



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

January 19, 2021

Thomas M. Armstrong
General Counsel
Government Accountability Office
Washington, D.C. 20548

RE: B-331564, Office of Management and Budget—Withholding of Ukraine Security Assistance

Dear Mr. Armstrong:

This letter responds to the Government Accountability Office's (GAO) opinion of January 16, 2020¹ and follow-up letter sent on February 14, 2020, in which GAO alleged that the Office of Management and Budget (OMB) violated the Impoundment Control Act of 1974 (ICA) by temporarily withholding funds appropriated for security assistance to Ukraine.² Despite these assertions, OMB did not violate the ICA. OMB's actions were entirely consistent with Federal law and the President's duties under the Constitution.

In its January 16 opinion, GAO claimed that OMB had not provided the information necessary for GAO to fulfill its duties under the ICA. In making this statement, GAO failed to acknowledge that OMB responded to every question that GAO originally posed. Further, in GAO's February 14 letter, GAO posed seven pages of entirely new questions that were unrelated to the inquiries in your prior communication. GAO also stated that it "consider[s] a reluctance to provide a fulsome response to have constitutional significance," and, in so stating, appears to cloak itself in the mantle of Congress. OMB respects GAO's role as a legislative branch instrumentality to serve Congress, but notes that: (1) GAO is not Congress, and (2) noncompliance with GAO's inquiries (or, for that matter, Congressional inquiries) is not a constitutional violation.

OMB has no desire to create needless inter-branch conflict. But full disclosure of Executive Branch information to GAO is not part of the proper balance of power between the branches. Information about the internal deliberations of Executive Branch staff prior to final decisions has long been recognized as privileged from disclosure. The deliberative process privilege is necessary to allow effective decision-making processes within government agencies, protecting "the frank discussion of legal and policy issues" by ensuring that agencies are not "forced to operate in a fishbowl."³ This privilege has

¹ B-331564, *Office of Management and Budget—Withholding of Ukraine Security Assistance* (Jan. 16, 2020) [hereinafter "January 16 Opinion"].

² Pub. L. No. 93-344, tit. X, 88 Stat. 297, 336 (1974).

³ *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

been recognized as applying to demands from Congressional bodies.⁴ Therefore, in the interest of protecting the quality of agency deliberations, OMB is withholding certain requested information from disclosure. You will find the responses to GAO's new questions attached to this letter.

OMB further responds to GAO's January 16 opinion as follows:

GAO's January 16 opinion completely failed to substantively address OMB's explanation that, "For decades, OMB has routinely used its apportionment authority to prevent funds from being used: (1) during certain time periods, (2) for certain programs and activities, or (3) without adequate assurances from Federal agencies that the funds will be used effectively consistent with law, and in accordance with programmatic need."⁵ OMB explained in detail how it has used the President's authority to apportion funds pursuant to 31 U.S.C. §§ 1512–1513, that this authority is essential to ensure that appropriated funds are not exhausted too early in the annual spending cycle, that funds may be apportioned according to time or purpose, and that there is nothing controversial about the routine use of this longstanding statutory authority.⁶ Even though it should be self-evident, OMB explained to GAO that: "Pauses in obligational authority are necessary for proper stewardship of taxpayer funds."⁷

For many years across many Administrations, OMB's use of this authority on behalf of the President has been a principal tool whereby it manages the ongoing operations of the Executive Branch. "OMB regularly uses this apportionment authority to temporarily pause agency obligations to obtain additional information needed to determine the best possible use of the funds consistent with the law."⁸ Federal law *mandates* that OMB apportion appropriated funds in a manner that makes portions temporarily unavailable as OMB "considers appropriate."⁹

Contrary to GAO's view, the ICA's bar on "policy deferrals" does not mean that the Executive Branch may *never* pause spending in order to make policy decisions. Indeed, such a conclusion 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, whether or not such funding was wise. 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.

⁴ See *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101, 104 (D.D.C. 2016) ("there is an important constitutional dimension to the deliberative process aspect of the executive privilege, and that the privilege could be properly invoked in response to a legislative demand.").

⁵ OMB General Counsel Letter to GAO, *Re: B-331564, Withholding of Ukraine Security Assistance* at 4 (Dec. 11, 2019) (emphasis added) [hereinafter "OMB December Letter"].

⁶ *Id.* at 3–5.

⁷ *Id.* at 4.

⁸ *Id.* at 5.

⁹ 31 U.S.C. § 1512(a)(2).

Moreover, the ICA’s deferral provisions cannot be read in a way that negates OMB’s apportionment authority.¹⁰ Insofar as possible, Acts of Congress must be read harmoniously so that each statute is given effect.¹¹ In its opinion, GAO does not even address the existence of OMB’s apportionment authority, or the fact that OMB is required by law to abide by it.

GAO also failed to respond to OMB’s argument regarding the longstanding practice of individual members of Congress issuing holds on funds. As OMB pointed out in its December 2019 letter, GAO has long recognized as perfectly legal the practice of agencies regularly delaying spending at the request of Congressional committees and their staff—an inter-branch courtesy that is not based on any constitutional or statutory authority.¹²

GAO says that it is its “practice to investigate withholdings of budget authority and to report to Congress when an agency fails to comply with the Impoundment Control Act’s requirements.”¹³ To this OMB responded, “OMB is aware of instances in which Members of Congress demanded that agencies withhold funds for months—and even years—beyond the period required by statute for reasons wholly unrelated to the purpose of the appropriation. OMB respectfully suggests that GAO take an interest in this practice, as well.”¹⁴ As OMB has already stated, “If compliance with constitutionally non-binding directives from Congressional committees to ‘hold’ funds is not a deferral, then certainly a delay in obligating funds arising from a Presidential direction that a policy process is necessary prior to making obligations cannot be [a deferral].”¹⁵ GAO has never found fault under the ICA with agencies accommodating requests from Members of Congress in this way, even though such Members have no legal authority whatsoever to direct the obligation of funds after Congress has appropriated those funds.

Sincerely,



Mark R. Paoletta
General Counsel

Attachment

¹⁰ OMB December Letter at 6.

¹¹ *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662–63 (2007).

¹² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-464SP, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2-50 to -51 (4th ed. 2016).

¹³ GAO Letter in B-331564, *Office of Management and Budget—Withholding of Ukraine Security Assistance* at 1 (Nov. 25, 2019).

¹⁴ OMB December Letter at 8 n.24 (emphasis added).

¹⁵ *Id.* at 9.

ATTACHMENT A

1. It is our understanding that OMB issued letter (1) on August 3, 2019, letter (2) on August 9, 2019, and letter (3) on August 29, 2019. Because letters (1) and (3) are undated, please confirm the date OMB sent each reapportionment letter to State and USAID.

Response: Those dates are correct.

2. For each account affected by the August 3, 2019, reapportionment letter, please provide a copy of each apportionment schedule OMB approved during the account's period of availability.

Response: OMB provided these apportionments to GAO in its response on this engagement (B-331564) on December 19, 2019.

3. Please explain whether OMB's decision to issue the August 3, 2019, reapportionment letter was related to a potential rescission proposal. If not, please explain OMB's reason for issuing the August 3, 2019, reapportionment letter.

Response: This request seeks information that is protected by the deliberative process privilege. The Administration was considering several uses of the funds in question.

a. Please provide a copy of any written requests OMB made to State or USAID in fiscal year 2019 relating to a potential rescission proposal and the dates on which OMB made such requests.

Response: This request seeks information that is protected by the deliberative process privilege.

b. Please provide copies of State and USAID's responses to the August 3, 2019, reapportionment letter, if any.

Response: This request seeks information that is protected by the deliberative process privilege.

c. Please identify and explain the authority under which OMB issued the August 3, 2019, reapportionment letter.

Response: These letters were issued consistent with 31 U.S.C. § 1512(b)(1)(A), which provides that “[a]n appropriation subject to apportionment is apportioned by...months, calendar quarters, operating seasons, *or other time periods*” (emphasis added), as well as 31 U.S.C. § 1513. The funds were made available after OMB received an accounting of current unobligated balances in the relevant accounts. (The letter noted that funds would be made available three days after

OMB received that accounting, though in fact OMB made the funds available sooner than that once the accounting had been received.)

4. Regarding the August 9, 2019, reapportionment letter, State and USAID told us that they "advised OMB that the daily rate limitation is not consistent with prior year-end spending guidance and practice." State and USAID also told us that they requested that OMB modify the daily rate to ease execution. Regarding the August 29, 2019, reapportionment letter, State and USAID told us that they "advised OMB that the weekly rate limitation is detrimental to our operations, not consistent with prior year-end spending guidance and practice, and has required changes to our established financial processes."

a. Please provide copies of any communications State or USAID made to OMB regarding the impact of the reapportionments on State or USAID's ability to obligate amounts in the affected accounts. Please provide a copy of and explain OMB's response, if any, to State or USAID's requests to modify the apportionment rates in the August 9 or August 29, 2019, reapportionment letters.

Response: This request seeks information that is protected by the deliberative process privilege.

b. Please explain whether OMB's decisions to issue the August 9 or August 29, 2019, reapportionment letters were related to a potential rescission proposal and, if not, please explain OMB's reason or reasons for issuing these reapportionment letters. Please explain whether reapportioning funds at a daily or weekly rate during the fourth quarter of the fiscal year is consistent with OMB's historical practice.

Response: This request seeks information that is protected by the deliberative process privilege. As stated above, however, the Administration was considering several uses of the funds in question. Furthermore, the manner in which an account was apportioned in the past does not bind the Executive Branch in how it may apportion funds pursuant to 31 U.S.C. § 1512.

c. Please provide OMB's legal views regarding whether the August 9 and August 29, 2019, reapportionment letters were consistent with OMB's authority under 31 U.S.C. § 1512 to apportion appropriations available for a definite period to avoid the need for a supplemental or deficiency appropriation.

Response: Consistent with § 1512, the funds referenced in the August 9 and 29 letters were made available at a rate that would allow for their full obligation before the end of the period of availability, and provided for faster rates of obligation upon request of the relevant agency, based on programmatic need.

5. In fiscal year 2018, State's appropriation provided that amounts appropriated for FMF "shall be obligated upon apportionment in accordance with paragraph (5)(C) of section 1501 (a) of title 31, United States Code." In the same Act, Congress appropriated an additional \$460,000,000 in fiscal year 2018

FMF-OCO funds to be available until September 30, 2019. OMB included the FMF-OCO account in the August 3, August 9, and August 29, 2019 reappropriation letters.

a. Please provide OMB's legal views regarding the effect of the phrase "shall be obligated upon apportionment" and explain whether it applies to FMF-OCO funds.

Response: Non-earmarked amounts appropriated to the Foreign Military Financing Program account (FMF) for the Department of State (State) are initially apportioned on an "unallocated" line. Funding on the unallocated line is not considered obligated for purposes of the proviso under the FMF heading until the funding is allocated to a specific country or program. This approach ensures that those funds are not obligated until any pre-obligation requirements have been completed, including any statutorily required congressional notification (CN) process. Once any notification or other requirements have been completed, the funds are moved to a country or program line on the apportionment and considered obligated at that time. The obligation of funds through the apportionment typically occurs at the very end of the fiscal year. The practice of apportioning funds as "unallocated" pending the CN process has been in place since at least 1991.

The FMF-Overseas Contingency Operations (OCO) appropriation in title VIII of the FY 2018 State Appropriations Act (Division K, Public Law 115-141) provided "an additional amount for 'Foreign Military Financing Program' ... to remain available until September 30, 2019." The FMF-OCO funds, therefore, were subject to the same terms and conditions as funds under the FMF heading. Moreover, section 8002 of the FY 2018 appropriations Act explicitly states that: "Unless otherwise provided for in this Act, the additional amounts appropriated by this title to appropriations accounts in this Act shall be available under the authorities and conditions applicable to such appropriations accounts."

b. Please explain the typical process by which State requests and OMB approves apportionments for FMF and, if different from the process for FMF, FMF-OCO funding.

Response: Once the Director of the Office of Foreign Assistance at State approves FMF or FMF-OCO funds and all pre-obligation requirements have been addressed, including any applicable Congressional notification requirements, State informs the Defense Security Cooperation Agency (DSCA) that DSCA is authorized to request the apportionment of FMF and FMF-OCO funds from OMB. DSCA requests apportionment from OMB, and subsequently OMB apportions the funds.

c. The August 9, 2019, reappropriation letter provided that, among other accounts, the fiscal year 2018 FMF-OCO funds "shall be obligated at a daily rate." In light of OMB's response to Question 5.a. and the fact that the congressional notification for the FMF-OCO funds was not sent to Congress until September 11, 2019, please provide OMB's legal views regarding whether the August 9, 2019, apportionment of

FMF-OCO funds violated the Antideficiency Act.

Response: The August 9, 2019, letter stated that funds in the affected accounts, including FY 2018 FMF-OCO funds, were to be obligated at a daily rate calculated to obligate remaining funds by September 30, 2019. This letter affected several accounts other than FMF and FMF-OCO, and those other accounts are not “obligated upon apportionment” like FMF. As discussed above, because the FMF funds are not obligated until apportioned to a country or program line, the letter itself did not obligate the FMF funds at issue and thus did not implicate the Antideficiency Act. The FY 2018 FMF-OCO funds for Ukraine were apportioned (and therefore obligated) on September 29, 2019, consistent with applicable congressional notification requirements.

d. The August 29, 2019, reapportionment letter provided that, among other accounts, the fiscal year 2018 FMF-OCO funds "shall become available for obligation" at a weekly rate. In light of OMB's response to Question 5.a. and the fact that the congressional notification for the FMF-OCO funds was not sent to Congress until September 11, 2019, please provide OMB's legal views regarding whether the August 29, 2019, apportionment of FMF-OCO funds violated the Antideficiency Act.

Response: See previous answer.

6. USAID explained that, of the total unobligated balance for the USAID accounts that were affected by the August 3, August 9, and August 29, 2019, reapportionment letters, certain amounts were not made available to USAID for obligation because they were either not apportioned or allotted to USAID.

a. Please confirm whether OMB apportioned all the unobligated balances in the accounts affected by the reapportionment letters and, if not, please explain why.

Response: OMB apportioned all the unobligated balances requested by State and the U.S. Agency for International Development (USAID) in the accounts affected by the letters.

b. Please describe the process by which OMB usually approves apportionments of State and USAID funds and how, if at all, the process for approving the apportionments here differed from OMB's historical practice. If the process differed from historical practice, please explain why.

Response: Apportionments of funds take different forms. *See* OMB Circular A-11 § 120.39. Most routinely, upon an agency’s submittal of an apportionment request to OMB, OMB reviews the apportionment for consistency with the law, apportionment technical requirements, and Administration policy. Once any issues are resolved, OMB staff sign off on the apportionment in the MAX system, and forward the apportionment to the approving official for signature.

OMB may provide for a mid-year change to the apportionment. The August 2019 OMB letters were an example of such a change, in which the rate of obligations of previously apportioned funds was temporarily reduced while the Administration considered several uses of the funds within the discretion provided by the appropriations. The letter format was employed (rather than the use of the apportionment database system) for convenience, as is periodically done.

7. State explained that it transmitted the congressional notification for \$115 million in fiscal year 2019 FMF funds to OMB on June 21, 2019, and the congressional notification for \$26.5 million in fiscal year 2018 FMF-OCO funds within the European Regional program line items for Ukraine to OMB on August 14, 2019. State also explained that, as the result of interagency discussions, it later merged these amounts into one congressional notification. State transmitted this notification to OMB on September 6, 2019, and the notification was transmitted to Congress on September 11, 2019.

a. Please explain why the notifications for FMF funds were not submitted until September 11, 2019. In that regard, please explain OMB's process for reviewing these materials and what actions OMB took, if any, regarding each congressional notification between the date State first submitted the notification to OMB and the date the notification was ultimately transmitted to Congress. If applicable, provide details regarding the content of any interagency discussions that may have contributed to the timeline for transmitting the congressional notifications. Please provide dates for each action described.

Response:

- On June 21, 2019, State transmitted to OMB a draft CN that included FY 2019 FMF for Ukraine and other countries. OMB then engaged State and other interagency partners on FMF for Ukraine, including in interagency meetings.
- On July 26, 2019, State submitted CN 19-188 notifying FMF for other countries while the interagency discussions on FMF for Ukraine continued.
- On August 14, 2019, State transmitted to OMB a revised FMF CN for multiple countries and programs, including \$26.5 million for FY 2018 FMF-OCO for Ukraine.
- Because interagency discussions were ongoing, on August 16, 2019, State transmitted a revised version of the FMF CN that did not include Ukraine.
- On September 11, 2019, State transmitted CN 19-286 to Congress, notifying a total of \$141 million in FMF for Ukraine (\$26.5 million FY 2018 FMF-OCO and \$115.0 million FY 2019 FMF).

b. Please provide copies of any communications with State regarding the congressional notification.

Response: This request seeks information that is protected by the deliberative process privilege.

c. Please provide a copy of the congressional notifications State submitted to OMB and the congressional notification that was ultimately transmitted to Congress.

Response: OMB refers GAO to State for the congressional notifications that were transmitted to Congress. Drafts of such notifications are protected by the deliberative process privilege.

8. For each congressional notification State submitted for FMF and FMF-OCO funds during fiscal years 2015 through 2018, please provide the date on which OMB received the congressional notification from State and the date on which the congressional notification was transmitted to Congress.

Response:

Ukraine FMF Congressional Notifications FY 2015-2018

Fiscal Year	Amount	CN Sent to OMB	Sent to Hill
FY 2018 FMF OCO	\$26.5M	8/14/19 (initial submission) & 9/6/19 (resubmit)	9/11/19
FY 2018 FMF	\$95M	8/1/18	8/31/18
FY 2017 FMF-OCO	\$85M	1/9/18	1/19/18
FY 2017 FMF OCO (D-ISIS)	\$14M	1/10/17	1/23/2017
FY 2016 FMF-OCO	\$4.68M	9/11/17	9/14/2017
FY 2016 FMF	\$76.32M	6/8/16	8/10/2016
FY 2016 FMF- OCO (CR)	\$4M	No CN Needed	N/A
FY 2015 FMF-OCO	\$47M	No CN Needed	N/A

9. Please provide OMB’s legal views regarding whether OMB’s actions related to the August 3, August 9, and August 29, 2019, reapportionment letters and funds appropriated to State for foreign military financing have been consistent with the Impoundment Control Act.

Response: OMB's actions related to the August 3, August 9, and August 29, 2019, letters¹ and funds appropriated for FMF were consistent with the ICA. On August 3, 2019, OMB issued a letter that made previously apportioned unobligated funds in State's FY 2018 FMF-OCO account (TAFS 11-1082 2018/2019) unavailable for obligation until three business days after OMB received an accounting from State on the current outstanding unobligated resources in the account, so that the Administration could determine the best use of the funds within the scope of the appropriations. These funds were subsequently made available in an August 9, 2019, letter apportionment, subject to an even daily rate for the remainder of the fiscal year, and providing that the agencies could request a higher rate if necessary to meet programmatic requirements. The August 29, 2019, letter made remaining unobligated balances in the account subject to a weekly rate, rather than a daily rate, effective on September 1, 2019. On September 11, 2019, State transmitted notice to Congress of its intent to obligate FY 2018 FMF-OCO and FY 2019 FMF funds, pursuant to congressional notification requirements included in the FY 2018 and FY 2019 appropriations Acts for the Department of State.²

OMB is statutorily required to apportion funds appropriated for a definite period so as to avoid a deficiency appropriation, and funds appropriated for an indefinite period to achieve the most effective and economical use of the funds.³ Thus, OMB may apportion an appropriation in a manner that temporarily precludes some portion of the funds from being available for obligation.⁴ While OMB's role in apportioning funds is in part to prevent agencies from exhausting appropriated funds prior to the expiration of the period of availability of such funds, that is not the extent of OMB's apportionment authority. Rather, the law affords OMB significant discretion to determine how and when funds are released to an agency.⁵

In managing Executive Branch appropriations, OMB regularly pauses for brief periods an agency's ability to spend funds. OMB does so for a number of reasons, including to ensure that the funds are being spent efficiently, to ensure that the funds are being spent in accordance with statutory directives, or to assess how or whether funds should be used for a particular activity within the discretion provided by law. Pausing before spending is a necessary part of program execution: before obligating appropriated funds, it is incumbent upon 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 taxpayer resources.⁶ Indeed, a conclusion that a pause—for even a few days—to determine how to spend funds constitutes a violation of the ICA would be constitutionally problematic. The President

¹ The letters did not apply to FY 2019 FMF funds.

² Consolidated Appropriations Act, 2018, Pub. L. No. 115-41, div. K, 132 Stat. 348 (2018); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. F, 133 Stat. 13 (2019).

³ 31 U.S.C. § 1512(a).

⁴ 31 U.S.C. § 1512(b)(1).

⁵ 31 U.S.C. § 1512(b)(2) (Appropriations shall be apportioned under paragraph (b)(1) in a manner the official designated in 31 U.S.C. § 1513 "considers appropriate."). The statute designates the President as the responsible official for the Executive Branch, and the President has delegated his authority to the Office of Management and Budget. Exec. Order No. 6166, § 16 (June 10, 1933), *as amended by* Exec. Order No. 12608, § 2 (Sept. 9, 1987), 3 C.F.R. 245 (1987 comp.).

⁶ Most commonly, OMB executes this action by placing a footnote on the apportionment that temporarily suspends obligations until the agency submits documentation to aid OMB in assessing the most efficient and effective use of the funds consistent with the law.

has a constitutional duty to take care that the laws be faithfully executed.⁷ He cannot fulfill that duty if he is unable to first take a reasonable time to determine what the law requires, and if discretion is provided in that law, how best to spend those funds.

In the case of the August 3 letter apportionment, OMB temporarily paused obligations from the FMF-OCO account to conduct an accounting of the account to determine the best use of the funds within the discretion afforded by the authorizing statute.

In addition, consistent with OMB's apportionment authority under 31 U.S.C. § 1512, OMB may spread funds within an account across the account's period of availability, dividing the funds evenly by quarters, months, days, or other time periods. The flat daily and weekly rates set in the August 9 and August 29 letter apportionments were consistent with OMB's authority under § 1512(b)(2) to apportion the funds by "other time periods" as OMB "considers appropriate." The apportionment letters made clear that the unobligated balances in the account were to be obligated at rates sufficient to ensure that the remaining funds would be obligated by the end of the fiscal year. Further, each apportionment letter expressly allowed for State and USAID to request a higher apportionment level where necessary for programmatic reasons in order to ensure the funds could be obligated prior to their expiration.

OMB's exercise of its statutory authority under 31 U.S.C. § 1512 to apportion funds to ensure that they are spent in accordance with statutory directives and last for the period of availability is different than a deferral under the ICA, which requires that a President not "defer" funds without prior notice to Congress. "Deferral" of budget authority is defined as:

- (A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities;
- or (B) 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.⁸

Under the ICA, "[d]eferrals shall be permissible only:

- (1) to provide for contingencies;
- (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or
- (3) as specifically provided by law.

No officer or employee of the United States may defer any budget authority for any other purpose."⁹

The definition of "deferral" under the ICA should be interpreted in a manner that is consistent with OMB's independent statutory requirement under § 1512 to ensure that funds are apportioned by:

⁷ U.S. CONST. Art. 2, § 3.

⁸ Congressional Budget and Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, tit. X, § 1011(1) (2 U.S.C. § 682(1)).

⁹ ICA § 1013(b) (2 U.S.C. § 684(b)).

- (A) months, calendar quarters, operating seasons, or other time periods;
- (B) activities, functions, projects, or objects; or
- (C) a combination of the ways referred to in clauses (A) and (B) of this paragraph.

In fact, OMB and GAO have historically read these two authorities—the ICA and OMB’s statutory apportionment authority—in a manner that gives effect to both provisions of law. In so doing, both agencies have long concluded that, despite the apparent breadth of the definition of “deferral” under ICA, there is necessarily a distinction between “deferrals”—which require the President to report to Congress pursuant to the ICA—and what have come to be known as “programmatically delays,” which do not. The GAO has been clear about this:

There is also a distinction between deferrals, which must be reported, and ‘programmatically’ delays, which are not impoundments and are not reportable under the Impoundment Control Act. A programmatically 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 . . . Since intent is a relevant factor, the determination requires a case-by-case evaluation of the agency’s justification in light of all of the surrounding circumstances.¹⁰

“Deferrals” occur when the intent behind withholding funds is *contrary to* the intent of the statute that provided the funds. “Programmatically delays,” on the other hand, occur when the Executive Branch determines there’s a need to step back and conduct a process, *consistent with* the intent of the statute, to determine the best policy for the efficient and effective use of the funds. As GAO notes, “programmatically delay” can take many forms, including conditions on the availability of funds not being met, contracting delays, time required to set up a program, delay due to pending issuance of necessary regulations, delay due to certain administrative determinations.¹¹

Another form that programmatically delay inevitably may take is when the Executive Branch needs time to develop or change its policy on implementing the underlying statutory authorization. When the Executive Branch is executing the laws, it is routinely necessary to reassess policy goals based on program effectiveness and other factors. Ensuring that there is time to conduct a meaningful process that results in successful policies (and that results in funds not being used in opposition to such policies in the meantime) implicitly requires that obligations pause until that policy process is concluded.¹²

¹⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-464SP, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2-50 (4th ed. 2016) (internal citations omitted).

¹¹ *Id.* at 2-50 to -51.

¹² OMB pointed out in its December 11, 2019, letter to GAO that GAO has long recognized as legal that agencies regularly delay spending at the request of Congressional committees and their staff. 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2-50 to -51. This inter-branch courtesy is not based on any constitutional or statutory authority. If compliance with non-binding directives from Congressional committee members and staffers to ‘hold’ funds is not a deferral, then a delay in obligating funds arising from a need to determine necessary steps for program implementation also cannot be a deferral. GAO has never addressed this inconsistency in its holdings.

OMB's exercise of its authority under 31 U.S.C. § 1512 and the Executive Branch's compliance with congressional notification requirements contained in the relevant appropriations Acts were at all times consistent with the terms of the ICA.