



Decision

Matter of: Office of Management and Budget—Application of the Impoundment Control Act to 2019 Apportionment Letters and a Congressional Notification for State Department Foreign Military Financing

File: B-331564.1

Date: February 10, 2022

DIGEST

For fiscal years 2018 and 2019, Congress appropriated lump-sum amounts for foreign assistance, including for foreign military financing (FMF). In August 2019, the Office of Management and Budget (OMB) issued a series of reapportionments for fifteen foreign assistance accounts, including FMF funds.

Both the appropriations for FMF and their underlying statutory authorizations require the administration to exercise substantial discretion to carry out the program. By law, the Department of State (State) must notify Congress before obligating FMF funds. In the summer of 2019, OMB and State engaged in interagency policy discussions while preparing to notify Congress of State’s intent to obligate a portion of the lump-sum FMF appropriation.

The Impoundment Control Act (ICA) prohibits any officer or employee from impounding funds—that is, withholding or delaying enacted budget authority from obligation or expenditure—unless the President transmits a special message to Congress. However, delays in the obligation of funds resulting from programmatic factors are not impoundments and, therefore, do not trigger the ICA’s requirement that the President transmit a special message. Based on the information before us, we conclude that OMB’s 2019 actions did not violate the ICA because these actions were reasonable exercises of programmatic discretion.

DECISION

Pursuant to our role under the Impoundment Control Act (ICA), we are issuing this decision regarding 2019 reapportionments of foreign assistance funds by the Office of Management and Budget (OMB) and policy discussions prior to congressional notification for Foreign Military Financing (FMF) funds. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, title X, § 1015, 88 Stat. 297,

336 (July 12, 1974), *codified at* 2 U.S.C. § 686. GAO must report to Congress when the President impounds funds without first transmitting a special message. *Id.* In carrying out this responsibility, GAO investigates potential impoundments by reviewing publicly available documents and requesting information from relevant agencies. It is our general practice to issue decisions on such matters where we find a violation of the ICA or where such a decision would advance congressional oversight.

In this decision, we are examining whether 2019 apportionment letters and consideration of congressional notification for Foreign Military Financing (FMF) funds violated the Impoundment Control Act.¹ In accordance with our regular practice, we contacted OMB, the Department of State (State), and the United States Agency for International Development (USAID) to seek additional factual information and their legal views on these matters.² We have received information from all three agencies.³

¹ In 2019, we issued a decision regarding OMB's withholding of security assistance for Ukraine. See B-331564, Jan. 16, 2020. We concluded that OMB had withheld funds appropriated specifically for the Ukraine Security Assistance Initiative (USAI) in violation of the ICA. In that decision, we noted that we continued to investigate whether OMB impounded additional foreign assistance funds, including funds State had designated for Ukraine.

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP; Letter from General Counsel, GAO, to General Counsel, OMB (Feb. 14, 2020); Letter from General Counsel, GAO, to Acting Legal Advisor, State (Feb. 14, 2020); Letter from General Counsel, GAO, to General Counsel, USAID (Feb. 14, 2020); Email from Staff Attorney, GAO, to Attorney-Advisor, State (Dec. 18, 2019); Letter from General Counsel, GAO, to Acting Director and General Counsel, OMB (Nov. 25, 2019); Letter from General Counsel, GAO, to Secretary of State and Acting Legal Adviser, State (Nov. 25, 2019); Letter from Managing Associate General Counsel, GAO, to Acting Legal Adviser, State (Oct. 7, 2019); Letter from Managing Associate General Counsel, GAO, to General Counsel, USAID (Oct. 7, 2019); Letter from Managing Associate General Counsel, GAO, to Acting Legal Adviser, State (Sept. 17, 2019); Letter from Managing Associate General Counsel, GAO, to General Counsel, USAID (Sept. 17, 2019); Letter from Managing Associate General Counsel, GAO, to Acting Legal Adviser, State (Aug. 23, 2019); Letter from Managing Associate General Counsel, GAO, to General Counsel, USAID (Aug. 23, 2019); *see also* Letter from Managing Associate General Counsel, GAO, to Deputy General Counsel, OMB (Aug. 23, 2019) (asking that OMB instruct State and USAID to respond to GAO directly).

³ Letter from USAID to General Counsel, GAO (Apr. 13, 2021); Letter from General Counsel, OMB, to General Counsel, GAO (Jan. 19, 2021) (OMB 2021 Response); Email from GAO Liaison, State, to Senior Staff Attorney, GAO (Jan. 19, 2021) (State

As explained below, we conclude that OMB did not violate the ICA by issuing these 2019 apportionment letters or by considering the congressional notification. The three apportionment letters were valid exercises of OMB's authority to apportion, and we see no evidence to suggest that OMB abused that power in contravention of the ICA. In addition, the congressional notification was prepared and transmitted in accordance with established practice, and the information before us shows that any delays in its transmission were the result of programmatic factors.

BACKGROUND

For fiscal years 2018 and 2019, Congress appropriated lump-sum amounts for foreign assistance, including FMF.⁴ For fiscal year 2019, Congress appropriated approximately \$5.9 billion for FMF.⁵ Congress also appropriated an additional \$460 million in Overseas Contingency Operations (OCO) funds for FMF for fiscal years 2018 and 2019.⁶

Apportionment Letters

Congress appropriates funds for one or more fiscal years, and the Antideficiency Act requires the apportionment of most appropriations. See 31 U.S.C. § 1512(a). An apportionment divides amounts available for obligation by specific time periods

2021 Response); Email from GAO Liaison, State, to Assistant General Counsel for Appropriations Law, GAO (Jan. 9, 2020) (State 2020 Response); Email from GAO Liaison, State, to Assistant General Counsel for Appropriations Law, GAO (Dec. 12, 2019); Letter from General Counsel, OMB to General Counsel, GAO (Dec. 11, 2019) (OMB 2019 Response); Email from GAO Liaison, State, to Senior Staff Attorney, GAO (Nov. 20, 2019) (State November 2019 Response); Email from Acting GAO Liaison, USAID, to Senior Staff Attorney, GAO (Nov. 6, 2019); Email from GAO Liaison, State, to Assistant General Counsel for Appropriations Law, GAO (Sept. 25, 2019); Email from GAO Liaison, State, to Assistant General Counsel for Appropriations Law, GAO (Aug. 30, 2019) (State August 2019 Response); Email from Acting GAO Liaison, USAID, to Assistant General Counsel for Appropriations Law, GAO (Aug. 30, 2019).

⁴ See, e.g., Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. F, title IV, 133 Stat. 13, 288 (Feb. 15, 2019); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. K, title IV, 132 Stat. 348, 854 (Mar. 23, 2018).

⁵ Pub. L. No. 116-6, 133 Stat. at 288.

⁶ Pub. L. No. 115-141, 132 Stat. at 970.

(usually quarters), activities, projects, objects, or a combination thereof.⁷ The amounts so apportioned limit the amount of obligations that may be incurred.⁸

The apportionment process helps prevent agencies from obligating their appropriations in a manner that would prematurely deplete them.⁹ Such a premature depletion can leave Congress with little choice but to make a deficiency or supplemental appropriation to permit agency operations to continue. These “coercive deficiencies” usurp Congress’s constitutional power of the purse.¹⁰ In addition, apportionment is intended to help achieve the most effective and economical use of the amounts made available for obligation.¹¹

Congress vested the President with authority to apportion executive branch appropriations, and the President has delegated that authority to OMB. 31 U.S.C. § 1513; Exec. Order No. 6166, § 16 (June 10, 1933) *at* 5 U.S.C. § 901 note. The process of apportionment is not static, as OMB has explicit authority to reapportion. 31 U.S.C. § 1512(a).

On August 3, 2019, OMB reapportioned funds in 15 accounts that spanned a variety of activities in State and USAID, including for FMF.¹² The reapportionment made

⁷ 31 U.S.C. § 1512(b); GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 12.

⁸ GAO-05-734SP, at 12.

⁹ *See id.* at 13.

¹⁰ *See* 59 Comp. Gen. 369 (1980).

¹¹ GAO-05-734SP, at 13.

¹² Letter from Associate Director for National Security Programs, OMB, to Deputy Secretary, State, and Deputy Administrator, USAID (effective Aug. 3, 2019) (Aug. 3 Letter). The 15 accounts identified in the reapportionment are: fiscal year (FY) 2019 Contributions to International Organizations (State); FY 2018/19 Contributions for International Peacekeeping Activities (State); FY 2019 Contributions for International Peacekeeping Activities (State); FY 2018/19 International Narcotics Control and Law Enforcement (State); FY 2018/19 Development Assistance (USAID); FY 2018/19 Development Assistance (State); FY 2018/19 Assistance for Europe, Eurasia and Central Asia (USAID); FY 2018/19 Assistance for Europe, Eurasia and Central Asia (State); FY 2018/19 Peacekeeping Operations (State); FY 2019 Peacekeeping Operations (State); FY 2018/19 Economic Support Fund (USAID); FY 2018/19 Economic Support Fund (State); FY 2018/19 Foreign Military Financing Program (State); FY 2019 International Organizations and Programs (State); FY 2018/19 Global Health (USAID).

the funds unavailable for obligation until 3 days after OMB received an accounting of the unobligated balances.¹³

Subsequently, on August 9, 2019, OMB issued another reapportionment, instructing that the remaining balances be “obligated at a daily rate calculated to obligate remaining funds by September 30th.”¹⁴ The letter also provided that State and USAID could request a reapportionment for programmatic reasons.¹⁵ State and USAID requested an exemption from the daily rate for USAID’s Global Health account, which OMB granted.¹⁶ State also requested that OMB modify the daily rate to ease execution.¹⁷ On August 29, 2019, OMB issued a third apportionment letter, apportioning remaining balances in the relevant accounts at a weekly rate, starting on September 1, 2019.¹⁸ The weekly rate apportioned a quarter of the then-remaining balance on each of the Sundays between September 1, 2019, and September 22, 2019.¹⁹ State subsequently requested that OMB remove the weekly rate from the apportionment, but OMB did not do so.²⁰

The daily and weekly rates were not typical apportionments for these foreign assistance accounts.²¹ OMB usually apportions State and USAID full-year foreign assistance appropriations by account or program after receiving requests for apportionment from State and USAID.²² Because the August 2019 letters differed from established practice by apportioning funds by time period, State and USAID had to implement additional financial controls.²³

¹³ August 3 Letter.

¹⁴ Letter from Associate Director for National Security Programs, OMB, to Deputy Secretary, State, and Deputy Administrator, USAID (Aug. 9, 2019) (Aug. 9 Letter).

¹⁵ *Id.*

¹⁶ State 2021 Response, at 3.

¹⁷ *Id.*

¹⁸ Letter from Associate Director for National Security Programs, OMB, to Deputy Secretary, State, and Deputy Administrator, USAID (Aug. 29, 2019) (Aug. 29 Letter). USAID’s Global Health appropriation was excluded from this apportionment. *Id.*

¹⁹ *Id.*

²⁰ State 2021 Response, at 3.

²¹ State 2021 Response, at 3.

²² *Id.* at 2.

²³ *Id.* at 1.

Congressional Notification for FMF Funds

The FMF program is authorized by the Arms Export Control Act, in order to “facilitate the common defense” through sales of military equipment to friendly countries. 22 U.S.C. § 2751. The President has substantial discretion in obligating FMF funds and must exercise considerable judgement in carrying out FMF sales. See, e.g. 22 U.S.C. §§ 2752(b), 2763(a), 2778(a)(1). Before State can obligate FMF funds, State must notify Congress. 22 U.S.C. § 5476. OMB instructs agencies to submit such congressional notifications to OMB for approval at least 5 working days before transmitting the notifications to Congress.²⁴

On June 21, 2019, State transmitted a congressional notification to OMB for review.²⁵ Although there was no legal requirement that State obligate any FMF funds to provide assistance to Ukraine, the notification included \$115 million in FY 2019 FMF funds that State planned to obligate for such assistance.²⁶ OMB, State, and “other interagency partners” then conducted interagency meetings on the lump-sum FMF funds that State planned to obligate for Ukraine.²⁷ On July 26, 2019, State submitted a congressional notification for FMF to other countries while discussions continued on the funds designated for Ukraine.²⁸ On August 14, 2019, State transmitted another congressional notification to OMB for review.²⁹ This notification included \$26.5 million in FY 2018/19 FMF OCO funds that State planned to obligate for assistance to Ukraine.³⁰ As a result of the interagency discussions, the funds designated for Ukraine were separated from both the June 21, 2019, and August 14, 2019, notifications and merged into one notification for all Ukraine-related FMF funds.³¹ State transmitted the Ukraine-specific notification to OMB for review on September 6, 2019, and State transmitted the notification to Congress on September 11, 2019.³²

²⁴ OMB Circular No. A-11, § 22.3 (Aug. 2021).

²⁵ State 2020 Response.

²⁶ *Id.*

²⁷ OMB 2021 Response, Attachment A, at 5.

²⁸ *Id.*

²⁹ State 2020 Response.

³⁰ *Id.*

³¹ *Id.*

³² OMB 2021 Response, Attachment A, at 5–6.

DISCUSSION

At issue here is whether OMB violated the ICA when it issued the three August 2019 reapportionment letters and when it engaged in interagency policy discussions on the congressional notification for FMF funds designated for Ukraine.

The ICA operates on the constitutional premise that when Congress appropriates money to the executive branch, the President is required to obligate the funds within their period of availability. Pub. L. No. 93-344, title X, §§ 1001–1017, 88 Stat. 297, 332 (July 12, 1974), 2 U.S.C. §§ 681–688; B-331564, Jan. 16, 2020 (*citing* B-329092, Dec. 12, 2017). The President may impound funds—that is, withhold them from obligation—only under specified circumstances and only if the President follows the procedures set forth in the Act. See 2 U.S.C. §§ 683–684. The ICA separates impoundments into two exclusive categories: deferrals and rescissions. The President may temporarily withhold funds from obligation by proposing a “deferral.” 2 U.S.C. § 684. The President may also seek the permanent cancellation of funds for fiscal policy or other reasons, including the termination of programs for which Congress has provided budget authority, by proposing a “rescission.” 2 U.S.C. § 683. In either case, the President must transmit a special message to Congress that includes the amount of budget authority proposed for deferral or rescission and the reason for the proposal. 2 U.S.C. §§ 683–684. Furthermore, amounts proposed for deferral or rescission must be made available in sufficient time to be prudently obligated. B-330330, Dec. 10, 2018.

Withholding funds without transmitting a special message is a violation of the ICA. See 2 U.S.C. §§ 683–684; see *also* B-329092, Dec. 12, 2017; B-331564, Jan. 16, 2020. However, our decisions distinguish between reportable impoundments and “programmatic delays,” which are not impoundments and therefore do not require the President to transmit a special message. See, e.g., GAO, *Impoundment Control: Deferral of DOD Budget Authority Not Reported*, GAO/OGC-91-8 (Washington, D.C.: May 7, 1991), at 3–4. Programmatic delays occur when an agency is taking reasonable and necessary steps to implement a program or activity, but the obligation or expenditure of funds is unavoidably delayed. B-329739, Dec. 19, 2018. Therefore, the reason for a delay, not the delay itself, is the key to determining whether the Act’s requirements apply. B-290659, July 24, 2002.

Distinguishing between impoundments and programmatic delays is particularly difficult in programs that confer substantial discretion to the implementing agency. See B-222215, Mar. 28, 1986. A careful examination of the facts and circumstances is necessary to determine whether an unlawful impoundment has occurred. See B-329739, Dec. 19, 2018. For instance, the reason for the withholding or delay, the historical rate of obligations for the relevant program, the ultimate obligation of funds within their period of availability, and policy statements or instructions to withhold from executive branch officials may be relevant in determining whether a delay or withholding is an improper impoundment. See, e.g., B-320091, July 23, 2010 (no impoundment where funds were obligated at rates comparable to years in which

nearly all funds were obligated before the end of the funds' period of availability); B-331298, Dec. 23, 2020 (no impoundment where funds were not withheld and were obligated at a "robust yet measured pace"); B-329092, Dec. 12, 2017 (withholding funds pursuant to direction from agency officials and cancellation proposal in President's budget was an impoundment).

Apportionment Letters

We first consider whether the three reapportionment letters OMB issued in August 2019 constituted improper impoundments under the ICA.

We note an inherent tension between OMB's apportionment authority and the ICA's prohibition on withholding funds absent the transmission of a special message. By definition, an apportionment by time period will "withhold" some funds now, in order to ensure funds are available in the future. Nevertheless, the ICA does not require the President to transmit a special message each time OMB makes a routine apportionment that subdivides an appropriation by time period. Indeed, the legislative history of the ICA suggests that Congress did not intend the special message procedures to apply to routine apportionments. As a Senate report explained, if OMB apportions an appropriation on a quarterly basis, the apportionment will necessarily hold "in reserve the balance for subsequent quarters so as not to incur a deficiency. The Committee does not regard such reservations as impoundments, provided that the apportionment is a good faith effort to implement the program or activity." S. Rep. No. 93-121 (1973), at 26.

However, OMB's authority to apportion is not so broad that it renders the ICA meaningless. OMB certainly cannot fail to apportion funds in order to avoid their obligation nor can apportionment be used to substitute the President's policy priorities for those of the Congress. See B-331564, Jan. 16, 2020; *State Highway Comm'n of Missouri v. Volpe*, 479 F. 2d 1099 (8th Cir. 1973) (noting the apportionment power cannot be used to "jeopardize the policy" of the appropriation); H. Rep. No. 81-1797, at 311 (1950) ("[T]here is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds."). Instead, a proper application of OMB's apportionment authority and the ICA's procedures construes them harmoniously, so that both statutes have full effect. See 2B Sutherland, *Statutes & Statutory Construction*, § 53:1 (There is "a duty to construe statutes harmoniously where reasonable.").

Our decisions on programmatic delays are instructive. GAO has long recognized that some delays in the obligation or execution of budget authority are not impoundments because they are not intentional withholdings and occur when an agency is taking the reasonable and necessary steps to carry out the program or activity. See, e.g., B-333110, June 15, 2021 (finding no impoundment where obligations were paused to ensure compliance with environmental, stakeholder consultation, and procurement statutes); B-291241, Oct. 8, 2002 (finding no impoundment where OMB did not apportion amounts while it conducted a "vigorous

and healthy internal legal discussion” regarding the applicability of a statutory cap). Apportionments are a necessary part of executing almost every federal program. As a result, routine apportionments—that is, those that are reasonable and necessary to avoid deficiencies—are not subject to the procedural requirements of the ICA. However, where OMB abuses its apportionment authority in order to intentionally delay or preclude the obligation of budget authority, the ICA’s procedures must apply. See B-331564, Jan. 16, 2020.

Here, the August 3, 2019, reapportionment letter was not an impoundment subject to the ICA. OMB issued the August 3, 2019, apportionment letter to collect an accounting of the unobligated balances in the affected accounts.³³ Because OMB may need to know the current unobligated balance in an account in order to make its apportionment and reapportionment decisions, it can reasonably request such an accounting to carry out its apportionment authority. See 31 U.S.C. § 1512(a) (authority to reapportion appropriations). The pause that accompanied the request for an accounting was also reasonable, as it allowed OMB to base its apportionment decision-making on current information. Without a pause, the accounting could have been out-of-date before OMB received it, as State and USAID might have continued obligating funds during the period between the preparation of the accounting and OMB’s reapportionment decision. Cf B-291241, Oct. 8, 2002 (finding no impoundment where OMB failed to apportion amounts while it conducted a “vigorous and healthy internal legal discussion” to ensure an agency did not violate a statutory cap). Therefore, the pause was necessary to ensure that OMB could collect the information from the agencies, consider the information, and make reapportionment decisions while the accounting remained correct. Further, the August 3 letter ensured that amounts would become available three days after OMB received the accounting, even if OMB took no action. This helped ensure that the funds would be available in an expeditious manner.

As a result, OMB’s actions here do not demonstrate an intent to prevent or delay the ultimate obligation of the funds. First, OMB requested the accounting well before the funds expired, allowing sufficient time for the funds to be obligated once they became available.³⁴ Second, there was not a date certain for the release of the funds; rather, OMB would make the funds available a short time after State and USAID provided the requested accounting.³⁵ Any agency with adequate funds control mechanisms should be able to provide such an accounting in short order, allowing for a minimal pause in obligations. In fact, State and USAID provided the requested information quickly, and OMB made the funds available shortly after

³³ OMB 2021 Response, Attachment A, at 7; August 3 Letter.

³⁴ See August 3 Letter.

³⁵ August 3 Letter.

receiving the accounting.³⁶ In all, the funds were unavailable for obligation for 6 calendar days.³⁷

In short, the reapportionment action in the August 3 letter may have resulted in a brief delay in obligations for the affected accounts. However, the nature of a request for an accounting, the certain availability of the amounts after provision of the accounting, and the expeditious manner in which any agency should be able to provide such an accounting, all indicate that OMB's action here was within the reach of its authority to apportion amounts. Therefore, the reapportionment action in the August 3 letter was not an improper impoundment under the ICA.

As with the reapportionment action in the August 3 letter, the reapportionment actions in the August 9 and August 29, 2019, letters similarly were not improper impoundments under the ICA, as OMB did not withhold funds from obligation. OMB reapportioned the unobligated balances in the relevant accounts by days and weeks respectively, exercising its authority to apportion by "other time periods."³⁸ The August 9 letter explicitly required that the daily rate be calculated to ensure all funds were available for obligation by the end of the fiscal year, and the August 29 letter made one-quarter of remaining unobligated balances available for obligation on each of four Sundays in September.³⁹ Therefore, by the end of the fiscal year, OMB had made all amounts available for obligation.

The August 9 and August 29 reapportionment letters may have caused a delay in the obligation of funds, but any such delay was not reportable under the ICA. OMB typically apportions funds in the affected accounts by program, rather than by time.⁴⁰ However, OMB's apportionment authority permits it to depart from typical practice in this fashion. The change in apportionment type required State and USAID to take additional steps before obligating funds, which may have caused some unavoidable delays in program execution.⁴¹ However, any such delays were a result of the agencies taking the necessary steps to obligate and expend funds consistent with the terms of the validly issued apportionments. Such delays are programmatic and are not improper impoundments under the ICA. See, e.g. B-333110, June 15, 2021 (delays to ensure compliance with statutory requirements are programmatic).

³⁶ See OMB 2021 Response, Attachment A, at 1–2.

³⁷ See August 3 Letter; August 9 Letter; see *also* State August 2019 Response.

³⁸ August 9 Letter; August 29 Letter.

³⁹ August 9 Letter; August 29 Letter.

⁴⁰ We are not aware of any limit on OMB's apportionment authority that requires OMB to apportion accounts in the same manner from year to year.

⁴¹ See State 2021 Response.

Although we find no improper withholding here, we do note that both State and USAID told OMB that the daily and weekly rate apportionments were “detrimental” to program operations. State explained that this process was not consistent with prior year-end spending guidance and required changes to its established financial processes, including implementing additional controls on the obligation of funds.⁴² We are aware of no evidence that State did not continue to obligate funds during this time. In fact, State explained that, consistent with its normal practice, it continued to work with bureaus and posts to obligate the funds prior to the end of the fiscal year.⁴³ Even so, State explained that it was unable to obligate certain funds in the Economic Support Fund appropriation before the amounts expired, despite its best efforts to do so, resulting in a higher unobligated balance than in prior years.⁴⁴ We are aware of no evidence to suggest OMB issued the daily and weekly rate apportionments to force the expiration of these funds. In the absence of such evidence, the sole fact that these funds expired unobligated is insufficient to establish that OMB improperly withheld them.

Congressional Notification for FMF Funds

By law, State must notify Congress before it can obligate FMF funds. 22 U.S.C. § 5476. OMB instructs agencies to submit such notifications to OMB for approval. OMB Circular No. A-11, § 22.3 (Aug. 2021). Next, we must determine whether OMB impermissibly impounded FMF amounts during the period in which OMB held, and did not transmit to Congress, a notification from State.

As discussed above, programmatic delays are not subject to the ICA’s special message requirements. Instead, the ICA requires the President to transmit a special message to Congress when he wishes to withhold funds from obligation. 2 U.S.C. §§ 683–684. Deferrals are temporary withholdings of budget authority, and the ICA authorizes deferrals only in limited circumstances: 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. 2 U.S.C. § 684. There are no other permissible reasons for a deferral, including policy reasons. The legislative history of the 1987 amendments to the ICA indicates that Congress explicitly contemplated and rejected the idea that the President may defer funds to advance his own policies at the expense of those enacted by Congress. See *generally*, H.R. Rep. No. 100-313, at 66–67 (1987); see *also* S. Rep. No. 93-688,

⁴² State November 2019 Response.

⁴³ *Id.*

⁴⁴ Other accounts affected by the August 2019 reapportionment letters had unobligated expired balances, but the amount of these balances was consistent with prior fiscal years. *Id.*; State 2021 Response. The existence of unobligated balances in an account does not necessarily indicate an impoundment. B-331298, Dec. 23, 2020.

at 75 (1974) (explaining that the objective of the amendments was to ensure that “the practice of reserving funds does not become a vehicle for furthering Administration policies and priorities at the expense of those decided by Congress”). GAO decisions have applied this principle. See, e.g., B-331564, Jan. 16, 2020; B-237297.3, Mar. 6, 1990. This elementary principle garners agreement across the branches of government: in a letter to GAO on this matter, OMB agreed that the President may not withhold funds “simply because he disagrees with the policy underlying a statute.”⁴⁵ As such, a deferral for policy reasons violates the ICA.

Based on the evidence before us, OMB’s actions did not constitute a deferral for policy reasons. OMB initially received a draft congressional notification from State on June 21, 2019, that included FY 2019 FMF assistance to be distributed to Ukraine.⁴⁶ State transmitted the final notification to Congress several weeks later, on September 11, 2019.⁴⁷ In the interim, OMB conducted interagency meetings with State and other interagency partners, and State notified Congress of its intent to obligate FMF funds for other countries.⁴⁸ OMB did not divulge the content of these discussions; however, policy discussions are a reasonable part of program execution where the President has significant discretion in administering the program.

Importantly, the program at issue here—Foreign Military Financing—confers substantial statutory discretion to the President in carrying out the program. Section 2 of the Arms Export Control Act provides that the Secretary of State, under the President’s direction, must carry out the program, “to the end that the foreign policy of the United States would be best served thereby.” 22 U.S.C. § 2752(b). Section 23, which authorizes the FMF program, provides that the President may finance the procurement of defense articles and services “on such terms and conditions as he may determine. . . .” *Id.* § 2763(a). And, section 38 authorizes the President to control the import and the export of defense articles and services to further “world peace and the security and foreign policy of the United States” *Id.* § 2778(a)(1). These provisions confer substantial discretion and require the President to exercise considerable judgment before FMF funds can be obligated.

In addition, Congress generally appropriates amounts for FMF in a lump sum directly to the President, without specifying amounts for particular countries and programs. See, e.g., Pub. L. No. 116-6, 133 Stat. at 288. Similarly, here, Congress did not specifically designate funds for Ukraine. See *id.*; Pub. L. No. 115-141, 132 Stat. at 970. Because the President had such wide discretion in obligating these funds, it

⁴⁵ OMB 2019 Response, at 6.

⁴⁶ OMB 2021 Response, Attachment A, at 5.

⁴⁷ *Id.*

⁴⁸ *Id.*

was reasonable and necessary for State, OMB, and other interagency partners to communicate regarding the best use of the funds within the scope of the appropriation. As such, to the extent such interagency discussions delayed the transmission of the congressional notification, such a delay was programmatic and not subject to the ICA's special message requirements.⁴⁹

The discretion provided by both FMF's authorization and appropriation distinguish this situation from OMB's 2019 actions with respect to the USAI. See B-331564, Jan. 16, 2020. In our 2020 decision, we concluded that OMB improperly impounded USAI funds in order to conduct a policy process to determine the best use of the funds. *Id.* In that instance, the executive branch was required to obligate and expend USAI funds for security assistance to Ukraine; failure to expend funds for Ukraine was not a permissible outcome of any such policy process. Therefore, withholding those funds violated the ICA, given the limited discretion provided by the appropriation. Here, however, Congress did not designate FMF funds for Ukraine, and the administration was free to consider whether to provide any FMF assistance for Ukraine at all. That wide grant of discretion necessitated a policy process to permit executive branch officials to determine a use of the FMF funds that was consistent foremost with the law but also with the President's policy priorities. Therefore, based on the information before us, the interagency discussions undertaken here by OMB and State were a reasonable part of FMF program execution.

In short, the interagency discussions may have resulted in a brief delay in the transmission of the congressional notification, a necessary prerequisite to obligating FMF funds. However, the statutory discretion vested in the President and the inherent flexibility of a lump-sum appropriation indicate that OMB and State's actions were consistent with the authority provided by the FMF program. Therefore, based on the facts before us, OMB did not impermissibly impound FMF amounts when it held, but did not transmit, a congressional notification from State.

CONCLUSION

Based on the information before us, we conclude that OMB did not violate the ICA when it issued three reapportionment letters in August 2019 or when it engaged in interagency policy discussions regarding State's plan to obligate FMF funds for Ukraine. OMB issued the reapportionment letters pursuant to its apportionment authority, and we see no evidence that OMB intentionally withheld the relevant funds

⁴⁹ As a threshold matter, it is not clear that the congressional notification was delayed beyond what is typical for the program. The time OMB takes to review FMF congressional notifications varies; for FMF designated for Ukraine, such reviews have lasted anywhere from a few days to a few months. State 2021 Response, at 7. In this instance, the congressional notification for FMF for Ukraine took a little under 3 months to reach Congress, which is not significantly longer than in previous fiscal years. *Id.* at 6–7.

in contravention of the ICA. Further, OMB's consideration of a congressional notification regarding foreign assistance funds State designated for Ukraine was not a reportable impoundment. To the extent OMB delayed the obligation of the funds, the delay was the result of programmatic considerations and therefore not an impoundment requiring transmission of a special message.

However, we note that the President, and by extension OMB and other executive branch agencies, is constitutionally bound to faithfully execute appropriations by prudently obligating them before their expiration. See U.S. Const. art. II, § 3; B-330330, Dec. 10, 2018. This duty requires OMB to consider both programmatic needs and agency capacity to carry out these needs as it makes apportionment decisions, so that agencies have sufficient time to prudently obligate amounts before they expire. Similarly, agencies must take all necessary and available steps to prudently obligate amounts prior to their expiration, even if OMB apportions the amounts in a manner that departs from prior practice or that disrupts the agency's usual practices.

To facilitate Congress's oversight of OMB's apportionment authority, Congress may wish to consider requiring the publication of apportionment and reapportionment documents. The publication of apportionments would enhance congressional oversight not only by alerting Congress to potential impoundments but also by improving congressional visibility into OMB's exercise of an authority that has significant ramifications both for executive agency operations and for Congress and its constitutional power of the purse. We have discussed this issue in prior testimony before the House Committee on the Budget.⁵⁰ B-333181, Apr. 29, 2021, at 12–13.



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⁵⁰ Pending legislation also proposes such a requirement. See H.R. 5314, 117th Cong. title V, § 502 (2021).