



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

November 16, 2018

GENERAL COUNSEL

Mr. Tom Armstrong
General Counsel
U.S. Government Accountability Office
Washington, D.C. 20548

Dear Mr. Armstrong,

Thank you for your letter of November 1, 2018, soliciting our views regarding the President's authority to withhold amounts proposed for rescission pursuant to the Impoundment Control Act of 1974 (ICA). The ICA establishes a process by which the President may submit a special message proposing to rescind all or part of any budget authority. The ICA also authorizes the President to withhold any budget authority proposed for rescission for 45 days of continuous session of Congress. The text of the ICA places no limit on how late in the fiscal year a President may propose funds for rescission or withhold funds pending Congressional consideration of a rescission proposal. Moreover, there is bipartisan historical precedent for budget authority being withheld late in the fiscal year pursuant to an ICA rescission proposal, including withholding such amounts through the end of the fiscal year. GAO has previously acknowledged this feature of the ICA, and has noted that withholdings are fully within the President's authority under that statute, and OMB concurs with GAO's longstanding views.

I. Section 1012 of the ICA does not preclude the President from proposing budget authority for rescission and withholding such funds from obligation pending Congressional consideration of a special message late in the fiscal year.

Section 1012(b) of the ICA authorizes the President to withhold budget authority included in the President's special message to Congress submitted pursuant to section 1012(a) of the ICA. Section 1012(b) directs that any amounts withheld from obligation "shall be made available for obligation [after 45 days of continuous session] unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded..." 2 U.S.C. § 683(b). Although section 1012(b) of the ICA limits the President's withholding authority to 45 days of continuous Congressional session, it does not impose an additional obligation on the President to make withheld budget authority available for obligation before the end of a fiscal year.

The silence in section 1012 on when in the fiscal year the President may propose rescissions and withhold budget authority stands in stark contrast to section 1013 of the ICA, which governs Presidential deferrals of funds. That authority allows the President to delay the obligation or outlay of budget authority for certain statutorily prescribed reasons, but not beyond the end of the fiscal year. Section 1013(a) states "[a] deferral 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 is transmitted to the House and the Senate." 2 U.S.C. § 684. Thus, the

text of the ICA indicates that Congress considered the possible effects of withholding funds close to the end of the fiscal year and decided to limit such withholdings only with respect to deferrals, not with respect to rescissions. Lest there be any doubt about whether 1013(a)'s time limit applies to rescissions, section 1013(c) provides that the deferral requirements "do not apply to any budget authority proposed to be rescinded...under section 1012." Thus, Congress has made clear that sections 1012 and 1013 are mutually exclusive, and that the requirements imposed by section 1013 do not apply to funds withheld pursuant to section 1012.

GAO has acknowledged this important distinction between sections 1012 and 1013, and the necessary implication that the former places no limits on withholdings late in the fiscal year. In a 1975 report to Congress regarding two rescission proposals, whose budget authority lapsed prior to the expiration of the 45-day withholding period, GAO stated:

[i]n 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.

GAO B-115398, December 15, 1975 ([ACG-76-12](#)). Here, GAO clearly acknowledges that nothing in section 1012 precludes the President from withholding funds that will expire during the withholding period.

II. Analysis under the fourth disclaimer is not and has never been impacted by when, within a given fiscal year, a proposal or withholding begins.

Section 1001(4) of the ICA, commonly referred to as the "fourth disclaimer," states that "[n]othing contained in this Act, or in any amendments made by this Act, shall be construed as—...superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder." 2 U.S.C. § 681. OMB and GAO both interpret the fourth disclaimer as barring the President from withholding budget authority during Congressional consideration of rescission proposals, if doing so would supersede another provision of law requiring the obligation or expenditure of the budget authority. Typically, this occurs when an obligation of the government arises by operation of law, for example, a claim to veterans or social security benefits. Analyzing whether a particular withholding pursuant to the ICA is allowable under the fourth disclaimer involves a detailed reading of underlying authorizing statutes to determine whether amounts proposed for rescission are required to be obligated or outlaid during the withholding period.

GAO has stated that:

[t]he crucial limitation is that the executive branch may not take impoundment actions that are inconsistent with an existing statutory mandate in the process of requesting Congress to reconsider its priorities... The only thing that the President may not do is use the Impoundment Control Act procedures in a manner that would violate the spending mandate while the proposal is awaiting congressional

reconsideration. Essentially this means only that the President must comply with a statutory mandate unless and until he can persuade Congress to change it.

GAO B-205053, March 10, 1982 ([OGC-82-9](#)), at 22-3. Thus, GAO has agreed that the relevant fourth disclaimer analysis hinges on a statutory mandate to spend the funds in question, not when in the fiscal year the funds are proposed for rescission or withheld.

The mere fact that an appropriation states that funds “shall be available” for a particular period of time during which they must be obligated does not alter the fourth disclaimer analysis. Rather, for the fourth disclaimer to apply, some law other than the appropriation itself must give rise to the government’s obligation to spend the funds, such as the requirement in the Social Security Act to make social security payments. If obligatory language in an appropriation itself triggered the fourth disclaimer, then the President could withhold funds under the ICA only when he already had discretion to withhold them under the appropriation, and the ICA would be a nullity. GAO has previously assured OMB that GAO did not reach such a result when interpreting the fourth disclaimer:

OMB is concerned that our February 5, 1982, opinion ... suggests that any statute using the word ‘shall’ will be viewed as mandating full spending and precluding impoundment. This misconstrues our prior opinions applying the mandatory versus permissive distinction. As is clear from our February 5 opinion on the LSCA and our other opinions which have construed statutes as mandatory, the relevant statute must be reviewed as a whole to ascertain congressional intent.

GAO B-205053, March 10, 1982 ([OGC-82-9](#)), at 18-19. OMB agrees with GAO’s long-established fourth disclaimer analysis, which has never taken into account when in a given fiscal year a rescission was proposed or a withholding undertaken.

III. There are several historical examples of presidentially proposed rescissions and withholdings beginning late in the fiscal year, including several that were withheld so late as to cause funds to lapse prior to the expiration of the 45-day withholding period. GAO did not raise issues with such proposals.

There is nothing new about presidentially proposed rescissions being sent to Congress late in the fiscal year, nor anything new about withholding those funds for the statutorily permitted period of 45 days, even when that period extended further than the end of a fiscal year and the funds lapsed. Indeed, between 1974 and 2000, there were 19 special messages sent to Congress proposing rescissions delivered between June and August. Five special messages have been sent to Congress in June, thirteen in July, and one in August. Under section 1014(b) of the ICA, GAO has a duty to review and opine on the facts surrounding Presidential rescission proposals, and pursuant to that section GAO has opined on all of the rescissions proposed and withheld late in the fiscal year. In none of those reports did GAO ever state or imply that any of these proposals were outside the President’s ICA authorities.

Late-fiscal year withholdings began in 1975, the year after the ICA was enacted, when President Ford sent a special message to Congress on July 25, 1975. Although this special message was for the 1976 fiscal year, it included proposed rescissions of funding for two

accounts that expired on September 30, 1975, and one account that expired on October 31, 1975. GAO noted this fact without objection in its report, stating, "Budget authority in R76-7 and R76-8 will lapse on September 30, nearly a month before expiration of the 45 days of continuous session the Congress normally has to review proposed rescissions. Budget authority in R76-5 will lapse on October 31, only two days after the 45th day of continuous session." GAO B-115398, August 12, 1975, ([ACG 76-5](#)). Records show that the funds proposed by R76-7 and R76-8 did expire on September 30, and the funds proposed by R76-5 were withheld until October 24th, one week prior to their expiration, after which point they were released for obligation.¹

A similar situation arose when President Carter sent several rescission proposals to Congress in July of 1977. Funds from two of those proposals lapsed on September 30, 1977, in one case prior to the expiration of the 45-day ICA withholding period, and in another case five days after the withholding period ended. Once again, GAO noted the lapse without objection. In its report shortly after the rescissions were proposed, GAO made no note of the fact that the funds were likely to lapse during or immediately following the withholding period. It later simply noted the fact that they had lapsed, stating "[t]he \$21,090,000 of annual budget authority proposed for rescission for International Security Assistance, foreign military sales (R77-16) in the President's 14th special message lapsed on September 30, 1977, before the end of the 45-day period." GAO B-115398, October 26, 1977 ([OGC-78-2](#)). GAO also noted that the other budget authority proposed for rescission whose 45-day withholding period expired on September 25 was released by OMB on September 26 after it was rejected by Congress, but that the agency was unable to obligate any of this budget authority before October 1, 1977, and the total amount lapsed on September 30, 1977, the last day of fiscal year 1977.

* * * *

In conclusion, the text of Impoundment Control Act clearly allows the President to propose and withhold funds at any time in a fiscal year. In addition to the unambiguous statutory language, there is bipartisan historical precedent for the President to withhold funds at any time of the fiscal year, including in instances where funds proposed for rescission have lapsed prior to the expiration of the 45-day withholding period.

Thank you again for the opportunity to provide OMB's views on this important issue.

Sincerely,



Mark R. Paoletta
General Counsel

¹ See OMB, Cumulative Report on Rescissions and Deferrals, September 1976, 41 Fed. Reg 39644, at 39650, 39652-53 (1976).