to monitor this inevitable potential for slippage—divergence that can and does occur regardless of whether the branches are controlled by the same political party. Even in an era of high partisan polarization, it is vital to

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<sup>1</sup>The views expressed are my own and do not necessarily reflect those of staff members, officers, or trustees of the Brookings Institution. Brookings does not take institutional positions on any issue.

<sup>2</sup>This section draws on a large body of political science research, summarized in B. Dan Wood, "Congress and the Executive Branch: Delegation and Presidential Dominance," in *The Oxford Handbook of the American Congress*, eds. George C. Edwards III, Frances E. Lee, and Eric Schickler (New York: Oxford University Press, 2011).

remember that the need for monitoring and oversight tools is structural and fundamental to the constitutional system.

**2. Procedural innovations by Congress in response to changes in executive branch behavior are not new, and as the executive branch changes its behavior, so must Congress.**

If divergence between Congress's intent and the executive branch's execution is inevitable, so too is the need for Congress to periodically revise its procedures to address the current exercise by the president and agencies of their implementation power. One goal of the Antideficiency Act's requirement that the executive branch apportion funds appropriated by Congress into smaller components, for example, is to prevent the executive branch from spending down its allocations quickly such that additional sums will be needed before the end of the fiscal year. In addition, when the Congressional Budget and Impoundment Control Act was enacted in 1974, several of its procedural provisions were expressly responding to aggressive assertions of power by the executive branch and to informational disadvantages facing Congress. The original provisions allowing Congress to review efforts by the president to rescind or defer funds are an example of the former, while the creation of the Congressional Budget Office as a counterweight to the Office of Management and Budget are an example of the latter.

Several components of the Power of the Purse Act—including those requiring budget authority proposed for rescission or deferral to be made available in time to be obligated; those requiring appropriations to be obligated no later than 90 calendar days before expiration; and those requiring apportionment decisions to be made public—are, in important ways, natural successors to these earlier budgetary provisions. Importantly, the presidential powers targeted by these provisions are statutory. If Congress, for example, felt compelled to direct the president to apportion appropriated funds for obligation, it should also feel comfortable periodically revising its approach to ensuring that apportionment is happening in the way Congress intends.

The president is not the only actor whose changing behavior can require a procedural response from Congress. Prior to the Supreme Court's decision in *INS v. Chadha*, legislative veto provisions were an important tool in Congress's arsenal for overseeing executive branch decision-making. Because legislative veto provisions, like the one in the National Emergencies Act, often included procedures that expedited consideration of the review legislation, they demonstrate a powerful choice by some individual members of Congress: cede some of their individual power in order to give the institution a stronger voice. The Supreme Court's decision in *Chadha* disrupted that bargain, and Congress would be well-served to adapt its procedures in response.

Notably, statutory legislative procedures designed to enhance congressional oversight of the executive branch are far from unprecedented.<sup>3</sup> While many of these are like the National Emergencies Act, the Arms Export Control Act, and the Congressional Review Act in that they involve a joint resolution of disapproval—which, because the president is unlikely to sign a measure overturning his own action, effectively require a two-thirds majority in both chambers to go into effect—others contain *approval* provisions like those contained in Title III of the Power of the Purse Act—including the procedures for approving presidential rescission requests in the Congressional Budget and Impoundment Control Act.

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<sup>3</sup> For a discussion of these and other expedited procedures, see Molly E. Reynolds, *Exceptions to the Rule: The Politics of Filibuster Limitations in the U.S. Senate* (Washington, D.C.: Brookings Institution Press, 2017).

**3. Changes in the nature of the legislative process have made procedural innovation in this area especially necessary.**

The need for reform is not just due to actions by the executive and judicial branches; the evolution of Congress's own approach to processing spending bills has also increased the need for new tools to enhance the legislature's oversight capacity.<sup>4</sup> While Congress is supposed to pass twelve appropriations bills by October 1 each year, it has not done so in several decades and temporary continuing resolutions are common. The appropriations process frequently ends with a single, large omnibus appropriations bill that contains all, or nearly all, of the discretionary spending for a fiscal year already in progress.

Relying on continuing resolutions and large omnibus bills breeds brinkmanship, where inaction means shutting down wide swaths of federal operations. Because the cost to Congress—and its constituents—of letting the government shut down is so high, legislators cannot credibly threaten to withhold funding from a specific executive branch priority or activity because the president or an agency has chosen to stray from congressional intent. In recent years, only the highest profile, partisan issues—like the Affordable Care Act and the wall along the southwestern border—have risen to the level at which Congress is willing to threaten a shutdown.<sup>5</sup> In addition, when there is a partial shutdown of federal operations, the executive branch has substantial discretion over determinations about exactly which activities cease and which ones can continue under exceptions to the Antideficiency Act's prohibition on obligating funds in the absence of an appropriation.<sup>6</sup> This discretion undermines Congress's power in shutdown confrontations further.

A common reaction to this brinkmanship that characterizes the current appropriations process is to call for a return to so-called "regular order," but little in Congress's recent experience suggests that it is likely; indeed, there are some elements of the omnibus appropriations process—including the fact that combining disparate issues together into a single bill can facilitate deal-making—that are adaptations to current political realities. Given this, Congress must turn to new tools like those in the Power of the Purse Act—such as requiring that funds are made available for obligation prudently; that apportionment documents are made public; that the executive branch notifies Congress if apportionments are not made within the statutorily required time period; and that other information is reported to Congress—to ensure it is getting the information it needs to ensure executive branch compliance without having to resort to threatening a shutdown.

**4. Likewise, changes in the nature of congressional oversight also mean that reforms to support Congress's work are needed.**

Historically, Congress's efforts to oversee the executive branch generally followed a model of accommodation. Each branch sought to protect its own institutional interest, with Congress able to threaten to subpoena the executive branch when it did not comply. While there were certainly

<sup>4</sup> This section draws on Molly E. Reynolds and Philip A. Wallach, "Does the Executive Branch Control the Power of the Purse?," *American Enterprise Institute*, October 2020 <<https://www.aei.org/wp-content/uploads/2020/10/Does-the-executive-branch-control-the-power-of-the-purse.pdf?x91208>>.

<sup>5</sup> Molly E. Reynolds, "Members of Congress Have Lost Control Over Spending," *Washington Post*, August 27, 2020.

<sup>6</sup> Eloise Pasachoff, "The President's Budget Powers in the Trump Era," in *Executive Policymaking: The Role of the OMB in the Presidency*, ed. Meena Bose and Andrew Rudalevige (Washington, DC: Brookings Institution Press, 2020), 69–98.

high-profile disputes that ended up in the courts,<sup>7</sup> both institutional parties were often able to reach some sort of mutually acceptable agreement. As former Representative Tom Davis (R-Va.) once described this, “you ask for the moon and you end up with a moon rock.”<sup>8</sup> This accommodations process, however, has eroded, and Congress has had more difficulty enforcing subpoenas against the executive branch. Declines in staff capacity have also made engaging in substantive oversight more challenging.<sup>9</sup>

Given this, Congress would be well served to strengthen its hand as it seeks information from the executive branch. Several provisions in the Power of the Purse Act aim to do this, including the requirement that the executive branch provides the Government Accountability Office with timely access to information and to employees for interviews if requested by the Comptroller General; the requirement that agencies respond to GAO requests for budget and appropriations law decisions; the expansion of suits that the Comptroller General can bring under the Impoundment Control Act; the authorization of administrative discipline for responsible officials who violate the Impoundment Control Act; and the publication requirement for Office of Legal Counsel memos on budget and appropriations law.

It is important to remember, however, that even if Congress takes steps to enhance its ability to use the federal courts as a remedy to check the executive branch, this is often a suboptimal approach—even in instances where courts are likely to side with Congress.<sup>10</sup> Consider a few recent examples. First, take the legal battle over the Affordable Care Act’s payments directly to insurance companies to reduce out-of-pocket expenditures by low-income individuals purchasing health insurance on the individual marketplaces. The Obama administration requested funds for these subsidies, and when Congress did not allocate money for them, the executive branch asserted that an existing permanent appropriation authority for tax refunds covered the payments. House Republicans sued in November 2014 and won in the District Court for the District of Columbia in 2016—but the judge stayed her own ruling while the appeals process proceeded. Executive action following the change in administration in 2017 ended the payments, but only after a two-plus year court battle that ultimately remained unresolved. The legal fight over the use of transfer authority by President Trump to fund the expansion of the border fence displays a similar dynamic: lawsuits filed in 2019 that remained unresolved when President Biden assumed office in January 2021.

These are but two examples of the ways in which the slow speed at which the federal courts move constrains Congress’s ability to use them effectively as the mechanism to ensure executive compliance.<sup>11</sup> While relying heavily on them is sometimes necessary, it is not the optimal approach available to Congress. The legislative branch must work on its own behalf, just as previous Congresses have been willing to as part of the continual push and pull between the branches. While other periods of heavy congressional delegation to the executive, like the 1930s and 1960s, were followed by enhancements by Congress of its own capacity to oversee those actions in the 1940s and 1970s, the expansion of executive power that began after September 11

<sup>7</sup> Todd Garvey, “Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure,” *Congressional Research Service*, May 12, 2017.

<sup>8</sup> Byron Tau, “House Democrats, Trump Gear Up for Battle Over Subpoenas,” *Wall Street Journal*, April 29, 2019.

<sup>9</sup> Molly E. Reynolds, “Improving Congressional Capacity to Address Problems and Oversee the Executive Branch,” *The Brookings Institution*, December 2019 <<https://www.brookings.edu/policy2020/bigideas/improving-congressional-capacity-to-address-problems-and-oversee-the-executive-branch/>>.

<sup>10</sup> This section also draws heavily from Reynolds and Wallach 2020.

<sup>11</sup> For several other examples, see Molly E. Reynolds and Margaret L. Taylor, “The Consequences of Recent Court Decisions for Congress,” *Lawfare*, October 5, 2020 <<https://www.lawfareblog.com/consequences-recent-court-decisions-congress>>.

has not been met with a similar assertion of congressional authority. The Power of the Purse Act represents an important part of that necessary effort.

Chairman YARMUTH. Thank you very much, Dr. Reynolds. I now recognize Ms. Hempowicz for five minutes. Unmute and you have the floor.

#### **STATEMENT OF LIZ HEMPOWICZ**

Ms. HEMPOWICZ. Thank you. Chairman Yarmuth, Ranking Member Smith, and Members of the Committee, thank you for inviting me to testify today about Congress' power of the purse and efforts to reclaim and reassert that power.

One reading of the Constitution's focus and prioritization on the legislative branch is that the founders intended it to be the most powerful actor within the three branches of government. However, today we have an executive branch that has encroached on significant authorities that the Constitution explicitly vested in the legislative branch, including the power of the purse. Because of this encroachment, the executive branch now wields a disproportionate amount of power in our three-branch structure.

A rebalancing of that power is long overdue, particularly in light of growing public concern about government corruption. I am here today to ask you to improve your ability to oversee how the executive branch spends the public money that Congress appropriates. More specifically, I urge you to require more transparency from the White House's Office of Management and Budget about how it apportions or schedules how executive agencies spend appropriated funds.

Now that you know what I am here to ask you to do, I will explain why. Congress has mandated that the executive branch set a schedule to disburse money that has been appropriated to agencies as an attempt to encourage responsible financial management. This is meant to prevent both overspending and programmatic disruptions. This process of scheduling out funding is called apportionment. I want to emphasize that this is not an inherent executive branch power. It is one that Congress created and it is well within congressional authority to dictate limits to how the executive exercises this function.

Today, the Office of Management and Budget exercises apportionment authority on behalf of the President. While they may delay the disbursement of funds for legitimate programmatic or technical reasons, the executive is not authorized to delay or withhold funds to achieve policy objectives. This is quite simply because allowing OMB or the President to withhold or delay funds to achieve policy objectives would be tantamount to handing the power of the purse over to the executive branch entirely.

Because there are clear constitutional limits to the apportionment process, transparency is critical to ensure that the executive is not abusing it. Which is why the public may be surprised to hear that these apportionment directives are issued entirely in secret. OMB issues apportionment directives both by fiscal quarter and by project or a combination of those two. So, though they are subject to public records requests through the Freedom of Information Act, it is difficult to ensure consistent transparency without proactive release of this information.

That means that lawmakers don't have regular access to the text of apportionment directives or the footnotes, which contain more

specific directions from the White House related to the funding and can be used as a way to compel or incentivize agencies to take certain actions. Not only does this make it harder for Congress to conduct oversight, but the lack of transparency makes it difficult for the public to have faith that taxpayer resources are being handled with integrity and in a manner consistent with the intent of Congress.

The executive branch has a long history of expansively interpreting the authorities granted to it by Congress, well beyond what the statutory text would dictate. Those legal interpretations often issued by the Office of Legal Counsel at the Department of Justice are also issued in secret and they have serious ramifications on the balance of power when it comes to matters related to the power of the purse.

The President's obligation to take care that the laws and spending decisions enacted by Congress are executed as Congress intended demand additional transparency in both areas. Taking it back to our founding, Congress holds the power of the purse because the founders envisioned it would be the branch of government most accountable to the people, and, therefore, best able to wield that power in a way that is responsive to the needs and interests of the public.

It also reflects that the founders were very concerned that vesting too much authority, particularly to spend public money, in an executive branch led by a single person. Remember, the Constitution only gives the executive a handful of independent authorities. None of which require secrecy around how the executive branch apportions funds.

The potential for the executive branch to manipulate spending in secret exposes our government to corruption and undermines the delicate balance of power between our branches of government. Additional transparency around these budgetary decisions will only improve Congress' capacity to oversee executive branch spending, serving as a check against malfeasance and corruption.

For example, Ranking Member Smith, if the congressional Power of the Purse Act was law, you and Congressman Katko would already have many of the answers to the questions you have recently asked the Biden Administration about how appropriated funds are being used at the southern border. That is because you would have—you would likely have timely access to the documents dictating that spending.

I urge this Committee to pass the congressional Power of the Purse Act, either on its own or as part of the sweeping anticorruption package introduced last Congress aptly titled the Protecting Our Democracy Act. Thank you, again, for holding this important hearing, and I look forward to answering your questions.

[The prepared statement of Liz Hempowicz follows:]



**Testimony of Liz Hempowicz, Director of Public Policy  
Project On Government Oversight  
before the House Budget Committee  
on “Protecting Our Democracy: Reasserting Congress’s Power of the Purse”**

Chairman Yarmuth, Ranking Member Smith, and Members of the Committee, thank you for inviting me to testify today about Congress’s power of the purse and efforts to reclaim and reassert that power. I am Liz Hempowicz, director of public policy at the Project On Government Oversight (POGO). POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

In my testimony I will begin by providing a brief overview of the power of the purse and apportionments—a key mechanism of this power—and will detail recommendations for how to fortify congressional control over the power of the purse. I will also delve briefly into the historical origins of this power, highlight the apportionments process and necessary reforms, and offer analysis on relevant statutes and legislation.

The power of the purse, or the authority over federal tax and spending decisions, is arguably Congress’s most essential and potent tool.<sup>1</sup> In conjunction with other constitutionally enumerated authorities, such as the power to declare war, the power of the purse gives Congress the strength and efficacy necessary to fulfill its role as the first branch of our federal government. Because this power is central to the legislative branch’s functionality, it is of great concern to observers from across the political spectrum that Congress has been losing its grip on the nation’s purse strings.<sup>2</sup>

Another key stakeholder in the management of the federal budget is the Office of Management and Budget (OMB), the entity in the Executive Office of the President tasked with creating the president’s budget proposal and implementing appropriations laws as set forth by Congress.<sup>3</sup>

<sup>1</sup> House of Representatives History, Art & Archives, “Power of the Purse,”

<https://history.house.gov/Institution/Origins-Development/Power-of-the-Purse/> (accessed April 12, 2021)

<sup>2</sup> Jonathan Bydalk, “Congress should reassert its ‘power of the purse,’” *The Hill*, June 9, 2020.

<https://thehill.com/opinion/finance/501865-congress-should-reassert-its-power-of-the-purse>; Dylan Hedtler-Gaudette and Soren Dayton, “Congress is losing ground on the budget; it’s time it claws that power back,” *The Fulcrum*, June 30, 2020, <https://thefulcrum.us/balance-of-power/power-of-the-purse>; Andrew Lantz, “Asserting Congress’s power of the purse shouldn’t be a partisan problem,” *Washington Examiner*, July 3, 2020, <https://www.washingtonexaminer.com/opinion/asserting-congress-power-of-the-purse-shouldnt-be-a-partisan-problem>

<sup>3</sup> Eloise Pasachoff, “The President’s Budget Powers in the Trump Era,” in *Executive Policymaking: The Role of OMB in the Presidency*, ed. Meena Bose and Andrew Rudalevige (Washington, DC: Brookings Institution Press, 2020), (accessed via SSRN: <https://ssrn.com/abstract=3664707>)



Apportionments are among OMB's most important tools for administrating and executing the federal budget.

An apportionment is "an OMB-approved plan to use budgetary resources" along set timelines and accompanied by certain other restrictions designed to facilitate efficient resource use and legal compliance.<sup>4</sup> In other words, OMB uses apportionments to give executive branch agencies the money Congress has appropriated for specific purposes, and it disburses that money in discrete parcels to avoid cost overruns and other mismanagement. Apportionments are legally binding on agencies. When used for their intended purpose and in accordance with the law, apportionments are an essential tool for effective fiscal management of finite public resources. However, as experts have noted, "these same tools of control can also lead to executive aggrandizement, obfuscation, and partisan politicization in a way that is harmful to the national interest."<sup>5</sup>

The potential for abuse of apportionments is exacerbated by the near-total secrecy in which OMB issues them, as they are not easily subject to congressional oversight. Given how instrumental apportionments are to the execution of congressional appropriations and budgetary directives, the current system—which effectively transfers the power of the purse to OMB after Congress has appropriated funds—is untenable. Indeed, it demands congressional action to bring more sunlight to the apportionment process and, in doing so, reclaim some of Congress's lost control over the power of the purse.

In view of both Congress's diminished authority over this constitutional power and the problems with the apportionments process, we were extraordinarily pleased to see the House Budget Committee hold a productive hearing on these topics in March 2020.<sup>6</sup> Following that hearing, we were even more pleased to see Chairman Yarmuth and some of his colleagues introduce the Congressional Power of the Purse Act last May, which POGO enthusiastically supports.<sup>7</sup> We also applaud the inclusion of that bill in last September's Protecting Our Democracy Act, a sweeping reform bill in the post-Watergate mold that aims to rein in the executive branch and strengthen Congress.<sup>8</sup>

Today's hearing is yet another encouraging sign of Congress's commitment to reasserting its prerogatives in critical areas. It is worth noting that the previous hearing and introduction of the Congressional Power of the Purse Act took place during the Trump administration, while this hearing and any subsequent legislative action (at least in the next four years) will happen during the Biden administration. These facts should underscore that reclaiming the power of the purse is

<sup>4</sup> Office of Management and Budget, *OMB Circular A-11 – Section 120, Apportionment/Reapportionment Process*, 4 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/a11\\_current\\_year/s120.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/a11_current_year/s120.pdf)

<sup>5</sup> Pasachoff, "The President's Budget Powers in the Trump Era" [see note 3].

<sup>6</sup> Hearing: *Protecting Congress' Power of the Purse and the Rule of Law: Hearing before the House Budget Committee*, 116<sup>th</sup> Cong., (March 11, 2020), <https://budget.house.gov/legislation/hearings/protecting-congress-power-purse-and-rule-law-0>

<sup>7</sup> Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong. (2020), <https://www.congress.gov/bills/116/congress/house/bill/6628>

<sup>8</sup> Protecting Our Democracy Act, H.R. 8363, 116<sup>th</sup> Cong. (2020), <https://www.congress.gov/bills/116/congress/house/bill/8363>

not a Republican or Democratic issue. Rather, it is a matter of good government and of lawmakers' responsibility to the Constitution and to the rule of law that makes our system work.

Unfortunately, the U.S. public has very little faith in that system these days, with just 20% of those surveyed in 2020 indicating that they trust the federal government to do the right thing.<sup>9</sup> This pervasive distrust appears to stem in part from concern about corruption.<sup>10</sup>

This committee, and Congress as a whole, can take steps to address that lack of trust by enacting the Congressional Power of the Purse Act and the Protecting Our Democracy Act. Each would increase transparency and accountability around executive branch decision-making. That increased transparency—whether in the realm of budget execution or any other agency activity—would help reassure the public that if government actors are abusing their authorities, that abuse will be exposed and addressed, encouraging policymakers to act responsibly and ethically in pursuit of the public interest.

### Recommendations

Whether members are concerned about executive branch abuses of budget authority during the Trump administration or the Biden administration's freeze on funding allocated for construction of a wall on the southern border, it is clear that there is too much room for executive abuse around the power of the purse.<sup>11</sup> We at POGO are encouraged to see bipartisan engagement in the effort to reaffirm this essential congressional authority.

While we hope to see both the Congressional Power of the Purse Act and the Protecting Our Democracy Act enacted in their entirety, we would encourage Congress to place a special focus and priority on codifying reforms to the apportionment process. Requiring more proactive disclosure of apportionment schedules and transparency around their issuance would be an effective place to start the broader push to get Congress back in full control of the power of the purse. In doing so, Congress can demonstrate that it is a responsible steward of the public trust.

POGO recommends that Congress enact the following reforms:

1. Require the Office of Management and Budget to post in real-time any apportionment schedule that has been issued and has become operative for the purposes of executive agency operations. These schedules must be posted on a public-facing website that meets

<sup>9</sup> Pew Research Center, "Americans' Views of Government: Low Trust, but Some Positive Performance Ratings," September 14, 2020, <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/>

<sup>10</sup> Gabriela Schulte, "Poll: Voters list a corrupt political establishment as a 'big problem' over healthcare, gun violence," *The Hill*, May 27, 2020, <https://thehill.com/hilltv/what-americas-thinking/499771-poll-voters-list-a-corrupt-political-establishment-as-a-bigger>

<sup>11</sup> House Budget Committee, "House Budget Committee Investigation Exposes Trump Administration's Systemic Abuse of Executive Spending Authority," Press Release, November 20, 2020, <https://budget.house.gov/OMB-Abuse>; House Budget Committee, "House Budget Committee Republicans Demand Hearing on President Biden's Unlawful Freeze on Border Wall Construction," Press Release, March 29, 2021, <https://republicans-budget.house.gov/press-release/house-budget-committee-republicans-demand-hearing-on-president-bidens-unlawful-freeze-on-border-wall-construction/>

current standards of website functionality and accessibility.<sup>12</sup> This basic transparency requirement would allow Congress and the public to better scrutinize how money is being allocated and spent by the executive branch.

2. Require additional information to accompany apportionment schedules. Along with the schedules themselves, Congress should require OMB to include written explanations for the decisions made within an apportionment. This requirement will help prevent arbitrary or politically motivated apportionment decisions.
3. Require OMB to issue apportionments along appropriate timelines. Congress should also make it mandatory for OMB to apportion funds to executive agencies in such a way as to ensure that agencies can use those funds for the purposes and within the timeframe set forth by Congress in appropriations bills.
4. Require congressional notification. Congress should codify a requirement for agencies to report to Congress if they have received an apportionment that would cause the agency to be unable to fulfill its directives from Congress. Notification would be triggered if the apportionment schedule would place conditionalities on funding that exceed executive authority; if the apportionment would cause delays or disruptions in programs, projects, or activities; or if an apportionment is not issued with sufficient time to allow the agency to do what Congress has instructed it to do.
5. Require public disclosure of apportionment authority. Congress should require that any delegations of the apportionment authority be recorded and posted in the federal register.

#### Historical Context on the Power of the Purse

Congressional control over the power of the purse has been at the bedrock of our governmental system from the very beginning. The idea stemmed from the Revolutionary-era “no taxation without representation” rallying cry and the model of the British governmental system, within which the parliament had control over the treasury as a means of checking the monarchy.<sup>13</sup> This insistence on having representation for the public in matters of taxation and spending carried over into the framing of the Constitution and the debates surrounding its adoption.

In “Federalist 58,” James Madison made the case that vesting the power of the purse in Congress was the best way to ensure that the branch closest to the people would be effective and sufficiently empowered relative to the other branches.<sup>14</sup> Madison argued that because Congress is most accountable to the people, it is best positioned to act as a safeguard against abuses and excesses from the other branches.

<sup>12</sup> U.S. General Services Administration, “IT Accessibility Laws and Policies,” <https://www.section508.gov/manage/laws-and-policies> (accessed April 26, 2021).

<sup>13</sup> House of Representatives History, Art & Archives, “Power of the Purse” [see note 1].

<sup>14</sup> James Madison, “Objection That The Number of Members Will Not Be Augmented as the Progress of Population Demands Considered,” *The Federalist Papers*, No. 58, February 20, 1788. [https://avalon.law.yale.edu/18th\\_century/fed58.asp](https://avalon.law.yale.edu/18th_century/fed58.asp) Madison wrote, “The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”

Relatedly, in “Federalist 78,” Alexander Hamilton made the case that Congress is intended to be the first among equals in terms of its powers and import to a nascent democratic republic.<sup>15</sup> Primary among the powers that were to make Congress a linchpin in the system is the power of the purse, arguably the most important duty across the breadth of the federal government. Hamilton wrote that the judiciary would, by definition and composition, be the weakest of the three branches since it controls neither the “sword” or the “purse,” powers granted to the executive branch and legislative branch, respectively.

In the Constitution, that is still the law of the land today, the two key provisions that solidify congressional prerogative over the power of the purse are:

- **Article I, Section 8, Clause 1:** “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”<sup>16</sup>
- **Article I, Section 9, Clause 7:** “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”<sup>17</sup>

Taken together, and in conjunction with the Federalist Papers, these provisions are the foundation of Congress’s explicit and exclusive authority to wield the power of the purse as it sees fit. And if the way it wields that power is unpopular enough, the voters can make their displeasure known through regular elections. This is how the system was designed, and it is how the system should work now.

Today, confronting low levels of trust among the public, as well as pervasive suspicion of corruption, it is essential that our government takes steps to regain that trust—whether or not it’s an election year. One concrete way to do so, and to ease the public’s concerns about government corruption, is to ensure that the federal government and the public servants who work within it are accountable to the public they are serving, especially regarding the ways in which the public’s hard-earned resources are spent and overseen.

#### **Key Power of the Purse Statutes and the Congressional Power of the Purse Act**

Beyond the Constitution, two key laws refine and undergird Congress’s power of the purse: The Antideficiency Act and the Impoundment Control Act. Each serves a vital function.

The Antideficiency Act is designed to prevent budget deficiencies by executive agencies, or instances where an agency spends more money than Congress has appropriated for it.<sup>18</sup>

<sup>15</sup> Alexander Hamilton, “The Judiciary Department,” *The Federalist Papers*, No. 78, May 28, 1788. [https://avalon.law.yale.edu/18th\\_century/fed78.asp](https://avalon.law.yale.edu/18th_century/fed78.asp)

<sup>16</sup> U.S. Constitution art. I, § 8, cl. 1. <https://constitution.congress.gov/browse/article-1/section-8/>

<sup>17</sup> U.S. Constitution art. I, § 9, cl. 7. <https://constitution.congress.gov/browse/article-1/section-9/>

<sup>18</sup> The earliest iteration of the Antideficiency Act was enacted in 1870 and has since undergone several rounds of amendments, most recently in 1982.



Importantly, violations of this law can carry administrative and criminal penalties. Of equal import to our recommendations, the Antideficiency Act also sets forth the apportionment power and grants it to the executive branch.<sup>19</sup> The Congressional Power of the Purse Act and the Protecting Our Democracy Act would make a series of reforms designed to buttress the Antideficiency Act by improving disclosure and accountability around violations and by requiring more transparency and cooperation from the executive branch in such instances.<sup>20</sup>

The Congressional Budget and Impoundment Control Act, often referred to as the Impoundment Control Act, was enacted in 1974.<sup>21</sup> Congress passed the law in response to several budget impoundments, or refusals to spend congressionally appropriated funds, by the Nixon administration.<sup>22</sup> The law established legal processes and restrictions around when and how appropriated funds can be withheld, canceled, or delayed, and requires congressional authorization for any permanent impoundment or rescission of funds. Title 10 of the Impoundment Control Act explicitly prohibits the executive branch from making budgetary decisions on the basis of its own policy preferences when those preferences diverge from the directives in congressional appropriations bills.<sup>23</sup> However, there are no penalties for violating the Impoundment Control Act. The Congressional Power of the Purse Act and the Protecting Our Democracy Act would address that problem.<sup>24</sup> The Congressional Power of the Purse Act would also codify a range of commonsense enhancements to the Impoundment Control Act to strengthen Congress's insight into the executive branch's budget execution activities, and would strengthen requirements to prevent inappropriate behavior by executive branch officials.<sup>25</sup>

#### **More on Apportionment**

While apportionments are a key budget execution tool for the executive branch, they are also an example of Congress having outsourced to the executive branch a degree of control over the power of the purse.<sup>26</sup> The fact that Congress assigned the apportionment authority to the executive branch means that Congress is squarely within its constitutional and legal rights to reclaim that authority or to add additional requirements and constraints to it.

Unsurprisingly, the executive branch has not always agreed that Congress has the authority to require more transparency or disclosure with regard to apportionments. The Trump administration opposed provisions that would have required real-time publication of apportionment schedules as well as more notification requirements for situations where apportionments would disrupt, delay, or otherwise alter expected funding processes for federal

<sup>19</sup> 31 U.S.C. § 1512 (2021).

<sup>20</sup> Congressional Power of the Purse Act §§ 211-214 [see note 7]; Protecting Our Democracy Act §§ 521-524 [see note 8].

<sup>21</sup> 2 U.S.C. §§ 601-688 (2021).

<sup>22</sup> Andrew Glass, "Budget and Impoundment Control Act becomes law, July 12, 1974," *Politico*, July 12, 2017, <https://www.politico.com/story/2017/07/12/budget-and-impoundment-control-act-becomes-law-july-12-1974-240372>.

<sup>23</sup> 2 U.S.C. § 684, <https://www.law.cornell.edu/uscode/text/2/684>.

<sup>24</sup> Congressional Power of the Purse Act § 105 [see note 7]; Protecting Our Democracy Act § 505 [see note 8].

<sup>25</sup> Congressional Power of the Purse Act §§ 101-105 [see note 7]; Protecting Our Democracy Act Title V, Subtitle A, §§ 501-505 [see note 8].

<sup>26</sup> 31 U.S.C. § 1512, <https://www.law.cornell.edu/uscode/text/31/1512>.

agencies.<sup>27</sup> This opposition appears to be rooted solely in claims that Congress is encroaching on a coequal branch of government and violating the separation of powers by doing so. The administration also claimed that an undue burden would be placed on OMB if such apportionment transparency requirements became law. We find these objections to be largely meritless and urge Congress not to take direction on its authorities from the White House.<sup>28</sup>

There is nothing coequal about the power of the purse. That power lies with Congress. To whatever extent Congress has decided to assign some technical aspects of that power to the executive branch, Congress clearly and unambiguously possesses the authority to take back that power or place parameters on that power. It is also specious to claim that it would be a burden, undue or otherwise, for OMB to post on a public-facing website documents that are already generated internally, especially given the ever-shrinking cost of digital content production and website hosting.

If Congress accepts these kinds of dubious claims from the executive branch, irrespective of which party controls Congress or the White House, it will have all the more trouble maintaining its grip on the power of the purse.

The potential for abuse of the apportionment power is not hypothetical. I'd like to highlight one recent example that shows how the apportionment process, while meant to be a technical tool that promotes more efficient and responsible federal budgeting practices, can be weaponized and abused toward political ends. This can happen under any administration, controlled by either party.

In 2019, as the House Budget Committee documented, the Trump administration used the apportionment process to engage in a suspicious delay in the release of security assistance funding for Ukraine.<sup>29</sup> As noted earlier, withholding appropriated funds on a temporary basis is permissible only when legitimate programmatic or technical reasons are operative, and not on the basis of policy disagreement. After the House Budget Committee and other congressional stakeholders raised the alarm, the Government Accountability Office (GAO)—the nonpartisan entity tasked with investigating possible violations of the Antideficiency Act and the Impoundment Control Act—looked into the matter. The GAO found that the Trump administration had violated the Impoundment Control Act.<sup>30</sup> This violation was facilitated through the use of a footnote attached to an apportionment schedule, which is one of the avenues through which the apportionment tool can be used in inappropriate and illegal ways. The incident would eventually form part of the argument in favor of the impeachment of then-President Donald Trump.

<sup>27</sup> Office of Management and Budget, "Statement of Administration Policy on H.R. 7617," July 30, 2020, <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/07/SAP-H.R.-7617-1.pdf>.

<sup>28</sup> Dylan Hedder-Gaudette, "Executive Branch Fights to Keep Spending Decisions Secret with Flimsy Arguments," Project On Government Oversight, August 13, 2020, <https://www.pogo.org/analysis/2020/08/executive-branch-fights-to-keep-spending-decisions-secret-with-flimsy-arguments/>.

<sup>29</sup> House Budget Committee, "House Budget Committee Outlines OMB's Abuse of Apportionment Process," December 2, 2019, <https://budget.house.gov/hbc-summary-omb-abuse>.

<sup>30</sup> Government Accountability Office, *Office of Management and Budget—Withholding of Ukraine Security Assistance*, B-331564 (January 16, 2020), <https://www.gao.gov/assets/b-331564.pdf>.

Whether one agrees or disagrees with the Trump administration's actions in the example I've highlighted, Congress must grapple with the reality that politicization of the apportionments process by any administration can set a dangerous precedent, and, if unchecked, could further erode Congress's power of the purse. This is why it is crucial to set clear and robust requirements around apportionment.

The risk that any administration will abuse the apportionment process for political ends is exacerbated when these directives are executed behind a veil of secrecy. Under the current system, apportionment schedules are entirely secret. As we note above, they are also legally binding on executive branch agencies, giving them something close to the force of law. It is unacceptable for the executive branch to promulgate law in the shadows, out of view of Congress and the public. Apportionments are no different. Indeed, there may have been abuses of the apportionment process during previous administrations from both parties that were just as egregious as the Ukraine funding Impoundment Control Act violation, but we will likely never know. This is because OMB is not required to be transparent with apportionment schedules, and the executive branch has fought to keep the apportionment process opaque.

As recently as November 2019, the idea of requiring apportionment transparency has received strong bipartisan support. At that time, the Senate Budget Committee voted to pass the Bipartisan Congressional Budget Reform Act, which included language around apportionment transparency that was similar to provisions contained in the Congressional Power of the Purse Act.<sup>31</sup>

#### **Conclusion**

The power of the purse is the most necessary and potent tool in Congress's arsenal. For decades and across administrations and congresses controlled by both parties, Congress has slowly but surely relinquished that power to the executive branch.

If Congress is to reverse this trend and deliver on its promise to be accountable and responsive to the public, it must enact reforms that will realign this power imbalance. Doing so will not only bring our governmental system back to its appropriate separation of powers, but will also help mitigate the public's persistent concerns around government corruption and resource mismanagement. My colleagues at POGO and I stand ready and willing to work with the House Budget Committee to achieve these ends.

<sup>31</sup> Bipartisan Congressional Budget Reform Act, S. 2765, 116<sup>th</sup> Cong., § 505 (2019).  
<https://www.congress.gov/bills/116/h-congress/senate-bill/2765/text>

Chairman YARMUTH. Thank you very much for your testimony. I now recognize Ms. Emmanuelli Perez for five minutes. Please unmute and we are interested in your testimony.

#### **STATEMENT OF EDDA EMMANUELLI PEREZ**

Ms. EMMANUELLI PEREZ. Chairman Yarmuth, Ranking Member Smith, and Members of the Committee, thank you for the opportunity to discuss Congress' constitutional power of the purse, the Government Accountability Office's role in serving this power, and several legislative proposals to strengthen this power.

Since our creation a century ago, GAO has performed audits and investigations and issued legal decisions to support Congress in its oversight of executive spending. Congress has also vested GAO with additional statutory responsibilities

[inaudible]—

Chairman YARMUTH. If you can suspend for a minute, please? Your sound is breaking up.

[Audio malfunction]

Chairman YARMUTH. Yes. Sam, why don't we see if we can get her sound corrected, and in the meantime, we will hear from Mr. Paoletta. So, Mr. Paoletta, you are recognized for five minutes. Please unmute and give us your testimony.

#### **STATEMENT OF MARK R. PAOLETTA**

Mr. PAOLETTA. Chairman Yarmuth, Ranking Member Smith, and Members of the Committee, thank you for the invitation to testify today on legislation to amend the Impoundment Control Act. 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, funds for the construction of a wall along the southern border, including \$1.4 billion specifically appropriated for the border wall construction. Based on GAO's opinion on funding for Ukraine, President Biden's hold is clearly illegal and a violation of the Impoundment Control Act. But the Democrats on this Committee have been silent on this direct assault on Congress' power of the purse.

President Biden's hold is 100 days and counting. It is an ongoing hold, which is twice as long as the Trump OMB 50-day hold on Ukraine funds. President Biden's decision to impound these border wall 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 horrible situations. And this was all avoidable given the good work done by President Trump and his Administration to address these issues at the border.

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—this is a quote—"an abuse of authority provided to the President to apportion appropriations," and sent sweeping document requests to OMB.



Why hasn't the Chairman or any Democrat on this Committee issued any statements or sent document requests to DHS or OMB asking about this ongoing hold? If you truly cared about preventing impoundments or asserting Congress' power of the purse, your actions would not be governed by who is president or whether you agree with the policy.

GAO rejected the Trump OMB's argument that the President could hold funds to figure out how best to spend the funds consistent with the appropriations and the President's agenda. In contrast to that Trump hold, President Biden's hold is designed to specifically thwart a lawfully enacted congressional appropriations to build the border wall. President Biden pledged during the campaign not to build another foot of the wall, calling it a waste of money. His Fiscal Year 2022 discretionary request proposes to rescind the very border wall money that he is holding. Thus, the Biden Administration is apparently now intentionally under-executing congressionally appropriated funding in order to later rescind it. That is a flat-out defiance of congressional intent and is a textbook impoundment.

GAO's Ukraine opinion stated, 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.

This bill will only make a bad law worse. The ICA has undermined responsible stewardship of government spending. Why? Because 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 programs with the least amount of money necessary. The ICA now makes those efforts potentially illegal. The ICA overthrew 200 years of how the executive and legislative branches worked together. Congress should use its powers under Article I of the Constitution to focus on passing detailed authorizing laws, reauthorizing the hundreds of laws that have expired, and enacting separate appropriations bills on time and not in a monstrous omnibus passed months late.

Well-crafted laws authorizing federal programs are critically important to ensuring that the executive can effectively fulfill congressional intent. The appropriations should be a means to implementing that federal program, not an end in itself.

The bill's provisions are all meant to increase the micromanaging of the daily operations of the executive branch. And they will further undermine 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 an appropriation must be apportioned, and particularly given Congress' inability to pass things on time, this bill will only further undermine Presidential decisionmaking and exacerbate wasteful spending.

A provision regarding publicly listing the positions that have apportioning authority will ultimately result in the doxing of federal civil servants. A provision regarding applying administrative penalties to executive branch officials found to have impounded funds

is bad policy because there are so many gray areas as to what constitutes a violation of the ICA. It is worth noting—this is interesting—that Members of Congress and their staff routinely call agency staff to demand that they hold apportioned funds, often without any purpose related to the implementation of that program.

During the Trump Administration, I provided GAO with 300 examples from the State Department in a 3-year period where Members of Congress demanded holds on funding. They ranged from somewhere from 10 days to 321 days. Are these impoundments for which an agency employee would be held responsible?

The provisions giving GAO additional powers to make demands on the executive branch are unwise and probably unconstitutional. For example, the law empowered the GAO to demand documents from the President of the United States, and if he does not comply in 20 days, GAO is empowered to sue him in federal court to make him comply. That is astonishing. Congress can't even do that, and GAO works for Congress.

There are other concerns with this bill, but in the interest of time, I will leave it at that. My full statement with two attachments, have been submitted for the record, and I am happy to answer any questions. Thank you.

[The prepared statement of Mark R. Paoletta and letters submitted for the record follows:]

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.<sup>1</sup> 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.

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<sup>1</sup> 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.<sup>2</sup>

#### 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.

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<sup>2</sup> 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 19<sup>th</sup> 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.

#### Bill's Provisions Would Further Undermine Effective Stewardship of Federal Spending

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.<sup>3</sup>

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<sup>3</sup> As pointed out in the January 19<sup>th</sup> 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 19<sup>th</sup> 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.

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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."<sup>1</sup> 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".<sup>2</sup> 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

<sup>1</sup> Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2511; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260.

<sup>2</sup> 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.<sup>3</sup>

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.”<sup>4</sup>

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.”<sup>5</sup>

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.<sup>6</sup> As these unlawful pauses have proceeded, the rate of illegal crossings has surged, creating a crisis across our southern border,<sup>7</sup> at times with tragic consequences.<sup>8</sup> Meanwhile, billions in lawfully appropriated dollars, which were provided by Congress to address precisely this issue, sit unused by the Biden Administration.

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

<sup>4</sup> “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.

<sup>5</sup> *Id.*

<sup>6</sup> 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”).

<sup>7</sup> 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>.

<sup>8</sup> 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."<sup>9</sup> The President is not vested with the power to ignore or amend a duly enacted law.<sup>10</sup> Instead, he must "faithfully execute" the law as Congress enacts it.<sup>11</sup>

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.<sup>12</sup> The Constitution grants the President no unilateral authority to withhold funds from obligation.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> The deferral of budget authority for any other purpose, including to advance a policy disagreement, is unlawful.<sup>16</sup>

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.<sup>17</sup>

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

<sup>9</sup> U.S. Const. art. I, § 9, cl. 7.

<sup>10</sup> 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").

<sup>11</sup> U.S. Const., art. II, § 3.

<sup>12</sup> 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).

<sup>13</sup> See B-135564, July 26, 1973.

<sup>14</sup> 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").

<sup>15</sup> 2 U.S.C. § 684(b).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at § 683.

proposal.<sup>18</sup> 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*.”<sup>19</sup> 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.<sup>20</sup> Instead, such actions are an unlawful impoundment. This is especially true when “[p]rogram execution [is] ... well underway.”<sup>21</sup>

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.”<sup>22</sup>

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.<sup>23</sup>

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

<sup>18</sup> 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).

<sup>19</sup> B-331564, Jan. 16, 2020 (emphasis added) (citations in original omitted).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *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.<sup>24</sup> 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] volition explicitly barred [DHS] from” taking further action by issuing the Proclamation.<sup>25</sup> 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”<sup>26</sup> and “a waste of money.”<sup>27</sup> 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

<sup>24</sup> 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.

<sup>25</sup> B-331564, Jan. 16, 2020.

<sup>26</sup> Biden Border Wall Proclamation.

<sup>27</sup> *Id.*

policy priorities, necessarily provide the animating framework for all actions agencies take to carry out government programs.<sup>28</sup>

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.”<sup>29</sup> 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”<sup>30</sup> 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

<sup>28</sup> *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”).

<sup>29</sup> B-331564, Jan. 16, 2020.

<sup>30</sup> 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>.





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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



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John Hoeven  
United States Senator



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Jerry Moran  
United States Senator



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Rand Paul M.D.  
United States Senator



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John Barrasso M.D.  
United States Senator



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Richard Burr  
United States Senator



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Lindsey O. Graham  
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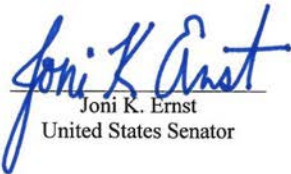
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James Lankford  
United States Senator



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Rob Portman  
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Susan M. Collins  
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Tommy Tuberville  
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Kevin Cramer  
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Mitt Romney  
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Todd Young  
United States Senator



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John Cornyn  
United States Senator



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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."<sup>1</sup> 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."<sup>2</sup> 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.

<sup>1</sup> U.S. CONST. art. I, § 9.

<sup>2</sup> 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."<sup>3</sup> The Supreme Court has endorsed this view outside of the spending context, including this past term.<sup>4</sup>

Moreover, absent clear evidence to the contrary, appropriations laws do not displace other permanent statutes that the Executive Branch is required to carry out.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> The Act requires that the President submit to Congress a special message when the President intends to defer funding.<sup>9</sup>

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.<sup>10</sup>

<sup>3</sup> U.S. CONST. art. II, §§ 2-3.

<sup>4</sup> *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 the Legislative Branch to play a direct role in the execution of the laws).

<sup>5</sup> *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).

<sup>6</sup> 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.

<sup>7</sup> 2 U.S.C. § 682(1).

<sup>8</sup> 2 U.S.C. § 684(b).

<sup>9</sup> 2 U.S.C. § 684(a).

<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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

<sup>11</sup> 2 U.S.C. § 683(b).

<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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

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."<sup>16</sup> 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.

<sup>13</sup> GAO B-115398, Aug. 12, 1975.

<sup>14</sup> GAO B-115398, December 15, 1975.

<sup>15</sup> 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.

<sup>16</sup> 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.<sup>17</sup> 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;<sup>18</sup> 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).<sup>19</sup> 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.<sup>20</sup> 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

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

<sup>18</sup> 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.

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

<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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

<sup>21</sup> 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).

<sup>22</sup> 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.

<sup>23</sup> 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.<sup>24</sup> In fact, every Administration from the Great Depression Era through the Nixon Era impounded funds.<sup>25</sup> 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."<sup>26</sup> 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."<sup>27</sup> 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

<sup>24</sup> 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.

<sup>25</sup> 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.

<sup>26</sup> GAO B-331564, at 5.

<sup>27</sup> 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."<sup>28</sup> 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."<sup>29</sup> 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."<sup>30</sup> 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.<sup>31</sup>

#### **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

<sup>28</sup> Franklin D. Roosevelt, Letter to Sen. Russell (1942).

<sup>29</sup> 89 Cong. Rec. 10362 (1943).

<sup>30</sup> 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").

<sup>31</sup> 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.<sup>32</sup> 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.

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<sup>32</sup> 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.<sup>33</sup> 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."<sup>34</sup> This definition is so broad that one could conclude that it includes any

<sup>33</sup> 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.

<sup>34</sup> 2 U.S.C. § 682(1).

action taken by OMB under its statutory authority to apportion funds.<sup>35</sup> 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....”<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

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

<sup>35</sup> 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.

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

<sup>37</sup> 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).

<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

<sup>39</sup> 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.

<sup>40</sup> 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 agency 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.

<sup>41</sup> 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.<sup>42</sup> But under the ICA, it is a flexibility that the President does not have. Reforming the ICA to return to

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*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.


<sup>42</sup> 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

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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.

Chairman YARMUTH. Thank you for your testimony. Since my name was invoked and by inclusion of the Members of the Committee, I do want to respond to the issue of what we have done with regard to the border wall funding. Within days of the announcement of the Administration that they were not going to fund, we were in contact with the OMB. We have been in contact with them and they have been perfectly willing to engage with us on the issue. We are certainly seeking answers from them. But when the Republican senators, and I guess, Democratic—I mean, Republican House Members as well, requested that GAO investigate this situation and they are currently investigating, we will respect that process as we respected it in prior occasions.

So, I just wanted to get that on the record. And, hopefully, we can get Ms. Emmanuelli Perez back on and get her sound corrected. Are you there?

Ms. EMMANUELLI PEREZ. Yes, sir. Can you hear me?

Chairman YARMUTH. We can hear you. You are still a little garbled.

Ms. EMMANUELLI PEREZ. Oh.

Chairman YARMUTH. Let us try it again, though.

#### **STATEMENT OF EDDA EMMANUELLI PEREZ**

Ms. EMMANUELLI PEREZ. OK, thank you very much. I apologize for these connection problems here.

Chairman YARMUTH. All right.

Ms. EMMANUELLI PEREZ. So, Mr. Chairman, Ranking Member Smith, Members of the Committee—

Chairman YARMUTH. You have five minutes.

Ms. EMMANUELLI PEREZ.—thank you for the opportunity to discuss Congress' constitutional power of the purse. The Government Accountability Office's role in serving this power, and several legislative proposals to strengthen this power.

Since our creation a century ago, GAO has performed audits and investigations and issued legal decisions to support Congress in its oversight of executive spending. GAO also has been vested with additional statutory responsibilities to oversee the use of public money. For example, under the Impoundment Control Act, we must review any special messages the President submits pursuant to the Act, and report to Congress when a special message is either improperly classified or not transmitted at all. We are regularly providing technical assistance to Congress and executive branch agencies.

We published the Red Book, a multi-volume appropriations law treatise that is relied upon across the government and we teach a principles of appropriations law course opinion that should be prudently considered. And the Supreme Court has cited GAO's Red Book in support of its appropriations law matters.

GAO takes seriously its role in protecting Congress' power of the purse. Today, I would like to discuss several suggestions we have for legislative changes that will strengthen Congress' power of the purse and provide increased transparency.

First, we would like to recommend that Congress amend the Impoundment Control Act to expressly preclude the withholding of budget authority through its expiration to ensure the prudent obligation of appropriated budget authority.

The Impoundment Control Act provides a president with the legal authority to temporarily withholding funds from obligation with specific notice to Congress and meeting specific conditions. It is critical to maintain the careful balance of the Impoundment Control Act proposals to cancel budget authority. When Congress does not act to rescind funds, it appropriates its funds for obligation.

In 2018, we issued a decision requested by Mr. Yarmuth and Mr. Womack where we examined whether the President had the authority under the Impoundment Control Act to withhold budget authority through its date of expiration. We determined that the President does not have this authority. And Congress can clarify the extent of that authority by explicitly prohibiting the withholding of funds through their date of expiration.

Second, we recommend that the Department of Justice report to Congress on whether it will prosecute reported Antideficiency Act violations. In addition to appropriate administrative discipline it should contemplate criminal penalties for knowing and willful violations. And that threat is an essential deterrent. To our knowledge, there has never been a criminal prosecution of an Antideficiency Act violation. And a reporting requirement would ensure that consideration of that liability for all by the enforcement of the Act.

Third, we recommend that Congress clarify the reach of the Antideficiency Act to correct the underreporting of Antideficiency Act violations. Although the Office of Management and Budget just yesterday amended its Circular No. A-11 reinstating its instruction that the agencies report Antideficiency Act violations found by GAO, we recommend that Congress amend the Antideficiency Act to clearly require agencies to report. When OMB had changed its longstanding guidance, we reported six Antideficiency Act violations to Congress that agencies failed to report. This will ensure that any future changes to OMB instructions do not interfere with the transparency, increased visibility of the agency operations, and congressional oversight. We also recommend that Congress encourage the agency in spending appropriate funds. And Congress could require that agencies report on the expired and canceled balances in their appropriation accounts. This information would increase the visibility to agency operations, strengthen congressional oversight, and help Congress and GAO identify potential violations of law.

Finally, we recommend that Congress require agencies to respond to GAO's request for information within a certain period of time. Delays in receiving information impede our ability to issue decisions in a timely manner and impacts Congress' ability to conduct its oversight functions.

Each of these legislative proposals will strengthen Congress' power of the purse, which is a key check on the power of the other branches. James Madison called it the power that allows Congress to reduce all the overgrown prerogatives of the other branches.

Chairman Yarmuth, Ranking Member Smith, and Members of the Committee, this completes my prepared statement. I would be pleased to answer any questions you may have. Thank you.

[The prepared statement of Edda Emmanuelli Perez follows:]

B-333181  
 GAO-21-538T

April 29, 2021

The Honorable John Yarmuth  
 Chairman  
 The Honorable Jason Smith  
 Ranking Member  
 Committee on the Budget  
 House of Representatives

Subject: *Testimony before the House Committee on the Budget—Proposals to Reinforce Congress's Constitutional Power of the Purse*

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

Thank you for the opportunity to discuss Congress's constitutional power of the purse, GAO's role in serving this power, and several legislative proposals to reinforce this power.

#### Introduction

The framers vested Congress with the power of the purse by providing in the Constitution that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>1</sup> This arrangement ensures that the government remains accountable to the will of the people and provides a key check on the power of the other branches. The power of the purse allows Congress to reduce "all the overgrown prerogatives of the other branches of government."<sup>2</sup>

In 1921, Congress created the General Accounting Office—now the Government Accountability Office—through the Budget and Accounting Act to assist it in the discharge of its core constitutional powers, including the power of the purse.<sup>3</sup> As

<sup>1</sup> U.S. Const., art. I, § 9, cl. 7.

<sup>2</sup> The Federalist No. 58 (1788) (James Madison).

<sup>3</sup> Budget and Accounting Act, 1921, Pub. L. No. 67-13, title III, 42 Stat. 20, 23–27 (June 10, 1921). See 61 Cong. Rec. 1090 (1921) (statement of Rep. Good) ("It was the intention of the committee that the comptroller general should be something more than a bookkeeper or accountant; that he should be a real critic, and at all (continued...)")

part of its exercise of the power of the purse, Congress has vested GAO with statutory responsibilities to investigate and oversee the use of public money. For example, GAO issues decisions on the use of appropriations to the Congress and Executive Branch officials.<sup>4</sup> GAO also has responsibilities under the Congressional Budget and Impoundment Control Act of 1974, where Congress provided that the Comptroller General will review any special messages submitted by the President pursuant to the act and report to Congress when a special message is either improperly classified or not transmitted at all.<sup>5</sup> And, in 2004, Congress amended the Antideficiency Act to require agencies to send to the Comptroller General a copy of each violation report on the same date the agency sends the report to the President and Congress.<sup>6</sup> Additionally, the Senate Appropriations Committee directed GAO to establish a central repository of Antideficiency Act violation reports and to track all reports, including responses to GAO legal decisions and findings in audit reports and financial statement reviews.<sup>7</sup>

GAO's expertise with regard to appropriations law matters is widely understood and respected throughout the government. Indeed, courts frequently cite to GAO's legal decisions and *Principles of Federal Appropriations Law* (often referred to as the "Red Book") in their decisions involving appropriations law. For example, when ruling on the Navy's use of appropriations, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) noted that our decisions are "expert opinion, which we should prudently consider."<sup>8</sup> Additionally, the Supreme Court has cited GAO's Red Book in support of its positions on appropriations law matters.<sup>9</sup>

GAO's role to provide information and expert legal analysis to Congress on appropriations law matters is essential to ensuring respect for Congress's constitutional power of the purse. As we have carried out our responsibilities under the statutory framework governing the obligation and expenditure of appropriated funds, our experiences, for over 100 years now, have revealed some ways that

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times should come to Congress, no matter what the political complexion of Congress or the Executive might be, and point out inefficiency, if he found that money was being misapplied—which is another term for inefficiency—that he would bring such facts to the notice of the committees having jurisdiction of appropriations.”).

<sup>4</sup> 31 U.S.C. §§ 3526, 3529.

<sup>5</sup> 2 U.S.C. §§ 685–686.

<sup>6</sup> Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004), *codified at* 31 U.S.C. § 1351.

<sup>7</sup> S. Rep. No. 108-307, at 43 (2004).

<sup>8</sup> *Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, at 1349 (*quoting Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001)).

<sup>9</sup> See, e.g., *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 190–199 (2012).

Congress could enhance this legal framework to provide more visibility, enhanced transparency, and greater oversight of agency activities.

#### Changes to the Antideficiency Act

Congress enacted the Antideficiency Act to protect and underscore Congress's constitutional prerogatives of the purse in response to various abuses.<sup>10</sup> Prior to the enactment of this act, some agencies would spend their entire appropriations during the first few months of the fiscal year, continue to incur obligations, and then return to Congress for appropriations to fund these "coercive deficiencies."<sup>11</sup> These were obligations to others who had fulfilled their part of the bargain with the United States and who now had at least a moral—and in some cases also a legal—right to be paid. Congress felt it had no choice but to fulfill these commitments, but the frequency of deficiency appropriations played havoc with the United States budget. As a result, Congress enacted the Antideficiency Act, which, in pertinent part, prohibits government officials from obligating or expending in excess of or in advance of appropriations.<sup>12</sup>

The Antideficiency Act has been called "the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds."<sup>13</sup> To guarantee that Congress has the information it needs to conduct oversight of executive branch activities, I would like to discuss some ideas we have for legislative changes to the Antideficiency Act. First, we recommend Congress clarify the reach of the Antideficiency Act to correct the underreporting of Antideficiency Act violations. Second, we recommend that Congress require the Department of Justice to report on whether reported Antideficiency Act violations will be prosecuted. Third, we recommend Congress require agencies to report the obligations they incur during lapses in appropriations. These changes would provide increased transparency and visibility into executive branch activities for both Congress and the American people, as well as improved consistency in the Antideficiency Act's application.

#### *Correcting the Underreporting of Antideficiency Act Violations*

In June 2019, the Office of Management and Budget (OMB) amended its Circular No. A-11 addressing agency reports of Antideficiency Act violations found by GAO. The June 2019 revision instructs agencies to report such violations only if "the

<sup>10</sup> See U.S. Const., art. I, § 9, cl. 7 (power of the purse, statement and account of public money); B-328450, Mar. 6, 2018; B-317450, Mar. 23, 2009.

<sup>11</sup> Gary Hopkins and Robert Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 57–58 (1978); Louis Fisher, *Presidential Spending Power*, 232 (1975).

<sup>12</sup> 31 U.S.C. § 1341(a)(1)(A).

<sup>13</sup> Hopkins and Nutt, *at* 56.



agency, in consultation with OMB, agrees that a violation has occurred.”<sup>14</sup> This revision was a departure from longstanding instructions to agencies. OMB had long instructed each executive branch agency to submit such a report whenever GAO found an Antideficiency Act violation.<sup>15</sup> Since 2004, when Congress amended the Antideficiency Act, GAO’s practice has been that if GAO concludes that an agency has violated the Antideficiency Act and the agency does not make its required report, we notify Congress of the violation.<sup>16</sup>

In response to OMB’s June 2019 revision to Circular No. A-11, GAO’s General Counsel transmitted a letter to agency general counsels explaining that GAO will continue to notify Congress of an agency’s Antideficiency Act violation if the agency does not do so, noting the agency’s failure to report.<sup>17</sup> The letter also noted that if GAO publishes a decision concluding that an Antideficiency Act violation occurred, we will contact the relevant agency to ensure a report of the violation, and if the agency does not report within a reasonable period, GAO will notify Congress of the violation.<sup>18</sup> Since issuing this letter to agency general counsels, we have reported to Congress six Antideficiency Act violations that agencies have failed to report.<sup>19</sup> While a GAO notification puts the violation before Congress, our reports only include information in the record associated with a decision; they do not include other information Congress may find useful, like agency activity to prevent recurrence of the violation or administrative discipline imposed upon agency officials responsible for the violation.

<sup>14</sup> OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 4, § 145.8 (June 28, 2019).

<sup>15</sup> See, e.g., GAO, *Anti-Deficiency Act: Agriculture’s Food and Nutrition Service Violates the Anti-Deficiency Act*, GAO/AFMD-87-20 (Washington, D.C.: Mar. 17, 1987) (citing OMB Cir. No. A-34, *Instructions on Budget Execution* (1987)); OMB Cir. No. A-11, pt. 4, § 145.8 (June 2018); OMB Cir. No. A-11, pt. 4, § 145.8 (July 2007) (revised Nov. 20, 2007); OMB Cir. No. A-34, *Instructions on Budget Execution*, pt. 2, § 22.8 (Nov. 7, 1997).

<sup>16</sup> See, e.g., B-308715, Nov. 13, 2007.

<sup>17</sup> B-331295, Sept. 23, 2019.

<sup>18</sup> *Id.*

<sup>19</sup> B-331132, Aug. 6, 2020 (reporting an Antideficiency Act violation by the Office of Information and Regulatory Affairs); B-331093, June 30, 2020 (reporting an Antideficiency Act violation by the U.S. Department of the Treasury); B-331094, June 25, 2020 (reporting an Antideficiency Act violation by the U.S. Department of Agriculture); B-330776, Apr. 22, 2020 (reporting an Antideficiency Act violation by the U.S. Department of the Interior); B-331428, Sept. 23, 2019 (reporting an Antideficiency Act violation by the U.S. Environmental Protection Agency); B-331296, Sept. 23, 2019 (reporting an Antideficiency Act violation by the Commodity Futures Trading Commission).

The Antideficiency Act itself requires agencies to notify Congress when agencies identify violations, but is silent on what agencies should do when GAO finds a violation.<sup>20</sup> The June 2019 revisions to OMB Circular No. A-11 and our recent experiences suggest that agencies may rely on this statutory silence to avoid reporting Antideficiency Act violations to Congress when GAO identifies a violation. Not only does this withhold important information from congressional oversight, it reflects diminished respect for Congress's constitutional power of the purse. We encourage OMB to amend Circular No. A-11 to instruct agencies to report Antideficiency Act violations that GAO identifies. Moreover, to ensure that any future changes to OMB instructions do not interfere with congressional oversight, we recommend that Congress amend the Antideficiency Act to clearly require agencies to report when GAO finds a violation. Such a change will increase transparency and provide increased visibility into agency operations.<sup>21</sup>

In 2007, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum concluding that a violation of a spending restriction that Congress enacted in a permanent statute does not violate the Antideficiency Act because the prohibition is not "in an appropriation."<sup>22</sup> This conclusion results in a rather anomalous policy that turns solely on Congress's choice of a legislative vehicle—permanent law or appropriations act—asserting, in effect, that Congress need not know of violations of statutory restrictions, only appropriations act restrictions. This is not GAO's view.<sup>23</sup> In 2009, in response to a request from members of the Senate Committee on Appropriations, GAO concluded that a violation of any prohibition on the use of public money is a violation of the Antideficiency Act.<sup>24</sup> If there are no funds available in an appropriation because of a statutory prohibition or restriction—whether enacted as part of the appropriations act or in other law—any obligation or expenditure would be in excess of the amount available for obligation or expenditure as provided for in the Antideficiency Act.

As a result of OLC's conclusions, executive branch agencies may not report violations of funding restrictions that are not in an appropriation even though GAO

<sup>20</sup> 31 U.S.C. §§ 1351, 1517(b).

<sup>21</sup> A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong., § 212 (2020).

<sup>22</sup> Memorandum Opinion for the General Counsel, Environmental Protection Agency, *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, OLC Opinion, Apr. 5, 2007, at 1.

<sup>23</sup> B-317450, Mar. 23, 2009; B-300826, Mar. 3, 2005.

<sup>24</sup> B-317450, Mar. 23, 2009.

would conclude those violations are also Antideficiency Act violations.<sup>25</sup> We might offer that Congress could fix the underreporting of these violations by revising the Antideficiency Act, or enacting a permanent statute, to clarify that violations of funding restrictions—whether they are in an appropriation or not—are violations of the Act.

#### *Reporting Prosecutions of Antideficiency Act Violations*

The Antideficiency Act is unique among fiscal law statutes in that it carries civil and criminal penalties for its violation. The Act requires that the officer or employee responsible for an Antideficiency Act violation be subject to “appropriate administrative discipline,” including removal from office.<sup>26</sup> In addition, an individual who “knowingly and willfully” violates the Antideficiency Act may be subject to criminal penalties, including a fine of up to \$5,000, a term of imprisonment not to exceed two years, or both.<sup>27</sup> The U.S. Department of Justice is responsible for prosecuting violations of the Antideficiency Act. To our knowledge, the Department of Justice has never brought charges against a government official or employee for a criminal violation of the Antideficiency Act. It has long been understood that the criminal penalties contemplated by the Act serve as an important deterrent. Lest that deterrent effect be mitigated by the lack of prosecutions, we recommend requiring the Department of Justice to annually review Antideficiency Act reports in GAO’s repository and issue a report to Congress, with a copy to GAO, on whether criminal charges have been brought for any of the Antideficiency Act violations reported that year to Congress.<sup>28</sup> Such a requirement would ensure that the Department of Justice fully consider each Antideficiency Act violation and would provide transparency in the enforcement of the Act.

#### *Reporting Obligations Incurred during a Lapse in Appropriations*

The Antideficiency Act’s prohibitions prohibit agencies from continuing most activities during a lapse in appropriations. At present, OMB Circular No. A-11 requires agencies to develop and maintain plans for an orderly shutdown in the

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<sup>25</sup> GAO has received some Antideficiency Act reports stemming from violations of prohibitions that were not enacted in an appropriations act. See, e.g., *Antideficiency Act Reports—Fiscal Year 2019*, GAO-ADA-19-04, at 5 (Apr. 27, 2020) (Defense Logistics Agency reporting a violation of 10 U.S.C. §§ 2533a as a violation of the Antideficiency Act). However, given OLC’s guidance, GAO is concerned that agencies may fail to consistently report similar Antideficiency Act violations.

<sup>26</sup> 31 U.S.C. § 1349.

<sup>27</sup> 31 U.S.C. § 1350.

<sup>28</sup> A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong., § 213 (2020).

event of a lapse in appropriations.<sup>29</sup> While these plans provide a helpful overview of agency activities during a lapse, the plans do not go into great detail about the programs for which agencies will incur obligations or the amounts of those obligations. We recommend that Congress enact legislation to require executive branch agencies to provide an accounting, by program, of the obligations that were incurred during a lapse in appropriations.<sup>30</sup> Having this information would help Congress more quickly identify where agencies may have violated the Antideficiency Act and allow Congress to act swiftly to prevent future violations. In addition, preparing these reports would encourage executive branch agencies to minimize obligations during a lapse in appropriations and would impose discipline in following the law.

These recommended changes to the Antideficiency Act will ensure that the cornerstone of Congress's power of the purse is respected and consistently applied throughout the federal government.

#### Changes to the Impoundment Control Act

In 1974, Congress enacted the Impoundment Control Act in response to attempts by the executive branch to thwart the will of Congress by refusing to spend congressionally-appropriated funds.<sup>31</sup> The Impoundment Control Act operates on the constitutional premise that the President must obligate funds appropriated by Congress, unless otherwise authorized to withhold.<sup>32</sup> The Act permits the President to temporarily impound—withhold the obligation of—appropriated funds in certain circumstances if the President notifies the Congress by transmitting a "special message."<sup>33</sup>

The Act gives the Comptroller General the responsibility to review all special messages submitted pursuant to the Impoundment Control Act and to report to Congress when the Comptroller General determines the President has improperly withheld funds.<sup>34</sup> The Act also authorizes the Comptroller General to bring a civil action to compel the release of any budget authority improperly withheld.<sup>35</sup> GAO's

<sup>29</sup> OMB Circular No. A-11, pt. 4, § 124.2 (Mar. 24, 2021).

<sup>30</sup> A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong., § 203 (2020).

<sup>31</sup> Pub. L. No. 93-344, title X, 88 Stat. 297, 332–339 (July 12, 1974), *classified at* 2 U.S.C. §§ 681–688.

<sup>32</sup> B-329092, Dec. 12, 2017.

<sup>33</sup> 2 U.S.C. §§ 681–688.

<sup>34</sup> *Id.* §§ 685–686.

<sup>35</sup> *Id.* § 687.

investigation of and reporting on potential impoundments alerts Congress to executive branch attempts to undermine Congress's power of the purse by refusing to spend budget authority appropriated by Congress. As a result, GAO's role under the Impoundment Control Act is essential to ensuring respect for Congress's power of the purse by providing increased visibility and oversight into executive branch activities.<sup>36</sup>

In order to ensure that enacted appropriations are carried out in accordance with Congress' directives, we would like to propose several amendments to the Impoundment Control Act. First, we recommend Congress amend the Impoundment Control Act to explicitly require the prudent obligation of appropriated budget authority. Second, we recommend that Congress clarify the extent of GAO's reporting authority under the Impoundment Control Act and provide that reports made by the Comptroller General do not act as a special message. Third, we recommend Congress require the President to publicly post apportionments and report to Congress the expired and cancelled balances of each appropriation account. These changes will provide Congress with the information it needs to conduct effective oversight of agency activities and ensure appropriated funds are obligated in a timely manner.

*Requiring the Prudent Obligation of Appropriated Budget Authority*

The Impoundment Control Act contemplates two types of withholdings—deferrals and rescission proposals. Deferrals are the temporary withholding of budget authority, permitted 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.<sup>37</sup> Rescission proposals seek the permanent cancellation of budget authority through legislative action. When the President transmits a special message proposing a rescission, he may withhold the funds for a period of 45 calendar days of continuous session of the Congress.<sup>38</sup> If Congress does not complete action on a rescission bill rescinding all or part of amounts proposed to be rescinded within the 45-day period, such amounts must be made available for obligation.<sup>39</sup>

The Impoundment Control Act explicitly states that deferrals may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral was transmitted to Congress.<sup>40</sup> By contrast, the Act does not explicitly impose a similar limitation for rescission proposals. In

<sup>36</sup> See B-331564, Jan. 16, 2020.

<sup>37</sup> 2 U.S.C. § 684.

<sup>38</sup> 2 U.S.C. §§ 682(3), 683.

<sup>39</sup> 2 U.S.C. § 683(b).

<sup>40</sup> 2 U.S.C. § 684(a).

2018, in response to a request from members of this Committee, GAO concluded that the Impoundment Control Act does not authorize the withholding of budget authority through its date of expiration.<sup>41</sup>

The President's authority to withhold budget authority pursuant to a rescission proposal is inextricably linked to the requirement that the budget authority be made available for prudent obligation.<sup>42</sup> As budget authority is available to incur obligations only during its period of availability, the funds proposed for rescission must not be expired at the conclusion of the prescribed 45-day period. Consequently, the Impoundment Control Act does not permit budget authority proposed for rescission to be withheld until its expiration simply because the 45-day period has not yet elapsed. A withholding of this nature would be an aversion both to the constitutional process for enacting federal law and to Congress's constitutional power of the purse, for the President would preclude the obligation of budget authority Congress has already enacted and did not rescind.

For example, consider a situation where fiscal year budget authority is withheld pursuant to a special message submitted less than 45 days before the end of the fiscal year and where, upon conclusion of the 45-day period, Congress has not completed action on a corresponding rescission bill. An interpretation of the Impoundment Control Act that would permit the withholding of such budget authority for the duration of the 45-day period would result in the expiration of the funds during that period. The expired amounts then could not be made available for obligation despite Congress not having completed action on a bill rescinding the amounts, as expired appropriations are not available for obligation. Such a result would frustrate the design of the Impoundment Control Act, as it would contravene the requirement that funds be made available for obligation at the conclusion of the prescribed 45-day period.

Moreover, to allow such so-called "pocket rescissions" would upset the delicate balance of powers provided for in the Constitution. Congress wields the authority to introduce, consider, and pass legislation—including appropriations—and the President must take care that enacted laws be faithfully executed. Appropriations

<sup>41</sup> B-330330, Dec. 10, 2018. In that decision, we recognized that some previous GAO decisions intimated that the President might withhold budget authority for the duration of the 45-day period, and that Congress would have to take affirmative action to prevent the withheld funds from expiring. However, our earlier opinions were based on premises that the Supreme Court has since invalidated. Any sound exercise of legal reasoning necessarily considers the most recent rulings from courts of jurisdiction. Accordingly, our 2018 decision overruled prior decisions consistent with the Constitution, the text of the Impoundment Control Act, and with Supreme Court precedent.

<sup>42</sup> The amount of time required for prudent obligation will vary from one program to another. In some programs, prudent obligation may require hours or days, while others may require weeks or months.

are laws like any other and can be rescinded only through the bicameralism and presentment procedures that the Constitution prescribes.<sup>43</sup> Indeed, the Supreme Court has noted that there “is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”<sup>44</sup> Interpreting the Impoundment Control Act as authorizing the President to unilaterally cancel budget authority would bestow powers upon the President beyond those the Constitution contemplates and would deny Congress its constitutionally prescribed role in the enactment of law. To ensure consistency in the application of the Impoundment Control Act and the timely obligation of enacted budget authority, we recommend amending the Act to make clear that budget authority may not be withheld through its date of expiration under any circumstances.<sup>45</sup>

*Clarifying the Extent and Impact of GAO’s Authority to Report Unauthorized Impoundments*

One of GAO’s several roles under the Impoundment Control Act is to report to Congress when GAO identifies an impoundment of budget authority for which no special message has been transmitted.<sup>46</sup> When we become aware of a potential violation of the Impoundment Control Act, GAO sends a letter to the relevant agency requesting factual information and the agency’s legal views. The agency’s response informs our understanding of the agency’s actions and its justification for those actions. When we identify an improper impoundment, GAO must report it if it is an ongoing impoundment of budget authority, but GAO is not explicitly required to report withholdings that are no longer ongoing. Our current practice is to report withholdings that are no longer ongoing when we conclude the executive branch has violated the Impoundment Control Act and where notification would enhance congressional oversight.<sup>47</sup> Enacting into law explicit authority supporting this practice would firmly establish the value that Congress places on this work while underscoring its importance for congressional oversight and accountability in government. Therefore, we recommend that Congress amend GAO’s authority

<sup>43</sup> See *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>44</sup> *Id.* at 438. Similarly, when the Impoundment Control Act was under consideration, a Senator noted, “The recommendation of the President that an appropriation be eliminated or reduced in and of itself would have no legal effect whatsoever.” 120 Cong. Rec. 20,473 (June 21, 1974) (statement of Sen. Ervin).

<sup>45</sup> A similar provision was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong., § 101 (2020).

<sup>46</sup> 2 U.S.C. § 686(a).

<sup>47</sup> See, e.g., B-331564, Jan. 16, 2020 (informing Congress of an Impoundment Control Act violation even though the subject funds had been made available for obligation and obligated before their date of expiration).

under the Impoundment Control Act to explicitly include reporting withholdings of funds that are not ongoing.<sup>48</sup>

GAO reports under the Impoundment Control Act are instrumental in alerting Congress to executive branch attempts to undermine Congress's power of the purse by refusing to spend appropriated budget authority. However, in its current form, the Impoundment Control Act considers such a report by the Comptroller General to be a special message, entitling the President to withhold the subject budget authority in accordance with the Act's requirements.<sup>49</sup> As a result of GAO's report, a President who has violated the Impoundment Control Act by failing to follow the required procedures may subsequently withhold the funds from obligation lawfully instead of making them available for obligation. Thus, the Comptroller General, in discharging his statutory duty to report violations of the Impoundment Control Act, ratifies the continuation of the initial violation. In order to avoid this result when improperly withheld funds have already been made available for obligation, GAO has issued decisions describing such violations, rather than transmitting a formal report to Congress.<sup>50</sup> To improve consistency, incentivize compliance with the law, and enable congressional oversight, we recommend amending the Impoundment Control Act such that a report by the Comptroller General does not serve as a special message ratifying an improper impoundment of funds.<sup>51</sup>

*Reporting of Apportionments and Expired and Cancelled Balances*

Special messages and reports by the Comptroller General under the Impoundment Control Act are an important source of information about agency activities. Even so, Congress should consider requiring the executive branch to provide additional information that would improve transparency and assist Congress in identifying potential violations of the Impoundment Control Act.

<sup>48</sup> A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong., § 103 (2020).

<sup>49</sup> 2 U.S.C. §686(a).

<sup>50</sup> See, e.g., B-329092, Dec. 12, 2017 (explaining that "[s]ince the purpose here is to ensure funds are made available for obligation and we have confirmed that the agency has done so, we are not transmitting a report to Congress under the Impoundment Control Act").

<sup>51</sup> A similar provision was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong., § 103 (2020).



First, we recommend that Congress require the President to report to Congress when appropriated funds are cancelled or expire unobligated.<sup>52</sup> Appropriations expire at the end of their period of availability. For example, a fiscal year appropriation expires at midnight on September 30—the last day of the fiscal year. Expired appropriations are available to record, adjust, and liquidate obligations properly made during the appropriation's period of availability.<sup>53</sup> After five fiscal years in expired status, any remaining balance in the appropriation account is cancelled and is no longer available for obligation or expenditure.<sup>54</sup> Requiring the President to report on the expired and cancelled balances in executive branch accounts could alert Congress to withholdings of funds that may violate the Impoundment Control Act.<sup>55</sup>

Second, we recommend that Congress consider requiring the Office of Management and Budget (OMB) to publicly post all apportionments of executive branch appropriations.<sup>56</sup> The Antideficiency Act requires OMB to apportion appropriations to prevent the need for a deficiency or supplemental appropriation.<sup>57</sup> Recently, OMB has impermissibly used that apportionment power in an attempt to evade the Impoundment Control Act's requirements.<sup>58</sup> As a result, many of GAO's inquiries into potential violations of the Impoundment Control Act include requesting the relevant apportionment documents from OMB. The public posting of all apportionments and reapportionments would substantially expedite GAO's inquiries. Moreover, publicly available apportionments would greatly increase visibility into OMB's use of its apportionment authority, enhancing Congress's ability to conduct oversight of OMB's operations.

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<sup>52</sup> Similar requirements were included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong., §§ 201, 202 (2020). Later this year, GAO will issue a report on the extent of cancelled appropriations at federal agencies as required by the National Defense Authorization Act for Fiscal Year 2020.

<sup>53</sup> 31 U.S.C. § 1553(a).

<sup>54</sup> 31 U.S.C. § 1552(a).

<sup>55</sup> Even if unobligated balances remain in a particular account, relatively small unobligated sums alone do not indicate an impoundment. Under sound administrative funds control practices, agencies may obligate cautiously in order to cover unanticipated liabilities and avoid violating the Antideficiency Act. See B-331298, Dec. 23, 2020. Large unobligated balances, however, may indicate an improper impoundment.

<sup>56</sup> A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong., § 102 (2020).

<sup>57</sup> 31 U.S.C. § 1512(a).

<sup>58</sup> B-331564, Jan. 16, 2020.

### Changes to GAO's authorities

Congress vested GAO with the authority to "investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds . . . ."<sup>59</sup> As such, GAO is integral to Congress' exercise of its oversight powers. Not only does GAO provide essential objective, non-partisan information to Congress, GAO is also authorized to settle the accounts of the United States and provide advance decisions on appropriations law matters to executive branch officials.<sup>60</sup>

I would like to discuss potential changes to GAO's authorities that will improve visibility into and accountability for executive branch actions. First, we recommend reducing the waiting period for the Comptroller General to bring suit under the Impoundment Control Act. Second, we recommend that Congress require the President to respond to GAO's requests for information within a certain time period. Taken together, these changes will strengthen Congress's oversight of executive branch agencies by enhancing GAO's efficiency and effectiveness.

#### *Shortening the Waiting Period for the Comptroller General to Bring Suit under the Impoundment Control Act*

Congress has authorized the Comptroller General to bring suit under the Impoundment Control Act to compel the release of improperly withheld budget authority.<sup>61</sup> Before bringing suit, the Comptroller General must first give Congress 25 days advance notice with an explanatory statement explaining the circumstances giving rise to the suit.<sup>62</sup>

When budget authority is improperly impounded late in the fiscal year, the 25-day waiting period required by the Impoundment Control Act can threaten the Comptroller General's ability to confirm that budget authority is made available for obligation before its expiration. For example, if the President improperly withholds fiscal-year funds from obligation on September 6, the Comptroller General would be unable to file suit until October 1, after the funds had already expired. Thus, the 25-day waiting period hampers the Comptroller General's capacity to make certain that budget authority will be made available in sufficient time for its prudent obligation. As a result, we recommend that Congress consider reducing or

<sup>59</sup> Pub. L. No. 67-13, § 312(a), 42 Stat. at 25, *codified at* 31 U.S.C. § 712(1).

<sup>60</sup> 31 U.S.C. §§ 3526, 3529.

<sup>61</sup> 2 U.S.C. § 687.

<sup>62</sup> *Id.*

eliminating the 25-day waiting period so that GAO may exercise its statutory authorities in a timely manner.<sup>63</sup>

*Improving GAO's Access to Information from the Executive Branch*

When GAO issues an appropriations law decision, we send a letter to solicit the agency's views of the facts and the law related to the decision. We have had difficulty in getting timely responses from agencies, and, in some cases, we have not received responses at all. For example, in a recent decision regarding the National Park Service's activities during a lapse in appropriations, we did not receive a response from the Department of the Interior until the day after we issued our decision, even after repeated attempts to acquire the necessary information.<sup>64</sup> In another recent decision on the Impoundment Control Act, we received no response to our inquiries from the Department of Defense.<sup>65</sup> In yet another instance, we did not receive a response from the Environmental Protection Agency related to the agency's use of Twitter.<sup>66</sup> Perhaps most egregiously, we were unable to provide a substantive response to a congressional request for a decision because the Department of the Interior declined to provide the necessary information.<sup>67</sup>

Delays in receiving information from executive branch agencies impede our ability to issue decisions on a timely basis. To ensure that GAO receives timely responses to our requests, we recommend a provision of law to require agencies to respond to our letters within a certain time period. We might also recommend that you consider imposing penalties or a reporting requirement on agencies that fail to respond to GAO within the allotted time.<sup>68</sup> Requiring timely responses to GAO promotes greater transparency and accountability and, as Congress relies on the information GAO provides, will enhance congressional oversight of executive branch activities.

<sup>63</sup> A similar provision was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong., § 104 (2020).

<sup>64</sup> B-330776, Sept. 5, 2019. See also B-318274, Dec. 23, 2010 (despite numerous telephone requests, the Department of the Interior did not respond to our letter prior to the issuance of our decision); B-309181, Aug. 17, 2007 (explaining that the Department of the Interior "provided the requested information but declined to provide its legal views in response to questions we asked").

<sup>65</sup> B-331564, Jan. 16, 2020.

<sup>66</sup> B-330107, Oct. 3, 2019.

<sup>67</sup> B-329372, June 27, 2018.

<sup>68</sup> A similar requirement was included in legislation introduced during the previous Congress. Congressional Power of the Purse Act, H.R. 6628, 116<sup>th</sup> Cong., § 103 (2020).

Each of these legislative proposals would strengthen GAO's existing role to provide information and legal analysis to Congress regarding the spending of public money. But, more importantly, these proposals would also support and advance Congress's constitutional prerogatives. It is imperative that Congress's power of the purse and oversight role are respected, upheld, and sustained in order to ensure accountability in the spending of public money.

Chairman Yarmuth, Ranking Member Smith, and members of the Committee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have.

Edda Emmanuelli Perez  
Deputy General Counsel

Chairman YARMUTH. Thank you very much for your testimony. We will now begin our question and answer session. As a reminder, Members can submit any questions to be answered later in writing. Those questions and responses will be made part of the formal hearing record. Any Members who wish to submit questions for the record may do so by sending them to the clerk electronically within seven days.

As is my custom, I am going to reserve my time, questioning time, to the end of the session. I believe the Ranking Member is going to go in his normal order. But first I will recognize the gentleman from Pennsylvania, Mr. Boyle, for five minutes.

Mr. BOYLE. Thank you, Mr. Chairman. I appreciate that and you holding this hearing on such an important piece of legislation. It goes back to what happened almost a quarter of a millennium ago, right here from the city that I am speaking to you from, Philadelphia, when our nation's founders gave Congress the power of the purse. Unfortunately, in so many ways and not just in the power of the purse, we have seen, in my view, a migration of power from the legislative branch to the executive branch really over the last 20, 25 years. And, frankly, that has happened in Administrations of both parties.

So, I think it is crucial that Congress again reassert its role in holding the power of the purse. Our founders thought we would jealously—we as members of the legislative branch, would jealously guard our powers. Unfortunately, as intense partisanship has taken hold, and we have even heard some of that already this hearing, as that intense partisanship has taken hold, it has allowed the executive branch to creep into our territory. So, I think this legislation is important. I am supportive of it.

Let me turn to Mrs. Hempowicz, and I apologize if I am not getting your name pronounced exactly correctly. But let me ask you specifically on the question of transparency. If Congress makes a spending decision that is transparent, I am very concerned about secrecy and apportionments when it is not Congress. As I mentioned, when we use our appropriations power, you do have transparency. What happens right now when we do see an executive apportionment? Is Congress aware of it? Is the public? What rules right now govern the transparency of that non-legislative process?

Ms. HEMPOWICZ. Thank you so much for that question, Representative. And I share your frustration with the ceding of power, congressional power, to the executive branch. Right now, when apportionment directives are issued by OMB, there is no transparency requirement. Congress may see them. The public may see them if, you know, an interested party—if Congress asks for them and goes through a lengthy accommodations process and you may receive them. If members of the public submit Freedom of Information Act requests, which also take a great deal of time to reach fruition, we might also receive—we might have transparency there. But it is not guaranteed. And you are right in the way that Congress passes laws, those are public. That is how lawmaking is supposed to be.

I think the excess secrecy here by the executive branch not only is making congressional oversight harder, but I think it's part of what is fueling this growing public concern about corruption in gov-

ernment. And I think the way to answer that, you know, I know it is a cliché, but sunlight is the best disinfectant. And so, I think this is certainly an area where more transparency would not only help Congress, but it would help the public.

Mr. BOYLE. Thank you for that. The natural followup then is what suggestions or ideas would you have on how we can improve transparency in those sort of executive branch apportionment decisions.

Ms. HEMPOWICZ. Yes, well, I think, you know, the first thing I would do is I would recommend passing the congressional Power of the Purse Act. But then going even further than that legislation, I think there needs to be additional transparency around opinions issued by the Office of Legal Counsel at Department of Justice. While the congressional Power of the Purse Act would require transparency of opinions, OLC issues around interpreting the executive's budget authority, that is the only section of those—that is the only—sorry—subset of those opinions that would be required to be transparent under this law. And I think there is certainly a lot of room and particularly when we are talking about congressional authorities. So, enforcing congressional subpoenas, things like that, you know, the OLC has wielded an incredible amount of power and almost always in favor of more secrecy for the executive.

Mr. BOYLE. Great. Well, thank you very much, Mr. Chairman. With that, I yield back. There you go.

Chairman YARMUTH. All right. I am having trouble unmuting. Thank you, Mr. Boyle. And I now recognize the Ranking Member Mr. Smith of Missouri for 10 minutes.

Mr. SMITH. Thank you, Mr. Chairman. First, I just want to raise my frustration with these virtual hearings. It really is a disservice to all the Members of the Budget Committee whenever one of the key witnesses that you all have from GAO, we can't hardly understand or hear much of what she is saying. I am going to start my questions with her. I hope we can answer them. But I do know that we have retrofitted the budget room so that we could actually do a hybrid hearing. And I would strongly suggest that we get back to regular order, Mr. Chairman.

Chairman YARMUTH. We want to as soon as possible. But I think we have connected her with a phone line now so she should be clearly audible.

Mr. SMITH. Thank you, Mr. Chairman.

Chairman YARMUTH. Thank you.

Mr. SMITH. Ms. Perez, I will start with you. As you are aware, on March 23, 2021, 71 Republican Members of Congress, including myself, joined 40 Republican senators in requesting a GAO legal opinion on suspension of border wall construction contracts and withholding appropriated funds. I ask unanimous consent, Mr. Chairman, to submit this letter into the record.

Chairman YARMUTH. Without objection, so ordered.

Mr. SMITH. Thank you, Mr. Chairman. Ms. Perez, can you provide any status update on when GAO will issue this opinion?

Ms. EMMANUELLI PEREZ. Yes. Yes, sir. We do have right now pending a decision that we are working on. We have asked OMB and DHS to provide factual and legal views to us. And we are expecting their responses right now mid to late next week. We did

actually begin looking at this issue when the President announced this in January. And, of course, also accepted the request signed by you and various other Members. But it is something we have been looking at and are asking OMB and DHS to provide us with information.

Mr. SMITH. OK. So, Ms. Perez, you are telling me that GAO started looking into this without any Member of Congress requesting it?

Ms. EMMANUELLI PEREZ. Yes, that is correct. As part of what we do under the Impoundment Control Act, if we become aware of a potential impoundment, we do start looking into it. Sometimes we learn through it from Congress. We have learned through it through the media. In this case, of course, the President did issue a proclamation. So, therefore, we did become aware of a possibility of an Impoundment Control Act issue and did start looking at that at that time.

Mr. SMITH. Thank you, Ms. Perez. I just want to reiterate, given that this is an ongoing hold, and it is currently happening resulting in a clear humanitarian crisis at our border, I believe that it is the responsibility of GAO to make this decision very quickly, as has I pointed out in prior letters when GAO addressed the Ukraine funding in the prior Administration. That was after all of this was done. And when Senator Van Hollen submitted the letter, it was in December. And on January 16th I believe it was, you all had a decision.

So, I definitely want to encourage, because of the crisis on the southern border, that this decision gets out there easily because, I mean, I think it's pretty straightforward that this Administration is violating the law. And I just would highly encourage that just for what is going on and as a Member of Congress, that is the power of the purse.

So, I would like to go to—you know, it has been 100 days since President Biden has suspended the border wall funding. Can you tell me what day it was that GAO started to look into this?

Ms. EMMANUELLI PEREZ. When we heard of the President's decision to pause the funding, you know, when we heard of the declaration that he did make, we immediately did start talking within GAO to start looking at what were the issues we needed to find. Who do we need to talk to. What type of information do we need to obtain. And then consequently, we also received the request from Members such as yourself. So, we will be making that decision.

Mr. SMITH. I look forward to that and I hope that you will notify us as soon as you have that decision.

Ms. EMMANUELLI PEREZ. We absolutely will. And we certainly share, you know, the urgency for having these decisions done as quickly as possible. We do look forward to hearing from OMB and DHS very soon. So, we hope that that will give us the information that we need to make that decision.

Mr. SMITH. Thank you. I will move on to Mr. Paoletta. It has been 100 days since President Biden suspended construction of the U.S. southern border wall and paused funding for border wall construction. These actions appear, in my opinion, to violate the Impoundment Control Act. This Committee was very active in its oversight of the executive branch last Congress, but the Democrats

have seemingly been pretty silent on the biggest power of the purse abuse occurring right now in the first three hours of this current Administration. That is why my colleagues and I on this Committee have demanded a hearing on the Administration's constitutional abuses, the violation of U.S. law, and unjust pause on border wall construction.

I am glad this hearing will provide an opportunity to discuss those issues and I ask unanimous consent to submit the letter written by Committee Republicans on this issue, dated March 29, 2021, into the record, Mr. Chairman?

Chairman YARMUTH. Without objection, so ordered.

[Letters submitted for the record follows:]



**Congress of the United States**  
Washington, DC 20515

March 23, 2021

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

Dear Comptroller General Dodaro,

We are writing to be added as co-requesters of a March 17, 2021 letter, signed by 40 United States Senators, requesting the Government Accountability Office's investigation and legal opinion on the actions of the Biden Administration to suspend border wall construction and to order a freeze of funds provided by Congress for that purpose, which we believe violated the Impoundment Control Act.

We have spoken with the appropriate staff for the lead requestor and have received approval to join the request. Please contact Emily Trapani on the Committee on Homeland Security at [Emily.Trapani@mail.house.gov](mailto:Emily.Trapani@mail.house.gov) if you have any questions about this request.

Sincerely,



JOHN KATKO  
Ranking Member  
House Committee on Homeland Security



KAY GRANGER  
Ranking Member  
House Committee on Appropriations



JASON SMITH  
Ranking Member  
House Committee on Budget



KEVIN MCCARTHY  
Member of Congress



STEVE SCALISE  
Member of Congress

Congress of the United States  
Washington, DC 20515



DAN SULLIVAN  
United States Senator



MIKE LEE  
United States Senator




JOSH HAWLEY  
United States Senator



RON JOHNSON  
United States Senator




CLAY HIGGINS  
Member of Congress



MICHAEL GUEST  
Member of Congress



DAN BISHOP  
Member of Congress



JEFF VAN DREW  
Member of Congress



RALPH NORMAN  
Member of Congress



MARIANNETTE MILLER-MEEKS  
Member of Congress



DIANA HARSHBARGER  
Member of Congress



ANDREW S. CLYDE  
Member of Congress

**Congress of the United States**  
Washington, DC 20515



CARLOS A. GIMENEZ  
Member of Congress



JAKE LATURNER  
Member of Congress



PETER MEIJER  
Member of Congress



KAT CAMMACK  
Member of Congress



AUGUST PFLUGER  
Member of Congress



ANDREW GARBARINO  
Member of Congress



HAROLD ROGERS  
Member of Congress



ROBERT B. ADERHOLT  
Member of Congress



MIKE SIMPSON  
Member of Congress



JOHN CARTER  
Member of Congress



KEN CALVERT  
Member of Congress



TOM COLE  
Member of Congress



MARIO DIAZ-BALART  
Member of Congress

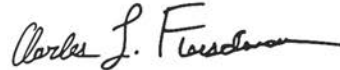


STEVE WOMACK  
Member of Congress

Congress of the United States  
Washington, DC 20515



JEFF FORTENBERRY  
Member of Congress



CHARLES FLEISCHMANN  
Member of Congress



DAVID P. JOYCE  
Member of Congress



ANDY HARRIS, M.D.  
Member of Congress



MARK AMODEI  
Member of Congress



CHRIS STEWART  
Member of Congress



STEVEN PALAZZO  
Member of Congress



DAVID G. VALADAO  
Member of Congress



DAN NEWHOUSE  
Member of Congress



JOHN MOOLENAAR  
Member of Congress



JOHN RUTHERFORD  
Member of Congress



BEN CLINE  
Member of Congress



GUY RESCHENTHALER  
Member of Congress



MIKE GARCIA  
Member of Congress

**Congress of the United States**  
**Washington, DC 20515**


  
 ASHLEY HINSON  
 Member of Congress

  
 TONY GONZALES  
 Member of Congress


  
 TOM MCCLINTOCK  
 Member of Congress

  
 GLENN GROTHMAN  
 Member of Congress

  
 CHRIS JACOBS  
 Member of Congress


  
 MICHAEL C. BURGESS, M.D.  
 Member of Congress


  
 EARL "BUDDY" CARTER  
 Member of Congress


  
 RANDY FEENSTRA  
 Member of Congress


  
 TEDD BUDD  
 Member of Congress

  
 ANTHONY GONZALEZ  
 Member of Congress

  
 CHRISTOPHER H. SMITH  
 Member of Congress

  
 MO BROOKS  
 Member of Congress

  
 BARRY MOORE  
 Member of Congress

  
 ANDY BIGGS  
 Member of Congress

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Washington, DC 20515



BURGESS OWENS  
Member of Congress



SCOTT DESJARLAIS, M.D.  
Member of Congress



MICHAEL CLOUD  
Member of Congress



MIKE ROGERS  
Member of Congress



DAN CRENSHAW  
Member of Congress



MATT ROSENDALE  
Member of Congress



BRIAN BABIN, D.D.S.  
Member of Congress



DOUG LAMALFA  
Member of Congress



DARRELL ISSA  
Member of Congress



RICK W. ALLEN  
Member of Congress



BOB GOOD  
Member of Congress



JAIME HERRERA BEUTLER  
Member of Congress





March 29, 2021

Honorable John Yarmuth  
Chairman  
Committee on the Budget  
United States House of Representatives  
Washington, D.C. 20515

Dear Chairman Yarmuth:

We are requesting you immediately convene the House Committee on the Budget to hold a hearing on President Biden's withholding of appropriated funds passed by Congress and signed into law for border wall construction. This action is an abuse of the Executive Branch's authorities and appears in violation of the Impoundment Control Act of 1974 (ICA).

On January 20, 2021, President Biden issued a Proclamation to terminate the emergency declaration at the southern border and direct the U.S. Department of Homeland Security to:

"pause immediately the obligation of funds related to construction of the southern border wall" and  
"pause work on each construction project on the southern border wall."<sup>1</sup>

As a result of this Proclamation, the Office of Management and Budget (OMB) immediately froze funds previously appropriated by Congress for this purpose. This executive action and the Biden Administration's posture regarding immigration policies has caused a national security, humanitarian, and public health crisis at our southern border.

In January 2020, the Government Accountability Office (GAO) issued a legal opinion finding:

"[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."<sup>2</sup>

Under this standard, President Biden's direction to halt funds for the border wall would constitute an illegal impoundment of congressionally appropriated funds.

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<sup>1</sup> 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, January 20, 2021, <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/>.

<sup>2</sup> U.S. Government Accountability Office, Decision "Matter of: Office of Management and Budget – Withholding of Ukraine Security Assistance," January 16, 2020, <https://www.gao.gov/assets/b-331564.pdf>, p. 7.

In the 116<sup>th</sup> Congress, under your Chairmanship, this Committee was extremely active in oversight of the Executive Branch regarding the ICA and annual appropriations acts. The Committee's Oversight Plan for the 116<sup>th</sup> Congress specifically called for:

“...ongoing oversight of OMB’s implementation of budget submission, control, execution, and enforcement procedures under the...Congressional Budget Act of 1974.”<sup>3</sup>

Consistent with the Committee’s Oversight Plan in the 116<sup>th</sup> Congress, you conducted oversight efforts of the Trump Administration’s implementation of federal spending provided by appropriations acts, including numerous document requests to OMB and initiating a Committee investigation.<sup>4</sup> Additionally, you repeatedly raised concerns regarding the Administration’s actions and ICA compliance, including delivering a special order speech stating your intent to introduce legislation to “protect Congress’ power of the purse.”<sup>5</sup>

You also held a hearing examining “Congress’ Power of the Purse and the Rule of Law.”<sup>6</sup> During this hearing you stated:

“[f]or Congress to...fulfill its constitutional responsibility to control how the people’s tax dollars are spent, we must reassert Congress’ control over spending and ensure we are the ones holding the purse strings. Increasing transparency and accountability will enable Congress to provide the oversight of the executive branch.”<sup>7</sup>

The Budget Committee’s Oversight Plan for the 117<sup>th</sup> Congress is even more specific on the Committee’s oversight role, stating:

“[this] Committee will continue its efforts to strengthen Congress’s power of the purse” in addition to “assessing OMB’s legal authorities to manage federal spending, including the Impoundment Control Act of 1974.”<sup>8</sup>

Given this increased emphasis on oversight of the ICA, we assume, at a minimum, you will execute similar efforts to pursue transparency and accountability consistently and thoroughly from the Executive Branch as it pertains to the ICA.

<sup>3</sup> Committee on the Budget, U.S. House of Representatives, “Oversight Plan of the Committee on the Budget for the 116<sup>th</sup> Congress House of Representatives,” 2019.

<sup>4</sup> House Committee on the Budget Report, “House Budget Committee Investigation Exposes Trump Administration’s Systemic Abuse of Executive Spending Authority,” November 20, 2020, <https://budget.house.gov/OMB-Abuse>.

<sup>5</sup> Chairman John Yarmuth, Floor Remarks Outlining Administration’s Systemic Lawbreaking,” January 28, 2020, <https://budget.house.gov/news/press-releases/chairman-yarmuth-floor-remarks-outlining-administration-s-systemic-lawbreaking>.

<sup>6</sup> House Committee on the Budget Hearing, “Protecting Congress’ Power of the Purse and the Rule of Law,” Wednesday, March 11, 2020, Protecting Congress’ Power of the Purse and the Rule of Law | House Budget Committee Democrats.

<sup>7</sup> House Committee on the Budget, “Hearing in Protecting Congress’ Power of the Purse and the Rule of Law,” Serial No. 116-25, <https://www.govinfo.gov/content/pkg/CHRG-116hhr41966/pdf/CHRG-116hhr41966.pdf>.

<sup>8</sup> Committee on the Budget, U.S. House of Representatives, “Oversight Plan of the Committee on the Budget for the 117<sup>th</sup> Congress House of Representatives,” 2021.




It is therefore this Committee's obligation to conduct an immediate hearing on President Biden's decision to abandon billions of tax dollars authorized by Congress to secure our border. This is necessary to ensure taxpayer dollars are being spent as directed by Congress. We are enclosing a letter from 71 Members of Congress including the Ranking Members of the House Committees on Homeland Security and Appropriations, joining 40 Senators calling for a GAO investigation into this matter.<sup>9</sup>


We assume you are just as concerned now about this executive action as you were in the 116<sup>th</sup> Congress. The only thing that has changed is the new resident of 1600 Pennsylvania Avenue. We look forward to your prompt hearing notice to discuss this crucial matter.

Sincerely,


  
Jason Smith  
Republican Leader  
House Committee on the Budget


  
Lloyd Smucker (PA-11)  
Member of Congress  
House Committee on the Budget


  
Trent Kelly (MS-01)  
Member of Congress  
House Committee on the Budget

  
Chris Jacobs (NY-27)  
Member of Congress  
House Committee on the Budget

  
Tom McClintock (CA-04)  
Member of Congress  
House Committee on the Budget

  
Michael C. Burgess, M.D. (TX-26)  
Member of Congress  
House Committee on the Budget

  
Glenn Grothman (WI-06)  
Member of Congress  
House Committee on the Budget

  
Earl L. "Buddy" Carter (GA-01)  
Member of Congress  
House Committee on the Budget

<sup>9</sup> House Letter to Government Accountability Office, March 23, 2021, <https://republicans-homeland.house.gov/wp-content/uploads/2021/03/3-23-2021-Co-Request-Letter-GAO-Wall-Construction-71-Members-FINAL.pdf>




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Ben Cline (VA-06)  
Member of Congress  
House Committee on the Budget



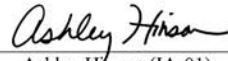

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Bob Good (VA-05)  
Member of Congress  
House Committee on the Budget




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Lauren Boebert (CO-03)  
Member of Congress  
House Committee on the Budget



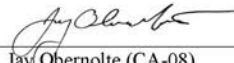

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Ashley Hinson (IA-01)  
Member of Congress  
House Committee on the Budget




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Byron Donalds (FL-19)  
Member of Congress  
House Committee on the Budget




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Jay Obernolte (CA-08)  
Member of Congress  
House Committee on the Budget




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Randy Feenstra (IA-04)  
Member of Congress  
House Committee on the Budget

[Enclosure]

cc: The Honorable Robert Fairweather, Acting Director, Office of Management and Budget  
The Honorable Shalanda Young, Deputy Director, Office of Management and Budget

Mr. SMITH. Thank you, Mr. Chairman. So, under the Impoundment Control Act, what are permissible grounds to hold or pause funds?

Mr. PAOLETTA. Well, you can pause—thanks, Mr. Smith. You can pause funds if you can send up a deferral notice to the Congress. You can pause funding if you are sending up a rescission package to the Congress. If you are in the day-to-day management of your funds—and it is interesting, I listened to this discussion as a person who has been part of the executive branch—if you are trying to implement the program and you need to pause the money to figure out how best to spend that money, within the confines of the appropriation, you can pause it.

OMB has an apportionment authority too, right? As the testimony and oral testimony discussed. And it is day-to-day operations within OMB to apportion funds. So, if you have 2-year funds, you might apportion it so that half those funds are unavailable for the first year, right? That is an apportionment, right? It is putting those funds off. That is just—we view that—or the executive branch views that as just day-to-day Administration of our implementing programs.

Mr. SMITH. So, I just want to get this right. So, funds cannot be withheld for a policy reason?

Mr. PAOLETTA. Again, so, in terms of—my view is that so long as you are trying—so, if you are trying to implement the program consistent with the appropriations and they are multiple ways you can do that, right? So, it is consistent with your appropriation and trying to figure out if you can—I will take the perfect example is the WHO funds, right, on that issue. The appropriation was to fund international organizations. There are scores of them, OK? And Congress when they passed the appropriation, said just pass, you know, you have so much money to fund international organizations. One of them was the WHO. We paused those funds—or the President. It was an apportionment. Paused them to figure out where else could we spend that money within the appropriation, OK? That is a policy, right? It is a policy discussion about how best we acquire those funds within the scope of that appropriation.

What is happening with President Biden's hold is that he is specifically thwarting the appropriation. He wants to defy the law in implementing that program.

Mr. SMITH. So, I am about to run out of time. And I want to try to get some stuff in the record as quickly as possible. So, if you could try to give me your opinion quickly, I would definitely appreciate it. But do you believe that the executive branch violated GAO standard of the Impoundment Control Act when it began withholding funds for the border wall?

Mr. PAOLETTA. One hundred percent.

Mr. SMITH. Do you believe withholding funding for the border wall is an attempt by the Administration to circumvent congressional intent?

Mr. PAOLETTA. I don't need to think that. President Biden has said that.

Mr. SMITH. OK. How is pausing funds for the border wall different than the temporary hold that occurred on funds for Ukraine, which as you know, GAO investigated?

Mr. PAOLETTA. Sure. We paused those funds to allow policy process to go on and figure out how best to spend those funds. If you looked at that first hold, it was 10 days. It was to get a policy discussion because the President had expressed concerns about the spending of that money in the way it may have been spent. So, we paused it for 10 days, you know, and will shorter holds to allow a policy discussion to happen. It was to be done consistent with that appropriation and, in fact, it was obligated consistent with that appropriation.

Mr. SMITH. Perfect. OK, when it comes to Congress' power of the purse, it appears Congress itself is failing to do its job. As I mentioned in my opening statement, Congress has failed to follow regular order when it comes to budgeting and reauthorizing programs. Would you agree that a focus when discussing Article I authorities should include how Congress has, on its own, ceded its power of the purse by failing to authorize and appropriate in a regular, detailed, and timely manner?

Mr. PAOLETTA. Yes, 100 percent.

Mr. SMITH. You know, Congress has consistently failed to meet its budget and appropriations responsibilities for Fiscal Year 2021, alone. Four continuing resolutions were enacted before enacting a huge omnibus appropriations act. And Congress has already missed its deadline to pass a Fiscal Year 2022 budget resolution. And, therefore, it appears Fiscal Year 2022 funding will likely be delayed and result in yet another omnibus appropriations act. Can you comment on how Congress' power of—

Chairman YARMUTH. The gentleman's time has expired. I have actually been already generous with the Ranking Member.

Mr. SMITH. Well, I appreciate that. And I think that Mr. Chairman, we probably could be more efficient in asking questions if we could actually be in the room. So, I would reiterate on behalf of the House Republicans, that we are all ready. We are all ready to stand in a committee room with a mask or without a mask in an in-person hearing. And if you need all of us to sign to do that, we will do it.

Chairman YARMUTH. All right. You made your position very clear. I appreciate that. I now yield five minutes to the gentleman from North Carolina, Mr. Price.

Mr. PRICE. Thank you, Mr. Chairman. I would like to quickly review four episodes from 2019 as the premise for my question. First of all, President Trump withheld duly appropriated funds from Ukraine. The GAO later determined that that was, in fact, an impoundment in his attempt to extort President Zelensky.

Second, the President totally withheld funds, appropriated funds, from the West Bank in Gaza, foreign aid funds. He did the same with funds to the Northern Triangle countries of Central America. And we struggled to get those funds reinstated.

Third, in early 2019, Leader McConnell acquiesced in Trump's demand that the border situation be declared a national emergency. Now, that let us reopen the government, but it also freed the President to spend unappropriated funds on his border wall.

And fourth, in 2019, President Trump bypassed congressional review under the Arms Export Control Act for arms sales to Saudi Arabia by declaring an emergency.

I would like, Mr. Chairman, to ensure that we can hold the record open for any Republican Members who would like to document the kind of objections they made at that time to any of these actions.

Chairman YARMUTH. We can hold the record open for a week. We will do that for a week.

Mr. PRICE. I think that would be useful to see what kind of objections were made to any of these by our Republican colleagues.

And my questions are these, and maybe we start with Ms. Reynolds or Ms. Hempowicz. First of all, how do we do something about this unrestrained, uncontrolled declaration of emergencies? What kind of boundaries should be placed around a president's power to declare emergencies and then to spend money as he pleases? Whether he just spends the money or whether he diverts the money from appropriated sources. And then, second, how can appropriations be protected? You know, we struggled in the State and Foreign Operations Appropriations Subcommittee to figure out how in writing the next year's bill, how do we prevent another withholding of West Bank and Gaza funds? How do we prevent just a total shutoff of any funds to address the sources of migration in Central America? Are there additional—did we miss something? We had a very hard time doing this.

So, those two questions. The enhancement of some kind of controls over emergency declarations, willy nilly emergency declarations. And also, how do you protect appropriations?

Dr. REYNOLDS. I am happy to offer a few comments first and then let Mrs. Hempowicz come in.

So, Representative Price, on the national emergencies piece, I think one of the most powerful pieces of the Power of the Purse Act is the proposal that would shift the current mechanism for congressional review of national emergencies declarations from a joint resolution of disapproval to a joint resolution of approval.

And as I mentioned in my statement, this situation arises in part because of a Supreme Court decision in 1983. But there are other examples where Congress has said that it believes that it should have the power to review, in an approval manner, decisions made by the executive branch. The rescissions provisions of the Congressional Budget Act are one example. So, I would point to that in response to your first question.

And in response to your second question, I think that some of the aspects of the Power of the Purse Act, especially around the transmission of information from the executive branch to the legislative branch, are the kinds of things that you are looking for to guarantee that in your case, the State and Foreign Operations Subcommittee of the Appropriations Committee is getting as much good information in a timely fashion that it can to make informed decisions in the next year's appropriations process.

Ms. HEMPOWICZ. And I agree with everything Dr. Reynolds said. And I just want to say—make one additional point on the national emergencies question. After President Trump declared the emergency at the southern border, there actually was incredibly bipartisan pushback in both the House and Senate. The President had to do, you know, had to use the first veto of his presidency to over—to veto the Congress telling him in a bipartisan way, we ob-

ject to this emergency authority being used this way immediately after we, you know, had a long, drawn-out government shutdown over this very issue.

And I just want to highlight that Members of Congress from both sides of the aisle objected there. Not because they objected to always to the policy that was being enacted by the President to build the border wall, but because they objected to how the President was making an end-run around Congress and really usurping the Congress' power of the purse in that instance. And so, I just wanted to highlight that under the National Emergencies Act, again, these are authorities that the Congress has delegated to the executive. And so, it doesn't make sense to me that it is so easy for the executive to work against Congress' expressed intent when it comes to executing those powers. And so, I think the voting—a vote by Congress as envisioned by part of this—by part of the congressional Power of the Purse Act where Congress has to approve an emergency for it to go longer than 30 days is exactly the way to address that problem.

Chairman YARMUTH. Thank you for your response. The gentleman's time has expired. I now recognize the gentleman from California, Mr. McClintock, for five minutes.

Mr. MCCLINTOCK. Thank you, Mr. Chairman. I just wanted to offer the thought that we have got no standing to complain about executive actions whoever the president is until we have thoroughly cleaned up our own house. Our refusal, under both Republican and Democratic majorities, to follow our own rules and meet our own responsibilities, I think is at the heart of the fiscal mess that we are facing today.

Let me mention three issues. Our failure to follow our own rules on unauthorized appropriations. Our failure to follow our statutory responsibilities under the 1974 Budget Act. And, finally, this return to earmarks that I am ashamed to say Republicans in the House are now joining. Thank God the Senate Republicans are not.

First, let us talk about unauthorized appropriations. Ever since 1835, the rules of the House have required that appropriations may only be for purposes authorized by law. Under that rule—it is still on the books—any member can raise a point of order to block any unauthorized appropriation. This provision established a process that is absolutely essential if the House is to meet its constitutional responsibilities to superintend the nation's finances. First, a program has to be authorized by Congress in a process that begins in an authorizing committee. Only then does a separate action appropriate funding for it.

This process imposes on Congress the responsibility periodically to review these programs. As a program's authorization expires, Congress has to revisit it to ask the obvious questions. Is it effective? Is it meeting its goals? Is it still needed? Is it worth the money we are paying for it? And depending upon the answer to these questions, Congress then renews the program, reforms it, or lets it die.

The failure of this House and the Senate to agree on recent appropriations has often degenerated into these continuing resolutions and merely tweak last year's spending and then extend it in the future. And when we do pass appropriations bills, about one-

third of the discretionary spending are for purposes not authorized by law. The law presumes authorizations that last years and sometimes decades ago. This is happening because the 1835 rule forbidding unauthorized appropriations is consistently waived, stripping Members of their right to object.

The second issue is our failure to follow the budget law. You know this, the 1974 Budget Act gives the House a very powerful set of tools to control spending and balance the budget. For years on the House Budget Committee, I have heard it said that, well, the budget's merely an aspirational document, offering a vision for the direction the government should take. That is simply not true.

The budget is an operational document, the single most important tool we have to control spending. The problem is we just don't use it. I have also heard incessantly that, well, it is a mandatory spending and that is beyond our control. Well, the budget resolution sets limits on the discretionary side. It is appropriated annually. That is about one-third of our budget. It also limits the mandatory spending that is set by statute. That is about two-thirds of the budget. But it also gives us powerful tools to enforce both limits. The problem is we just don't use it.

On the discretionary side, as the deadline approaches and the threat of government shutdown looms, the appropriations bills are cast aside in favor of stopgap measures that continue the spending trajectory without reform. And on the mandatory side, enforceable limits are supposed to be placed in the reconciliation instructions that are sent to the House authorizing committees. Those committees are then required to make conforming statutory changes. If the committees fail to act, the Budget Committee can do so directly. But this powerful process is never used. Why? Because decisions on reforming mandatory spending, mainly entitlement programs, are those difficult decisions in our fiscal policy. It is easier not to make them and just blame the process.

And finally, I want to address this return to earmarks, aided and abetted by my own party. It is an ominous development. There has been a set of principles since the Magna Carta that the authority that appropriates money should not be the same authority that spends that money. That is why we have a separation of powers. Congress makes law but cannot enforce it. The President enforces law but cannot make it. Congress declares war but cannot wage it. The President wages war but cannot declare it. And Congress appropriates money but cannot spend it. The President spends money but cannot appropriate it. There is a reason why earmarks breed corruption. They breakdown that same separation of powers that is at the center of our constitutional architecture.

So, I would simply say in response to the subject matter, Mr. Chairman, with all due respect, the fault, dear Brutus, is not in our stars and it is not in our presidents, but it is in ourselves that we are underlings. I yield back.

Chairman YARMUTH. The gentleman's time has expired. I now yield five minutes to the gentlewoman from Illinois, Ms. Schakowsky.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. You know, I have to be honest, other than the Members of Congress and legal and constitutional scholars, I really don't believe that most everyday

Americans are thinking about the Congress' power of the purse and what the framers intended. And while I certainly believe that it is critical that the Congress control how the peoples' tax dollars are spent, the people are thinking more about things like whether or not they have access to quality healthcare, that their children are safe at school, and that they are able to pay their bills, their rent, and their mortgage.

So, what I would like to do is go witness by witness and ask if you can give me an example of why these questions about the control of federal spending matter in the real world. I will start with Ms. Reynolds, just real short because I don't have that much time.

Dr. REYNOLDS. Sure, thank you. I think what is important to remember is that Congress and the executive branch both have roles to play here. The executive branch makes certain decisions. But someone has to make sure those are good decisions, and that is Congress' responsibility. And so, if you have a constituent who calls the Social Security and waits a long time on hold, how else are you supposed to help them than sort of investigate and oversee what is happening?

Ms. SCHAKOWSKY. That is an example. That is good. That is an example. OK, and Ms. Hempowicz—Hempa—

Ms. HEMPOWICZ. You got it.

Ms. SCHAKOWSKY. Did I get it? OK, Hempowicz.

Ms. HEMPOWICZ. Yes. I agree with you. I don't think—even I am not sitting around my kitchen table talking about apportionment decisions. But I think one thing, not a specific example, but I think the growing tension between Congress and the executive branch and the fights that publicly play out over access to information and access to documents, that Congress needs to conduct rigorous oversight. I think that is certainly permeating to the kitchen table. And I think as we see I think—and that points to the necessity for bills like the congressional Power of the Purse Act to show your constituents, we are doing what we can to empower ourselves—

Ms. SCHAKOWSKY. I hear you.

Ms. HEMPOWICZ.—to address your concerns.

Ms. SCHAKOWSKY. I hear you. And, Ms. Emmanuelli Perez, if you could—Emmanuelli Perez—if you could answer that as well?

Ms. EMMANUELLI PEREZ. Yes, certainly, ma'am.

Ms. SCHAKOWSKY. An example would be good.

Ms. EMMANUELLI PEREZ. Yes. It is important because even though everyday citizens may not be looking specifically at these types of decisions all of the time, they do see where the government gives them service. They do see where the branches are either, you know, negotiating or disputing. And so, it is important to them, as well, to make sure that everyone has the information needed in order to carry out our function.

Ms. SCHAKOWSKY. OK, and Mr. Paoletta. I have a feeling I know what your example is going to be but go ahead. Can you give—

Chairman YARMUTH. You need to unmute.

Ms. SCHAKOWSKY. Go ahead.

Mr. PAOLETTA. I apologize. It is important for Congress to write clear laws, you know. So, they set out the program requirements and then the executive branch is going to implement that law. And I think that is the problem in terms of why people are sort of when



they watch Congress and the executive branch fighting, that it is a lack of clarity from Congress as to what they expect from the executive branch. And what I see and what I saw are Congress, you know, Congress encroaching on the executive branch in their implementation of the law.

Congress passes the law. That is what they do. They can't day-to-day implement the law. That is why the President does it. That is his constitutional responsibility. So, I think writing clear laws so that there is better focus on how that law gets implemented.

Ms. SCHAKOWSKY. Thank you. I barely have time for my question, actually, which is about the role of the GAO. And I think I will jump to if Ms. Emmanuelli Perez, if you could talk about and elaborate on what the role of the GAO decisions play in congressional oversight of the executive spending. I know you talked a bit about that, but if you could elaborate on that. Are you still here?

Ms. EMMANUELLI PEREZ. Yes, ma'am. So, the role of GAO is really to help Congress in its constitutional power of the purse. It is important that Congress has the information that it needs and GAO through its audits and in its decisions, is the one that is providing that information and really helping Congress in terms of carrying out those laws, carrying out the power of the purse, and ensuring that Congress can then make changes as it sees fit and ensures that the executive is carrying that out appropriately.

Ms. SCHAKOWSKY. Well, I have always felt that the GAO has played a very important and constructive role. So, I thank you for that, and I yield back.

Chairman YARMUTH. The gentlewoman's time has expired. I now recognize the gentleman from Wisconsin, Mr. Grothman, for five minutes. You need to unmute, Mr. Grothman. He has left the building. I don't see him there visually. So, we will come back to him. I now recognize the gentleman from Michigan, Mr. Kildee, for five minutes. Mr. Kildee? All right, he probably didn't expect to be called on so soon. Is Mr. Smucker available?

Mr. SMUCKER. Yes. Can you hear me, Mr. Chairman?

Chairman YARMUTH. Yes, Mr. Smucker. The gentleman from Pennsylvania is recognized for five minutes.

Mr. SMUCKER. All right. Sorry about that, caught me by surprise a little bit there.

Chairman YARMUTH. Yes, I know. All right.

Mr. SMUCKER. Thank you so much for holding this hearing, Mr. Chairman. I was pleased that we are holding a hearing on this important topic. And actually, a little surprised given that it is based on the actions taken by President Biden on his very first day in office relative to the—

Ms. SCHAKOWSKY. Is there any reason for me to stay on?

Mr. SMUCKER.—relative to the border wall. I think if we were to be consistent with the comments made last Congress by Democrats and by the Chairman, we should be calling this executive order illegal. I don't know that I have specifically heard that word today, but, you know, this is I think an important discussion to have. And, certainly, you know, to the point that was made earlier about what people care about, people care, certainly in my district, about what is happening on the southern border.

We are seeing a real crisis here on the border. I can tell you I saw firsthand along with, you know, many of my colleagues who have visited the border and seen the impact on the border. Certainly, the impact on the border patrol agents who are just completely overwhelmed. And so, this is a real crisis that we are dealing with as a result of what I think is an illegal action by the President: freezing the congressionally appropriated funding for the construction on the southern border wall.

So, Mr. Paoletta, you know, I would just like to ask you whether you would make that statement? Based on your work at OMB and the standard that was set last Congress as we talked about President Trump's actions, do you believe that the President's action in this case were illegal?

Mr. PAOLETTA. Yes, I do, Congressman. I think they are 100 percent illegal, and it is very clear from his actions and his statements. During the campaign, he said he wouldn't build another foot of wall. On his first day, he issued an executive order pausing all funds. Every report is that all funds have been paused and construction has been completely stopped, which is a terrible policy decision, but for purposes of legality, it is illegal.

His press secretary also said they weren't going to spend any more money on the wall. And then he put it in his Fiscal Year 2022 discretionary request that he wants to have Congress rescind all unobligated balances. So, that is completely different than what we were doing in the Trump Administration, which was within the appropriation, trying to figure out how we would spend those funds.

So, it was consistent with the appropriation. It wasn't defying the appropriation. That is why this is illegal. And it is interesting to hear GAO say that she started looking at it and talking internally. It would be interesting to know exactly when they reached out to the Administration to ask their views. It seems like it was well after the 2-months when the senators in the House sent a letter asking them to look at it.

Mr. SMUCKER. Yes, well, they will have an opportunity to answer that question a little later. But, you know, I would like to, I guess, hear from you, why do you think we are not talking about this in those terms, particularly in what we have seen my colleagues from the other side of the aisle really talk about the Administration last cycle. Why aren't we doing that this cycle relative to this action?

Mr. PAOLETTA. You know, I was on the—we were on the receiving end of the Trump OMB of the letter from the Chairman on, I think it was September 27, 2019, asking us for a ton of documents. He says he has reached out to OMB to ask for information. That is a little different in terms of how he handled the Trump hold. And the media has been completely silent on this. And any story—in fact, there was a political story that ran complete cover, in my opinion, for the Biden hold. And so, it is really to me disappointing that, you know, if you are going to be—and, you know, enforcing or wanting to strengthen the power of the purse, you would be using it right now on this President for what he is doing.

And it may be—

Mr. SMUCKER. Thank you. I am going to stop you at that if you don't mind. I am running out of time, you know. And I do appreciate the Chairman holding this hearing. I said that. I meant that.

And he has certainly introduced legislation that would, you know, give more Budget Committee responsibilities to the GAO.

I think a better solution would be to empower this very Committee to fulfill its responsibility in the government funding process. And I am talking about marking up a budget resolution for a given fiscal year, which we have not done. It is now nearly May, and we have yet to even consider a Fiscal Year 2022 budget resolution. And meanwhile, the appropriators are already drafting their bills. You know, it is additionally under threat of a second multi-trillion dollar bill being passed through reconciliation. You know, it's a tool that is supposed to be used to reduce the deficit and not increase it by trillions.

So, you know, I think to restore fiscal accountability, restore transparency, responsibility, we got to return to regular order within this Budget Committee to for us to play and continue to be a key player in this process. I think it is very important that we do that. Thank you, Mr. Chairman.

Chairman YARMUTH. Thank you. The gentleman's time has expired. I will remind you, Mr. Smucker and others, that we are now awaiting a GAO opinion, which according to our witnesses notably could soon to be issued. So, we will be able to know what the GAO's opinion is in relatively short order.

With that, I don't see Mr. Grothman has returned. Has Mr. Kildee returned? I will now recognize the gentlewoman from California, Ms. Chu, for five minutes.

Ms. CHU. Thank you, Mr. Chair. Dr. Reynolds, I represent a district in California, and in California, there are several so-called sanctuary cities. These are cities that were very disturbed with the Trump Administration's approach to immigration enforcement. And especially with his wanting federal law enforcement to enter state and local jails to question and prosecute people for their immigration or citizenship status, and, therefore, frightened members of their cities who might not cooperate with the police.

Well, one of President Trump's first executive orders in January 2017, directed federal agencies to withhold funds from these so-called sanctuary cities. The order was repeatedly blocked in court, but the Administration continued to pursue it for the entirety of President Trump's term.

And then, there was another attempt to target California in December 2020, as California was about to hit the peak of coronavirus cases. That is when the Trump Administration announced it would be withholding \$200 million in Medicaid funding quarterly because of California's requirement that all private health plans in our state cover abortion services. Not only did this put the lives of Californians struggling to fight off a pandemic in danger, it showed blatant executive overreach because the funding the Trump Administration threatened to withhold, had nothing to do with the alleged violations or restrictions on abortion funding.

These repeated attempts to place unauthorized restrictions and conditions on congressionally appropriated funds was, of course, another attempted encroachment on Congress' power of the purse. But it is also democratic unelected Administration officials seeking to disburse the funds—were doing so unilaterally without responding to voters and gaining approval in Congress.

So, could you talk about the accountability measures that the executive branch even needs when it circumvents Congress in this way? How do Americans have less transparency into this process when it happens this way?

Dr. REYNOLDS. Thank you, Representative Chu. It is a great question. And I think it really comes back to the heart of what is on the table here when we talk about this legislation, which is that Congress needs as much information as it can get from the executive branch to make responsible spending decisions. And that includes information around the kinds of things that you are describing.

I will also reiterate something that I mentioned in my testimony, which is the increasing reliance or the increasing need to rely on the federal courts by Congress to try and enforce its spending and other policy decisions. And one major challenge there and one of the reasons why Congress needs to bolster its own authority is because that process is incredibly slow.

So, you mentioned in the case of California, sanctuary cities. And you talked a little bit about the length of time that court fight went on. We have many other examples of lengthy court fights. And so, one of the reasons that Congress needs to give itself more tools is so that it does not have to turn to the federal courts who move quite slowly in this area, to try and have that as a backstop in these disputes with the executive branch.

Ms. CHU. Thank you so much. Now, I would like to ask Ms. Perez a question about the ability for GAO to operate. And that is I am the—I was last October, the Chair of the Subcommittee on Oversight for the Small Business Committee, and the GAO's Director William Shear testified that the Trump Administration refused to give GAO access to documents and information concerning the implementation of the Paycheck Protection Program. And also resisted implementation for an oversight plan for PPP until December. Using this example of PPP, can you describe why GAO needs timely access to agency documents and information and how that may have hampered implementation and congressional oversight of the program?

Ms. EMMANUELLI PEREZ. Yes, ma'am. So, and this is an example of when GAO needs access to information as quickly as possible to be able to carry out its oversight for Congress. So, in the programs that you are describing, obviously, we are looking at the CARES Act and various funds and authorities provided there. And so, in order to give Congress the most timely advice and the most timely review, we need to have that information promptly.

With those types of delays, unfortunately, it then delays our reporting to Congress. It delays our ability to be able to give you the advice that you need and the information that you need. So, that definitely does have an impact on Congress' oversight.

Ms. CHU. Thank you. I yield back.

Chairman YARMUTH. Somebody muted me. I now recognize the gentleman from Texas, Dr. Burgess, for five minutes. I know Dr. Burgess is here. Unmute your mic, please, unless he left. I can see Dr. Burgess on the screen. Dr. Burgess, you have five minutes for your questions.

Mr. BURGESS. Well, can you hear my question?

Chairman YARMUTH. No, we didn't. Now we hear you though.

Mr. BURGESS. All right, very good. Thank you, Chairman. Thank you to the witnesses for joining us today. Mark Paoletta, it is good to see you again. Mr. Paoletta spent a good deal of time as Chief Counsel on our Oversight Investigations Subcommittee on Energy and Commerce. A subcommittee that I have always held in very high regard. One of the most important subcommittees in the U.S. House of Representatives.

But I am just going to ask you again, Mr. Paoletta, and I think the Ranking Member Smith and perhaps Representative Smucker had also made this point, but it seems like we have got a set of parallel circumstances. January 16, 2020, the Government Accountability Office determined the President did not withhold funds under the Impoundment Control Act for policy reasons. And then on his first day in office, President Biden signed a proclamation pausing all obligated funding for the border wall construction and directing the Secretary of Defense and Homeland Security to create a plan to redirect these funds.

So, is there a substantial difference between the actions of then President Trump and now President Biden in regards to those two activities?

Mr. PAOLETTA. Yes. They are completely different. When the funds were paused on Ukraine, the very first hold was 10 days. It was literally to try and pause the funding so that—because there had been concerns about the funding expressed by the President. So, there had been a process right below, that doesn't end the process, right? In the executive branch, the president is the person who makes the decision at the end of the day. And so, we wanted to pause the funds to allow a policy discussion to happen. I wasn't part of that policy process, but we were able to pause those funds. And at the end of the day, those funds were spent consistent with the appropriation, right?

What is happening here is that it is completely designed to thwart that appropriation because President Biden has already said he doesn't want to build another foot of the wall. His executive order said it is a waste of money.

Mr. BURGESS. Let just ask you though if I could, the GAO though made a determination when President Trump paused the funding that seems like it would have to be consistent, it would have to make the same decision about the pausing of the border wall funding. In other words, the inconsistency of coming to a different conclusion giving those two fact sets, well, that just wouldn't be possible, would it?

Mr. PAOLETTA. It would be impossible.

Mr. BURGESS. Well, I mean, that is what is so frustrating for so many of us. I live in Texas, not on the southern border. I live on the northern border. But made many trips down there over there over the years and to see the border wall construction literally halted and with big gaps and that is where the cartels and coyotes are directing their human smuggling and human trafficking. And it is heartbreaking.

It is, in fact, President Biden's own commander of the public health service at the Dallas Convention Center where 2,400 of these young men remained under an emergency hold, he said that

we are responding to a—it is a crisis management situation. Well, you wouldn't have a crisis management situation if you didn't have a crisis.

Look, I just left another hearing and we are talking a lot about budget process here today. And I know that is something that can bore people, but you are very familiar with, unfortunately, the oversight of the Environmental Protection Agency and the Energy and Commerce Committee, for several years going back to an IG report in 2015, when they suggested that the Title 42 exceptions for salaries in the EPA were never authorized by the U.S. Congress.

And, in fact, I had an opportunity to question the new administrator. He seemed unaware of that. He did make a promise that he would come back with forthright and transparent data for the subcommittee about their hires. They are set to hire a bunch of new people. They thought the Trump Administration made too many personnel cuts. So, they are on a hiring spree. And it concerns me that having never authorized the Title 42 exceptions to the senior executive service salaries, that the possibility of overspending on those positions is a very real one. So, would you agree that the authorization needs to occur before the expenditure can happen?

Mr. PAOLETTA. That is the best way to do it. To authorize programs and, again, pursuant to I think your House rules, you would need to—it would be best to authorize before you appropriate.

Mr. BURGESS. Thank you. And, Mr. Chairman, Chairman Yarmuth, I just have to also echo what Ranking Member Smith said about getting back to normal hearings. Look, the Doctors Caucus sent a letter to our House leadership. Many of us have been vaccinated. Others have had the illness. We need to be able to meet in a more normal fashion because there is just so much you get out of an in-person hearing that you cannot get. And we have seen the technical problems that we have encountered. I encountered them on the E&E hearing as well. We have to get passed that point. We can't do the peoples' business if we can't meet as the people intended. And thank you and I will yield back.

Chairman YARMUTH. Thank you, Dr. Burgess. And I was going to save this until the end, but I will commit to the Ranking Member and to you and all the Members of the Committee that the next Committee we have, I will be in the hearing room. And we will at least have a hybrid at that point. So, I want to accommodate my friends on the other side and some of ours too. I am sure we would all prefer to be back in that situation. But I will be in the hearing room for the next hearing. I now yield five minutes to the gentlewoman from Virgin Islands, Ms. Plaskett.

Ms. PLASKETT. Thank you, Chairman Yarmuth and Ranking Member Smith for holding this hearing to explore how Congress can reassert its power of the purse. I appreciate the opportunity to examine this important issue. Several of my colleagues have noted despite the Constitution's clear delegation of tax and spending power to Congress, various Presidential Administrations have steadily infringed on this authority in recent decades.

This infringement is concerning because it represents a shift in power away from our constituents who have elected us and, there-

fore, a weakening of their voices in important decisions regarding funding allocations. Dr. Reynolds, this issue is particularly personal for me and for my constituents, the American people of the Virgin Islands.

As some of you may remember, two Category 5 hurricanes, Irma and Maria, struck the Virgin Islands in 2017, and caused devastating amounts of damage that my constituents are still grappling with every day. When I say still grappling with, we have not to this date, had put up the mobile hospital unit. FEMA and others have not agreed until just recently on the mobile unit for us to have a hospital. Never mind the rebuild of the hospital. And while Congress appropriated billions of dollars to provide emergency relief for areas impacted by the hurricanes, such as the example I gave you, the previous Administration significantly delayed the disbursement of these funding to both the Virgin Islands and Puerto Rico.

These delays have negatively impacted our ability to recover from the disaster, to rebuild, and to prepare for future hurricanes. We have seen this in inspector general's reports just recently about Puerto Rico. Can you, Doctor, speak to how recent encroachments by the executive branch on Congress' power of the purse can lead to prioritization of a president's political priorities over the needs of our specific constituents?

Dr. REYNOLDS. Thank you, Congresswoman Plaskett. I appreciate the question. And I think that your experience and that of your constituents does illustrate one of the challenges that is sort of inherent in Congress and the executive branch having to work together to deliver services and meet the needs of the American people. And I think that, again, one of the purposes of this legislation of the issues that we are talking about today, is to try to make sure that you, as Members of Congress, are getting more information, better information, in a timely fashion to be able to say to the executive branch you are not doing what we, Congress, intended with our constitutional tax and spend powers when we told you that you have this money to spend on, in your case, replacing—building a mobile that will be replacing a hospital in your district.

And so, I do think, again, that that is to Representative Schakowsky's earlier request for examples of why this matters. I think that is another good one. And I appreciate you raising it.

Ms. PLASKETT. Thank you. That leads me to you, Mrs. Hempowicz. You recently discussed the lack of transparency regarding Office of Management and Budget's apportionment decisions, which show how money is being allocated within an agency. And you have recommended that Congress require OMB to publicly post all apportionment schedules, including special notes in apportionment documents. Can you speak to how these apportionment decisions can sometimes be used to advance a president's policy goals rather than simply serving the intended administrative purpose?

Ms. HEMPOWICZ. Yes, thank you so much for that question. You are right. You know, I think these footnotes, apportionment footnotes are a very technical thing. And so, you know, I guess an example of that is saying that, you know, money that has been appropriated can't be spent until a report has been issued about how

those funds would be spent, or how the funds under that project would be managed.

But it also, you know, there is no requirement for specificity in these footnotes. And so, you can also get something that is as vague as, you know, we are going to do an interagency process to determine the best use of the funds. That doesn't tell Congress a lot. That doesn't tell the American people a lot. You know, what is that inter—what is that interagency process? What policy are you trying to accomplish? And that I should say was the reason given for the—in the footnote on the hold for the Ukraine assistance.

And so, I think that just goes to show that like, you know, these—the vague explanations are part of the problem. If there was more—if there was more transparency to Congress you could see that vague explanation, reach out to OMB, reach out to the White House, reach out to the State Department and say, what is this interagency process? Ask some of those questions. Because it is not always something nefarious going on. But if you don't have the information you need to conduct effective oversight, nefarious things can be going on in the background that the public will never know and the Congress will never know about and can't correct for.

Ms. PLASKETT. Thank you very much. And thank you, Mr. Chairman, for the opportunity. This is very insightful, and I yield back.

Chairman YARMUTH. The gentlewoman's time has expired. If he is in the room, I don't see him, but Mr. Carter would be up next. Mr. Carter of Georgia are you here? OK, if not, I don't see Ms. Wexton of Virginia as well. But I know I see Mr. Scott of Virginia, and so, we will come back and get any others who might have been thrown off by the change in schedule. I now yield five minutes to the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. I would like to ask Ms. Emmanuelli Perez what is the legal effect of a GAO conclusion that impoundment is inappropriate? Does it have any enforcement effect?

Ms. EMMANUELLI PEREZ. Well, sir, GAO doesn't enforce the decisions that we issue. They are really intended for both the Congress and the executive branch to have the benefit of those legal decisions. So, in the case of an Impoundment Control Act decision, when we say that the Impoundment Control Act has been violated, the effect really is for the executive branch to immediately have to release the funding. That is release the withholding and ensure that those funds get obligated on time.

Mr. SCOTT. But if there is a disagreement, the disagreement just lands. What is the recourse if there is a—if the executive branch just disagrees with your decision, what is the recourse under present law? And what would be the recourse under Chairman Yarmuth's legislation?

Ms. EMMANUELLI PEREZ. Yes, so, the resource under present law is that, of course, since we at GAO can't enforce the decision, it really is up to Congress to enforce it. So, you know, in the case of the Impoundment Control Act or any other appropriations law issue, Congress can certainly enforce that.

With respect to under the Chairman's Power of the Purse Act, it would provide some additional authorities for the executive branch to not take these additional legal, you know, practices and look and



try to use them in a way that are not, you know, in accordance with either the Impoundment Control Act or the Antideficiency Act or other laws.

So, it really would be emphasizing, you know, certain reporting, emphasizing certain actions that the executive branch would have to take and ensuring that those follow the decisions as shown by GAO.

Mr. SCOTT. You mentioned Congress, what can Congress do if there is a violation? How does it enforce the impoundment violation?

Ms. EMMANUELLI PEREZ. Well, Congress certainly, you know, as part of its own legislative process with the oversight, as well as with appropriations, you know, Congress has taken actions before in either cutting the budgets of agencies or identifying areas where they feel that an agency has to take action. So, certainly, Congress through that oversight and legislative process can do that.

Mr. SCOTT. If you have something that has been properly authorized and appropriated, but depends on promulgation of rules, and the executive branch just refuses to promulgate the rules, what happens in that case?

Ms. EMMANUELLI PEREZ. Well, it certainly would depend on the particular facts, whatever law is authorizing it, what the rules that are being required of the executive branch. So, certainly, you know, we would be taking a look at whether there are certain actions the agency has to take by law and identifying if they have not done so. And, again, that could be up to, you know, Congress to enforce that.

Mr. SCOTT. And can you say a word about violations that happen during a government shutdown?

Ms. EMMANUELLI PEREZ. Yes. With the government shutdowns, one of the issues that we have seen and we have issued a number of decisions on this in the past year and a half, is that agencies may have often tried to really expand on the authority that they would have to continue operation. So, under the Antideficiency Act, it is very specific that only—the only exceptions really are for constitutional duties, as well as for emergency type situations. Not for regular operations or ongoing operations of agencies.

So, we do have a couple of examples where agencies did go beyond the Antideficiency Act. The other thing that we would recommend would be really that Congress have more oversight, you know, the ability to see how agencies are obligating funds during shutdowns. So, in addition to understanding their plans for shutdowns, that they would see what exactly they obligated, what activities they carried out. And we think that would be really helpful in terms of the oversight that GAO can assist the Congress with.

Mr. SCOTT. And what can be done if—in these cases you have an executive branch and a legislative branch, probably a contentious split in the legislative branch, what can actually be done if the executive agency just goes ahead and spends the money?

Ms. EMMANUELLI PEREZ. Well, if an agency, for example, violates the Antideficiency Act, and if GAO, for example, finds that the agency had violated the Antideficiency Act, then what we have said is that the agency should report that violation to Congress. And in reporting that violation to Congress, they are going to provide in-

formation about the rationale for using the funds, what actions they are taking with respect to ensuring it doesn't recur, and any discipline or other action. So, we think that having Congress ensure that those types of violations are reported are really going to assist again in that transparency and oversight.

Mr. SCOTT. Thank you, Mr. Chairman, and I yield back.

Chairman YARMUTH. The gentleman's time has expired, and I yield five minutes to the gentleman from Iowa, Mr. Feenstra.

Mr. FEENSTRA. Thank you. Thank you, Mr. Chair, Chairman Yarmuth and Ranking Member Smith. Thank you, Mr. Chair, for having this hearing today. I want to thank each of the witnesses for their testimony. I am new to Congress, but not new to the government finance, especially when it comes to city and state governments. I was a City Administrator and a State Senator. And I am very cognizant of budgets. And in my home state, we have specific rules that we do not spend more than we take in. We have a 99 percent spending level. I have found very little concern of this at the federal level.

Mr. Chairman, you said on the House floor that the national debt will probably rise to about 50 trillion in the next couple of decades. You mentioned several historical points where our debt grew but did not mention that or in terms of debt to GDP, and at that time our debt to GDP is about 50 percent. Well, today, our debt to GDP is well over 100 percent and we are in uncharted waters, which we just can't shrug off as we move forward.

I am new here, but you don't have to be a Member of Congress to see that we are piling up debt on this credit card and it has consequences. Mark Paoletta, this question is for you. The National Oceanic and Atmospheric Administration has existed over 50 years without ever being codified into law. A 2016 CBO report highlighted that many federal agencies like the State Department, HUD, and the National Weather Service haven't been reauthorized in decades.

Just last year, the CBO released a report that found \$332 billion of funding was provided to 407 expired authorizations. It seems to me that there is a lot more ways than the Impoundment Control Act for Congress to reclaim the power of the purse. We could actually try to do our jobs and pass timely legislation through regular order, rather than spending weeks on messaging bills shouting our political talking pounds. I have been digging into these reports and we aren't suffering from a lack of things to do.

So, Mr. Paoletta, my question is you have worked both on committee and at the OMB, do you believe that autopilot funding and authorizing as needed in omnibus bills impacts how the executive branch functions? And who benefits from this, the executive or Congress?

Mr. PAOLETTA. Well, the people who don't benefit are the American people. Congress needs to do their job and authorize programs in clear and understandable terms as to how programs are supposed to work. The fact that there are hundreds of unauthorized programs, some as you said, the Department of State is unauthorized, is outrageous. And passing omnibus appropriations that throw massive amounts of money in a very vague way, you know, that has the legislative branch encroaching into the executive

branch on how to implement it. What Congress needs to do is to pass a budget, pass appropriations bills on time, and that is the best way to make our government work. That is as simple as it can be.

Mr. FEENSTRA. I agree. So, how did the train go off the rails? I mean, how did this all begin and how do we get the train back on the track?

Mr. PAOLETTA. My views in Congress is, you know, I am not going to—it is in Congress' control as to pass their budgets, to authorize their programs, and to pass appropriations bills on time. I am not sure what the answer is. It is just I know that the way it is run right now, and particularly having worked in both branches and most recently in OMB, it is very difficult as Congress does—and you see these—what is interesting, Congressman, is the idea that there is going to be this broad appropriation and then Congress is going to come in on individual levels and tell the executive how to spend the money. That is not their role, right? The law, what they pass is what is important, and is the guiding light as to how you are going to implement a program.

And just one more point, if I may. Just in terms of transparency, it would be useful if FOIA was applied to Congress, right? We all talk about the transparency of the executive branch and, you know, looking, you know, sunlight being the best disinfectant. It is outrageous, in my view, that Congress is not subject to FOIA. GAO is not subject to FOIA. So, what goes into lawmaking? One of the witnesses said, you know, we pass a law, that is sunlight. No, what went into that law as to why it was passed and what a member thinks it should be, you know, doing when it is enacted. So, I think FOIA applying to Congress would be a great way to actually help the system work better.

Mr. FEENSTRA. I would agree. I would agree 100 percent. Thank you, Mr. Paoletta, for your comments. Mr. Chair, I yield back.

Chairman YARMUTH. I thank the gentleman. His time has expired. I now recognize the gentlewoman from Iowa, Mrs. Hinson, for five minutes. I think she was the first one to sign on today, so, you have been very patient.

Mrs. HINSON. Thank you, Mr. Chairman. Can everyone hear me OK? OK, thank you. Thank you for holding this hearing today. I believe this is an incredibly important topic and I would like to thank my colleague from Iowa for his comments on unauthorized programs. It is very difficult for appropriators and us here on the Budget Committee to do our job when Congress is failing at doing its basic oversight, its basic job of authorizing, and its basic job of appropriating.

So, I have only been in Congress a few short months and already I am concerned about the lack of transparency and fiscal responsibility that I have seen here in Washington. I think it is incredibly important that Congress does reassert its control over the power of the purse. I am a member of the Appropriations Committee and the Budget Committee. And there is a reason that the committee is required to include the perspectives of appropriators because we do see those spending decisions and authorizations from this Budget Committee all the way out the door. I personally believe this is

incredibly important in advocating for the taxpayers of Iowa and this country and fighting for transparency throughout this process.

So, my first question today is for Ms. Hempowicz. Simple here that you have done a lot of work on transparency, accountability, freedom of information. So, how does the impact of administrative deferrals or recissions like what we have seen with President Biden's redirecting of these border security funds recently raise concerns about transparency in this process?

Ms. HEMPOWICZ. I think, you know, the fact that apportionments are issued in secret, you know, raises a lot—it makes it much difficult for—much more difficult for Congress to fulfill its role as overseeing the spending process. You know, Mr. Paoletta said how Congress passes the law and it is the executive's job to implement it. But that is not the only job of the executive. It is to implement that law with the intent of Congress in mind. And when there is no transparency here and when we have seen, as we have, that there is a lot of room for flexibility for the executive to interpret things as they would see fit, and in ways that maybe run counter to what congressional intent was, there is a lot of room for manipulation in this process. And I think transparency is one of the things and certainly not the only thing but is one thing that will dramatically rebalance power between the executive and Congress.

Mrs. HINSON. And what do you think about the transparency or the impact on transparency when an Administration fails to notify Congress of what it is doing?

Ms. HEMPOWICZ. Yes, I mean, again, it just goes to Congress' decreased ability to conduct rigorous oversight over the executive branch. Something that the Project On Government Oversight believes is incredibly important no matter who is in the White House. And the less transparency to Congress means that it takes longer for you to do that oversight, for you to get that information. Because eventually you will likely get it, but in that time, you know, what have you missed?

It is also, I think, important to mention how, you know, fighting with the executive branch to release information to Congress takes up so much time of your staff. Your staff has so many responsibilities to do and to execute in a given day. You know, if there was transparency required in the law, proactive transparency that will give you a lot of that information, you can redirect your staff to more important things because you have got access to those documents and now you are able to fulfill your oversight function.

Mrs. HINSON. Right. Well, thank you for your feedback on that issue. And then my next question is for Deputy Counsel Perez. I know you are familiar with our Constitution so, as we read the section that gives the executive branch authority to spend funds, do they have the authority to spend funds for purposes other than what Congress has appropriated?

Ms. EMMANUELLI PEREZ. No, ma'am. The whole purpose there is that with the purpose statute with the actual appropriations themselves, the executive branch does have to follow what the Congress has appropriated. Now, certainly, Congress sometimes is much more specific in some cases in what the funds should be spent for. There are times, of course, when Congress also has provided the executive with some discretion. But the whole intent is that the ex-

ecutive branch needs to follow the laws that Congress has passed and that the President——

Mrs. HINSON. And I agree, legislative intent is crucial and paramount here. So, you also talk about the Impoundment Control Act in your testimony that it was enacted to stop executive overreach. What do you consider to be executive overreach? What is that threshold for you? And what actions are being taken to prevent overreach for this current Administration in regards to the border wall funding freeze?

Ms. EMMANUELLI PEREZ. Well, with respect to the border wall funding freeze, obviously, we have that decision that is pending. We have not issued it yet. And we are, of course, waiting for information. Part of what we did was immediately start to contact the agencies when we learned of the President's proclamation and, you know, to start to ask for information. And then, of course, followed up with development letters.

The whole purpose there of the Impoundment Control Act is we need to look at that there is a process there in the Impoundment Control Act, and the President has to follow that process. That is to notify Congress with specific conditions provided by the law and to not, for example, you know, propose deferrals for policy reason and in the case of any policy situation, the only process really is to propose a rescission. And so, what we look at there is what has the executive branch carried out? We look at the rate of obligations. We look at what, for example, in these cases, what has OMB instructed? Those are all critical parts of that analysis.

Mrs. HINSON. OK, thank you, Ms. Perez. And, Mr. Chairman, I would like to ask unanimous consent to submit our letter for the record that House Appropriations Committee Republicans, including myself, wrote today to Vice President Harris requesting an update on the results of the funding pause. So, I would seek unanimous consent to add that to the record today.

Chairman YARMUTH. Without objection, so ordered.

Mrs. HINSON. Thank you. I yield back.

[Letter submitted for the record follows:]

**Congress of the United States**  
**Washington, DC 20515**

April 29, 2021

The Vice President  
The White House  
Washington, DC 20500

Dear Madam Vice President:

We are alarmed by the staggering number of migrants that have been apprehended while illegally crossing the southwest border during this Administration's first 100 days. As the President's designee to address the flow of migrants at our border, we are writing to seek an update on the results of the 60-day pause and review of border wall construction contracts and to insist that funds appropriated for border security be used immediately to address this crisis.

We are extremely concerned that the President ordered a 60-day pause on border wall construction on his first day in office, one of the many Administration policies that are now emboldening cartels to engage in human trafficking, encouraging migrants to undertake an often dangerous journey, and putting our nation's security at risk. We also have raised with the Government Accountability Office (GAO) the question of whether this pause represents an illegal impoundment of funds based on GAO's previous interpretations of the Impoundment Control Act.

It is now more than a month past the end of the 60-day construction pause, and the Administration has yet to provide any details to Congress and the public on the results of the review and the status of funds appropriated for this specific purpose. We are concerned that taxpayer funds are being wasted while this pause continues. Making matters worse, the Administration proposes to cancel any unused border wall funding at the end of fiscal year 2021, just five months from now, while refusing to make such funds available for obligation in the meantime.

We request that you provide to the Committee on Appropriations the results of the review, including:

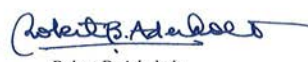
- the metrics that are being used to determine whether continued construction will occur by border sector;
- the status of funds previously appropriated and made available for construction;
- a list of all payments made or expected for contractors who could not complete work during the period of the pause; and
- a full accounting of any other costs that have been incurred by the government while construction was prohibited by the Administration.


Border wall construction funds were appropriated by the Congress as a result of bipartisan, bicameral negotiations and should be spent as provided in law. As you can see by the unprecedented number of apprehensions reported by Customs and Border Protection, we are in a state of emergency that requires action, not delay in spending the funds Congress has already made available. We stand ready to work with our security and law enforcement agencies to address this crisis and look forward to receiving your response.

Sincerely,


  
Kay Granger, Ranking Member  
Committee on Appropriations

  
Harold Rogers  
Committee on Appropriations

  
Robert B. Aderholt  
Committee on Appropriations

  
Michael K. Simpson  
Committee on Appropriations

  
John R. Carter  
Committee on Appropriations

  
Ken Calvert  
Committee on Appropriations


  
Tom Cole  
Committee on Appropriations

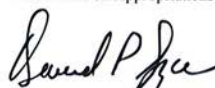
  
Mario Diaz-Balart  
Committee on Appropriations

  
Steve Womack  
Committee on Appropriations


  
Jeff Fortenberry  
Committee on Appropriations

  
Charles J. Fleischmann  
Committee on Appropriations


  
Jaime Herrera Beutler  
Committee on Appropriations


  
David P. Joyce  
Committee on Appropriations

  
Andy Harris, M.D.  
Committee on Appropriations

  
Mark E. Amodei  
Committee on Appropriations

  
Chris Stewart  
Committee on Appropriations

  
Steven M. Palazzo  
Committee on Appropriations

  
David G. Valadao  
Committee on Appropriations

  
Dan Newhouse  
Committee on Appropriations

  
John R. Moolenaar  
Committee on Appropriations

  
John H. Rutherford  
Committee on Appropriations

  
Ben Cline  
Committee on Appropriations

  
Guy Reschenthaler  
Committee on Appropriations

  
Mike Garcia  
Committee on Appropriations

  
Ashley Hinson  
Committee on Appropriations

  
Tony Gonzales  
Committee on Appropriations

Chairman YARMUTH. The gentlewoman's time has expired. I now recognize Mr. Cline of Virginia for five minutes.

Mr. CLINE. Thank you, Mr. Chairman. I appreciate you holding this important hearing. The power to direct and control federal spending is arguably Congress' most important legislative tool. So, I am pleased that we are holding this hearing regarding ways that we in Congress, and especially on the Budget Committee, can restore and strengthen Congress' power of the purse against executive branch overreach. This is particularly timely since soon after taking office, President Biden announced the withholding of funds for construction of the southern border wall.

There are other issues at play on this topic, including how Congress can create better legislation, rather than relying on end of the year omnibus bills and continuing resolutions to govern. So, I will ask Mr. Paoletta, Chairman Yarmuth's bill from the last Congress, the congressional Power of the Purse Act, modified GAO's role in matters regarding budget and appropriations law. Do you have any thoughts about the section of the congressional Power of the Purse Act that would make administrative and possibly criminal consequences on federal branch—federal employees in the executive branch who are found to have violated the Impoundment Control Act?

Mr. PAOLETTA. Thanks for the question, Congressman. You know, the problem with the Impoundment Control Act is that it is a very confusing law. And so, I think that it puts federal employees in a difficult position, right? You have the Antideficiency Act that you can't spend more money than you have. And if it is, you know, intentional, that would be criminal, and—or, you know, possibly criminal.

And on the flipside, if you are not spending all your funds, you could be—you could be in trouble with these administrative sanctions. I think GAO proposed criminal penalties for impounding funds. The problem with—the problem with—so, I think it is a bad policy idea to impose sanctions on individuals with respect to the Impoundment Control Act.

Mr. CLINE. Thank you. I will ask Ms. Perez. Congress' reliance on continuing resolutions and omnibus appropriations is not an ideal way to effectively and efficiently budget and govern. What are some of the GAO's findings with regard to this negative effect of this type of governing? And further, what impact do CRs have on agency budgets and their ability to adequately plan?

Ms. EMMANUELLI PEREZ. Yes, so, we have done work on looking at the impact of continuing resolutions, you know, multiple continuing resolutions during a year or actually having them, you know, for a full—for a full year. And, certainly, what we have found in our work and we are very happy to provide that information for the record, is that there are impacts with respect to having, you know, having to rework. So, for example, multiple attempts to be able to, you know, implement grants or to be able to award contracts because you have shorter periods for the funding to be available.

We have seen delays in hiring, delays in other programs and programs being implemented because with a continuing resolution, one of the things, the prerogatives that Congress has is really to



kind of really put everything on hold that is status quo. And so, agencies then have an impact on being able to implement any new authorities. We have seen a number of those issues in our work.

With respect to, you know, to looking at how, you know, how that can be approved, we certainly have also seen issues with the budget process when there is a continuing resolution. There is an impact on the agencies as well in being able to plan out their budgets and plan how they are going to implement. So, we definitely have seen some negative impacts there.

Mr. CLINE. Can you talk about the ways the GAO can measure the amount of waste that is generated from government shutdowns? Have you ever tried to quantify it and have you ever produced a report related to government shutdowns and the amount of waste that is—that are—that is produced?

Ms. EMMANUELLI PEREZ. We have done work on government shutdowns and looked at the impact of, you know, on shutdowns, on agency programs. We have not actually, though, really come up with any, you know, any estimate of the, you know, the amounts that are used there and any possible waste. We do understand that there may be other entities that have done that, however. And we would be happy to look for that information.

Mr. CLINE. Thank you. Dr. Reynolds, you coauthored an article in October 2020 that stated, strengthening congressional committees could also help the legislative branch pushback against the President's use of his budgetary power. What are ways congressional committees could serve as an effective check on the executive branch?

Dr. REYNOLDS. I thank you, Representative Cline. I think there are all of the tools that are available to congressional committees can be deployed in service of asserting Congress' role in the separation of power. So, hearings like this one, letters that can be sent looking for additional information. Part of, again, what we are talking about today is the ability to make that process work better for Congress, make it easier for you all to get your information back. And the last thing I will say is boosting the staffs on your committee. Making sure that you have the ability to hire subject matter experts, to compensate them well, to keep them in those roles in order to make sure that your committees really have the expertise you need to understand the federal programs that you are trying to oversee in the executive branch.

Mr. CLINE. Thank you. I appreciate the answers. Mr. Chairman, I yield back.

Chairman YARMUTH. The gentleman's time has expired. I now recognize another gentleman from Virginia, Mr. Good, for five minutes.

Mr. GOOD. Thank you, Mr. Chairman, and thank you to all of our guest witnesses. I appreciate your testimony that you provided to us. And, you know, I share the concerns that have already been mentioned by many colleagues about how the—our legislative branch, our legislative body has surrendered so much of our power and authority to the executive branch. You know, constitutionally there is a reason why Article I comes first and deals with the legislative branch. And it is the largest portion of our Constitution deals with the legislative branch as the founders intended that branch

that is closest to the people to be the most powerful, dominant branch.

And I quickly appreciate the remarks previously here today by Congressman McClintock from California, what he shared, and I would echo his remarks without being redundant and repeating those.

I do have a question for Mr. Paoletta. In your testimony, you noted that reforming the ICA—and I am quoting here—“to return to a more equitable division of power between Congress and the President with respect to the expenditure and appropriated funds would allow prudent financial management to flourish.” Can you just speak a little further on what recommendations you would have for reforming the ICA?

Mr. PAOLETTA. Well, I think it is not so much focused on the ICA. I have written on the ICA in my opening statement, but I think it is really just a return to regular order. It is actually, you know, having well-written authorizations and stand-alone appropriations that really lay out what Congress wants so there isn't, you know, this broad, you know, appropriation or an unauthorized program that continues on. So, that is at the heart of it is what I think Congress needs to do is authorize programs very clearly as to what they want the executive to carry out and then pass appropriations to fund those.

Mr. GOOD. Well, you did an effective job in your testimony also of talking about how dysfunctional we are in the way that we are handling our funding now and how we are—it is not sustainable what we are doing. I do want to yield the balance of my time out of respect to the Ranking Member because he ran out of time and I know he had some more questions he wanted to ask. So, I do yield the balance of my time to Ranking Member Smith, thank you.

Mr. SMITH. Thank you, Representative, for yielding. My question, Ms. Hempowicz, you previously wrote an article about pandemic spending which stated Congress must make sure that the money is really going to protect jobs and keep workers safe. That large corporations don't get loans that they don't truly need. That crony capitalism doesn't influence who receives assistance, and that fraudsters don't rip off taxpayers, correct?

Ms. HEMPOWICZ. Yes. Yes, Ranking Member.

Mr. SMITH. To that end, I understand you and your organization even published newsletters called, Corrupted, that described instances of corruption, fraud, waste, and abuse related to spending and other things during the pandemic?

Ms. HEMPOWICZ. Yes, sir.

Mr. SMITH. So, if you remember, when did you all begin publishing those articles?

Ms. HEMPOWICZ. I don't remember that.

Mr. SMITH. I think it is like August 13th is—does that sound about right?

Ms. HEMPOWICZ. Sure.

Mr. SMITH. OK. And do you know how often you all distributed these articles?

Ms. HEMPOWICZ. The Corrupted newsletter?

Mr. SMITH. Yes.

Ms. HEMPOWICZ. I believe it was weekly.

Mr. SMITH. OK. And do you all still distribute these weekly newsletters about your oversight efforts?

Ms. HEMPOWICZ. Not that one in particular for our—the content that had been in the Corrupted newsletter is now spread between a couple different products. But we are certainly still doing investigations and publishing reports on any waste, fraud, and abuse that we are able to identify in COVID spending.

Mr. SMITH. So, when did you stop doing that weekly newsletter?

Ms. HEMPOWICZ. It was a couple months ago, I believe.

Mr. SMITH. January 14th is what I saw. Does that sound about right?

Ms. HEMPOWICZ. Sure.

Mr. SMITH. You know, given your previous statement that Congress must make sure that money is really going to protect jobs and keep workers safe and your organization's stated commitment to oversee COVID-related spending, coupled with the fact that President Biden and congressional Democrats recently enacted 1.9 trillion in federal spending, why did you stop publishing these weekly reports?

Ms. HEMPOWICZ. Again, it was a strategic decision behind the scenes to kind of make sure that we are using our resources well. We are a small organization. We are still absolutely publishing that content. You know, I think maybe you are suggesting that we have stopped investigating COVID fraud, and that is just absolutely not the case, sir.

Mr. SMITH. So, would you say that this is not because there is a different occupant in the White House?

Ms. HEMPOWICZ. Absolutely not. And I would say even earlier this week, our organization published a piece critical on the Biden Administration in particular. Particularly on some revolving door issues that may be affecting some of the policymaking coming out of the White House.

Mr. SMITH. You know, I think some waste that you all could look into is some waste that I have been reading about and discovered just in the last week that billionaires in Florida received the \$1,400 stimulus check. I think that's pretty wasteful, wouldn't you think so?

Ms. HEMPOWICZ. I would agree. And I would say, you know, a lot of the oversight over COVID spending has been actually very difficult. And the inspectors general have mentioned that too. Partially because last year, the Office of Management and Budget undercut some of the reporting requirements that were included in the CARES Act that would have given the public and the inspectors general and the internal watchdogs more detailed information. You mentioned earlier jobs, particularly would have given more detailed information about how those various programs were reflecting in or not reflecting in increased jobs.

And so, I would say, you know, part of it is, again, we are a small organization. We don't have unlimited resources. We are trying to make sure that we are using those resources as best as we can. But we also did create a tracker. It is called—and now I am forgetting the name, but I am sure it is on our website—that tracks all the COVID spending. And I believe that tracker is the most comprehensive tracker that we have that is out there. You know more

so than what the government has put together. Because it is really important to us as an organization that the public is able to track this spending.

And particularly, on the unemployment insurance that you were mentioning, we don't have a lot of data about that. So, it is more difficult to do those kinds of investigations. But I certainly take your point and it is really important to us as an organization. And so, I would encourage you to keep your eye on our website because that is where that content is now, not in that newsletter.

Mr. SMITH. I didn't mention anything about unemployment insurance. I was talking about stimulus checks——

Ms. HEMPOWICZ. I'm sorry.

Mr. SMITH.——that billionaires don't need.

Ms. HEMPOWICZ. I'm sorry. I missed that.

Mr. SMITH. So, that may have been someone else. But I appreciate that you all——

Chairman YARMUTH. The gentleman's——

Mr. SMITH.——continue to look at the waste in spending.

Ms. HEMPOWICZ. Yes, of course.

Chairman YARMUTH. The gentleman from Virginia's time has expired. I now recognize the gentlewoman from Texas, Ms. Jackson Lee, for five minutes.

Ms. JACKSON LEE. Mr. Chairman, thank you very much for this hearing. And thank you for the earlier work. I remember when you introduced the protecting of the purse and all of the Democratic Members signed on to it and it is very commendable that you are holding this hearing again in a different Administration.

But we do know that the king of moving money around and ignoring the needs that Congress dictated for their appropriations to be used for certainly was the past Administration. And I guess, as we all know, the greatest abuse was the \$391 million from Ukraine that was utilized as a carrot, as a stick, as a brick against the President of Ukraine in order to find out dirt on the family and/or present holder of the Presidency of the United States.

I think it is important and as Members of Congress, we look at this in a non-partisan manner to constitutionally protect what our duties happen to be.

But let me add some additional affronts. And that is the diminishing and the not using and not helping to support different agencies that dealt with civil rights. Particularly, the Civil Rights Division of the DOJ. The last Administration was particularly prone to not want to have that kind of appropriation going on. This was not precisely an appropriation, but it was language in attempting to get violence, gun violence as a national health issue. Thank goodness we have a new day.

So, it can also be policy that may generate into the Congress' decision on funding. So, I want to ask the question, how diligent we should be under the Constitution to ensure that some of the underbelly of the agencies, the subagencies like the Office of Civil Rights, that we can also delve into and find out whether or not there is a cutting, there is a non-expenditure, there is sort of a smothering of these agencies unbeknownst to Congress who has expended funding for them.

Why don't I start with the representative from the GAO to answer that question, Mr. Perez. Is that Ms.?

Ms. EMMANUELLI PEREZ. Yes, this is Ms. Perez, no problem. Yes, absolutely. So, part of what we see, which is in the power of the purse bill that had been, you know, presented in the last session that we would continue to recommend is really having agencies not only have OMB publish the apportionments so that we have information specifically on those accounts in that real time basis, but also having agencies report on their obligations with respect to shutdowns, report on their expiring and canceled appropriations, because that would really give Congress and GAO as well as other watchdogs, the ability to look at what is occurring really with sort of that lifespan of the appropriations as Congress has set out. So, these are the types of information that we think would be helpful to Congress in being able to conduct its oversight.

Ms. JACKSON LEE. Thank you. I am going to ask this last question to both Ms. Hempowicz and Ms. Reynolds. How important is it and, Ms. Perez, indicated that we need to do the subset, the sub-agencies, if you will, because I think that is where havoc can really be activated. How important is it for Congress' due diligence, but more importantly, for the vision and/or the right running of Congress that all of these agencies that are not well-known that are doing lifesaving actions, are dealing with civil rights, are dealing with civil liberties, protecting the LGBTQ community, how important is it for Congress to dig into how moneys are obstructed or not used for those purposes? Ms. Hempowicz?

Ms. HEMPOWICZ. It is incredibly important. I mean, you know, I can't really expound on that. It is just so critical. It is so critical that when Congress appropriates money, the executive branch spends it as Congress intended. And so, to do that to make sure that is happening, you need transparency to make sure that—to facilitate your oversight.

Ms. JACKSON LEE. And I would add the religious community as well and protecting them. Ms. Reynolds?

Dr. REYNOLDS. The only thing I will add is that part of why it is so important is because there can be divergence between what Congress asks for and what the executive branch does for reasons from nefarious to routine. And you need good information to be able to figure out all of those things because, again, the potential here for gaps is inevitable. And that is part of why it is so important that you get the information you need to make good decisions.

Ms. JACKSON LEE. Thank you very much. Mr. Chairman. I think my time has expended and thank you for this hearing. I yield back.

Chairman YARMUTH. Thank you, Ms. Jackson Lee. Your time has expired. I now recognize the gentleman from Wisconsin, Mr. Grothman, for five minutes.

Mr. GROTHMAN. Just a general question. Could anybody give me a suggestion as to how we can better improve identifying areas that we feel are wasteful or lead us to, really, I think the biggest problem we have here, reduce overall spending?

Ms. HEMPOWICZ. I can jump in with a suggestion. I would—and this might be surprising—but I would consider, you know, raising staff pay. I think one area where—one of the reasons why Congress is suffering here is because congressional staff, you know, there is

just I think it is called brain drain. There is such high turnover that you don't have oftentimes the expertise your staff needs to be to be doing these programs effectively. And so, that would be my suggestion.

Mr. GROTHMAN. Go ahead, I'm sorry. Go ahead.

Ms. EMMANUELLI PEREZ. Oh, I'm sorry, sir. And if I could, from GAO's perspective, we certainly have the work that we do annually on the duplication overlap and fragmentation, as well as really just generally all of our work looking at, you know, fraud, waste, and abuse. In addition, we have got the high-risk series and just a number of other areas. So, we certainly would urge you to, you know, work with GAO to help you identify any of those subjects.

Mr. GROTHMAN. Nobody could argue that right now Congress is not overspending substantially. Obviously, things have gotten worse since we got rid of the sequester. Could you give a crack at whether that was a big mistake or not?

Ms. EMMANUELLI PEREZ. Well, we certainly did some work as well looking at sequestration and the effect. And one of the things that we did find is because sequestration is an across the board cut, it is difficult then for agencies to be able to, you know, adjust to it and to be able to react to it because they are not able to identify or prioritize what Congress may want them to do, as well as agencies' programs are. So, in that sense, while it may be effective for some cutting spending, it does have an across the board impact which does make it difficult to prioritize.

Mr. GROTHMAN. Anyone else want to take a crack at that. I am not sure I buy it, but.

Mr. PAOLETTA. I could take a crack at how to spend less money. You know, the Impoundment Control Act, from my perspective, Congressman, as I said, it disincentivizes. It actually makes it illegal to try and save money, in my opinion, right? If you get \$100 billion, and you can do the program for \$70 million, you get that \$30 million. And if you put a pause on it, you deferred those funds to make it a better-run program, and you have those \$30 million left over, you have to spend those funds by the end of the period of availability, unless you send it up for rescission, and those never get passed. So, there is no incentive to do a program to make it better, to do it cheaper because that money has to be spent, per the ICA, by the end of the year.

In the old days, if you did it and got it done, and you had money left over, so long as you accomplished the purposes of that program, it could lapse. Whenever you try and save money, the ICA makes it illegal. So, there is no incentive to save money running federal programs.

Mr. GROTHMAN. Why won't we reinstate it?

Mr. PAOLETTA. Well, that is what the ICA does right now, sir. And so, my view is one of the tools could be if you can run a program for less money, those funds should lapse. And if Congress wants to reappropriate it after it lapses with some fast track, they can do that. But I think the ICA as written right now is a terrible law.

Mr. GROTHMAN. OK.

Ms. EMMANUELLI PEREZ. So, we would disagree with that because in the sense, the ICA does permit you to propose those for

recissions. And we do have statistics that show how Congress enacts recissions, as well as, you know, historically how Congress would also enact recissions that were proposed by the Administration. So, we do feel that that act does have the opportunity for the executive branch to identify that type of situation.

Mr. GROTHMAN. OK, thank you. I give it back to the Chairman.

Chairman YARMUTH. I thank the gentleman. His time has expired. And I now yield myself 10 minutes for questioning. And I am going to begin by yielding to the gentleman from North Carolina for questions, Mr. Price.

Mr. PRICE. Well, thank you, Mr. Chairman. Since we are not going to have another round, I want to just suggest a question that our witnesses could usefully explore for the record. And that has to—but I think we must raise it. And that is the—I don't know if Mr. McClintock is still on the call, is he? But he raised questions suggesting that congressional projects or earmarks were somehow constitutionally infirm, constitutionally questionable. And I just think we have to get a response on that from our witnesses for the record.

My view has always—I was stunned by that. My view has always been that the constitutional argument ran in the other direction, that there was something very questionable about this kind of arbitrary denial of the power of the purse. I don't imagine that earmarking is constitutionally required, but I certainly can't imagine that it is constitutionally denied.

Mr. McClintock said that Congress appropriates and the executive branch spends. Well, an earmark or a congressionally directed appropriation is an appropriation. It is just a more precise and more specific kind of appropriation. And the executive agency, of course, still executes that project.

So, I just think we need to clear that up because we are embarking on this and I view it as a reclaiming of the power of the purse and, therefore, a very positive affirmative act. And I am glad that both parties in the House, the majorities of both parties in the House, have agreed with that. But if we could ask our witnesses to submit some kind of commentary on that for the record, I think it would be very useful.

Chairman YARMUTH. We would be happy to do that. I thank the gentleman.

So, reclaiming my time, I want to mention I have been informed by counsel just in relation to the last exchange with Mr. Paoletta, that the Impoundment Control Act specifically allows for deferrals to achieve savings through greater efficiency of operations. So, there is an opportunity to do that under current law and ICA law.

So, I want to respond to a couple of things because one of them just doesn't pass the BS test in my opinion. And that is the claim that the Ranking Member made and I think Mr. Paoletta made also, that the impoundment of refusal to spend \$1.4 billion on the border wall had somehow exacerbated or caused the current situation at the border. And the notion that in 100 days that that 1.4 billion could have been spent and to in any way affect the flow of people who are trying to enter the country is just absurd. I am sorry, that is just crazy.

I am not defending what the Administration does and GAO will have a response to us again in a short period of time as to the legality of what he did. But the idea that that is somehow connected to the situation at the border is really ridiculous.

And I do want to respond also to Mr. Feenstra. I don't think he is with us any longer, but, you know, when you compare what a state government's fiscal constraints are or a local government or a business or a household, as many people always do, it is not a valid comparison to the federal government. The federal government is the issuer of currency. All of those other either corporations or government entities, are users of currency. They cannot create dollars. The U.S. Government can and does, and we do it every day. And the idea that somehow, you know, the constant refrain is that we are piling debt on the future generations, I have said this many times before, we have been accumulating debt in this country for 230 years. Not one person has ever been asked to pay up. Not one person.

And when the national debt reached \$1 billion under Abraham Lincoln, I am sure a lot of people were saying that same thing. When it reached \$1 trillion under Ronald Reagan, I know there were people saying the same thing because I was around then. But the fact is that what many people refer to as debt is an accounting device. It represents all of the money that the federal government has injected into this country over its history minus the taxes. And when we talk about debt as a percentage of GDP, I think many, many economists now are saying that is the wrong measure. It doesn't mean anything. And I think you will get agreement from that from the Federal Reserve Chairman and many others.

Japan's GDP ratio, debt to GDP ratio, is 240. Japan has very low interest rates. They have 0 percent interest rates and so they pay on their securities they issue. Zero interest rate. They have very little inflation. And their currency is stable.

So, again, we throw around all of these things that kind of we have been living with for the last 50 or 60 years these notions that really don't reflect the way the federal money supply works, and how the federal debt in emphasis what they mean. So, I throw that out. We can have a hearing on that at some time. I actually intend to do that.

I do have a question for Ms. Emmanuelli Perez. In your testimony you recommended that Congress require that OMB publicly post all apportionments of executive branch appropriations. You also noted that many of GAO's inquiries into potential violations of the Impoundment Control Act include requesting the relevant apportionment documents. Can you explain why a greater apportionment transparency would be beneficial for GAO, Congress, and the public?

MS. EMMANUELLI PEREZ. Absolutely, sir. So, in order to have the information to provide you and the Congress, with timely decisions, we need to have timely access to information. So, having those apportionments available publicly means that as they are being published, as they are being carried out, we can have access to that information. We can be looking at programs as things are coming to our attention or with respect to any other work we are doing.



So, it definitely gives us the opportunity to give you more timely advice, to give you timely decisions in other work that we do.

Chairman YARMUTH. And so, you would have a much easier time of flagging potential problems with potential violations in the law. We would have a much easier—

Ms. EMMANUELLI PEREZ. Yes.

Chairman YARMUTH.—time doing oversight of the money that we appropriate.

Ms. EMMANUELLI PEREZ. Yes, absolutely because if we look at an apportionment and we see something that seems to be anomalous, then we can question it right away. We can say this seems different. We can compare it to prior years. That is one of the key things you can do in looking at the Impoundment Control Act issues is look at the prior rate of obligations. See how the program was working in prior years. So, that again, having that information up front is going to help us identify potential problems.

Chairman YARMUTH. Thank you. Now, Mr. Paoletta said something which I think is very true and that is that Congress doesn't do a very good job of specifying what we want when we allocate money a lot of the times. For instance, and I don't know if this the case, but I don't have any idea how the language of the law is read. I don't know whether it said new law, whether it said replacement. I don't know. You may know, Mr. Paoletta. And I am not trying to say that is justification for anything because it is clearly true that, you know, we don't always write the laws in the best way. We do try to have report language that clarifies some of those more detailed intentions when we know them. So, I think that your advice to Congress to be very—as clear as we can be as to how the executive branch is supposed to implement those policies is well taken and considered. So, I appreciate that.

Mr. PAOLETTA. Thanks, Chairman.

Chairman YARMUTH. I am going to—no, go ahead and talk to it.

Mr. PAOLETTA. No, thank you, sir, for that. Thank you.

Chairman YARMUTH. You are welcome. You are welcome to respond, yes. But I have no other questions and I have vented already enough. So, I am going to thank the witnesses for their testimony, their responses. I thank the Members for their questions.

And once again, I will reiterate to the Ranking Member and every other member that the next hearing of the Budget Committee on the Budget Committee, I will be—for that hearing, I will be in the budget room. Mr. Smith, I will join you there and anyone else who wants to join us. You are absolutely right. We have equipped the hearing room so that we can hold hybrid hearings in a much better way than we could have in the beginning of the pandemic. So, we will do that.

Mr. SMITH. Thank you, Mr. Chairman.

Chairman YARMUTH. And with that, if there is no further business before the Committee, this hearing is adjourned.

Oh, Mr. Carter showed up. Wait a minute.

Mr. CARTER. I am sorry, Mr. Chairman. That is OK.

Chairman YARMUTH. OK, sorry. We will give you a little extra time next time.

Mr. CARTER. Well, I am just glad I have got something I can hold over your head, and don't worry, I will do it.

Chairman YARMUTH. Thank you all. And once again, thanks to all the witnesses. The meeting is adjourned.  
[Whereupon, at 3:30 p.m., the Committee was adjourned.]

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**CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS**

**STATEMENT**

**VIRTUAL HEARING:**

**“REASSERTING CONGRESS’S POWER OF THE PURSE”**

**COMMITTEE ON THE BUDGET**

**THURSDAY, APRIL 29, 2021**

**1:00 P.M. (EDT)**

- Thank you Chairman Yarmuth and Ranking Member Smith for convening this hearing on *“Reasserting Congress’s Power of the Purse.”*
- Let me welcome our witnesses:

Edda Emmanuelli Perez  
Deputy General Counsel  
U.S. Government Accountability Office

Liz Hempowicz  
Director of Public Policy  
Project On Government Oversight

Molly Reynolds, Ph.D.  
Senior Fellow - Governance Studies  
The Brookings Institution

*(Minority Witness)*  
Mark R. Paoletta  
Senior Fellow  
Center for Renewing America

- The Framers understood that the separation of powers in the structure of the federal government is essential to protecting liberty and preventing a backslide into monarchy.
- The Framers knew it was essential that the power to decide how to spend the people's money be vested in the Congress, not the President.
- In fact, to assuage concerns that the "President may easily become king . . . [and] prescribe the terms on which he shall reign as master," the Framers placed the power of "the purse in the hands of the representatives of the people," because "where the purse is lodged in one branch, and the sword in another, there can be no danger."
- The Framers saw in the "power of the purse . . . the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."
- The Constitution seeks to ensure that the purse will always remain with Congress in several provisions.
- In Article I, Section 7, clause 1, the Constitution vests the Money Power to raise revenue in the Congress providing that "All Bills for the raising of revenue shall originate in the House of Representatives."
- Article I, Section 9, clause 7, the Appropriations Clause mandates that "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."
- An appropriation is a law that makes specified funds available for particular purposes.

- The Constitution also mandates the publication of a regular statement and account of receipts and expenditures, prohibits appropriations of longer than two years to support the armed forces, and grants the Congress the power to tax and to spend.
- Under the U.S. Constitution, control of the purse is not just a power of Congress, it is also a responsibility.
- That responsibility falls particularly strongly on the House of Representatives, which with bi-annual elections for all members is the most democratically accountable branch of government.
- This is why the founding generation believed that “[a]mong the duties—and among the rights, too—of th[e] House, there is perhaps none so important as the control which it constitutionally possesses over the public purse.”
- Importantly, appropriations give the House a power it can exercise unilaterally, even despite opposition from the Senate; the House can refuse funding on its own (as can the Senate, and the President unless there are enough votes to override a veto).
- This makes appropriations in general and the power to refuse funding in particular a rare tool that a bare majority that captures the House of Representatives can use to pursue the goals of the people who elected it.
- Even as Congress has created this administrative state, however, it has fulfilled its responsibility to control spending under the Constitution by enacting foundational laws that constrain federal agencies’ exercise of delegated power when it comes to spending.
- Two of the most important of these laws are the Anti-Deficiency Act and the Impoundment Control Act.
- The Anti-Deficiency Act prohibits agencies from spending or obligating funds they do not have, with limited exceptions and is Congress’ response to the threat that agencies’ funding deficiencies pose to Congress’ control of government spending.

- An “obligation” is a legal liability of the government to make a future payment, such as through awarding a grant or entering into a contract. (Congressional permission for an agency to take actions to obligate the government to make a future payment is called “budget authority.”)
- A “deficiency” occurs when an agency over-obligates or over-spends its enacted appropriations.
- Deficiencies are a threat to the power of the purse because by creating them agencies effectively force Congress to appropriate the funds necessary to honor the government’s prior commitment.
- The Anti-Deficiency Act includes limited exceptions that have proven incredibly consequential during lapses in appropriations (i.e., shutdowns).
- Presidents have asserted increasing authority to continue government operations without the necessary funding in place through flexible, atextual, and often undisclosed interpretations of the limited exceptions in the Anti-Deficiency Act.
- In general, the Anti-Deficiency Act requires the President to apportion, in writing, all appropriations enacted into law for the executive branch.
- An apportionment is a legally binding document that allows an agency to spend its enacted appropriations.
- The overarching purpose of the apportionment process is to prevent deficiencies—i.e., to make sure agencies use time limited appropriations at an appropriate pace (so that, for example, a program does not run out of money before the fiscal year is over) and use appropriations available for an indefinite time period effectively and economically.
- The Office of Management and Budget, via delegation from the President, approves all apportionments for the executive branch.
- Apportionments generally divide amounts by specific time period or among projects or activities.

- They may contain footnotes, which provide additional direction to agencies and are also legally binding.
- After funding has been apportioned, agencies decide how to further allocate it, provided that such decisions are consistent with the apportionment and enacted law.
- President Nixon's abuse of this "apportionment" process led Congress to enact a second foundational budget and appropriations law, the Impoundment Control Act, which reasserted Congress' power of the purse by prohibiting the President from apportioning funds for policy reasons and by establishing procedures to prevent the President and other government officials from unilaterally substituting their own funding decisions for those of the Congress.
- The ICA lays out procedures the President must follow to reduce, delay, or eliminate funding in an account.
- The Act divides impoundments into two categories: rescissions and deferrals.
- If the President wants to spend less money than Congress provided for a particular purpose, they must first secure a law providing Congressional approval to rescind the funding in question.
- The ICA requires that the President send a special message to Congress identifying the amount of the proposed "rescission"; the reasons for it; and the budgetary, economic, and programmatic effects of the rescission.
- Upon transmission of such special message, the President may withhold certain funding in the affected accounts for up to 45 legislative session days.
- If a law approving the rescission is not enacted within the 45 days, any withheld funds must be made available for obligation.
- The ICA defines a "deferral" as withholding, delaying, or – through other Executive action or inaction – effectively precluding funding from being obligated or spent.

- The ICA prescribes three narrow circumstances in which the President may propose to defer funding for a program: (1) providing for contingencies; (2) achieving budgetary savings made possible through improved operational efficiency; and (3) as specifically provided by law.
- The ICA requires that the President send a special message to Congress identifying the amount of the proposed deferral; the reasons for it; and the period of the proposed deferral.
- Upon transmission of such special message, the funds may be deferred without further action by Congress; however, the deferral cannot extend beyond the end of the fiscal year in which the special message is sent.
- The ICA language on deferrals is long-standing budget law that allows the executive branch to delay the obligation or expenditure of funding only for the specified reasons rather than policy reasons.
- Mr. Chairman, there is no higher priority than the safety, security, health and well-being of the American people.
- All Americans are concerned about the Coronavirus, it is evolving into a global epidemic that is quickly spreading.
- The main priority of this government and every government around the world should be combating the spread of this virus.
- We cannot afford to nickel and-dime our response to public emergencies like the coronavirus pandemic.
- It is imperative that our allies and partners around the world obtain the diagnostic equipment, medical supplies, doctors, workers, hospitals and any additional resources essential to stopping the spread of this virus.
- We must take preventative actions in combating the coronavirus to ensure stability in our economy, education, farmlands, local



business, food security, and the health and wellbeing of all our citizens.

- Every urban, suburban, and rural area of America will be impacted from this virus, these areas need of materials and resources that can best help to combat the coronavirus.
- Mr. Chairman, the Power of the Purse is an indispensable weapon in the arsenal given to Congress by the Constitution's Framers to promote the general welfare, provide for the common defense, and to preserve our democracy.
- I look forward to hearing from our witnesses on ways to ensure that this power is preserved and strengthened so that our democracy endures for ages to come.
- Thank you; I yield the remainder of my time.

**House Committee on the Budget Hearing on  
Protecting Our Democracy: Reasserting Congress' Power of the Purse  
April 29, 2021  
Questions for the Record  
Chairman John A. Yarmuth**

**Questions for Liz Hempowicz, Director of Public Policy, Project On Government Oversight**

1. In your testimony, you mentioned that violations of the Antideficiency Act (ADA) can carry administrative and criminal penalties and noted that there are currently no penalties for violations of the Impoundment Control Act (ICA). You also noted that the Congressional Power of the Purse Act (CPPA) addresses this disparity by explicitly authorizing administrative discipline for responsible officials for violations of the ICA. Why is it important to add such penalties to the ICA and how would this reform empower government officials to push back on political pressure to break the law?
2. During the hearing, you mentioned that there needs to be additional transparency for opinions issued by the Office of Legal Counsel (OLC) at the Department of Justice.
  - a. How do OLC budget and appropriations opinions influence Executive Branch spending?
  - b. How would the public disclosure of OLC budget and appropriations opinions, as required by the CPPA, improve Congress' ability to conduct oversight of the Executive Branch?
3. In addition to requiring the Office of Management and Budget (OMB) to publicly post apportionments, in your testimony you outlined other initiatives related to apportionment transparency. For example, you recommended that any delegations of apportionment authority be posted in the Federal Register; that OMB be required to include written explanations for the decisions made within an apportionment; that agencies report to Congress if they receive an apportionment that would impact the agency's ability to obligate the funds Congress has appropriated; and that agencies report to Congress if OMB does not apportion funding within the required statutory time period. The CPPA includes similar requirements. How do these additional reforms ensure transparency in the apportionment process? Why are these initiatives critical to reasserting Congress' power of the purse and how will they affect the average American?

**House Committee on the Budget Hearing on  
Protecting Our Democracy: Reasserting Congress' Power of the Purse  
April 29, 2021  
Questions for the Record  
Chairman John A. Yarmuth**

**Questions for Edda Emmanuelli Perez, Deputy General Counsel, U.S. Government Accountability Office (GAO)**

1. In your testimony, you explained that the Impoundment Control Act (ICA) operates on the constitutional premise that the President must obligate the funds appropriated by Congress unless otherwise authorized to withhold them. You also noted that the ICA permits the President to temporarily withhold appropriated funds in certain circumstances if the President transmits a “special message” under the procedures established by the ICA. Can you further explain the following points:
  - a. Absent the ICA being law, what authority would the President have to withhold funds?
  - b. If a President wants to withhold funds for policy reasons, is there a way the President can do so under the ICA? If so, are there any limits to such authorities?
  - c. If a President wants to achieve savings by delaying the obligation of certain funds or by proposing to rescind funds, is there a way the President can do so under the ICA? If so, are there any limits to such authorities?
  - d. If Congress does not approve a President’s rescission proposal through the expedited procedures established by the ICA, can Congress use the normal legislative process to permanently cancel funds? If so, how often does it do so?
2. In your testimony, you explained that one of the purposes of the Antideficiency Act (ADA) is to prohibit government officials from obligating or expending in excess of or in advance of an agency’s appropriations. You also explained that Congress passed the ICA in response to attempts by the Executive Branch to thwart the will of Congress by refusing to spend congressionally appropriated funds. How do the ADA and the ICA interact? Do they require the exact spending of appropriations, down to the penny?

QUESTIONS FOR THE RECORD SUBMITTED BY

**THE HONORABLE DAVID E. PRICE**

**Molly E. Reynolds**, Senior Fellow, The Brookings Institution Commandant

**Liz Hempowicz**, Director of Public Policy, Project on Government Oversight

**Edda Emmanuelli Perez**, Deputy General Counsel, U.S. Government Accountability Office

**Mark R. Paoletta**, Senior Fellow, Center for Renewing America

**House Budget Committee**

*Protecting our Democracy: Reasserting Congress' Power of the Purse*

April 29, 2021

**Background:** During the hearing, Mr. McClintock raised a question that suggested that congressionally-directed spending – or earmarks – were somehow constitutionally questionable. My view has always been that the constitutional argument ran in the other direction, that there was something very questionable about this kind of arbitrary denial of the power of the purse. I don't imagine that earmarking is constitutionally required, but I certainly can't imagine that it's constitutionally denied either. My colleague stated that Congress “appropriates”, and the Executive Branch “spends”. Well, it is my understanding that an earmark is a more precise appropriation for a project that the executive agency still executes. An earmark is just a more precise and more specific kind of appropriation.

**Question to all witnesses:** Is congressionally directed spending in the form of appropriations earmarks constitutionally infirm or unconstitutional?

**Committee on the Budget**

*Protecting our Democracy: Reasserting Congress' Power of the Purse*  
*Thursday, April 29, 2021*

Questions for the Record for Edda Emmanuelli Perez, Deputy General  
Counsel, U.S. Government Accountability Office

**Submitted by Rep. Ben Cline**

*Congress' reliance on continuing resolutions and omnibus appropriations*

Question:

Has the GAO ever measured the amount of waste that is generated from government shutdowns?



**House Committee on the Budget Hearing on  
Protecting Our Democracy: Reasserting Congress' Power of the Purse  
April 29, 2021**

**Questions for the Record: Chairman John A. Yarmuth**

**Questions for Liz Hempowicz, Director of Public Policy, Project On Government Oversight**

**1. In your testimony, you mentioned that violations of the Antideficiency Act (ADA) can carry administrative and criminal penalties and noted that there are currently no penalties for violations of the Impoundment Control Act (ICA). You also noted that the Congressional Power of the Purse Act (CPPA) addresses this disparity by explicitly authorizing administrative discipline for responsible officials for violations of the ICA. Why is it important to add such penalties to the ICA and how would this reform empower government officials to push back on political pressure to break the law?**

Simply put, if an individual can violate the ICA with impunity, it sends a signal to the executive branch that it is not an important law to follow and invites future administrations to ignore its limitations. By creating an administrative penalty for ICA violations, the Congressional Power of the Purse Act will create a personal incentive for career professionals to follow the law and push back if they receive directions that would have them violate the ICA.

**2. During the hearing, you mentioned that there needs to be additional transparency for opinions issued by the Office of Legal Counsel (OLC) at the Department of Justice.**

**a. How do OLC budget and appropriations opinions influence Executive Branch spending?**

Executive branch offices are bound by OLC's directives, so OLC opinions interpreting relevant budget authorities and appropriations law chart the legal path for all executive branch budget actions. As legal counsel to the executive, OLC is naturally biased in favor of helping its client achieve its goals through legal analysis. The result is that OLC often expansively interprets the executive branch's authority and provides legal cover for executive branch actors to take legally questionable actions with functional impunity, including when it comes to executive branch spending.

**b. How would the public disclosure of OLC budget and appropriations opinions, as required by the CPPA, improve Congress' ability to conduct oversight of the Executive Branch?**

In our system of government, it is Congress's role to promulgate law and oversee the execution of that law. It is the executive branch's role to implement law as it is written by Congress, not to

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substitute its own legal interpretations or preferences in contravention of what Congress has written. In this system and within this arrangement, laws must be drafted, passed, and implemented transparently and with integrity. Since OLC opinions have the effective force of law and since those opinions are created in secret, Congress has a vital interest in having access to those opinions so it can respond accordingly.

If the executive branch is permitted to interpret and implement congressionally enacted laws however it sees fit and is not required to be open and transparent with both Congress and the broader public, the entire rule of law edifice is compromised. Therefore, it is essential that OLC be required to publish its opinions publicly. This is especially true when OLC is interpreting appropriations and budget law, as the Constitution clearly vests the power of the purse in the Congress. If such a requirement were codified, Congress would be able to much more swiftly and effectively oversee how spending directives and constraints are being executed or ignored. That information could then be used to take corrective legislative action or to pursue accountability in the face of illegal or inappropriate actions.

An additional benefit of requiring real-time disclosure of OLC opinions is the deterrence effect. If OLC lawyers and other executive branch officials know that any opinion they issue that becomes operative for agencies will become public, it is likely that those stakeholders will be less prone to dubious interpretations and guidance that speciously expand executive branch authority. In the good government community, we often say that sunlight is the best disinfectant; OLC opinions are frequently riddled with flawed legal reasoning, self-serving claims, and a distinct lack of objectivity. If it were standard practice for these opinions to be made public upon their issuance, some of these questionable patterns may cease to exist or, at the very least, those patterns would become more visible, and Congress and the courts could more easily respond as necessary.

**3. In addition to requiring the Office of Management and Budget (OMB) to publicly post apportionments, in your testimony you outlined other initiatives related to apportionment transparency. For example, you recommended that any delegations of apportionment authority be posted in the Federal Register; that OMB be required to include written explanations for the decisions made within an apportionment; that agencies report to Congress if they receive an apportionment that would impact the agency's ability to obligate the funds Congress has appropriated; and that agencies report to Congress if OMB does not apportion funding within the required statutory time period. The CPPA includes similar requirements. How do these additional reforms ensure transparency in the apportionment process? Why are these initiatives critical to reasserting Congress' power of the purse and how will they affect the average American?**

Requiring additional information and reporting around apportionment schedules is essential because it is important to contextualize apportionments and accompany them with relevant details. For example, knowing if apportionment authority has been delegated to a political appointee as opposed to a career civil servant is important in the event of something inappropriate being found in an apportionment schedule. Having known who is responsible for issuing that apportionment would be indispensable in any related oversight or the pursuit of accountability, either by Congress itself or by GAO.

Requiring a written explanation for apportionment decisions is similarly critical in understanding the “why” of the situation. Sometimes, an apportionment or accompanying footnotes might look inappropriate or otherwise deviant from the standard course but it could have a perfectly legitimate explanation. In other instances, that same apportionment could be inappropriate or, in the worst cases, illegal. In either case, having a brief and accessible written explanation will help promote accountability and transparency in the apportionment process while also promoting integrity in how taxpayer funds are being dispersed after Congress has appropriated them.

Since it is Congress who is constitutionally empowered to appropriate taxpayer dollars and determine the purposes of the spending of those dollars, Congress has a vested interest in knowing that its directives and instructions are being actualized. Therefore, requiring reporting from agencies if apportionments somehow disrupt the expected funding timelines and parameters laid out by Congress is critical. Like transparency around OLC opinions and apportionment schedules themselves, transparency, and real-time reporting regarding the impact of apportionment schedules serves the purpose of ensuring that the executive branch is operating within the four corners of its constitutional powers and that Congress is the one in charge when it comes to the power of the purse. In a more practical sense, the money that Congress appropriates to federal agencies isn’t an abstraction; that money is used to facilitate a range of critical programs that Americans rely on, including low-income housing; healthcare for seniors and people with disabilities; support for small businesses; education funding; and innumerable other federally funded activities that impact the daily lives of the American people. Knowing that those funds are being spent for the purposes intended and within the expected timeframe is crucial to ensuring that those programs have the impact they are designed to have and to providing stability in the broader economy.

**Question for the Record: Representative Price**

*Question for all witnesses*

**Is congressionally directed spending in the form of appropriations earmarks constitutionally infirm or unconstitutional?**

No, Congressional directed spending in the form of appropriations earmarks is constitutional. Article I of the Constitution gives Congress the unquestionable authority to direct how federal dollars are spent. Congress taking a more proactive and precise role in directing and defining the spending that it is responsible for appropriating could be viewed as a reassertion of the power of the purse.”



Questions for the Record  
 From Chairman John A. Yarmuth  
 For Edda Emmanuelli Perez  
 Hearing on "Protecting Our Democracy: Reasserting Congress' Power of the Purse"  
 April 29, 2021  
 House Committee on the Budget

- 1. In your testimony, you explained that the Impoundment Control Act (ICA) operates on the constitutional premise that the President must obligate the funds appropriated by Congress unless otherwise authorized to withhold them. You also noted that the ICA permits the President to temporarily withhold appropriated funds in certain circumstances if the President transmits a "special message" under the procedures established by the ICA. Can you further explain the following points:**

- a. Absent the ICA being law, what authority would the President have to withhold funds?**

Absent the Impoundment Control Act (ICA), the President has no such authority. The Constitution requires the President to "faithfully execute[]" the appropriations laws that Congress enacts. U.S. Const. art. II, § 3. The ICA is the only authority that a President has to withhold funds from obligation, and even that authority is "strictly circumscribed." B-330330, Dec. 10, 2018, at 9. More specifically, the ICA permits only the temporary withholding of budget authority and provides that, unless Congress rescinds the amounts at issue, they must be made available for obligation. *Id.* at 1-2. Rather than an interference with Executive power, the ICA represents a grant of authority to a President. Absent the ICA being law, therefore, the President has no constitutional or other authority to withhold funds from obligation. See B-330330, Dec. 10, 2018, at 3 (observing the President has no unilateral authority to withhold funds).

- b. If a President wants to withhold funds for policy reasons, is there a way the President can do so under the ICA? If so, are there any limits to such authorities?**

Yes. The ICA allows the President to withhold funds for policy reasons, but only under limited circumstances. Namely, a President may propose funds for what is known as a "rescission" on policy grounds. 2 U.S.C. § 683(a). A rescission is legislation enacted by Congress that permanently cancels the availability of previously-enacted budget authority. See GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 85.

To seek a rescission, the President must transmit a special message to Congress detailing the amounts, reasons for, and effect of the proposed rescission. B-330019, Sept. 27, 2018, at 1 (citing 2 U.S.C. §§ 682–688). The executive branch has the burden of justifying a withholding of budget authority. B-331564, Jan. 16, 2020, at 6.

During this process, the ICA authorizes the President to withhold budget authority that is the subject of a rescission proposal for a period of 45 days of continuous session following Congress's receipt of the proposal. 2 U.S.C. § 683(b). Amounts are permanently rescinded only if Congress takes affirmative legislative action through the constitutional processes of bicameralism and presentment. B-330330, Dec. 10, 2018, at 7. Therefore if Congress does not, within that 45-day period, complete action on a bill rescinding the budget authority, the budget authority proposed to be rescinded must be made available for obligation. *Id.* at 12; 2 U.S.C. § 683(b). The ICA grants a President no authority whatsoever to rescind funds. B-330330, Dec. 10, 2018, at 9.

Finally, the rescission process is the only mechanism through which a President may withhold funds on policy grounds. The only other type of withholding the ICA permits is known as a "deferral," which is a temporary withholding of budget authority that the President may report for reasons the ICA specifies. 2 U.S.C. § 684(b). Policy reasons are not a valid basis under the ICA for the President to defer funds. B-331564, Jan. 16, 2020, at 6.

**c. If a President wants to achieve savings by delaying the obligation of certain funds or by proposing to rescind funds, is there a way the President can do so under the ICA? If so, are there any limits to such authorities?**

Yes. Under the ICA, a President may unilaterally delay obligations to achieve savings by reporting what is known as a "deferral." 2 U.S.C. § 684; B-331564, Jan. 16, 2020, at 5-6. Through a deferral, an agency temporarily withholds or delays funds from obligation or expenditure. *Id.* A President may also propose that Congress rescind—that is, permanently cancel—previously-enacted budget authority. If the President properly follows the procedures set forth in the ICA, transmission of a rescission proposal to Congress affords the President authority to withhold corresponding funds from obligation for a brief period while Congress considers the proposal. B-330330, Dec. 10, 2018, at 3. 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 detailed reasons for the proposal. B-331564, Jan. 16, 2020, at 5-6 (citing 2 U.S.C. §§ 683-684).

Deferrals are subject to several limitations. The ICA authorizes the deferral of budget authority 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. 2 U.S.C. § 684(b). No officer or employee of the United States may defer budget authority for any other purpose. *Id.* Moreover, the President may not propose a deferral for a period beyond the end of the fiscal year in which the President transmits the special message reporting it. 2 U.S.C. § 684.

Rescissions are also subject to several limitations. Amounts are permanently rescinded only if Congress takes affirmative legislative action through the constitutional processes of bicameralism and presentment. B-330330, Dec. 10, 2018, at 7. The budget authority

proposed for rescission must be made available for obligation unless, within 45 calendar days of continuous congressional session, Congress has completed action on a rescission bill rescinding all or part of the amount proposed for rescission. 2 U.S.C. § 683. Amounts proposed for rescission must be made available for prudent obligation before the amounts expire, even where the 45-day period for congressional consideration in the ICA approaches or spans the date on which the funds would expire. B-330330, Dec. 10, 2018.

**d. If Congress does not approve a President's rescission proposal through the expedited procedures established by the ICA, can Congress use the normal legislative process to permanently cancel funds? If so, how often does it do so?**

Yes. Congress, through its power of the purse, may use the normal legislative process to permanently cancel funds if it does not approve a President's rescission proposal. See *generally* U.S. Const. art. I, § 9, cl. 7.

As to how frequently Congress rescinds appropriated amounts on its own, GAO maintains a longstanding body of work regarding rescissions statistics. Our most recent data show that Congress has initiated 3,252 rescissions totaling about \$384 billion between fiscal year 1974 through February 28, 2020 of fiscal year 2020. GAO, *Updated Rescission Statistics, Fiscal Years 1974–2020*, B-330828, July 16, 2020, Enclosure 1, available at <https://www.gao.gov/assets/710/708194.xls> (last accessed on May 14, 2021). The following table provides more information on these totals:

**CONGRESSIONALLY-INITIATED RESCISSIONS,  
FISCAL YEAR 1974 THROUGH FEB. 28, 2020**

<b>Fiscal year</b>	<b>Rescissions initiated by Congress</b>	<b>Dollar amount of rescissions initiated by Congress</b>	<b>Total rescissions enacted</b>
2020	77	\$6,440,973,600	77
2019	94	\$10,629,441,000	94
2018	79	\$11,540,020,237	79
2017	161	\$32,908,974,514	161
2016	109	\$24,005,650,333	109
2015	126	\$13,368,100,106	126
2014	119	\$15,470,291,641	119
2013	103	\$10,606,360,717	103
2012	123	\$17,116,923,790	123
Subtotal: 2012 – 2020	991	\$142,086,735,938	991
Subtotal: 1990 – 2011	2007	\$203,107,727,335	2152
Subtotal: 1974 – 1989	254	\$38,657,219,022	570
<b>Grand Total: 1974 – 2020</b>	<b>3252</b>	<b>\$383,851,682,295</b>	<b>3713</b>

Source: *Id.*

- 2. In your testimony, you explained that one of the purposes of the Antideficiency Act (ADA) is to prohibit government officials from obligating or expending in excess of or in advance of an agency's appropriations. You also explained that Congress passed the ICA in response to attempts by the Executive Branch to thwart the will of Congress by refusing to spend congressionally appropriated funds. How do the ADA and the ICA interact? Do they require the exact spending of appropriations, down to the penny?**

The Antideficiency Act and the Impoundment Control Act complement each other, with each statute performing a critical role in protecting and furthering Congress's constitutional power of the purse.

The Impoundment Control Act operates on the premise that when Congress appropriates money to the executive branch, the President is required to obligate the funds. B-329092, Dec. 12, 2017, at 2. Meanwhile, the Antideficiency Act bars agencies from incurring obligations exceeding the amount Congress appropriates. 31 U.S.C. § 1341(a)(1). Though agencies must exercise prudent judgment and sound funds control to ensure compliance with each of these two statutes, the Impoundment Control Act does not require agencies to obligate every penny of amounts Congress appropriates. Rather, prudent budget execution can result in some amounts going unobligated. Relatively small unobligated sums alone do not indicate an impoundment, and agencies may obligate cautiously in order to cover unanticipated liabilities. B-331298, Dec. 23, 2020, at 4-5. Having unobligated amounts, moreover, can help agencies ensure they do not violate the Antideficiency Act and that they have sufficient balances to adjust previously-incurred obligations. *Id.* at 5.

In addition, our decisions recognize that agencies may occasionally encounter what is known as a "programmatic delay," which is a delay in obligation that is not a reportable impoundment under the Impoundment Control Act. We have found that any number of circumstances may constitute programmatic delays. For example, in 1976 we concluded that a historically low loan application level caused a programmatic delay. B-115398.51, Sept. 28, 1976, at 6. Similarly, in 2002, we concluded that uncertainty as to whether statutory conditions were met caused a programmatic delay. B-290659, July 24, 2002. See *also* B-291241, Oct. 8, 2002; B-195437.3, Feb. 5, 1988; B-207374, July 20, 1982. By contrast, we have found impoundments, rather than programmatic delays, under other circumstances. In 2018, for instance, we concluded that a delay was not programmatic where the Department of Homeland Security was reviewing the potential consequences of pending legislation. B-329739, Dec. 19, 2018, at 6-8. See *also* B-241514.5, May 7, 1991; B-241514.2, Feb. 5, 1991. Finally, we note that a delay may be programmatic only if the agency is making reasonable efforts to obligate. See B-241514.5.

Questions for the Record  
 From Representative David E. Price  
 For Edda Emmanuelli Perez  
 Hearing on "Protecting Our Democracy: Reasserting Congress' Power of the Purse"  
 April 29, 2021  
 House Committee on the Budget

**1. Is congressionally directed spending in the form of appropriations earmarks constitutionally infirm or unconstitutional?**

No. Earmarking—or the practice of designating appropriated funds for particular purposes—is a valid exercise of Congress's constitutional power of the purse. See GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 46 (defining the process of earmarking as "[d]esignating any portion of a lump-sum amount for particular purposes by means of legislative language").

The Constitution vests Congress with the power of the purse, providing that "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law." U.S. Const. art. I, § 9, cl. 7. In other words, Congress, and only Congress, can authorize the use of public money. Appropriated funds are available only for the purposes for which Congress has provided them. 31 U.S.C. § 1301(a). The appropriations enacted by Congress may be either lump-sum appropriations, available for a wide range of activities, or line-item appropriations available for much more limited purposes. Lump-sum appropriations necessarily provide more flexibility and discretion for agencies, while line-item appropriations constrain agency discretion. The Supreme Court has recognized Congress's authority to limit and direct agency spending, remarking, "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes." *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993). Earmarks achieve the same objective as line-item appropriations.

Indeed, the practice of earmarking funds for particular purposes dates back to the early days of the American republic. In the second appropriation for 1791, the First Congress appropriated funds for several specific objects requested by Secretary of the Treasury Alexander Hamilton, including "converting the beacon of Georgia into a light-house." Ch. VI, 1 Stat. 190 (Feb. 11, 1791) (referring to Estimates for 1791, No. 2 (Jan. 6, 1791) (available in *American State Papers: Documents, Legislative and Executive, of the Congress of the United States*, United States Congress 82, 85–86 (1832))). In light of the above, such directives are within Congress's constitutional prerogatives. And to assist Congress in exercising its power of the purse, GAO has reported on the use of earmarks and agencies' responses to these directives from Congress. See, e.g., GAO, *Congressional Directives: Selected Agencies' Processes for Responding to Funding Instructions*, GAO-08-209 (Washington, D.C.: Jan. 2008).

Questions for the Record  
From Representative Ben Cline  
For Edda Emmanuelli Perez  
Hearing on "Protecting Our Democracy: Reasserting Congress' Power of the Purse"  
April 29, 2021  
House Committee on the Budget

**1. Has the GAO ever measured the amount of waste that is generated from government shutdowns?**

GAO has not estimated the fiscal impact of government shutdowns in dollar terms. But other entities have done so, and our work has discussed those estimates.

In a 2014 report, we examined what economic studies and reports stated about the effects of the October 2013 shutdown on economic activity. GAO, *2013 Government Shutdown: Three Departments Reported Varying Degrees of Impacts on Operations, Grants, and Contracts*, GAO-15-86 (Washington, D.C.: Oct. 15, 2014), at 4. Our report noted that the Office of Management and Budget (OMB) estimated that the 16-day shutdown resulted in agencies furloughing 850,000 federal employees, or 40 percent of the civilian workforce, for a combined 6.6 million work days. *Id.* at 1, 5. Those employees were retroactively paid at a cost of roughly \$2 billion, according to OMB. *Id.* at 5. Our report also noted the Bureau of Economic Analysis's estimate that the 2013 shutdown reduced real gross domestic product (GDP) growth by 0.3 percentage points in the fourth quarter of 2013 due to lost productivity of furloughed workers. *Id.* at 38-39.

Although GAO has not quantified the possible fiscal impact of government shutdowns, we have examined the impacts of shutdowns and continuing resolutions (CRs) on agencies. This work has shown that CRs and lapses in appropriations leading to government shutdowns create inefficiencies and other management challenges for agencies. For example, we have identified instances of reduced government services and productivity and increased costs resulting from CRs and shutdowns. These included delayed contracts and grants, delayed hiring, and additional work that potentially reduced productivity. We also found that shorter and more numerous CRs can lead to more repetitive work, including entering into shorter-term contracts or grants multiple times to reflect the duration of the CR. GAO, *Budget Issues: Continuing Resolutions and Other Budget Uncertainties Present Management Challenges*, GAO-18-368T (Washington, D.C.: Feb. 6, 2018).

We also found that CRs limited management options and that after operating under CRs for a prolonged period, agencies faced additional challenges executing their budgets in a compressed time frame. GAO, *Continuing Resolutions: Uncertainty Limited Management Options and Increased Workload in Selected Agencies*, GAO-09-879 (Washington, D.C.: Sept. 24, 2009), at "GAO Highlights." Notably, the management challenges caused by CRs continued even after agencies received their full year appropriations. GAO-18-368T, at 5.

For other GAO reports in this area, please see *FY 2019 Government Shutdown: Selected Agencies Could Improve Contingency Planning for Potential Shutdown Scenarios and Strengthen Some Internal Controls*, GAO-20-377 (Washington, D.C.: July 1, 2020) (reviewing four agencies' contingency plans and operations during the fiscal year 2019 partial shutdown); *Budget Issues: Budget Uncertainty and Disruptions Affect Timing of Agency Spending*, GAO-17-807T (Washington, D.C.: Sept. 20, 2017) (statement based primarily on GAO's reports and testimonies on agency budgeting from 2009-2016); and *Budget Issues: Effects of Budget Uncertainty from Continuing Resolutions on Agency Operations*, GAO-13-464T (Washington, D.C.: Mar. 13, 2013) (statement based on findings of 2009 report GAO-09-879).



**Questions for the Record, “Protecting our Democracy: Reasserting Congress’ Power of the Purse,”  
House Budget Committee, April 29, 2021**

**Molly Reynolds, Senior Fellow, Governance Studies, The Brookings Institution**

*Is congressionally directed spending in the form of appropriations earmarks constitutionally infirm or unconstitutional?*

Based on my understanding of the constitutional underpinnings of the budget process, there is nothing constitutionally suspect about Congress making detailed spending decisions, including in the form of what we generally refer to as “earmarks.”



June 4, 2021

The Honorable David E. Price  
Committee on the Budget  
204 Cannon House Office Building  
Washington, D.C. 20514

Dear Representative Price:

Thank you for the question on whether appropriations earmarks are unconstitutional. I am not a constitutional law expert, and I have not done a detailed review of this issue. During my time as General Counsel of the Office of Management and Budget ("OMB"), I do not recall the issue of the constitutionality of earmarks arising. I would note, however, that contrary to your premise set forth in the background to your question, many of the Founding Fathers and several Presidents viewed certain earmarks as unconstitutional. Additionally, the Supreme Court, consistent with its recent jurisprudence once again recognizing and enforcing the constitutional limits on Congress' powers, could view certain earmarks as constitutionally impermissible.

The Spending Clause in Article I, Section 8, Clause 1 of the Constitution reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." The Founders' use of the language "general Welfare" to limit Congress' spending authority certainly indicates that spending on "Welfare" that was less than "general," for example that benefited merely private or local interests, was not part of the limited powers delegated to Congress in the Spending Clause. Accordingly, there is ample reason to think the Framers would consider it a fair and serious question whether a congressional earmark to renovate a local or private opera house in Peoria, Illinois was appropriately viewed as for the "general Welfare of the United States."

According to the Merriam-Webster Dictionary, earmarks are "a provision in Congressional legislation that allocates a specified amount of money for a specific project, program, or organization." Our Founding Fathers believed that there were constitutional limits to Congress' power to appropriate funds. Professor Sam Bagenstos, who is now the Biden Administration's General Counsel of OMB, co-authored an article on the Spending Clause and discussed the differing Founders' views on the spending powers, noting that James Madison, considered the Father of the U.S. Constitution, believed that "the Clause authorizes spending only when it implements other powers granted to Congress in Article I of the Constitution," while "Hamilton famously argued that the Clause authorized spending, so long as 'the object, to which an appropriation of money is to be made, must be *general*, and not *local*; its operation extending in fact, or by possibility,

throughout the Union, and not being confined to a particular spot.”<sup>1</sup> Other Founders likewise were divided over the scope of Congress’ spending power. Thomas Jefferson concurred with Madison’s view, and it was an issue in the 1800 election, where Jefferson and his Democratic-Republicans, including Madison, prevailed over the Federalists, such as Hamilton. Under either of those views, however, an earmark specific to a local project and not in furtherance of some separate constitutional power (building or renovating a particular Post Office, for example) would not be constitutionally permissible.

As noted in a 2010 article in the West Virginia Law Review:

The Founding Fathers certainly did not favor this practice. In fact, for much of America’s history, politicians believed that earmarks were unconstitutional. The first national controversy involving pork did not occur until 1817, more than forty years after this country’s birth. During that year’s congressional session, John C. Calhoun tried to appropriate federal funds for local interests. His proposal, the Bonus Bill of 1817, attempted to use the earnings bonus from the Second Bank of the United States to fund the construction of a highway that would lead westward. Even though the highway would benefit several states, President James Madison promptly vetoed the bill, denouncing it and earmarks, in general, as unconstitutional expansions of power under the Necessary and Proper Clause.<sup>2</sup>

In his review of the Spending Clause, Professor Bagenstos noted that, “[a]s a general rule, Democratic presidents and members of Congress tended to adopt positions similar to Madison’s, or slightly broader. Thomas Jefferson, Madison, James Monroe, James Polk, James Buchanan, and Grover Cleveland all opposed bills authorizing spending on local infrastructure and disaster relief projects, citing constitutional objections.”<sup>3</sup> “In 1830, President Andrew Jackson took a stand against earmarks by vetoing a bill that would fund the construction of a road in Kentucky. Like Madison, he opposed earmarks on the ground that it would be unconstitutional to use federal money to further purely local interests.”<sup>4</sup>

When the Supreme Court tackled major principles in this area in its 1936 decision *United States v. Butler*, 297 U.S. 1 (1936), all of the Justices sided with Hamilton’s view that spending for the “general Welfare” extended beyond merely effectuating otherwise-enumerated powers, but only so long as it was for national benefit, as opposed to local benefit. And the Court noted that Justice Joseph Story in his Commentaries adhered to that view as well.<sup>5</sup> It was consistent with Story’s position that “[t]he Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers.”<sup>6</sup> The central disagreement between the majority and dissent in *Butler* was not over the general principle that exclusively local appropriations (without a national purpose) were unconstitutional, but instead to the application of that principle to the specific spending at issue. Decades later, the Court in *South Dakota v. Dole*, 483 U.S. 203 (1987), continued to hold to this expansive view of the Spending Clause. Despite rejecting the narrower Madisonian view on spending, even *Butler* and *Dole* recognized that there remained some limits to Spending Clause power under the Hamiltonian view, in particular the requirement that any congressional spending be national, not local.

<sup>1</sup> Samuel R. Bagenstos & Ilya Somin, *The Spending Clause*, THE CONSTITUTION CENTER, <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/755>.

<sup>2</sup> Jason Iuliano, *Eliminating Earmarks: Why the Congressional Line Item Veto Can Succeed Where the Presidential Line Item Veto Failed*, 112 W. VA. L. REV. 947, 952–53 (2010).

<sup>3</sup> Bagenstos & Somin, *supra* n.1.

<sup>4</sup> Iuliano, *supra*, at 953.

<sup>5</sup> See 2 Joseph Story, *Commentaries on the Constitution of the United States* § 919 (1833) (“A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them. If the defence proposed by a tax be not the common defence of the United States, if the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the constitution.”).

<sup>6</sup> Joseph Story, *Commentaries on the Constitution of the United States* 2 § 906 (1833).

Although recognizing such limits in general in *Butler*, the Court started deferring to Congress' determination of "general Welfare" to the point that the limitation on that term effectively meant whatever Congress said. It should be noted that this extreme deference corresponded to the Court's 1937 massive expansion of Commerce Clause authority, followed later with a similar hands-off approach to the Tenth Amendment. In recent years, however, the Supreme Court has increasingly returned to recognizing limits to Congress' enumerated powers. Three times in recent decades the Court has held that statutory provisions exceeded Congress' Commerce Clause authority. Twice the Court has held that Congress' legislation commandeered the States in violation of the Tenth Amendment. And in the first Supreme Court concerning the constitutionality of the Affordable Care Act (ACA), *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Court held that Congress exceeded its authority under the Spending Clause.

Given these more recent decisions reigning in congressional authority, it is not out of the question that perhaps the judiciary could begin to consider limits on Congress' authority under the Spending Clause to appropriate in furtherance of the "general Welfare." Although in modern years *Dole* called for "substantial" deference to Congress' determination, and although the courts seem to have treated that mandate as absolute deference, there is a difference between judicial deference and judicial abdication. *Cf. Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring). The Supreme Court has clearly deferred, but it has never held that its deference is unlimited. Even Hamilton -- by all accounts a strong advocate of a robust national government -- never called for such limitless spending discretion. *Butler* drew a clear line between what is national and what is local, and neither *Dole* nor any other Supreme Court case of which I'm aware says that there is no point at which a court could hold that a spending provision does not provide for the general welfare. One modern attempted earmark that might have tested this line is the infamous "Cornhusker Kickback" in the original version of the ACA, which gave financial benefits to Nebraska that not a single other State received. In light of this, some commentators considered the benefits to be a cynical ploy to get Nebraska's U.S. Senator Ben Nelson to vote for the bill. At the time, his vote appeared essential given the Senate's composition. The earmark sparked widespread criticism and was promptly abolished in the reconciliation legislation that immediately followed the passage of the ACA.

If it truly were the case that there was no instance in which the Court would not defer to a congressional spending determination, then the Court would be ignoring a cardinal principle of constitutional interpretation: If possible, a court is to endeavor to give meaning to every word and phrase of the Constitution, to assume that no word is meaningless or intended to be without effect.<sup>7</sup> Given that only Congress can pass spending legislation and given that the Constitution specifies that no money is to be expended from the Treasury unless duly appropriated by Congress in legislation, to say that the general welfare is whatever Congress decides it to be is to read the words "general Welfare" out of the Constitution. Moreover, to give meaning to the prevailing Hamiltonian view that Congress may spend on projects that are "general," as opposed to purely "local," there must be some spending decisions that are purely "local" and therefore impermissible pursuant to the Spending Clause, or Hamilton's distinction would be meaningless.

Some earmarks, of course, could likely meet that "general" versus "local" standard even under active judicial review. For example, an earmark to build a Navy destroyer would seem to satisfy even Madison's view, as it would be to "provide and maintain a Navy," which Article I, Section 8, Clause 13 lists among the enumerated powers of Congress. Other earmarks might not be rooted in enumerated powers but could serve a sufficiently broad "federal interest" for the Nation's collective benefit that would satisfy Hamilton's view. Spending on a strategic petroleum reserve with specific storage facilities, for example, could provide energy security for all parts of the country even though the storage facilities would necessarily be in specific geographic locations. But there are plenty of earmarks that many Americans could say appear to be for the

<sup>7</sup> See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 174 (2012) ("If possible, every word and every provision is to be given effect.")

benefit of a single State or locality, and an engaged court could declare such a provision not to be for the "general Welfare." The latter earmarks are anathema to the whole array of views at the Framing and thus run afoul of the original meaning of the Spending Clause.

Based on the Founders' views, it would not be surprising that Madison, Hamilton, many Presidents, and perhaps Members of Congress would find it beyond Congress' power of the purse to make these appropriations, all of which are found in this year's appropriation:

1. \$2.5 million for the restoration of the Ohio Theater in Toledo, Ohio.
2. \$7.75 million for a sheep experiment station in Dubois, Idaho.
3. \$3.4 million for digging a tunnel for turtles in Florida.
4. \$3.6 million for the Center for Grape Genetics in Geneva, NY.

I understand that in the modern era, Congress has frequently included earmarks in appropriations bills. As noted, I am unaware of any recent Supreme Court decision directly on point that would definitively require invalidation of such earmarks. But in response to the premise of your question that there did not appear to be *any* question regarding the constitutionality of earmarks, the Founders and previous Presidents' views -- and in particular Democrat Presidents -- demonstrate that there have been serious questions since the ratification of the Constitution about the constitutionality of appropriating earmarks that do not benefit the "general" Welfare.

Irrespective of the constitutional issues at stake, I believe that using earmarks is bad policy. Rather, it would be better, as I stated in my opening statement, that:

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 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 ministerial check-writing capacity. Rather, the proper balance involves Congress explaining in law what it wants done, providing sufficient guidance for any properly legislative determinations needed accomplish its agreed-upon goals, and then providing sufficient appropriations to allow 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.

Thank you for your question and the opportunity to respond to it.

Sincerely,



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