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B-330330

December 10, 2018

The Honorable Steve Womack
Chairman
Committee on the Budget
House of Representatives

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

Subject: *Impoundment Control Act—Withholding of Funds through Their Date of Expiration*

This responds to your request for our legal opinion regarding the scope of the authority provided under the Impoundment Control Act of 1974 (ICA) to withhold budget authority from obligation pending congressional consideration of a rescission proposal. Pub. L. No. 93-344, title X, 88 Stat. 297, 332 (July 12, 1974), *amended by* Pub. L. No. 100-119, title II, §§ 206, 207, 101 Stat. 754, 785 (Sept. 29, 1987), *classified at* 2 U.S.C. §§ 681-688; Letter from Representative Steve Womack, Chairman, and Representative John Yarmuth, Ranking Member, House Committee on the Budget, to Comptroller General (Oct. 31, 2018). Under limited circumstances, the ICA allows the President to withhold amounts from obligation for up to 45 calendar days of continuous congressional session. *See* ICA, § 1012(b); 2 U.S.C. § 683(b). At issue here is whether the Act allows such a withholding of a fixed-period appropriation scheduled to expire within the prescribed 45-day period to continue through the date on which the funds would expire.

As discussed below, we conclude that the ICA does not permit the withholding of funds through their date of expiration. The statutory text and legislative history of the ICA, Supreme Court case law, and the overarching constitutional framework of the legislative and executive powers provide no basis to interpret the ICA as a mechanism by which the President may unilaterally abridge the enacted period of availability of a fixed-period appropriation. The Constitution vests in Congress the power of the purse, and Congress did not cede this important power through the ICA. Instead, the terms of the ICA are strictly limited. 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. The

President cannot rely on the authority in the ICA to withhold amounts from obligation, while simultaneously disregarding the ICA's limitations.

In accordance with our regular practice, we contacted the Office of Management and Budget (OMB) for its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP; Letter from General Counsel, GAO, to General Counsel, OMB (Nov. 1, 2018). In response, OMB provided its legal analysis. Letter from General Counsel, OMB, to General Counsel, GAO (Nov. 16, 2018) (Response Letter).

BACKGROUND

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." U.S. Const., art. I, § 9, cl. 7. The Constitution also vests all legislative powers in Congress and sets forth the procedures of bicameralism and presentment, through which the President may accept or veto a bill passed by both houses of Congress and Congress may subsequently override a presidential veto. *Id.*, art. I, § 7, cl. 2, 3. The procedures of bicameralism and presentment form the only mechanism for enacting federal law. *See INS v. Chadha*, 462 U.S. 919, 951 (1983) ("[T]he prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."). The Constitution also vests Congress with power to make all laws "necessary and proper" to implement its constitutional authorities. U.S. Const., art. I, § 8, cl. 18. To that end, Congress has enacted several permanent statutes that govern the use of appropriations, including the Antideficiency Act, which provides that agencies may incur obligations or make expenditures only when sufficient amounts are available in an appropriation. 31 U.S.C. § 1341. Because agencies may incur obligations only in accordance with appropriations made by law, and because the Constitution vests all lawmaking power in Congress, only appropriations duly enacted through the constitutional processes of bicameralism and presentment authorize agencies to incur obligations or make expenditures.

The Presentment Clauses allow the President to veto an appropriations bill before it becomes law. *See* Art. I, § 7, cl. 2, 3. However, the Constitution provides no mechanism for the President to invalidate a duly enacted law. Instead, the Constitution requires the President to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3; *see also 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").

An appropriation is a law like any other; therefore, unless Congress has enacted a law providing otherwise, the President must take care to ensure that appropriations are prudently obligated during their period of availability. *See* B-329092, Dec. 12, 2017 (noting that the ICA operates on the premise that the President is required to obligate funds appropriated by Congress, unless otherwise authorized to withhold). An "impoundment" is any action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority. GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 61. The President has no unilateral authority to withhold funds from obligation. *See* B-135564, July 26, 1973. The ICA, however, allows the President to impound budget authority in limited circumstances. The President may temporarily withhold funds from obligation—but not beyond the end of the fiscal year—by proposing a "deferral." ICA, § 1013; 2 U.S.C. § 684. The President may also seek the permanent cancellation of funds for fiscal policy or other reasons, including the termination of programs for which Congress has provided budget authority, by proposing a "rescission." ICA, § 1012; 2 U.S.C. § 683.

When the President transmits a special message proposing a rescission of budget authority (a rescission proposal) in accordance with the ICA, amounts proposed for rescission may be impounded (that is, withheld from obligation) for a period of 45 calendar days of continuous congressional session.[1] *See* ICA, § 1012; 2 U.S.C. § 683. The Act states that such amounts "shall be made available for obligation 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 or that is to be reserved."[2] ICA, § 1012(b); 2 U.S.C. § 683(b). Section 1017 of the ICA establishes expedited procedures to facilitate Congress's consideration of a rescission bill during the 45-day period. ICA, § 1017; 2 U.S.C. § 688. This opinion focuses on the withholding of amounts pursuant to a rescission proposal.

DISCUSSION

The ICA authorizes the President to withhold funds from obligation under limited circumstances. At issue here is whether the ICA allows the withholding of a fixed-

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[1] The continuity of a session of Congress is only broken if either House adjourns for more than three days to a day certain, or upon an adjournment of Congress *sine die*. ICA, § 1011(5); 2 U.S.C. § 682(5). As a result of Congress's current practice of conducting *pro forma* sessions, this 45-day period is likely to be 45 calendar days after the date of transmission of the special message.

[2] The ICA defines a "rescission bill" as "a bill or joint resolution which only rescinds, in whole or in part, budget authority proposed to be rescinded in a special message transmitted by the President under section 1012 [section 683], and upon which the Congress completes action before the end of the first period of 45 calendar days of continuous session of the Congress after the date on which the President's message is received by the Congress." ICA, § 1011(3); 2 U.S.C. § 682(3).

period appropriation, pursuant to the President's transmission of a rescission proposal, to continue through the date on which the funds would expire.

Powers Granted by the ICA are Limited

To interpret the ICA, we begin with the text of the statute and give ordinary meaning to statutory terms, unless otherwise defined. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006). Section 1012(b) states that funds proposed to be rescinded "shall be made available for obligation 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 . . . ." Use of the conjunction "unless" denotes that the clause that follows provides an exception to the rule that precedes the term. *See American Heritage Dictionary* (4th ed. 2009) (defining "unless" as "except on the condition that" and "except under the circumstances that"). Further, "shall," in the context of a statute, generally means "must." *Ballentine's Law Dictionary* (3d ed. 2010) (defining shall as "the equivalent of 'must,' where appearing in a statute"). *See also Western Minnesota Municipal Power Agency v. FERC*, 806 F.3d. 588, 592 (D.C. Cir. 2015) ("shall give preference" was a mandatory directive to the commission); *Drummond Coal Co. v. Watt*, 735 F.2d 469, 473 (11th Cir. 1984) (noting "'shall' is a mandatory, not permissive form"). The phrase "shall be made available" thus constitutes a mandatory directive that funds proposed for rescission be made available for obligation, and the term "unless" denotes the single exception to this requirement. The text of section 1012(b) then provides that the only mechanism that permits budget authority to be permanently withheld is Congress's completion of action on a rescission bill within the 45-day period.

An appropriation is available to incur new obligations only during its period of availability, which, for a fixed-period appropriation, is a finite period of time.[3] *See* 31 U.S.C. § 1551(a)(3). *See also* 31 U.S.C. §§ 1501, 1502 (obligation of a fixed-period appropriation must correspond to the *bona fide* needs of the appropriation's period of availability and must be executed before the end of such period). For example, an agency may use a one-year appropriation to obligate the government for expenses properly chargeable to that year, or may use a multiple-year appropriation to obligate the government for expenses properly chargeable to that multiple-year period. But the government may not incur obligations against such appropriations after the relevant time frame, as the budget authority's period of availability would have ended.

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[3] An obligation is defined as a "definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States." *Glossary*, at 70. *See also* B-325526, July 16, 2014.

Immediately after the period of availability for obligation of a fixed-period appropriation ends, the budget authority is “expired” and no longer available to incur new obligations.[4] *Glossary*, at 23 (defining expired budget authority). *See also* 18 Comp. Gen. 969 (1939). An expired account is only available to record, to adjust, and to liquidate obligations properly chargeable to that account during the account’s period of availability. 31 U.S.C. § 1553(a). Notably, the permissible uses of an expired appropriation relate back to obligations incurred during the period of availability of the funds and do not constitute new obligations themselves.

The plain language of section 1012(b) provides that absent Congress’s completion of action on a rescission bill rescinding all or part of amounts proposed to be rescinded within the prescribed 45-day period, *such amounts must be made available for obligation*. The authority to withhold is not severable from the provision’s requirement regarding the release of the funds. Indeed, the provision permits a *temporary* withholding of budget authority, and otherwise requires its availability for obligation in all other circumstances. As budget authority is available to incur obligations only during its period of availability, implicit in the ICA’s requirement under section 1012(b) that budget authority be “made available for obligation” is that such budget authority must not be expired. Because a fixed-period appropriation is current only for a definite period of time, section 1012(b) of the ICA requires that if Congress does not enact a rescission bill, the appropriation must be made available for obligation during that finite period. After this finite period has ended, the appropriation is expired and cannot be available for new obligations.

Consequently, the ICA 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 section 1012(b) 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. The ICA represents an agreement between the legislative and executive branches, whereby the President may withhold budget authority for a limited period during which Congress may *consider* the corresponding proposal to rescind the amounts using

[4] An expired account closes five years after the period of availability for obligation ends, and any remaining balance is then cancelled. 31 U.S.C. § 1552(a).

expedited procedures. The expiration of these amounts would frustrate the design of the ICA, as it would contravene the plain meaning of section 1012(b), which requires that amounts not rescinded during this period of *consideration* be “made available for obligation.”

Regardless of whether the 45-day period for congressional consideration provided in the ICA approaches or spans the date on which funds would expire, section 1012(b) requires that budget authority be made available in sufficient time to be prudently obligated. 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. We have previously signaled that the consequence of an unenacted rescission proposal should be the full and prudent obligation of the budget authority. B-115398, Aug. 27, 1976. In 1976, the President submitted a special message for which the 45-day period would end on September 29, 1976, leaving one day to obligate appropriations that were withheld. *Id.* We noted this one-day period could be insufficient to prudently obligate the funds. *Id*. We found the timing of the proposal “particularly troublesome” as it could “operate to deny to the Congress the expected consequence of its rejecting a rescission proposal—the full and prudent use of the budget authority.” *Id.*

We have drawn similar conclusions concerning deferrals under the ICA. In such cases we have noted that deferred funds must be released in sufficient time to allow them to be prudently obligated. *See* B-216664, Apr. 12, 1985 (emphasizing that deferral, under the President’s sixth special message for fiscal year 1985, of amounts scheduled to expire should not extend beyond the point at which the funds could be prudently obligated). *See also* 54 Comp. Gen. 453 (1974) (recognizing that a deferral of budget authority that “could be expected with reasonable certainty to lapse before [it] could be obligated, or would have to be obligated imprudently to avoid that consequence” constitutes a de facto rescission, and must be reclassified as a rescission proposal).

The legislative history of the ICA supports this construction of section 1012(b). During consideration of the report of the committee of conference on H.R. 7130, 93rd Cong. (1974), which was ultimately enacted into law as the ICA, members recognized that affirmative congressional action is required for a rescission of funds under the language of section 1012. Senator Sam J. Ervin, Jr., the sponsor of a related bill, stated regarding section 1012:

> “[The purpose] is to provide an orderly method by which differences of opinion may be reconciled between the President and Congress in respect to the amounts of appropriations sought. . . . The recommendation of the President that an appropriation be eliminated or reduced *in and of itself would have no legal effect whatsoever*. In other words, for it to become effective, both Houses of Congress, by a majority vote, would have to take action either eliminating the appropriation or reducing the appropriation. . . . I might say that the

> 45-day provision is placed in the bill for the purpose of spurring speedy congressional action, but with recognition of the fact that Congress cannot deprive itself of any other power it has under the Constitution."

120 Cong. Rec. 20,473 (June 21, 1974) (statement of Sen. Ervin) (emphasis added). As one member stated succinctly when discussing similar language: "the impoundment fails unless Congress acts affirmatively." 119 Cong. Rec. 15,236 (May 10, 1973) (statement of Sen. Roth) (debating S.373, which would have required an impoundment to cease within 60 days unless it had been ratified by Congress). *See also* H.R. Conf. Rep. No. 93-1101, at 76 (1974); S. Conf. Rep. No. 93-924, at 76 (1974) ("Unless both Houses of Congress complete action on a rescission bill within 45 days, the budget authority shall be made available for obligation.").

Congress considered bill language under which an impoundment would have continued indefinitely unless Congress took specific action to affirmatively *disapprove* of the impoundment. H.R. 8480, 93rd Cong. (1973) (providing that an impoundment "shall cease *if* within [60] calendar days of continuous session after the date on which the message is received by the Congress the specific impoundment shall have been *disapproved* by either House . . . ." (emphasis added)). However, Congress did not enact such language.[5] Instead, Congress enacted legislation under which an impoundment becomes permanent only if Congress enacts appropriate legislation through the processes of bicameralism and presentment.

Under the Constitution, the President must take care to execute the appropriations that Congress has enacted. Though the ICA permits the President to withhold amounts from obligation under limited circumstances, the amounts are permanently rescinded only if Congress takes affirmative legislative action through the constitutional processes of bicameralism and presentment. One must read the ICA as a whole. The Act outlines a process, and affords the President limited authority to withhold appropriated amounts while Congress expedites its consideration of the President's legislative proposal to rescind the already enacted appropriations. It would be an abuse of this limited authority and an interference with Congress's constitutional prerogatives if a President were to time the withholding of expiring budget authority to effectively alter the time period that the budget authority is available for obligation from the time period established by Congress in duly enacted appropriations legislation. It would be inimical to the ICA and to its constitutional underpinnings for the executive to avail itself of the withholding authority in the ICA, but to ignore the remainder of the process. *See generally* B-330376, Nov. 30, 2018

[5] Congress did, however, initially enact language requiring that deferred funds be made available if either house of Congress passed an "impoundment resolution" disapproving of the deferral. Pub. L. No. 93-344, § 1013(b) (prior to 1987 amendment).

(citing *NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004)) (finding that agencies "cannot have it both ways," claiming both the benefit of adhering to a statutory provision, while simultaneously arguing that the requirements of the provision do not apply). Therefore, amounts proposed for rescission must be made available for prudent obligation before the amounts expire, even where the 45-day period for congressional consideration provided in the ICA approaches or spans the date on which funds would expire: the requirement to make amounts available for obligation in this situation prevails over the privilege to temporarily withhold the amounts.

OMB asserts that the ICA does not preclude an impoundment from persisting through the date on which amounts would expire. Response Letter, at 2. Specifically, OMB relies on the purported silence of section 1012 with regard to the President's ability to propose rescissions under the ICA late in the fiscal year, as compared to the language in section 1013, which governs the deferral of budget authority. *Id.* In particular, section 1013 states that 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[,]" and also provides that the provisions of the section, which necessarily includes this proscription, do not apply to amounts proposed for rescission under section 1012. ICA, §§ 1013(a), (c); 2 U.S.C. §§ 684(a), (c). According to OMB, these distinctions demonstrate that section 1012 does not require the President to make withheld budget authority available for obligation before the end of the fiscal year. Response Letter, at 1. Under OMB's rationale, the ICA grants the President authority to withhold funds for the entire 45-day period, even if such withholding would result in the expiration of impounded balances.

We disagree with OMB's position. As a practical matter, OMB's interpretation of the ICA would grant the President unilateral authority to rescind funds that are near expiration by altering the time period that the budget authority is available for obligation from the time period established in existing law. Suppose the President were to transmit a special message less than 45 days before amounts are due to expire. In OMB's view, an impoundment could continue through the funds' date of expiration—at which point the funds would no longer be available for new obligations. Therefore, fiscal year funds proposed for rescission in a special message late in the fiscal year, even if not legally rescinded by the enactment of legislation, would be effectively rescinded if Congress takes no action at all. In OMB's view, only through affirmative legislative action could Congress prevent the rescission of funds that the President proposes for rescission in a special message transmitted close to the date on which the funds would expire. OMB's reading of the ICA would preempt the congressional process by which the budget authority's period of availability was established, fundamentally ceding Congress's power of the purse to the President.

This interpretation would contradict the plain meaning of section 1012, which, by its terms, requires that amounts not rescinded through a rescission bill be made available for obligation. As previously discussed, this requirement that amounts be made available for obligation already limits the time frame during which such amounts may be permissibly withheld; there is no need in section 1012 for language that specifically prohibits amounts from being withheld beyond the end of the fiscal year.

In addition, the legislative history of the ICA indicates that the distinctions between section 1012 and section 1013, on which OMB relies, do not carry the implications that OMB suggests. *See* 120 Cong. Rec. at 20,473 (statements of Sen. Ervin and Sen. McClellan) (discussing distinction between deferral and rescission proposals). Unlike a rescission proposal, through which the President seeks the permanent cancellation of budget authority and may temporarily withhold amounts pending congressional consideration, the ultimate objective of a deferral proposal is a temporary withholding only. Section 1013 was crafted to govern this temporary withholding of budget authority and, thus, specifies that amounts may not be withheld beyond the end fiscal year. *See id.* In contrast, section 1012 limits withholding to the prescribed 45-day period, absent Congress's completion of a bill rescinding the amounts proposed for rescission. Neither does section 1013(c), which provides that the provisions of section 1013 do not apply to rescission proposals submitted under section 1012, support OMB's position that there is no restriction on when the President may submit a rescission proposal. Rather, section 1013(c) was intended to clarify that any action that would seek the permanent cancellation of budget authority must be governed by the more stringent provisions of section 1012. *See id.* (statement of Sen. Ervin) ("Any action or proposal which results in a permanent withholding of budget authority must be proposed under section 1012. Section 1013(c) specifically provides that section 1013 does not apply to cases to which section 1012 applies. Only temporary withholding may be proposed under section 1013 . . . .").

Through the ICA, Congress did not grant the President the extraordinarily broad rescissions authority that OMB asserts. Indeed, the ICA grants the President no authority whatsoever to rescind funds. The Act allows the President to transmit legislative proposals for rescission to Congress, while granting the President authority to withhold the funds for limited periods of time while Congress considers the proposals. Congress considered, and did not enact, language that would have granted the President authority to propose rescissions that would take permanent effect if Congress took no action. Instead, as we discussed above, under the ICA only Congress may rescind budget authority.

Under the Constitution, Congress enacts laws, and the President must take care to faithfully execute the terms of those laws, including appropriations acts. Within this framework, Congress enacted the ICA, which granted the President strictly circumscribed authority to temporarily withhold funds from obligation. The overarching constitutional framework of the executive and legislative powers, as well as the statutory text and legislative history of the ICA, provide no basis to construe the ICA as a mechanism by which the President may, in effect, unilaterally shorten the availability of budget authority by transmitting strategically-timed special messages. Rather, 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.

Prior Opinions

We have previously considered situations in which the President transmitted special messages concerning amounts that were near their date of expiration. We have intimated that in such a situation, the President may withhold the budget authority from obligation for the duration of the 45-day period, and that Congress must take affirmative action to prevent the withheld funds from expiring. *See, e.g.*, B-115398, Dec. 15, 1975. In some instances we have simply noted that funds may expire, without stating whether the funds were properly withheld or reporting that they must be made available for obligation. *See, e.g.*, B-115398, Aug. 27, 1976. *See also* B-220532, Sept. 19, 1986 (reclassifying deferral as rescission proposal, recognizing potential for funds to expire before being able to be obligated for intended purpose). As we explain below, in light of Supreme Court precedent and subsequent amendments to the ICA, we overrule these prior opinions.

In the President's second special message for fiscal year 1976, submitted on July 26, 1975, he included two rescission proposals of budget authority scheduled to expire on September 30, 1975.[6] B-115398, Aug. 12, 1975. In our review of the special message, we stated that these amounts would lapse nearly a month before expiration of the 45-day period, B-115398, Aug. 12, 1975, and, in a subsequent report on the status of funds, confirmed the amounts had in fact lapsed during the 45-day period, B-115398, Dec. 15, 1975. In our report on the status of the funds, we stated that "having to wait 45 days of continuous session before it can be determined that a proposed rescission has been rejected is a major deficiency of the [ICA]." B-115398, Dec. 15, 1975. We offered that Congress should have an affirmative means within the Act to address scenarios such as this, by, for example "changing the Act to allow a rescission resolution as is now allowed for deferrals, or changing the Act to prevent funds from lapsing where the 45-day period has not expired." *Id.* We stated that with respect to the two rescission proposals, "Congress was unable, under the Act, to reject the rescission in time to prevent the budget authority from lapsing."[7] *Id.*

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[6] Prior to fiscal year 1977, the fiscal year began on July 1 and extended through June 30 of the following year—for example, fiscal year 1976 began on July 1, 1975 and extended through June 30, 1976. Beginning on October 1, 1976, the fiscal year time frame changed to October 1 through September 30. *See* Pub. L. No. 93-344, title V, § 501, 88 Stat. at 321.

[7] Similarly, the President submitted a special message about a year later, on July 19, 1977, proposing the rescission of budget authority that expired on

(continued...)

When the ICA was enacted, it required deferred funds to be made available if either house of Congress passed an "impoundment resolution" disapproving of the deferral. Pub. L. No. 93-344, § 1013(b) (prior to 1987 amendment). In 1975, we suggested that Congress create an analogous process to enable rejection of a rescission proposal. B-115398, Dec. 15, 1975. However, our statement predated *INS v. Chadha*, 462 U.S. 919, in which the Supreme Court held a one-house veto provision to be unconstitutional because it was an exercise of legislative power that circumvented the procedures of bicameralism and presentment. The deferral provision in the ICA was later eliminated in the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987.[8] Pub. L. No. 100-119, title II, § 206.

Our 1975 opinions are based on the premise that Congress could amend the ICA to provide Congress with a unilateral mechanism to reject a rescission proposal. In addition to *Chadha,* other Supreme Court decisions also have resoundingly invalidated this premise. *See Clinton*, 524 U.S. 417, 438–41; *Chadha*, 462 U.S. at 951–58. As the Court made clear in *Clinton*, the Constitution vests the President with authority to "initiate and influence legislative *proposals*." 524 U.S. at 438 (emphasis added). A rescission proposal is one such legislative proposal. The rescission proposal does not have the force of law: "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Id*.

Because bicameral passage by Congress is necessary for the President's proposal to become law, no congressional action is necessary to invalidate the President's proposal. Without affirmative congressional action, the President's proposal remains just that: a proposal. Our 1975 opinions intimate that, under some circumstances, congressional inaction on a rescission proposal can be tantamount to affirmative congressional action to enact the rescission proposal. This interpretation would, in effect, give the President power to amend or to repeal previously enacted appropriations merely by calibrating the timing of the submission of a special message. This interpretation is clearly contrary to the Supreme Court's rulings in *Chadha* and *Clinton*. *See* 524 U.S. at 448–49; 462 U.S. at 951–58. Therefore, we overrule our prior inconsistent opinions.

(...continued)
September 30, 1977. B-115398, Aug. 5, 1977. The funds lapsed prior to completion of the 45-day period on October 4, 1977. B-115398, Oct. 26, 1977.

[8] We initially opined that *Chadha* did not implicate the disapproval provision in the ICA. B-196854.3, Mar. 9, 1984. However, as Congress ultimately amended the ICA and eliminated the provision, this case is no longer applicable.

CONCLUSION

The terms of the ICA are strictly limited. They vest in the President limited authority to propose a rescission of budget authority and to withhold such budget authority from obligation for a limited time period during which Congress may avail itself of expedited procedures to consider the proposal. However, the statutory text and legislative history of the ICA, Supreme Court case law, and the overarching constitutional framework of legislative and executive powers provide no basis to construe the ICA as a mechanism by which the President may, in effect, unilaterally shorten the availability of budget authority by transmitting rescission proposals shortly before amounts are due to expire.

To dedicate such broad authority to the President would have required affirmative congressional action in legislation, not congressional silence. *See, e.g.*, B-303961, Dec. 6. 2004 (declining to interpret a general "notwithstanding" clause to imply a waiver of the Antideficiency Act without indication that Congress intended to relinquish its "strongest means" to enforce its power of the purse). To paraphrase the Supreme Court, Congress does not alter the fundamental details of its constitutional power of the purse through vague terms or ancillary provisions —"it does not, one might say, hide elephants in mouseholes." *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (declining to interpret a statute in a manner inconsistent with its plain meaning). A construction of the ICA that would permit the withholding of funds proposed for rescission through their date of expiration would be precisely this elephant.

Though the ICA permits the President to withhold amounts from obligation under limited circumstances, the amounts are rescinded only if Congress takes affirmative legislative action through the constitutional processes of bicameralism and presentment. Therefore, 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. We overrule prior inconsistent GAO opinions.

If you have any questions, please contact Julie Matta, Managing Associate General Counsel, at (202) 512-4023, or Omari Norman, Assistant General Counsel for Appropriations Law, at (202) 512-8272.

Sincerely,

Thomas H Armstrong

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