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Written Testimony

House Committee on the Budget

Hearing on
PROTECTING OUR DEMOCRACY: REASSERTING CONGRESS' POWER OF THE PURSE
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Chairman Yarmuth, Ranking Member Smith, and Members of the Committee:

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

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

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

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

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

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

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

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

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

In its Ukraine Opinion, GAO blurred the aforementioned distinction between deferrals based on policy disagreements, which are prohibited by the ICA, and deferrals due to programmatic delay, which are not. GAO effectively adopted the position that agencies are prohibited from ever pausing spending to determine the best uses of those funds, even where the law grants the Executive Branch discretion in how to implement the particular program. . . Contrary to GAO’s view, the ICA’s bar on “policy deferrals” does not mean that the Executive Branch may never pause spending to make policy decisions. Such an interpretation borders on the absurd, leading to a scenario whereby agencies would be forced to spend taxpayer funds before they had even determined, as allowed within their statutory discretion, how to do so.

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

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

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

Biden Administration Arguments Defending Impoundment of Funds are Wrong

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

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

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

GAO Should Have Begun Reviewing Biden Hold Much Sooner

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

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

The ICA Has Undermined Effective Stewardship of Federal Spending

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

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

In 1943, the House Appropriations Committee issued similar views: "Appropriations of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expected for that activity" and that the person in the Executive Branch responsible for spending an appropriated sum is obligated to render "all necessary service with the smallest amount possible within the ceiling figure fixed by Congress."

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

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

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

Our spending laws should encourage responsible and transparent spending decisions, with an aim toward saving taxpayer money whenever possible. This means that if Congress appropriates more money than what it costs to fully but efficiently execute government programs, the funds should be permitted to lapse. The ICA comes woefully short in each of these regards. Congress should use its powers under Article I of the Constitution to focus on passing detailed authorizing laws or re-authorizing the hundreds of laws that have expired. Well-crafted laws authorizing federal program are critically important to ensuring that the Executive can effectively fulfill congressional intent. Such laws should clearly detail the functions and scope of the government programs that Congress wants carried out. In contrast, appropriations laws (which are later provided to carry out authorizing laws) should be more general in nature.

It is that structure—robust and unambiguous authorizing laws that plainly articulate the will of Congress, followed by general appropriations in amounts that permit the President to execute the authorizing laws—that provides the proper balance of powers between the Executive and Legislative Branches. The proper balance is not Congress deciding precisely how much must be spent on a program and attempting to force the Executive to serve in a mere check-writing capacity. Rather, the proper balance involves Congress explaining in law what it wants done, providing sufficient appropriations to achieve those ends, and allowing the President—who, from his or her vantage point in the Executive Branch, necessarily has superior knowledge of agency operations—to carry out those mandates with less money than appropriated, if possible.

This is not a radical approach. This is common sense, and it is good government. But under the ICA, it is a flexibility that the President does not have. Reforming the ICA to return to a more equitable division of power between Congress and the President with respect to the expenditure of appropriated funds would allow prudent financial management to flourish.

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.³

³ As pointed out in the January 19th letter, "GAO's ability to avail itself of the ICA authority to bring suit against officials of the Executive Branch is questionable at best." In a 1987 signing statement amending the ICA, President Reagan wrote "The Supreme Court's recent decision in *Bowsher v. Synar* . . . makes clear that the Comptroller General cannot be assigned executive authority by Congress. In light of this decision, section 206(c) of the joint

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

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

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

[A]gencies, striving to avoid obligating funds in excess of the amount available in their appropriations in violation of the Anti-Deficiency Act, lapse a significant amount of funding every fiscal year. Prudent accounting requires that in many accounts some cushion be provided to ensure sufficient funds are available to cover unforeseen obligations. Often, such funds lapse. In such instances, has the agency unlawfully impounded funds when they lapse? If the agency does not report this to Congress, has the agency also violated the deferral provisions of the ICA? GAO has said no in both instances—despite the fact that funds that were appropriated were not spent during those funds' period of availability—notwithstanding the broad definition of deferral under the ICA. Yet when an agency similarly pauses obligations simply to decide how to spend funds within the law, GAO concludes that such is an ICA violation. Conflicting and inconsistent opinions such as these cannot be followed, and places the Executive Branch, which is constitutionally charged with executing the laws, in an impossible position.

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

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

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

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

I am happy to answer your questions.