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April 29, 2021

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

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

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

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

### Introduction

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

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

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

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

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

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

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

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

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

<sup>4</sup> 31 U.S.C. §§ 3526, 3529.

<sup>5</sup> 2 U.S.C. §§ 685–686.

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

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

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

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

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

### Changes to the Antideficiency Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Reporting Prosecutions of Antideficiency Act Violations*

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

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

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

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

<sup>26</sup> 31 U.S.C. § 1349.

<sup>27</sup> 31 U.S.C. § 1350.

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

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

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

### Changes to the Impoundment Control Act

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

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

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

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

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

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

<sup>33</sup> 2 U.S.C. §§ 681–688.

<sup>34</sup> *Id.* §§ 685–686.

<sup>35</sup> *Id.* § 687.

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

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

#### *Requiring the Prudent Obligation of Appropriated Budget Authority*

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

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

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

<sup>37</sup> 2 U.S.C. § 684.

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

<sup>39</sup> 2 U.S.C. § 683(b).

<sup>40</sup> 2 U.S.C. § 684(a).

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

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

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

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

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

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

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

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

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

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

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

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

<sup>46</sup> 2 U.S.C. § 686(a).

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

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

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

### *Reporting of Apportionments and Expired and Cancelled Balances*

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

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

<sup>49</sup> 2 U.S.C. §686(a).

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

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

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

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

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

<sup>53</sup> 31 U.S.C. § 1553(a).

<sup>54</sup> 31 U.S.C. § 1552(a).

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

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

<sup>57</sup> 31 U.S.C. § 1512(a).

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

## Changes to GAO's authorities

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

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

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

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

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

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

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

<sup>61</sup> 2 U.S.C. § 687.

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

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

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

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

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

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

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

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

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

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

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

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

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

Edda Emmanuelli Perez  
Deputy General Counsel