Modernizing the Power of the Purse Statutes

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Abstract

Two foundational statutes limit the executive branch's important and necessary work in executing the budget against the backdrop of congressional control: the Antideficiency Act, dating back to the post-Civil War era, and the Impoundment Control Act, which emerged from the Nixon years. This Article, originally written as an invited contribution to The George Washington Law Review*'s annual issue on administrative law, calls these the Power of the Purse statutes. While these statutes have been generally successful in responding to the problems that first prompted them, this Article illustrates gaps in the statutes that have become apparent in an era of expanded presidential control and proposes reforms to fix them. The reforms largely—although not entirely—map onto legislation proposed by Democrats in recent years. This Article argues that these proposals are commonsense reforms that ought to be supported by bipartisan majorities—as underscored by, among other things, their support from a remarkably bipartisan coalition of civil society organizations during both the Trump and Biden Administrations and the enactment of several of the reforms with bipartisan support through consecutive Consolidated Appropriations Acts. This Article thus reframes both the problems and the proposals as institutional rather than partisan and urges that the reforms ought to become law.*

* Agnes Williams Sesquicentennial Professor of Law, Georgetown University Law Center. This Article grew out of testimony I presented at a congressional hearing in 2020 as the House Budget Committee was initially considering what it would subsequently introduce as the Congressional Power of the Purse Act. *See Protecting Congress's Power of the Purse and the Rule of Law: Hearing Before the H. Comm. on the Budget*, 116th Cong. 75–84 (2020) (statement of Eloise Pasachoff). I am grateful for the invitation to testify there and for opportunities to present different stages of this project at a Georgetown University Law Center faculty workshop, the American Bar Association Administrative Law Annual Conference, the Legislation Roundtable, and Stanford's Public Law Workshop. I benefitted from many helpful conversations in those settings and elsewhere, including with Pam Bookman, Josh Chafetz, Bridget Dooling, Abbe Gluck, Kevin Kosar, Matt Lawrence, Tony McCann, Gillian Metzger, Zach Price, Dave Rapallo, Emily Satterthwaite, Kate Shaw, David Super, David Vladeck, Dan Walters, and others. For excellent research assistance, I thank Grayson Kuehl and Max Rosenthal, in addition to the wonderful Georgetown Law Library staff. I am grateful to *The George Washington Law Review* team for the invitation to contribute to the Administrative Law Issue and for their flexibility in shifting the publication of this Article to the subsequent volume in light of my father's death right as the Administrative Law Issue essays were due. This Article is dedicated to the memory of Jay M. Pasachoff (1943–2022), Field Memorial Professor of Astronomy at Williams College for fifty years, whose example as a dedicated teacher and researcher has shaped so much of my life.

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Introduction

It is a truism that Congress holds the power of the purse in our constitutional structure.[1] As James Madison wrote in Federalist 58, the purse is a "powerful instrument" when it comes to "reducing . . . all the overgrown prerogatives of the other branches of the government."[2] In fact, he went on, "[t]his power over the purse may . . . be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[3] The power of the purse derives from the Appropriations Clause, which declares that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[4]

Yet at the same time, the executive branch has always played an important role in executing the budget.[5] This role has become even more critical and visible as the size of the government has grown and the sums to support the government's tasks have expanded.[6] The modern era of presidential control has added another layer to this work as presidents have claimed more and more authority in general[7] and have expanded the institutional apparatus to do so over the budget in particular.[8]

Current high-profile controversies pose questions about some of the outer dimensions of this balance of power, from the debt ceiling crisis[9] to the issue of mass executive cancellation of student loans[10] to whether the Consumer Financial Protection Bureau's ("CFPB") funding from the Federal Reserve rather than annual appropriations

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1 Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1344 (1988).

2 The Federalist No. 58, at 359 (Alexander Hamilton, James Madison & John Jay) (Clinton Rossiter ed., 1961).

3 *Id.*

4 U.S. Const. art. I, § 9, cl. 7.

5 Louis Fisher, Presidential Spending Power 3 (1975).

6 Paul C. Light, The Government-Industrial Complex: The True Size of the Federal Government, 1984–2018 (2018); Jonathan S. Gould, A Republic of Spending (Sept. 2023) (unpublished manuscript) (on file with author).

7 Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2248 (2001); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. Rev. 104, 109–16 (2021).

8 Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 Yale L.J. 2182 (2016); Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 Vand. L. Rev. 357, 369–70 (2018).

9 *See, e.g.*, Conor Clarke, The Debt Limit 4–5 (May 21, 2023) (unpublished manuscript) (on file with author), https://ssrn.com/abstract=4454798 [https://perma.cc/FY3T-UXP4] (discussing "'constitutional trilemma,' in which the Executive Branch must choose between three unenviable options" in response to a congressional refusal to raise the debt ceiling).

10 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

violates the Appropriations Clause.[11] But a more prosaic, underappreciated set of statutes provides the backdrop for the routine operations of this balance of power: the Antideficiency Act,[12] which prevents agencies from spending or committing themselves to spend in the absence of appropriations,[13] and the Impoundment Control Act,[14] which limits the executive branch's ability to refuse to spend appropriated sums.[15]

Together, these framework statutes implement the constitutional dimensions of the balance between Congress and the executive branch in everyday spending.[16] They do so by making congressional spending choices mandatory in both directions. Under the Antideficiency Act, the executive branch cannot obligate or expend beyond what Congress has appropriated, while under the Impoundment Control Act, the executive branch cannot ordinarily obligate or expend less. Executive spending discretion is limited within the range set by these two statutes.

This Article calls the Antideficiency Act and the Impoundment Control Act the Power of the Purse statutes because of their importance in cabining executive authority and affirming congressional control over spending. The need to modernize these statutes for the era of presidential control is the subject of this Article.[17]

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11 *Compare* Cmty. Fin. Servs. Ass'n, Ltd. v. CFPB, 51 F.4th 616, 623 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 981 (2023) (agency's funding structure violates the Appropriations Clause), *with* CFPB v. L. Offs. of Crystal Moroney, P.C., 63 F.4th 174, 177 (2d Cir. 2023) (agency's funding structure does not violate the Appropriations Clause).

12 31 U.S.C. § 1341.

13 Antideficiency Act, 31 U.S.C. §§ 1341, 1342, 1517; *see also* U.S. Gov't Accountability Off., GAO-06-382SP, Principles of Federal Appropriations Law 6-34 to -158 (3d ed. 2006) (describing the operations of this Act).

14 Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 (codified at 2 U.S.C. §§ 681–688).

15 *Id.*; *see also* U.S. Gov't Accountability Off., GAO-16-464SP, Principles of Federal Appropriations Law 2-47 to -51 (4th ed. 2016) (describing the operations of this Act).

16 U.S. Gov't Accountability Off., *supra* note 13, at 6-34 (describing the Antideficiency Act as "one of the major laws in the statutory scheme by which Congress exercises its constitutional control of the public purse"); Allen Schick, Congress and Money: Budgeting, Spending and Taxing 401 (1980) (describing the Impoundment Control Act as providing a statutory structure to resolve questions of "legislative domination versus executive discretion" in power of the purse questions).

17 In addition to these framework statutes, a series of individual provisions scattered throughout Title 31 (Money and Finance) further circumscribe the executive branch's authority during budget execution. For example, these provisions hold that appropriations must be expressly stated, not implied; that "[a]ppropriations may be used only for their intended purposes"; that appropriations made for a definite time period may be used only for expenses properly incurred during that time period; that agencies must generally deposit any money received from nonappropriated sources into the Treasury rather than keeping it for themselves; and that all obligations agencies incur must be properly documented and recorded. U.S. Gov't Accountability Off., GAO-16-463SP, Principles of Federal Appropriations Law 1-8 to -9 (4th ed. 2016) (describing these and other "permanent fiscal statutes"). This Article does not focus on these provisions as they are generally functioning well and are not in need of statutory updating.

Part I of the Article first explains what each Act does and how each has generally been successful at achieving the goals that originally prompted it.[18] It next shows how executive branch action in an era of presidential control has revealed important gaps in each Act that demonstrate the need for statutory updating.[19] Just as administrative lawyers talk about the need to modernize the Administrative Procedure Act[20] as the foundational statute governing rulemaking, adjudication, and judicial review in the administrative state,[21] so, too, do we need to talk about modernizing these foundational statutes governing the power of the purse.

Part II of the Article then turns to identifying how the statutes ought to be revised. It proposes reforms to improve transparency;[22] to constrain certain activities by the Office of Management and Budget ("OMB") and agencies themselves;[23] to enhance the ability of the Government Accountability Office ("GAO") to provide relevant information to Congress and the public about agency spending;[24] and to include features that are currently missing but deserve attention in the modern era.[25]

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18 *See infra* Sections I.A.1, I.B.1.

19 *See infra* Sections I.A.2, I.B.2. To be sure, issues relating to the Antideficiency Act and the Impoundment Control Act are not the only contemporary power of the purse issues related to statutory design that deserve attention. In another work, for example, I address the scope of executive branch control over federal grants, arguing that such control over policy decisions implemented through federal grants raises fewer concerns than executive control over grant awards and grant enforcement because the latter categories receive less oversight by courts and Congress; in addition to proposing miscellaneous revisions to legislation governing federal grants, I suggest ways for Congress to use its already-existing appropriations and oversight authority to respond better. Eloise Pasachoff, *Executive Branch Control of Federal Grants: Policy, Pork, and Punishment*, 83 Ohio State L.J. 1113 (2022) [hereinafter Pasachoff, *Executive Branch Control of Federal Grants*]. I have also elsewhere addressed the scope of executive branch power over transfer and reprogramming funds, arguing that this power is generally beneficial and that in response to abuse, Congress need only use tools it already has rather than revising the tools themselves. Eloise Pasachoff, *The President's Budget Powers in the Trump Era*, *in* Executive Policymaking: The Role of the OMB in the Presidency 69, 78–82 (Meena Bose & Andrew Rudalevige eds., 2020) [hereinafter Pasachoff, *The President's Budget Powers in the Trump Era*]. In this Article, I focus on the Antideficiency Act and the Impoundment Control Act as two areas where the framework statutes themselves need attention.

20 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

21 *See, e.g.*, Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 Admin. L. Rev. 629 (2017); Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 Chi.-Kent L. Rev. 487 (2019).

22 *See infra* notes 310–41 and accompanying text.

23 *See infra* notes 342–68 and accompanying text.

24 *See infra* notes 370–97 and accompanying text.

25 *See infra* notes 398–420 and accompanying text.

Recent authorizing legislation initially proposed by Democrats in the 116th[26] and 117th[27] Congresses sought to address some of these recommendations. While the legislation received support from a wide array of civil society groups across the political spectrum,[28] it ultimately failed to become law. In the House, the authorizing committee that considered the legislation became caught up in anti-Trump rhetoric, resulting in party-line votes.[29] In the Senate, the legislation never made it out of the authorizing committee at all.[30]

Yet a subset of these reforms—one permanent change and two temporary reporting requirements—actually were enacted into law through several appropriations provisions.[31] The appropriations committees, in some ways the congressional stakeholders with the most at stake institutionally in the power of the purse reforms, took the lead in successfully pushing for passage of these reforms with some degree of bipartisan support through the appropriations process.[32] Approaching these reforms from an institutional perspective was key to their success.

This Article takes up the institutional rather than partisan call in urging that the work of modernizing the Power of the Purse statutes be completed. Democrats in the 118th Congress have once more offered a legislative vehicle to do so: the Congressional Power of the Purse Act provisions of the broader Protecting Our Democracy Act.[33] Yet while this bill once more has only Democratic sponsors,[34] and while the reforms were initially introduced by Democrats during the Trump Administration as responses to that administration's actions,[35] they are not, in fact, fairly characterized as simply Democratic efforts to constrain a Republican president. Instead, they are best seen as

26 Congressional Power of the Purse Act, H.R. 6628, 116th Cong. (2020); Congressional Power of the Purse Act, S. 3889, 116th Cong. (2020).

27 Protecting Our Democracy Act, H.R. 5314, Title V, Reasserting Congressional Power of the Purse, 117th Cong. (2021); Protecting Our Democracy Act, S. 2921, Title V, Reasserting Congressional Power of the Purse, 117th Cong. (2021).

28 *See infra* note 291 and accompanying text.

29 *See infra* notes 295–96 and accompanying text.

30 *See infra* notes 297–98 and accompanying text.

31 Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. E, §§ 204, 748, 136 Stat. 49, 256–57, 306–07; Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, §§ 204, 748, 749, 136 Stat. 4459, 4667, 4718 (2022); Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. B, §§ 748, 749, H.R. 2882, 118th Cong. §§ 748, 749; *see also infra* note 83 and accompanying text.

32 *See infra* note 300 and accompanying text.

33 Protecting Our Democracy Act, H.R. 5048, Title V, Congressional Power of the Purse Act, 118th Cong. (2023).

34 *See Cosponsors: H.R. 5048—118th Congress (2023–2024)*, Congress.Gov, https://www.congress.gov/bill/118th-congress/house-bill/5048/cosponsors?s=1&r=1&q=%7B%22search%22%3A%5B%22hr5048%22%5D%7D [https://perma.cc/W2XL-6FFX].

35 *See infra* notes 295–96 and accompanying text.

congressional efforts to assert the power of the purse against overreaching presidents of either party. This Article thus reframes the interventions through this institutional lens.

While arguing for modernizing the Power of the Purse statutes, this Article does not suggest that the executive branch plays a generally inappropriate role in budget execution. To the contrary, it would be impossible to operate modern government without the executive branch's important work in executing the budget, and some discretion is both inevitable and to the good.[36] But executive branch spending has several characteristics that make robust and effective congressional oversight and control particularly important. There are few opportunities for public participation in priority setting and policymaking anywhere in the executive spending process, in contrast to the widespread availability of public participation throughout other administrative processes.[37] Executive spending decisions are also far less transparent than other final administrative decisions.[38] And executive spending decisions are far less subject to judicial review because of the many justiciability hurdles that such decisions present.[39] I take up these normative claims at more length in other work.[40] The goal of this Article is simply to illustrate the need for rebalancing the power of the purse through reforms to the Antideficiency Act and Impoundment Control Act and to show how these reforms are both commonsense and nonpartisan.

I. THE ANTIDEFICIENCY ACT AND IMPOUNDMENT CONTROL ACT: PROMISES AND PITFALLS

This Part introduces the Antideficiency Act and the Impoundment Control Act as two core statutes that play an important role in protecting Congress's power of the purse. For each Act, this Part first explains what it requires and how it constrains the executive branch before identifying

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36 *See, e.g.*, FISHER, *supra* note 5, at 261 ("[T]he impulse to deny discretionary authority altogether should be resisted."); Pasachoff, *Executive Branch Control of Federal Grants*, *supra* note 19, at 1117–18 (explaining why, "for the most part, robust Executive Branch control over federal grants is good").

37 *See, e.g.*, Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1118–20 (2021); Pasachoff, *supra* note 8, at 2279–80.

38 Metzger, *supra* note 37, at 1119–20; Pasachoff, *supra* note 8, at 2251–62; Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1712–15 (2017).

39 Pasachoff, *Executive Branch Control of Federal Grants*, *supra* note 19, at 1166–71; Metzger, *supra* note 37, at 1120–27; Sohoni, *supra* note 38, at 1706–07; Matthew B. Lawrence, *Second-Class Administrative Law*, 101 WASH. U. L. REV. (forthcoming 2024).

40 In addition to my articles and book chapter cited in *supra* notes 8 and 19, I have a book project under development: ELOISE PASACHOFF, ALL THE PRESIDENT'S MONEY? EXECUTIVE BRANCH SPENDING IN AN ERA OF PRESIDENTIAL CONTROL (on file with author).

the gaps and problems with the Act that have become apparent in the era of presidential administration.

A. The Antideficiency Act: Limiting Executive Branch Spending

The earliest version of the Antideficiency Act dates back to 1870, when Congress addressed the problem of coercive deficiencies, whereby agencies would overspend their appropriated sums and then come back to Congress for more.[41] This had been a problem almost since the country's founding,[42] but reached a particular height following the Civil War.[43] Over the years, Congress has revised the Act numerous times in an effort to constrain executive branch attempts to work around its proscriptions.[44] While today, the Act is generally successful at accomplishing its original goals, it has weaknesses in responding to contemporary executive strategies.

1. What the Antideficiency Act Does

The Antideficiency Act contains three core substantive prohibitions, all of which support one bottom line: that "[g]overnment officials may not make payments or commit the United States to make payments at some future time for goods or services unless there is enough money in the 'bank' to cover the cost in full," where the "'bank' . . . is the available appropriation."[45]

First, "[a]n officer or employee" of an agency may neither make nor authorize an expenditure or obligation exceeding an appropriation (that is, sums already in an account) or in advance of an appropriation (such as at the end of the fiscal year, before the new fiscal year's appropriations are made), "unless authorized by law."[46]

Second, "[a]n officer or employee" may neither "accept voluntary services" on behalf of the United States nor "employ personal services exceeding that authorized by law" except in cases of "emergencies involving the safety of human life or the protection of property."[47] Such emergencies, Congress clarified in 1990, do "not include ongoing, regular

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41 FISHER, *supra* note 5, at 232–33; Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 PUB. CONT. L.J. 155, 160 (1979).

42 *See, e.g.*, 1 Stat. 342, 343 (1794) ("For making good a deficiency in the appropriation of the year one thousand seven hundred and ninety-three, for extra-services of clerks in the office of the Secretary of State . . . eight hundred dollars.").

43 Fenster & Volz, *supra* note 41, at 160.

44 *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 13, at 6-34 to -36.

45 *Id.* at 6-37.

46 31 U.S.C. § 1341(a)(1)(A)–(B).

47 *Id.* § 1342.

functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."[48]

Third, "[a]n officer or employee" may neither make nor authorize an expenditure or obligation exceeding an "apportionment"—that is, OMB's division of appropriations by program, by time period, or by both[49]—or the agency's own rules on accounting for apportionments.[50] Strictly, the Antideficiency Act delegates to the President herself the apportionment power, but by longstanding practice, OMB takes on this task in her stead, typically by a senior civil servant.[51]

Unlike the Administrative Procedure Act, the Antideficiency Act does not enforce its requirements at the level of the agency.[52] Instead, the Antideficiency Act prohibits *officers or employees* of agencies from taking these steps.[53] This distinction is critical. As GAO explains, "The Antideficiency Act is the only fiscal statute that includes both civil and criminal penalties for a violation."[54] As to the former, an officer or employee who violates any of the Act's prohibitions may face "appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office."[55] As to the latter, an officer or employee who violates any of the Act's prohibitions "knowingly and willfully . . . shall be fined not more than $5,000, imprisoned for not more than 2 years, or both."[56] The goal of these consequences is deterrence; an individual agency employee may work harder to stay within fiscal lines, even pushing back at improper orders from above, if she is concerned about these individual consequences.[57]

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48 *Id.*

49 *Id.* §§ 1512–1513.

50 *See id.* § 1517(a)(1)–(2).

51 *See id.* §§ 1512(b)(2), 1513(b)(1); *see also* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 73.

52 *See* 5 U.S.C. § 553(b)–(c) ("[W]hen *the agency* for good cause finds"; "the agency shall give interested persons an opportunity to participate"; "*the agency* shall incorporate in the rules adopted a concise general statement of their basis and purpose." (emphasis added)); § 554 ("The *agency* shall give all interested parties opportunity for . . . the submission and consideration of facts, arguments . . . ." (emphasis added)).

53 31 U.S.C. §§ 1341(a)(1), 1342, 1517(c) ("An *officer or employee* of the United States government . . . may not . . . ." (emphasis added)).

54 U.S. Gov't Accountability Off., GAO-19-372T, Application of the Antideficiency Act to a Lapse in Appropriations: Testimony Before the Subcomm. on Interior, Environment, and Related Agencies, Comm. on Appropriations 2 (2019), https://www.gao.gov/assets/gao-19-372t.pdf [https://perma.cc/MJ3S-QHYT].

55 31 U.S.C. § 1349(a); *accord id.* § 1518.

56 31 U.S.C. § 1350; *accord id.* § 1519.

57 *See* U.S. Gov't Accountability Off., *supra* note 13, at 6-143 to -44; Philip J. Candreva, *The Federal Antideficiency Act at 150—Where Do We Stand?*, 39 Pub. Budgeting & Fin. 75, 90 (2019); Gordon Gray, *The Antideficiency Act: A Primer*, Am. Action F. (Aug. 3, 2016), https://www.americanactionforum.org/research/antideficiency-act-primer/ [https://perma.cc/MDS3-S7Z2].

The Antideficiency Act also requires transparency about its violations and their aftermath. "If an officer or employee" violates the Act, the head of the relevant agency "shall report immediately to the President and Congress all relevant facts and a statement of actions taken."[58] The agency head must transmit a copy of the report to GAO's Comptroller General on the same day.[59] For almost twenty years, at the direction of Congress, GAO has compiled annual summaries of these reports and released them to the public.[60] Reported violations each year since 2005 have ranged from under ten to under thirty.[61]

These reports illustrate that the Antideficiency Act has been generally successful in preventing agencies from overspending or from spending in unauthorized ways.[62] A recent study of hundreds of reported violations between fiscal years 2006 and 2017 found that most of the violations were "neither pervasive nor material," concluding that even where "agency preventive controls" failed to avoid a violation, "detective controls are working and responsible parties apparently feel safe self-reporting."[63] The revisions Congress made to the Act over the first half of the twentieth century in response to executive branch efforts to get around it have also largely avoided the problem of coercive deficiencies that led to the Act's creation in the first place.[64] GAO's heightened role in overseeing violations has also played an important role in the Act's success over the last twenty years.[65] Moreover, the assumption that the Antideficiency Act, particularly the threat of its penalties, plays an important role in motivating compliance with the law underlies other recommendations for improving congressional oversight.[66]

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58 31 U.S.C. § 1351; *accord id.* § 1517(b).

59 31 U.S.C. §§ 1351, 1517(b).

60 U.S. Gov't Accountability Off., B-333630, Fiscal Year 2021 Antideficiency Act Reports Compilation (2022); *see also* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 1401, 118 Stat. 2809, 3192 (2004); S. Rep. No. 108-307, at 43 (2004).

61 *See Antideficiency Act Resources*, U.S. Gov't Accountability Off., https://www.gao.gov/legal/appropriations-law/resources [https://perma.cc/Y96A-7TGF].

62 Candreva, *supra* note 57, at 76 ("With respect to congressional control over the executive, the ADA is effective at stopping overspending and unauthorized spending . . . .").

63 *Id.*

64 *Id.* at 76–77.

65 *Compare* U.S. Gov't. Accountability Off., *supra* note 61 (illustrating depth of GAO's attention since 2004 to Antideficiency Act enforcement), *with* Fenster & Volz, *supra* note 41, at 157 (critiquing GAO and Congress as of 1979 for insufficient attention to Antideficiency Act enforcement).

66 *See, e.g.*, Kevin M. Stack & Michael P. Vandenbergh, *Oversight Riders*, 97 Notre Dame L. Rev. 127, 133 (2021).

2. *Gaps and Problems in the Antideficiency Act*

While the Antideficiency Act has been generally successful at accomplishing the aims of the statute's original goals, it has proved less successful in achieving those goals as applied to the problems presented in an era of presidential control. Five gaps and problems in the Antideficiency Act have emerged as particularly salient for power of the purse issues in the twenty-first century.

a. *Apportionment Authority*

First, nothing in the Antideficiency Act explicitly defines the outer limits of OMB's apportionment authority, even though complying with OMB's apportionments is one of the core requirements of the Act. Can OMB apportion funds while placing additional legally binding limits on agency action to ensure compliance with the President's priorities? In other words, to what extent is apportionment solely a function of efficient funds management as opposed to being a source of authority or otherwise providing space for presidential policies?[67]

The language of the statute and the overall context of its history and purpose suggest that efficient funds management is the goal.[68] That is, funds appropriated for "a definite period" must be apportioned in a manner to prevent the need for "a deficiency or supplemental appropriation for the period," while funds appropriated "for an indefinite period" must be apportioned "to achieve the most effective and economical use."[69] In addition, the Act specifies limited circumstances in which an apportionment may be used to reserve funds, and none of these circumstances involve policy development.[70] Contrast this restrictive language

67 To be clear, "efficient funds management" and "presidential policies" are best thought of as on a continuum rather than as a dichotomy; different administrations may well have different views on what it means to manage funds efficiently. *Cf.* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."). The distinction here is the difference between using apportionments to accommodate the "inevitable contingencies that arise in administering congressionally-funded agencies and programs" (efficient funds management) and using apportionments to "advance the broader fiscal policy objectives of the Administration" while "*negat[ing]* the will of Congress by substituting the fiscal policies of the Executive Branch for those established by the enactment of budget legislation" (presidential policies). City of New Haven v. United States, 809 F.2d 900, 901 (D.C. Cir. 1987); see also *infra* notes 243–46 and accompanying text for more on this distinction in the context of the Impoundment Control Act.

68 Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 74.

69 31 U.S.C. § 1512(a).

70 *Id.* § 1512(c)(1)(A)–(C) (allowing an apportionment to reserve funds only "to provide for contingencies," "achieve savings made possible by or through changes in requirements or great efficiency of operations," and "as specifically provided by law").

with an earlier version of the provision giving open-ended authority to the President to "'apportion' funds where justified by 'other developments subsequent to the date on which such appropriation was made available.'"[71] As the D.C. Circuit explained in a case examining the intersection of apportionment and deferral under the Impoundment Control Act—discussed in more detail below[72]—the "purpose of the amendment" to the apportionment provision in the Antideficiency Act "was to preclude the President from invoking the Act as authority for implementing 'policy' impoundments."[73] Together, this language and history make clear that the apportionment power provides no general delegation of policy authority.

Yet, by longstanding practice, OMB can attach "footnotes" to apportionments that direct agency officials to take or not to take certain actions.[74] Sometimes, these footnotes can have significant policy effect. For example, an apportionment footnote might condition the availability of funds on some subsequent OMB action, such as approving an agency's "spend plan"; detail policy goals that should be achieved in a spend plan; or preclude an agency from obligating funds that were previously available to the agency to use.[75] Apportionment footnotes are not merely precatory; as OMB explains, they "become part of the apportionment and are subject to the Antideficiency Act," so agency actors face the possibility of individual sanctions if they ignore the instructions in such footnotes.[76]

The lack of clarity around the extent of OMB's authority during the apportionment process has meant, in an era of presidential control, that presidents have the functional ability to use apportionments to enhance their power. For example, apportionment footnotes provided the vehicle for the controversy underlying the first Trump impeachment, as it was

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71 *City of New Haven*, 809 F.2d at 906 n.18 (quoting 31 U.S.C. § 665(c)(2) (1970)) (internal alteration omitted).

72 *See infra* notes in Section I.B.2.d.

73 *City of New Haven*, 809 F.2d at 906 n.18; *see also* U.S. Gov't Accountability Off., *supra* note 15, at 2-48 n.56 (explaining that the provisions governing the reserve of funds under the apportionment power in the Antideficiency Act are identical to the provisions specifying permissible circumstances for deferral under the Impoundment Control Act, and noting that "[d]eferrals for policy reasons are not authorized").

74 Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A-11, Preparation, Submission, and Execution of the Budget, § 120.34–.38 (2016) ("Footnotes appear as textual descriptions on specific tabs in the apportionment file, and typically provide additional information or direction associated with one or more lines on the request."). OMB further distinguishes between purely "informational" footnotes, which have no legal effect, and those that provide authority or limits, which do. *Id.*

75 *See, e.g.*, Protect Democracy, *Experts Explain How to Read Apportionments and Navigate OMB's New Apportionment Website*, YouTube 40:00–60:00 and accompanying slides (Oct. 17, 2022), https://www.youtube.com/watch?v=XEDz8Wg2wx0#t=39m58s [https://perma.cc/4NER-RNK3].

76 *Id.*; *see also* Off. of Mgmt. & Budget, *supra* note 74, § 120.36.

through apportionment footnotes that OMB placed a hold on the ability of the Department of Defense and the State Department to transmit funds to Ukraine.[77] OMB's general counsel defended this use of apportionment power as necessary "to ensure that funds were not obligated prematurely in a manner that could conflict with the President's foreign policy," suggesting that apportionment is itself a tool of presidential control.[78] Indeed, one of the Trump Administration's arguments for changing the funding structure of the CFPB was that it ought to be "subject to OMB apportionment" in order to "facilitat[e] additional oversight by the President."[79]

While the apportionment power has been in the Antideficiency Act for over a hundred years,[80] its use to enhance presidential power appears to be largely a modern invention; the seminal work on the presidential spending power from the founding through the Nixon Administration was almost entirely silent on this tool.[81]

b. Apportionment Transparency

The ability of presidents to use apportionment to enhance presidential power was enhanced, until recently, by the lack of transparency around apportionment.[82] This is the second gap in the Antideficiency Act itself—although this gap was recently narrowed by the Consolidated Appropriations Act of 2023, which made permanent the temporary disclosure requirements of the previous year's appropriations act.[83] Because this remedy is so new, it is worth highlighting the reason for its existence in addition to noting how it can still be improved.

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77 Dan Mangan & Kevin Breuninger, *Trump Administration Broke Law in Withholding Ukraine Aid, Watchdog Says As Senate Prepares for Impeachment Trial*, CNBC: POLITICS (Jan. 16, 2020, 10:05 AM), https://www.cnbc.com/2020/01/16/trump-administration-broke-law-in-withholding-ukraine-aid.html?&qsearchterm=trump%20administration%20broke%20law [https://perma.cc/XSG5-EVRK]; U.S. GOV'T ACCOUNTABILITY OFF., B-331564, OFFICE OF MANAGEMENT & BUDGET—WITHHOLDING OF UKRAINE SECURITY ASSISTANCE (2020) [hereinafter B-331564], https://www.gao.gov/products/b-331564 [https://perma.cc/YM29-79N5]; U.S. GOV'T ACCOUNTABILITY OFF., B-331564.1, OFFICE OF MANAGEMENT & BUDGET—APPLICATION OF THE IMPOUNDMENT CONTROL ACT TO 2019 APPORTIONMENT LETTERS AND A CONGRESSIONAL NOTIFICATION FOR STATE DEPARTMENT FOREIGN MILITARY FINANCING (2022) [hereinafter B-331564.1], https://www.gao.gov/assets/720/718986.pdf [https://perma.cc/UEV5-3N9E].

78 Letter from Mark R. Paoletta, Gen. Couns., Off. Mgmt. & Budget, to Tom Armstrong, Gen. Couns., GAO, at 9 (Dec. 11, 2019) (writing in regards to B-331546, *Office of Management and Budget—Withholding of Ukraine Security Assistance*).

79 U.S. DEP'T TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES 89 (2017); *see* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 74.

80 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 13, at 6-35.

81 *See* FISHER, *supra* note 5, at 337 (mentioning apportionment on a few scattered pages, in contrast to other tools that received full-length chapter treatment).

82 *See* Pasachoff, *supra* note 8, at 2259, 2262–63.

83 Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022); *see infra* notes 86–88 and accompanying text.

OMB's apportionments are final legal documents with real effect, and yet, until this recent change, there was no easy way for Congress or the public to see what OMB's directions were. If OMB was overstepping, or if presidents were imposing troublingly unrelated restrictions on agencies through apportionment, it might take a whistleblower or active noncompliance for anyone to know.[84] Apportionment secrecy thus impeded both Congress's ability to control the power of the purse and the public's ability to hold the executive branch accountable for its spending.[85] Nor was there any systematic way to assess the balance between technical apportionment decisions and policy-laden ones, or to compare apportionment actions across administrations or agencies. To what extent are apportionment footnotes used, and are they the primary source of policy direction, or are there ways that apportionments themselves have similar effect? To what extent were the Trump Administration's actions outliers? The lack of answers to these questions has enhanced presidential power at the expense of congressional oversight.

The Consolidated Appropriations Act for 2023 did not amend the Antideficiency Act to require disclosure, but it did make permanent what the previous year's appropriations act had required only for the 2022 fiscal year:[86] that OMB "post each document apportioning an appropriation . . . including any associated footnotes" on a public website.[87] It also required each agency to notify the House and Senate Committees on Appropriations and the Budget if an apportionment was delayed beyond the limited time period specified by the Antideficiency Act, which "conditions the availability of an appropriation on further action," or "may hinder the prudent obligation of such appropriation or the execution of" one of the agency's activities.[88] While these notification requirements are temporary in that they apply only to that

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84 *See, e.g.*, Brandon Carter, *House Intel Committee Releases Whistleblower Complaint on Trump-Ukraine Call*, NPR (Sept. 26, 2019, 8:52 AM), https://www.npr.org/2019/09/26/764071379/read-house-intel-releases-whistleblower-complaint-on-trump-ukraine-call [https://perma.cc/3NK7-XQMD] (reporting that a whistleblower disclosed the phone call that triggered concern about improper conditions on apportionment for aid to Ukraine, which ultimately led to the first Trump impeachment); *cf.* U.S. Gov't Accountability Off., B-310108, Forest Service—Apportionment Limitation for Aviation Resources (2008) (assessing the agency's noncompliance with OMB's apportionment footnote after the agency's repeated requests to modify the footnote). OMB-imposed rules limiting agency communication about budget-related matters with anyone in Congress or outside the executive branch also reduced incentives to let appropriators know directly about apportionment issues. *See* Off. of Mgmt. & Budget, *supra* note 74, § 22; Pasachoff, *supra* note 8, at 2224–27.

85 *See* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 88–91.

86 *See* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. E, § 204(b), 136 Stat. 49, 256–57.

87 *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, § 204, 136 Stat. 4459, 4667 (2022).

88 *Id.* § 749(a)(1)–(3).

year's appropriations act, the fact that these temporary reporting requirements have now appeared in three appropriations acts in a row suggests that they may have staying power.[89]

These new requirements go a long way toward remedying this gap in the Antideficiency Act, acknowledging the importance of the apportionment power while also relying on disclosure, rather than a substantive limit on that power, as a means to reassert congressional control.

At the same time, the disclosure requirement has not fully solved the problem of apportionment transparency. It is difficult to understand how to read apportionments because they appear largely as a series of acontextual numbers.[90] It is not easy to find the apportionment for a given program as the website provides links agency-by-agency only by a Treasury Appropriation Fund Symbol rather than alongside names that a member of Congress, a staff member, or a member of the public would recognize as a program of interest.[91] It requires downloading, as opposed to being able to open and view online directly, and discrete Excel or JavaScript Object Notation files.[92] And it is not easy to find apportionment footnotes or their rationales, buried as they are deep within various apportionments rather than flagged externally or summarized anywhere more comprehensibly.[93] The OMB apportionment website is thus an example of transparency without simplicity or context, making it difficult to use as an accountability resource.

A number of the civil society organizations that supported the initial iterations of the Congressional Power of the Purse Act have developed a series of helpful Apportionment Resources for Congress to aid in understanding how to use the material on the website.[94] These resources include videos from former OMB and agency budget officials, PowerPoint slides, and step-by-step instructions for finding relevant

89 *See supra* note 31.

90 For example, click any link at *Approved Apportionments*, Off. of Mgmt. & Budget, https://apportionment-public.max.gov/ [https://perma.cc/ZE4K-KHK6].

91 For example, the Department of Agriculture's links include almost 150 discrete apportionment documents for the first five months of FY 2023 with titles like "FY2023_Agency=AG_18_TAFS_2023-01-24-21.38.xlsx." *Id.*

92 *Id.* (provides two folders per agency per fiscal year, one with Excel files and another with JSON files to download).

93 *See id.*

94 *Using OMB's Apportionment Website: Resources for Congress*, Protect Democracy (Nov. 3, 2022), https://protectdemocracy.org/work/using-ombs-apportionment-website-resources-for-congress/#finding-an-apportionment [https://perma.cc/V7YC-TWK3] (noting that training was sponsored by Protect Democracy, American Action Forum, Demand Progress, FreedomWorks, National Taxpayers Union, Project on Government Oversight, R Street Institute, and Taxpayers for Common Sense); *see also infra* note 291 and accompanying text (identifying the Power of the Purse coalition).

apportionments.[95] Yet helpful as these resources are, they still reflect significant limits on ready understanding of the material on OMB's apportionment website. For example, the Apportionment Resources website explains how to find a relevant apportionment in eleven steps, walking through sequential references to the relevant fiscal year's appropriation act provision, the Treasury Department's Federal Account Symbols and Titles Book, and an excel spreadsheet on OMB's website.[96] The website then provides an 85-page slide deck explaining how to read a given apportionment![97]

While Congress has taken significant steps in support of apportionment transparency, more work remains to be done in order to make that transparency readily comprehensible.

c. Shutdown Spending

The third gap in the Antideficiency Act involves the two statutory exceptions to the prohibitions on obligating in advance of appropriations: the "unless authorized by law" exception[98] and the emergency exception to the prohibition on receiving voluntary services on behalf of the United States.[99]

In principle, these provisions mean that the only reasons for agencies to take limited actions during a lapse in appropriations are either where Congress has otherwise authorized those actions or for true emergencies involving "the safety of human life or the protection of property," not those involving "ongoing, regular functions of government."[100] The President herself may be able to take additional actions in keeping with the view of the Office of Legal Counsel ("OLC") that "authorized by law" includes "not only those obligations in advance of appropriations for which express or implied authority may be found

95 *See Using OMB's Apportionment Website: Resources for Congress*, *supra* note 94.

96 *Id.*

97 Lester Cash, Ed Martin, & Charlotte (Charlie) McKiver, *How to Read Apportionments and Use OMB's Website: A Video Training*, Protect Democracy (Oct. 13, 2022), https://protectdemocracy.org/work/using-ombs-apportionment-website-resources-for-congress/#finding-an-apportionment [https://perma.cc/U8NK-HDH8]; Lester Cash, Ed Martin, & Charlotte (Charlie) McKiver, *Approved Apportionments: Using OMB's Public Apportionment Website*, Protect Democracy (Oct. 13, 2022), https://docs.google.com/presentation/d/12XLFJ7Bhljt5r8JbE35nu0wrLVXD_O2a/edit#slide=id.p1 [https://perma.cc/5LRX-HPBX] (the slide deck accompanying the training).

98 31 U.S.C. § 1341(a)(1)(B) ("An officer or employee . . . may not . . . involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.").

99 *Id.* § 1342.

100 *See* Government Operations in the Event of a Lapse in Appropriations, 1995 WL 17216091 (O.L.C. Aug. 16, 1995); *see also* Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Att'ys Gen. 293, 5 Op. O.L.C. 1 (1981) [hereinafter Authority for the Continuance of Government Functions]; Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriations, 43 Op. Att'ys Gen. 224, 4A Op. O.L.C. 16 (1980).

in the enactments of Congress, but also those obligations necessarily incident to presidential initiatives undertaken within [the President's] constitutional powers."[101]

In practice, however, as shutdowns have become more common, different administrations have made vastly different choices about how and whether to keep different parts of the government open during shutdowns, sometimes with questionable links to any exception, and typically without any clear articulation of a legal rationale.[102] There is no reliable way for courts to assess the legality of these choices since a shutdown is likely to be over long before a court would be able to reach a final decision, rendering the case moot.[103] Nor is there any systematic way for Congress or the public to assess the legal or policy rationales for these choices. OMB requires agencies to submit shutdown plans, and in recent years, these plans have been posted on a centralized website, but these are high-level plans that do not permit the kind of legal or policy oversight that other kinds of final executive branch action receive when challenged in court.[104] OLC may have issued formal legal opinions opining on the permissibility of certain choices before the agencies took action,[105] but not all OLC opinions are made public.[106] Ex post, GAO can investigate, at Congress's request, whether an agency's choices complied with the emergency exception and the agency's statutory authorities, but agencies do not always comply with GAO efforts to obtain information, and so GAO's decisions may not have all of the

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101 *See* Authority for the Continuance of Government Functions, *supra* note 100, at 7; Price, *supra* note 8, at 361–63.

102 *See, e.g.*, Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 83–84.

103 *See, e.g.*, Nat'l Treasury Emps. Union v. United States, 444 F. Supp. 3d 108, 118 (D.D.C. 2020) (dismissing a shutdown case as moot while noting the IRS's "dubious claim" that its recall of employees to process tax returns during the shutdown was "somehow necessary for 'the safety of human life or the protection of property'" rather than simply a choice made in order "to avoid the anticipated political heat that would have no doubt been generated as to both Executive and Legislative officeholders had the shutdown caused delays in the disbursement of taxpayer refunds"); *see also* Avalos v. United States, 54 F.4th 1343, 1349 (Fed. Cir. 2022) (holding that the Fair Labor Standards Act is not violated when the government does not pay federal employees who work during a government shutdown until after the lapse in appropriations has been resolved).

104 *See* Pasachoff, *supra* note 8, at 2233; *see also Agency Contingency Plans*, Off. of Mgmt. & Budget, Exec. Off. of the President, https://www.whitehouse.gov/omb/information-for-agencies/agency-contingency-plans/ [https://perma.cc/WBE6-FPFM] (providing a list of agency shutdown plans).

105 *See, e.g.*, Authority for the Continuance of Government Functions, *supra* note 100.

106 *See, e.g.*, *The OLC's Opinions*, Knight First Amend. Inst. at Colum. U., https://knightcolumbia.org/reading-room/olc-opinions [https://perma.cc/YJE8-25TT] (providing "comprehensive public database" of OLC opinions released to date, "including those released in response to [Knight's] FOIA lawsuit"); Melissa Wasser, *Fact Sheet: Office of Legal Counsel Transparency*, Project on Gov't Oversight (Nov. 3, 2021), https://www.pogo.org/resource/2021/11/fact-sheet-office-of-legal-counsel-transparency [https://perma.cc/P7MD-KQKV].

full context.[107] GAO investigations may also not capture the full scope of executive branch actions during a shutdown, but only what managed to become public enough that it rose to Congress's attention in the first place.[108]

There is thus an informational deficit as Congress considers, in the aftermath of a shutdown, what choices the executive branch actually made and whether any legal authorities need to be expanded or restricted, either through modifications to substantive statutes or through riders in the next year's appropriations law. To the extent that the choices a President made are truly incident to her constitutional powers and cannot lawfully be constrained by Congress,[109] the absence of information hinders accountability to the people. And finally, the uncertainty around the executive branch's choices and the absence of public information about those choices can increase the likelihood of shutdowns happening in the first place,[110] making information even more valuable.

d. *Violations and Sanctions*

The fourth gap in the Antideficiency Act involves the processes for reporting violations of the Act and assessing the possibility of sanctions for such violations.

There are two ways that violations of the Act are identified. Agencies themselves may learn of an action taken by one of their employees and determine that an Antideficiency Act violation has occurred.[111] Alternatively, GAO may investigate a potential violation of the Act at the request of a member of Congress, agency head, or other accountable officer and determine that the action was indeed a violation.[112] The Antideficiency Act states that "If an officer or employee of an executive agency . . . violates" one of the substantive prohibitions in the Act, the agency head must "report immediately to the President and

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107 *See infra* notes 128–36 and accompanying text.

108 *See, e.g.*, U.S. Gov't Accountability Off., B-331132, Office of Management and Budget—Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriations (2019); U.S. Gov't Accountability Off., B-331091, National Archives and Records Administration—Publication of Federal Register During the Fiscal Year 2019 Lapse in Appropriations (2020).

109 *See supra* note 101 and accompanying text.

110 *See* Matthew B. Lawrence, *Disappropriation*, 120 Colum. L. Rev. 1, 71 (2020).

111 *See* U.S. Gov't Accountability Off., *supra* note 13, at 6-144 to -45.

112 *See* 31 U.S.C. §§ 712(1), 712(4); *see also* U.S. Gov't Accountability Off., GAO-06-1064SP, Procedures and Practices for Legal Decisions and Opinions 3–6 (2006), https://www.gao.gov/assets/gao-06-1064sp.pdf [https://perma.cc/F3YM-K6T9]. GAO will also investigate possible Antideficiency Act violations without a request from Congress or an agency if GAO finds information that appears to suggest a possible Antideficiency Act violation during an ongoing GAO audit. *See* 31 U.S.C. § 717(b).

Congress all relevant facts and a statement of actions taken," with a copy of the report sent to GAO.[113] But what happens if the agency and GAO disagree about whether a violation has actually taken place?

GAO has taken the consistent position that when it finds a violation has occurred, the agency must report that finding to the President and Congress.[114] OMB has taken different positions during different administrations. For the most part, its view has been that even though GAO opinions do not bind the executive branch, agencies must still report GAO findings of Antideficiency Act violations to the President and to Congress even if "the agency does not agree that a violation has occurred," while "explain[ing] the agency's position" about why the action was not a violation.[115] During the Trump Administration, however, OMB revised its view of the reporting requirement, concluding that agencies need not report any GAO determinations of a violation unless they, "in consultation with OMB," agreed that such a violation occurred.[116] The Biden Administration's OMB reverted to the ordinary position of requiring reporting even in cases of disagreement.[117]

The lack of clarity in the Antideficiency Act around reporting violations accrues power to the President. When agencies do not provide Congress with their views of why GAO's finding is wrong, Congress is left with GAO's thoughtful analysis of the facts and law on the one hand and the executive branch's terse recalcitrance on the other. Both of OMB's positions on the reporting requirement are rooted in the same constitutional separation of powers view that "a legal opinion by a Legislative Branch agency cannot bind the Executive Branch,"[118] so the difference is not rooted in different views of constitutional requirements. The difference instead is rooted in the value of rational explanation and comity as opposed to assertions of power without

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113 31 U.S.C. § 1517(b); *see also id.* § 1351.

114 U.S. Gov't Accountability Off., GAO-21-538T, Testimony Before the House Committee on the Budget—Proposals to Reinforce Congress's Constitutional Power of the Purse 4–5 (2021), https://www.gao.gov/assets/gao-21-538t.pdf [https://perma.cc/GBW8-XGEJ] (testimony of Emmanuelli Perez, GAO Deputy Counsel); U.S. Gov't Accountability Off., *supra* note 13, at 6-145 to -46.

115 Off. of Mgmt. & Budget, *supra* note 74, § 145.8; *see also* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 85.

116 Memorandum from Mark Paoletta, General Couns. of Off. of Mgmt. & Budget, to Agency Gen. Couns. 2 (Nov. 5, 2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/11/Memo-to-Agencies-on-A-11.pdf [https://perma.cc/RFR4-9R4U]; *see also* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 85.

117 Off. of Mgmt. & Budget, *supra* note 74, § 145.8; H.R. Rep. No. 117-79, at 13 (2021), https://www.congress.gov/117/crpt/hrpt79/CRPT-117hrpt79.pdf [https://perma.cc/5U2A-KWZ5].

118 Memorandum from Mark Paoletta, *supra* note 116, at 1; *see also* Off. of Mgmt. & Budget, *supra* note 74, § 145.8 (expressing a similar view).

analysis.[119] Congress is thus left not only with an informational deficit as it evaluates what to do with GAO's finding but also with the executive branch's refusal to participate in one of the core remedial aspects of the Antideficiency Act.

Congress faces a related informational deficit with respect to the other remedial aspects of the Antideficiency Act: the administrative penalties and criminal sanctions available for violations. Every year since 2004, GAO has produced an overall report for Congress on the executive branch's violations of the Act with a case-by-case explanation of the circumstances of the violation and the remedial steps the agency took in response both to prevent the violation from happening again and the consequences imposed on the agency actor committing the violation.[120] What Congress does not know, however, is whether the Attorney General investigated any of these violations as "knowing[] and willful[]," which would trigger criminal sanctions.[121]

This lack of information is a problem. The threat of criminal sanctions for intentionally violating the Antideficiency Act serves an important deterrent function, enhancing Congress's power of the purse by making the potential consequences for violating Congress's spending directions quite serious.[122] Yet there is no record of any prosecution of violations of the Act.[123] This absence may, of course, mean that the threat of prosecution is serving the deterrent effect as intended. But in conjunction with the potential for agency refusals to report GAO findings of violations, the absence may also undercut the value of the deterrent effect to the extent that agency employees may see that there is no chance that they will be prosecuted if their agency head, "in consultation with OMB,"[124] directs them to make spending decisions that violate the Act.

e. GAO and Documents

The fifth gap in the Antideficiency Act involves GAO's authority to obtain documents relevant to its assessment of potential violations of that Act.

While the Antideficiency Act itself does not provide a specific investigatory role for GAO, Congress has tasked GAO generally with "investigat[ing] all matters related to the receipt, disbursement, and use of public money" and investigating or otherwise assisting any committee

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119 *Compare* Memorandum from Mark Paoletta, *supra* note 116, at 1–2, *with* Off. of Mgmt. & Budget, *supra* note 74, § 145.8.

120 *See supra* note 60 and accompanying text.

121 31 U.S.C. § 1350; *accord id.* § 1519.

122 U.S. Gov't Accountability Off., *supra* note 114, at 6.

123 *Id.*

124 *See* Memorandum from Mark Paoletta, *supra* note 116, at 2.

with jurisdiction over spending, or either House of Congress as a whole, with its inquiries.[125] To support this investigative work, GAO is also "authorized to obtain such agency records as the Comptroller General requires to discharge the duties of the Comptroller General (including audit, evaluation, and investigative duties)."[126] In turn, "[e]ach agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency."[127]

What happens if an agency declines to provide such information? GAO is directed to make a written request to the head of the agency, specifying the information requested and the reason for the request.[128] The head of the agency then has twenty days to respond.[129] If GAO is not granted access to the information within that time period, GAO "may file a report with the President, the Director of the Office of Management and Budget, the Attorney General, the head of the agency, and Congress."[130] If that action does not prompt the agency to provide the information within an additional twenty days, GAO may subsequently file a lawsuit in the D.C. District Court to require the agency to produce the record, with certain exceptions for sensitive information.[131]

Recent events in which agencies have failed to provide GAO with the requested information have revealed that these provisions could usefully be strengthened.[132] For one thing, the absence of specific reference to GAO's investigatory powers under the Antideficiency Act or other budget and appropriations laws puts GAO in an odd position. Even though the reference to its investigatory powers over "all matters related to . . . use of public money" unquestionably covers budget and appropriations law, the fact that the records request section references only GAO's "audit, evaluation, and investigative duties" in its "including" clause appears to put budget and appropriations law investigations in a less favored category.[133]

For another thing, there is no deadline for agencies to respond to GAO requests initially, before GAO turns to the agency head.[134]

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125 31 U.S.C. § 712(1), (4)–(5).

126 *Id.* § 716(a)(1).

127 *Id.* § 716(a)(2).

128 *Id.* § 716(b)(1).

129 *Id.*

130 *Id.*

131 *Id.* § 716(b)(2), (d).

132 *See, e.g.*, U.S. Gov't Accountability Off., *supra* note 114, at 14 (describing difficulties in obtaining information in Antideficiency Act inquiries from the Department of Interior, the Department of Defense, and the Environmental Protection Agency in six different episodes across the three previous administrations).

133 *See supra* notes 125–26 and accompanying text.

134 U.S. Gov't Accountability Off., *supra* note 114, at 14.

This absence allows responses to be strung out indefinitely, hindering GAO's ability to provide Congress information in a timely manner.[135] At times, GAO has not even been able to obtain sufficient information to analyze the issue in response to a congressional request at all.[136] Congress's ability to oversee spending is hampered when agencies do not share relevant material that GAO requests.

B. The Impoundment Control Act: Limiting Executive Branch Failure to Spend

If the Antideficiency Act has its roots in the nineteenth century, the Impoundment Control Act has a much more recent vintage, growing out of conflicts during the Nixon Administration.[137] The Nixon Administration took the occasionally used presidential tool of impoundment—that is, precluding the obligation or expenditure of budget authority appropriated by Congress—to a new level, one generally understood to be so different in degree as to be different in kind.[138] The core of previous impoundments had been for efficiency or lack of necessity; the core of the Nixon Administration's impoundments were based in policy disagreements.[139] If the Administration had failed to achieve its policy goals during the appropriations process, it would simply use the budget execution process to do so.[140] In response, Congress included the Impoundment Control Act as Title X of its overhaul of the federal budget process.[141] This Act, too, has been generally successful, but, as with the Antideficiency Act, there is room for improvement.

1. What the Impoundment Control Act Does

The Impoundment Control Act defined and cabined two types of potential impoundment actions: deferral and rescission.[142]

Under deferral, the President proposes to withhold or delay the obligation or expenditure of budget authority for a specific, limited period of time.[143] The President must submit a formal "special message" to Congress explaining the amount he is planning to defer, the reason,

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135 *See id.*

136 *See, e.g.*, U.S. Gov't Accountability Off., B-330776, Department of the Interior—Activities at National Parks During the Fiscal Year 2019 Lapse in Appropriations 2 (2020).

137 Allen Schick, The Federal Budget: Politics, Policy, Process 285 (3d ed. 2007).

138 Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 64 (2017).

139 Fisher, *supra* note 5, at 147–48; *see also* Chafetz, *supra* note 138.

140 *See* Chafetz, *supra* note 138.

141 Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297; *see also* Chafetz, *supra* note 138, at 65.

142 2 U.S.C. § 682(1), (3).

143 *Id.* § 684(a).

the time period of deferral (which must remain within the current fiscal year), and all of the relevant facts and circumstances of the proposal.[144] The Impoundment Control Act narrowly prescribes acceptable reasons for deferral: "(1) to provide for contingencies; (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law."[145] Policy disagreements are not a proper basis for deferral. As the Impoundment Control Act underscores, "[n]o officer or employee of the United States may defer any budget authority for any other purpose."[146]

The Impoundment Control Act had originally permitted deferrals based on policy disagreements because Congress had been allowed to reject deferrals with a one-house veto.[147] After the Supreme Court held that a one-house veto violated the Constitution's requirement of bicameralism and presentment in *INS v. Chadha*,[148] the D.C. Circuit invalidated the deferral provision in its entirety as inseverable from the one-house veto,[149] and Congress subsequently amended the Act.[150] It removed the President's ability to defer based on policy disagreements and, instead of allowing either chamber to veto the deferral unilaterally, provided a fast-track mechanism for each chamber to consider an "'impoundment resolution' . . . which only expresses its disapproval of a proposed deferral."[151] Regardless of whether the House or Senate disapproves of the deferral, the deferral may not extend beyond the current fiscal year.[152]

Under rescission, the President proposes in another "special message" not just to delay but actually to cancel budget authority.[153] The permissible reasons for proposed rescissions are much broader: "[w]henever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons . . . ."[154] In other words, if the President has a policy disagreement with an appropriation, rescission allows him to propose to cancel it. Congress may then use the same fast-track mechanism to consider the proposed rescission in a rescission

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144 *Id.* § 684(a)(1)–(6).
145 *Id.* § 684(b)(1)–(3).
146 *Id.* § 684(b).
147 SCHICK, *supra* note 137, at 286.
148 462 U.S. 919, 959 (1983).
149 City of New Haven v. United States, 809 F.2d 900, 909 (D.C. Cir. 1987).
150 *See* Pub. L. No. 100-119, § 206, 101 Stat. 754, 785 (1987) (codified at 2 U.S.C. § 684(b)).
151 2 U.S.C. § 682(4); *see also id.* § 688 (providing the fast-track procedures).
152 *Id.* § 684(a).
153 *Id.* § 683(a).
154 *Id.*

bill.[155] If it does not approve such a bill within forty-five session days, the President must release the funds.[156]

GAO has statutory authority to review proposed rescissions and deferrals for compliance with the statute as well as to investigate potential violations of the Act, such as when agencies fail to release for obligation funds after Congress declined to approve a rescission proposal or when agencies withhold funds without submitting a special message for deferral.[157] After conducting its review, GAO is authorized to bring a civil action "against any department, agency, officer, or employee" failing to make available required budget authority, after first filing an "explanatory statement" with the Speaker of the House and the President of the Senate about the underlying circumstances and then letting twenty-five session days pass for congressional consideration.[158] In practice, however, GAO has essentially never been in the position of filing such a lawsuit, because agencies routinely release the funds.[159]

In evaluating compliance with the Act's deferral provision, GAO has developed a third category of impoundment-like action that it deems permissible and outside the scope of the Impoundment Control Act: what it calls a "programmatic delay."[160] According to GAO, a "programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency's reasonable and good faith efforts to implement the program."[161] For example, GAO has identified as permissible programmatic delays those "precipitated by legal requirements," such as the need to perform

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155 *See id.* § 688.

156 *See id. §* 683(b).

157 *See id.* § 685(b).

158 *Id.* § 687.

159 GAO makes note of the release in a published appropriations law decision. *See, e.g.*, U.S. Gov't Accountability Off., B-330045.3, Impoundment Control Act of 1974–Release of Withheld Amounts Due to Expiration of 45-day Period (2018) [hereinafter B-330045.3]. GAO did bring one lawsuit in an effort to get an agency to release funds improperly withheld under the Impoundment Control Act after the Department of Housing and Urban Development ("HUD")—initially in the Nixon Administration, continued in the Ford Administration—suspended a low-income housing program and refused to release the funds even after Congress refused to approve the suspension as a rescission and affirmatively rejected the suspension as a deferral. *See* U.S. Gov't Accountability Off., OGC-77-20, Review of the Impoundment Control Act of 1974 After 2 Years 218–20 (1977) [hereinafter OGC-77-20]; *see also* Staats v. Lynn, No. 75-0551 (D.D.C. 1975), discussed and briefs of the parties reprinted in *Hearing on GAO Legislation Before the Subcomm. on Reports, Accounting, and Management of the Senate Government Operations Comm.*, 94th Cong., 1st Sess. 184–256 (1975). After the briefing was complete, however, the Ford Administration decided to revive the program, at which point the parties stipulated, and the court agreed, that the case should be dismissed as moot. *See* OGC-77-20, *supra* note 159, at 224. This case is discussed more below with respect to the question of GAO's standing. *See infra* note 397.

160 U.S. Gov't Accountability Off., *supra* note 15, at 2-50 to -51.

161 *Id.* at 2-50.

environmental reviews and consult with stakeholders as required by statute,[162] and those due to delays in receiving contract proposals or loan applications.[163]

Unlike the penalties for violating the Antideficiency Act, the Impoundment Control Act contains no penalties for its violation—no administrative penalties and no criminal penalties alike. If GAO determines that a particular action was an improper deferral or rescission, it simply reports the matter to Congress and directs the agency to release the funds.[164]

The Act has been generally successful in restricting illegal impoundments.[165] For example, impoundments dropped dramatically from the decade preceding the Act to the decade following the Act.[166] When President Ford attempted to continue President Nixon's impoundment efforts shortly after the Act was passed, Congress quickly rebuffed him under the Act's new procedures, and he complied.[167] The same pattern held under President Reagan.[168] Neither President George W. Bush nor President Obama proposed any rescissions at all.[169] When President Trump proposed a rescission package for the first time in eighteen years, Congress swiftly rejected it,[170] and he released the funds in compliance with the Act.[171] More generally, even where impoundments have taken place without going through the proper channels as established by the Act, agencies have regularly complied with congressional pushback

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162 U.S. Gov't Accountability Off., B-333110, Office of Management and Budget and U.S. Department of Homeland Security—Pause of Border Barrier Construction and Obligations 1 (2021).

163 U.S. Gov't Accountability Off., *supra* note 15, at 2-51.

164 2 U.S.C. §§ 683(b), 686(a).

165 Chafetz, *supra* note 138, at 65–66.

166 Christopher Wlezien, *The Politics of Impoundments*, 47 Pol. Rsch. Q. 59, 64 (1994). To be sure, the executive branch faced significant losses in court in the pre-Impoundment Control Act era under the language of individual substantive statutes and appropriations laws; the Impoundment Control Act was an effort to move beyond "ad hoc efforts to restore individual programs," no matter how successful those efforts ultimately were. Fisher, *supra* note 5, at 184–98; *see also* Train v. City of New York, 420 U.S. 35, 41–42 n.8 (1975) (rejecting an effort to impound funds appropriated under an individual statute before the Impoundment Control Act took effect).

167 Schick, *supra* note 16, at 403–05.

168 *See* City of New Haven v. United States, 809 F.2d 900, 902–03 (D.C. Cir. 1987) (describing President Reagan's effort to impound funds appropriated for four separate housing assistance programs, Congress's rejection of that effort, and subsequent presidential compliance); *see also* Joseph Jucewicz, *Cooperation Altered by Adjudication: The Impoundment Process Since Nixon*, 3 J.L. & Pol. 665, 688 (1987) ("Like Nixon, Reagan today finds himself stymied by legislative and judicial barriers to the use of his impoundment power.").

169 U.S. Gov't Accountability Off., B-330828, Updated Rescission Statistics, Fiscal Years 1974–2020 3–4 (2020).

170 *Id.* at 3.

171 *See* B-330045.3, *supra* note 159, at 2.

or GAO's instructions to release improperly impounded funds.[172] While the Act did not entirely prevent all impoundments from taking place, then, the framework provided by the Act is generally understood to have "successfully shifted an important budget authority from the executive branch to the legislative branch."[173]

The Act is not uniformly appreciated, however. The day before President Trump left office, senior officials in his Office of Management and Budget—Russell Vought, OMB Director, and Mark Paoletta, OMB General Counsel—issued a letter to the Democratic chair of the House Budget Committee calling the Impoundment Control Act "unworkable in practice" because it "micromanages the President's execution of the laws with predictably terrible results."[174] More recently, as part of his campaign for re-election in 2024, President Trump pledged to "restore executive branch impoundment authority to cut waste, stop inflation, and crush the Deep State," saying that he would both challenge the constitutionality of the Impoundment Control Act in court and also work with Congress to "overturn" it.[175]

The evidence does not support these critiques or claims of authority. For example, Vought and Paoletta argue that the Act "[d]iscourage[s] [e]fficiency, [t]ransparency, and [a]ccountability" because the Act's requirements are so "onerous" that "[a]dministrations have undoubtedly found it easier to simply find unnecessary or redundant uses for excess funds rather than go through the ICA's deferral and rescission processes."[176] But the Act does not interfere with the many sources of executive spending discretion that remain available to administrations, including the opportunity to transfer and reprogram funds,[177] the greater

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172 *See* Metzger, *supra* note 37, at 1102.

173 Sam Berger, Seth Hanlon & Galen Hendricks, Ctr. for Am. Progress, Reflections on the Congressional Budget Act (2018), https://www.americanprogress.org/article/reflections-congressional-budget-act/ [https://perma.cc/Q6RT-RPFG].

174 Letter from Russell Vought, Dir., OMB, & Mark Paoletta, Gen. Couns., OMB, to Chairman John Yarmuth, H. Comm. on the Budget 1, 9 (Jan. 19, 2021) [hereinafter Letter from Vought & Paoletta], https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/Response-to-House-Budget-Committee-Investigation.pdf [https://perma.cc/U6U4-G6AS].

175 *Agenda 47: Using Impoundment to Cut Waste, Stop Inflation, and Crush the Deep State*, Donald J. Trump (June 20, 2023), https://www.donaldjtrump.com/agenda47/agenda47-using-impoundment-to-cut-waste-stop-inflation-and-crush-the-deep-state [https://perma.cc/FCM2-5BZW].

176 Letter from Vought & Paoletta, *supra* note 174, at 9–10.

177 A transfer shifts funds between appropriations and requires express statutory authority, while a reprogramming shifts funds "within an appropriation to purposes other than those contemplated at the time of appropriation," and is generally available subject to particular limitations that Congress may place on an individual appropriation or agency. U.S. Gov't Accountability Off., *supra* note 15, at 2-44; *see also id.* at 2-30 to -37 (discussing the concept of executive spending discretion more generally); Wlezien, *supra* note 166, at 69 (suggesting that impoundment and transfers may in certain circumstances be substitutes).

authority over no-year or multi-year funds,[178] and the GAO-blessed exception for programmatic delay.[179] If administrations truly think that a particular set of spending is wasteful, they can attempt to justify its elimination or restriction in the next year's budget proposal as well. If Congress rejects that claim, the rejection does not make Congress "an [u]nreliable [p]artner," as Vought and Paoletta suggest,[180] but rather indicates that Congress has different policy priorities and a different sense of what constitutes waste.

Moreover, *any* effort on the part of Congress to control executive branch budget execution could be disparaged as micromanaging, as opposed to appropriate efforts to ensure that the executive does not thwart congressional direction.[181] Vought and Paoletta point to nothing specific in the Impoundment Control Act to justify this concern as especially significant under the Act.

As for the 2024 Trump campaign's suggestion that impoundment authority is a necessary tool to "cut waste" and "stop inflation,"[182] the claim is hard to square either with the realities of the federal budget or with the law. The campaign's commitment to "maintaining the same level of funding for defense, Social Security, and Medicare"[183] means that it is leaving out some of the largest categories of the budget in its efforts.[184] The remaining categories would require drastic cuts to accomplish the campaign's avowed spending goals,[185] and the

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178 Congress appropriates no-year funds when it makes sums "available for obligation without fiscal year limitation," typically by indicating that the appropriation is "to remain available until expended," while Congress appropriates multi-year funds when it makes sums "available for obligation for a definite period in excess of one fiscal year." U.S. GOV'T ACCOUNTABILITY OFF., GAO 05-261SP, PRINCIPLE OF FEDERAL APPROPRIATIONS LAW 5-7 to -9 (observing that no-year funds have "obvious" advantages to agencies, given the increase of flexibility that they provide).

179 *See supra* notes 160–63.

180 Letter from Vought & Paoletta, *supra* note 174, at 10.

181 *See, e.g.*, CONG. BUDGET OFF., BIENNIAL BUDGETING 44 (1988), https://www.cbo.gov/sites/default/files/100th-congress-1987-1988/reports/doc02-entire.pdf [https://perma.cc/BPX5-UT77] (discussing claim that annual budgeting itself turns Congress into micromanagers and noting that biennial budgeting could cause Congress to micromanage even more in each appropriation bill because it would review budgets less frequently); Kurt Couchman & Russ Duerstine, *DoD's Biggest Problems with a Continuing Resolution Come from Congress*, THE HILL (Jan. 10, 2022, 7:00 PM), https://thehill.com/blogs/congress-blog/economy-budget/589101-dods-biggest-problems-with-a-continuing-resolution-come/ [https://perma.cc/8Z3H-JUBK] (listing the Impoundment Control Act as only one example of congressional micromanagement).

182 *Agenda 47*, *supra* note 175.

183 *Id.*

184 *See* CONG. BUDGET OFF., THE FEDERAL BUDGET IN FISCAL YEAR 2022 (Mar. 28, 2023), https://www.cbo.gov/publication/58888 [https://perma.cc/X64Y-ZNUS].

185 The campaign position explains, "This is the ONLY way we will ever return a balanced budget: Impoundment." *Agenda 47*, *supra* note 175. Yet the nonpartisan Center for a Responsible Federal Budget estimates that leaving out spending on defense, veterans, Social Security, and Medicare would require cuts as much as eighty-five percent to everything else to achieve

evidence suggests that leaving it to the President alone to decide what to cut would likely lead to picking partisan favorites rather than careful assessment of how to stop waste.[186] This is not to say that there is no waste in government spending; in fact, GAO has identified major categories of waste in defense spending and Medicare spending,[187] even though the Trump campaign has pledged not to touch those categories. But the sledgehammer of impoundment is not the right way to fix the problem of waste as compared to the hard work of policymaking and administration.

With respect to inflation, economists disagree about the extent to which government spending causes inflation.[188] But even assuming that some degree of spending is connected to inflation, that does not mean that unilateral impoundment is a better tool to control inflation or spending—whether as a matter of economics or democracy—than the Federal Reserve's levers,[189] the spending caps negotiated as part of the 2023 debt ceiling crisis,[190] or the various mechanisms for sequestration

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a balanced budget within ten years, "the equivalent of *ending* all nondefense appropriations and *eliminating* the entire Medicaid program." *What Would It Take to Balance the Budget?*, Comm. for a Responsible Fed. Budget (Jan. 12, 2023), https://www.crfb.org/blogs/what-would-it-take-balance-budget [https://perma.cc/PRP7-66TQ].

186 *See* Douglas L. Kriner & Andrew Reeves, The Particularistic President: Executive Branch Politics and Political Inequality 11 (2015); John Hudak, Presidential Pork: White House Influence Over the Distribution of Federal Grants 4 (2014).

187 *See, e.g.*, U.S. Gov't Accountability Off., GAO-23-106203, High-Risk Series: Efforts Made to Achieve Progress Need to Be Maintained and Expanded to Fully Address All Areas 9 (2023) (identifying six Department of Defense operations as among the thirty-seven areas across the federal government that are most vulnerable to waste, fraud, and abuse); U.S. Gov't Accountability Off., GAO-23-106285, Improper Payments: Fiscal Year 2022 Estimates and Opportunities for Improvement 9 (2023) (identifying Medicare as reflecting nineteen percent of all improper payments in Fiscal Year 2022, for a total of $46.8 billion).

188 *Compare, e.g.*, Robert J. Barro, *Understanding Recent US Inflation*, AEI (Aug. 30, 2022), https://www.aei.org/op-eds/understanding-recent-us-inflation/ [https://perma.cc/7ZQQ-AKLB] (arguing that "the likely main culprit behind the recent high inflation was an extraordinarily expansionary fiscal policy"), *with* Joseph E. Stiglitz & Ira Regmi, The Causes of and Responses to Today's Inflation 3 (2022), https://rooseveltinstitute.org/wp-content/uploads/2022/12/RI_CausesofandResponsestoTodaysInflation_Report_202212.pdf [https://perma.cc/K9DS-7X2Z] (arguing that "excessive spending during the pandemic is *not* the principal cause of today's inflation").

189 *See generally* Gauti B. Eggertsson & Donald Kohn, *The Inflation Surge of the 2020s: The Role of Monetary Policy* (Hutchins Ctr., Working Paper No. 87, 2023), https://www.brookings.edu/articles/the-inflation-surge-of-the-2020s-the-role-of-monetary-policy/ [https://perma.cc/J6HP-G7VV].

190 *See, e.g.*, *How Much Would the Fiscal Responsibility Act Save?*, Comm. for a Responsible Fed. Budget (June 1, 2023), https://www.crfb.org/blogs/how-much-would-fiscal-responsibility-act-save [https://perma.cc/AW5U-UWRT]; David Reich, *Debt Ceiling Deal Squeezes Non-Defense Appropriations, Even With Agreed-Upon Adjustments*, Ctr. on Budget & Pol'y Priorities (June 21, 2023), https://www.cbpp.org/research/federal-budget/debt-ceiling-deal-squeezes-non-defense-appropriations-even-with-agreed-upon [https://perma.cc/E95Y-QL47].

and pay-as-you-go requirements that already exist in federal law.[191] Focusing solely on cutting government spending to limit inflation also ignores the complicated issue of government spending in order to prevent or mitigate recession—a topic on which the Trump campaign's impoundment announcement is silent.[192]

Meanwhile, in the legal arena, no court has ever ruled that the President has any inherent constitutional authority to impound, while courts during and immediately following the Nixon era routinely rejected statutory authority to do so.[193] Some Nixon officials did try to present constitutional arguments in support of impoundment based in the President's Take Care authority and historical practice.[194] As others have shown, however, these arguments unsuccessfully tried to bootstrap controversial attempts to reject congressional policy choices onto earlier instances of routine, limited, and ultimately congressionally approved instances of presidential failure to spend.[195] Indeed, no less than William Rehnquist, while serving as President Nixon's Assistant Attorney General at the Office of Legal Counsel, opined that "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent."[196] To the extent that some limited impoundment authority may conceivably be located in the President's commander-in-chief powers,[197] President Trump's campaign has explicitly disavowed his interest in using impoundment on defense spending.[198]

Rather than a serious critique of the merits of the Impoundment Control Act, then, the Trump campaign's lambasting of the Act is better understood through the lens of its longstanding goal to "crush the Deep

191 *See, e.g.*, Walter J. Oleszek, Mark J. Oleszek, Elizabeth Rybicki, & Bill Heniff Jr., Congressional Procedures and the Policy Process 83–85 (11th ed. 2020).

192 *See, e.g.*, Philipp Carlsson-Szlezak, Paul Swartz & Martin Reeves, *Weighing the Risks of Inflation, Recession, and Stagflation in the U.S. Economy*, Harv. Bus. Rev. (June 10, 2022), https://hbr.org/2022/06/weighing-the-risks-of-inflation-recession-and-stagflation-in-the-u-s-economy [https://perma.cc/3WBF-73TA].

193 *See* Metzger, *supra* note 37, at 1115–16.

194 Fisher, *supra* note 5, at 150; Christian I. Bale, Note, *Checking the Purse: The President's Limited Impoundment Power*, 70 Duke L.J. 607, 609–10 (2020).

195 *See* Fisher, *supra* note 5, at 148, 165, 171; Price, *supra* note 8, at 434–35.

196 Presidential Auth. to Impound Funds Appropriated for Assistance to Federally Impacted Schools, 1 Supp. Op. O.L.C. 303, 309 (1969).

197 *Id.* at 310–11 (noting that it would be a different situation "if a congressional directive to spend were to interfere with the President's authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander in Chief of the Armed Forces and his authority over foreign affairs"); *see also* Bale, *supra* note 194, at 627–35; Price, *supra* note 8, at 435 n.281.

198 *See Agenda 47*, *supra* note 175.

State."[199] If the President can pick and choose what to fund and what to starve, no matter what Congress says, that would be a powerful tool to accomplish this aim.[200]

Similarly, the Vought & Paoletta letter is instead better seen as a political document defending President Trump against a host of appropriations law violations, including under the Impoundment Control Act, as he left office.[201] This meaning becomes especially clear when read in conjunction with Paoletta's subsequent testimony before the House Budget Committee opposing the Congressional Power of the Purse Act (discussed more below[202]). In this testimony, he relied on the Vought & Paoletta letter while also lambasting President Biden for alleged violations of the Impoundment Control Act and accusing both GAO and Democrats in Congress for ostensibly looking the other way.[203]

Yet while the Vought & Paoletta letter and Trump campaign critiques of the Impoundment Control Act are best seen as political statements, that does not mean that defense of the Impoundment Control Act is itself partisan. Presidents of both parties take up the tools of previous presidents and seek to expand them.[204] Expanding the impoundment power would not redound to Republicans' benefit in a Democratic administration. Republicans would not want a Democratic president to unilaterally refuse to spend money appropriated for, for example, the

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199 *Id.*; *see also* Tom Rogan, *Mick Mulvaney: 'The Deep State Is Real, and It's Our Job to Go Out and Fix It'*, Wash. Exam'r (Feb. 19, 2020, 1:38 PM), https://www.washingtonexaminer.com/?p=2719810 [https://perma.cc/LH6Q-STPE].

200 *See* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 Harv. L. Rev. 585, 609–11 (2021).

201 *See* Letter from Vought & Paoletta, *supra* note 174, at 1 ("This letter responds to the report and accompanying statements, released by the House Budget Committee . . . on November 20, 2020, concerning the Office of Management and Budget's . . . exercise of its statutory and delegated authorities to manage Executive Branch spending over the past four years. The purpose of this letter is to correct the false and misleading record portrayed by the Committee's statements . . . ."); *House Budget Committee Investigation Exposes Trump Administration's Systemic Abuse of Executive Spending Authority*, House Comm. on the Budget (Nov. 20, 2020), https://democrats-budget.house.gov/OMB-Abuse [https://perma.cc/LY9E-T7PK]; Paul M. Krawzak, *Trump Budget Office Slams 1974 'Impoundment' Law on Way Out*, Roll Call (Jan. 19, 2021, 2:16 PM), https://rollcall.com/2021/01/19/trump-budget-office-slams-1974-impoundment-law-on-way-out/ [https://perma.cc/U6U6-239Y].

202 *See infra* note 236 and accompanying text.

203 *Protecting our Democracy: Reasserting Congress' Power of the Purse: Hearing Before the H. Comm. on the Budget*, 117th Cong. 32–34 (2021) [hereinafter *Protecting our Democracy*] (statement of Mark R. Paoletta, Senior Fellow, Center for Renewing America); *see also* Sean Moran, *Paoletta: Joe Biden '100 Percent' Violated Federal Law by Withholding Border Wall Funds*, Breitbart (Apr. 30, 2021), https://www.breitbart.com/politics/2021/04/30/joe-biden-percent-violated-federal-law-withholding-border-wall-funds/ [https://perma.cc/L23H-D6ED].

204 *See* Peter M. Shane, Democracy's Chief Executive: Interpreting the Constitution and Defining the Future of the Presidency 16–19 (2022).

Space Force—one of President Trump's signature creations[205]—or on subsidies traditionally more favored by Republicans than Democrats.[206]

Analyzing the gaps in the Impoundment Control Act revealed by the era of presidential control is thus an institutional, not a partisan, task. This next Section turns to that analysis. Along the way, this Article discusses, and largely rejects, specific claims Vought and Paoletta make. There is one point they make, however, that this Article generally supports: a critique of the Impoundment Control Act's failure to distinguish between an improper deferral and a permissible programmatic delay. As explained below, this exception has in some sense swallowed the rule.[207]

2. *Gaps and Problems in the Impoundment Control Act*

Like the Antideficiency Act, the Impoundment Control Act has been generally successful in accomplishing the goals for which it was designed. But also like the Antideficiency Act, the Impoundment Control Act has not kept pace with the way those goals respond to the challenges of presidential control in the twenty-first century. In the Impoundment Control Act, too, five gaps and problems have emerged.

a. *Pocket Rescissions*

The first gap is the underspecification of a deadline by which a President must propose to rescind funds before the end of the fiscal year on September 30. The Act says that no deferral may take place that would run beyond the end of the fiscal year but is silent about such a deadline for rescission proposals.[208] Does that mean that a President may propose rescission right up until the end of the fiscal year, thereby unilaterally letting the funds expire without giving Congress a real chance to consider the proposal?[209]

Vought and Paoletta argue yes, concluding that the Act's silence on the deadline for rescission proposals gives the President the opportunity

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205 *See* Samantha Masunaga, *What Happens to the Space Force After the Trump Administration?*, L.A. TIMES (Dec. 15, 2020, 5:00 AM), https://www.latimes.com/business/story/2020-12-15/space-force-biden-trump [https://perma.cc/RE5D-WU48].

206 *See* Veronique de Rugy, *GOP to Taxpayers: We're Against Subsidies, Except If They're for Rich Farmers*, MERCATUS CTR. (July 15, 2013), https://www.mercatus.org/economic-insights/expert-commentary/gop-taxpayers-were-against-subsidies-except-if-theyre-rich [https://perma.cc/EFL9-HL9E].

207 *See infra* notes 243–67 and accompanying text.

208 *Compare* 2 U.S.C. § 684(a) ("A deferral may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral is transmitted to the House and the Senate."), *with id.* § 683 (silence).

209 *See* Letter from Vought & Paoletta, *supra* note 174, at 3.

for what they term a "pocket rescission."[210] But this argument seems at odds with the statutory language, as GAO has concluded.[211] The Impoundment Control Act says that the funds proposed to be rescinded "shall be made available" unless Congress has approved the rescission within the forty-five-day period of consideration.[212] This mandatory language admits no exceptions, indicating that Congress expects the funds to be used as intended before the end of the fiscal year if it does not approve the proposed rescission.[213] This reading makes good sense, as the whole point of the rescission provision is to make sure that the executive branch follows Congress's directions in appropriations laws.

Vought and Paoletta point to a 1975 opinion in which GAO appeared to reach the opposite conclusion.[214] In that opinion, GAO reviewed late-year rescission proposals by President Ford and observed that the funds would lapse before the end of the forty-five-day period.[215] To prevent such a reoccurrence, GAO proposed that Congress amend the rescission provision to parallel the then-operative deferral provision by allowing a one-house veto.[216] While Vought and Paoletta say that it is "unclear . . . why GAO suddenly jettisoned its own decades-long precedent and declared that such proposals now violate the ICA,"[217] GAO explained why in its 2018 opinion overruling the 1975 ones: "This interpretation would, in effect, give the President power to amend or to repeal previously enacted appropriations merely by calibrating the timing of the submission of a special message. This interpretation is clearly contrary to the Supreme Court's rulings in *Chadha* and *Clinton*."[218]

This gap in the Impoundment Control Act has given rise to unnecessary conflicts at the end of the fiscal year and ought to be remedied.[219]

b. Penalties

The second gap in the Impoundment Control Act is the lack of consequences for violating it.

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210 *Id.* at 3–4, 3 n.12 ("a pocket rescission occurs when the President submits a rescission proposal under the Act within 45 days of the end of the fiscal year and Congress fails to act on the proposal, causing the funds to lapse.").

211 U.S. Gov't Accountability Off., B-330330, Impoundment Control Act—Withholding of Funds Through Their Date of Expiration 8–9 (2018).

212 2 U.S.C. § 683(b).

213 U.S. Gov't Accountability Off., *supra* note 211, at 4–5.

214 Letter from Vought & Paoletta, *supra* note 174, at 3–4.

215 U.S. Gov't Accountability Off., B-115398.33 (1976).

216 *Id.*

217 Letter from Vought & Paoletta, *supra* note 174, at 4.

218 U.S. Gov't Accountability Off., *supra* note 211, at 11.

219 *See* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 77, 89 (describing end-of-year conflict in 2019); U.S. Gov't Accountability Off., *supra* note 215 (describing end-of-year conflict in 1976).

Imagine a scenario in which a political official directs a civil servant to obligate funds in a manner that the civil servant believes, in accordance with longstanding agency practice, would violate the Antideficiency Act. The civil servant can point to the risk of personal consequences for violating the Act as a means to push back against the direction.[220] In contrast, if a political official directs a civil servant to withhold funds in a manner that the civil servant believes, in accordance with longstanding agency practice, would constitute an improper deferral under the Impoundment Control Act, there are no such consequences to point to.[221] The existence of consequences in the Antideficiency Act coupled with the absence of consequences in the Impoundment Control Act skews compliance toward the former, which in turn gives presidents more leeway in improper impoundments than in unauthorized spending.

Vought and Paoletta object to importing penalties into the Impoundment Control Act, suggesting that agencies will be caught between a rock and a hard place if individuals face consequences in both directions.[222] A budget manager would be in an impossible position were she to face penalties for improper withholding if she prudently sets aside some funding to avoid an Antideficiency Act violation in the future, and then that funding lapses without being used.[223]

The Antideficiency Act's penalties are not rooted in strict liability, however, nor would equivalent penalties in the Impoundment Control Act need to be.[224] GAO's annual reports on Antideficiency Act violations are full of minor administrative penalties or even just warnings.[225] The specter of serious punishment for minor Impoundment Control Act violations ignores the way the absence of any penalties undercuts

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220 *See* Jason Miller, *Should You Be Concerned over OMB's Decision that GAO's Antideficiency Determinations Are Non-Binding?*, Fed. News Network (Dec. 16, 2019, 12:32 PM), https://federalnewsnetwork.com/reporters-notebook-jason-miller/2019/12/should-you-be-concerned-over-ombs-decision-that-gaos-antideficiency-determinations-are-non-binding/ [https://perma.cc/32KV-6BN3] (suggesting to federal employees, in light of potential Antideficiency Act penalties for noncompliance, that disregarding the agency's own determination of a violation in favor of OMB's contrary determination "becomes much more risky and probably not worth endangering your career"); Gray, *supra* note 57 (describing how threat of penalties enhances compliance with the Antideficiency Act).

221 *See, e.g.*, Kate Brannen, *Exclusive: Unredacted Ukraine Documents Reveal Extent of Pentagon's Legal Concerns*, Just Sec. (Jan. 2, 2020), https://www.justsecurity.org/67863/exclusive-unredacted-ukraine-documents-reveal-extent-of-pentagons-legal-concerns/ [https://perma.cc/ZW27-5N85] (highlighting repeated but unsuccessful efforts by civil servants to raise Impoundment Control Act problems with political officials).

222 *See* Letter from Vought & Paoletta, *supra* note 174, at 12.

223 *See Protecting our Democracy*, *supra* note 203, at 41.

224 *See supra* note 56 and accompanying text.

225 *See* Candreva, *supra* note 57, at 86–87.

the Act's ability to prevent improper impoundments. That is, the goal of a penalty regime need not be to punish but to incentivize compliance.[226]

c. GAO's Authority

The third gap in the Impoundment Control Act involves the scope of GAO's authority as it relates to providing information to Congress.

GAO is tasked with reporting to Congress if it discovers an ongoing improper impoundment, but nothing in the Act explicitly requires it to report to Congress if it discovers an improper impoundment for which the funds have already been released.[227] Yet Congress may well be interested in such information, whether to assess the functionality of the executive branch's internal controls or to determine whether additional provisions should be made to prevent similar improper impoundments in the future. GAO has of its own accord started to report now-settled impoundments based on its judgment that doing so in a particular matter "would enhance congressional oversight,"[228] but this practice does not necessarily capture every instance, nor can it be consistently counted on. General instructions to report even settled impoundments would provide Congress with ongoing information and would parallel the scope of GAO's authority to report on Antideficiency Act violations even once they have been fixed.[229]

Relatedly, the same provision of the Impoundment Control Act says that if GAO identifies an impoundment for which the President failed to transmit the required "special message" to Congress, then GAO's report to Congress itself qualifies as a special message triggering the Act's provisions for fast-track review.[230] The problem with this equivalence is that GAO's report has the effect of ratifying the President's improper action, even if GAO finds the impoundment was improper.[231] This is so because the special message not only triggers the fast-track provisions but also authorizes the withholding during the period of congressional review, making the impoundment lawful during that period, even though the President failed to follow the required notification provision in the first place.[232] This equivalence provision thus undercuts Congress's goal of obtaining information about proposed rescissions and deferrals without automatically approving them.

226 *Cf.* Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 Yale L.J. 248, 318 (2014) (describing the purpose of a funding cutoff mechanism as "[r]ehabilitation and deterrence").

227 U.S. Gov't Accountability Off., *supra* note 114, at 10; *see* 2 U.S.C. § 686(a).

228 U.S. Gov't Accountability Off., *supra* note 114, at 11.

229 *See id.*; *see also supra* note 60 and accompanying text.

230 2 U.S.C. § 686(a).

231 U.S. Gov't Accountability Off., *supra* note 114, at 11.

232 2 U.S.C. § 686(a).

In addition, while GAO is required under the Antideficiency Act to provide annual reports on violations of the Act, Congress has no ready source of information about why certain accounts with sums still available have been allowed to expire.[233] Yet more information about such accounts might alert Congress to Impoundment Control Act problems and might either prevent their lapsing in the first place or provide information that justifies their lapse.

Another gap related to GAO's authority in providing information to Congress stems from the absence of clarity around the steps GAO is authorized to take in investigating possible Impoundment Control Act violations. GAO's authority to investigate such violations is part of the authority outlined in its organic statute, as described above for Antideficiency Act violations.[234] Yet while the Impoundment Control Act prescribes a number of steps for GAO to take under the Act, it does not clearly explain its authority to obtain information or records as part of its assessment of whether there has been a violation.[235] This absence is a puzzling omission in light of how critical GAO's role is in ensuring Impoundment Act agency compliance and congressional oversight.

Paoletta objects to the idea that GAO should be further authorized "to demand information and interviews of federal employees" as an affront to the separation of powers, saying that such matters are for political negotiation rather than a lawsuit.[236] But one need not agree that such matters should end up in court to see that spelling out routine expectations for the ordinary investigative process would be helpful, and in many instances uncontroversial. GAO and agencies have countless routine interactions within the scope of GAO's authority.[237] Indeed, agencies regularly reach out to GAO to obtain GAO's views on appropriation law issues,[238] and GAO regularly conducts training for federal employees on appropriations law.[239] Agencies participate with GAO in part against the backdrop of its litigating authority. Defining the scope of GAO's authority to investigate Impoundment Control Act matters

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233 *Compare Antideficiency Act Resources*, Gov't Accountability Off., https://www.gao.gov/legal/appropriations-law/resources [https://perma.cc/A9VN-MJCL] (explaining that Act's requirements and providing comprehensive annual reports), *with* Gov't Accountability Off., *supra* note 114, at 12 (describing value of additional transparency requirements on potential Impoundment Act violations).

234 *See supra* notes 125–31 and accompanying text.

235 *See* 2 U.S.C. §§ 686–687 (outlining numerous steps for GAO under the Act but not indicating its investigative authority).

236 *Protecting our Democracy*, *supra* note 203, at 40.

237 U.S. Gov't Accountability Off., GAO-19-55G, GAO's Agency Protocols 7 (2019), https://www.gao.gov/products/gao-19-55g [https://perma.cc/CF96-UATF].

238 U.S. Gov't Accountability Off., *supra* note 15, at 1-12 to -15; U.S. Gov't Accountability Off., *supra* note 237, at 7–8.

239 *Appropriations Law Training*, U.S. Gov't Accountability Off., https://www.gao.gov/legal/appropriations-law/appropriations-law-training [https://perma.cc/WKY9-8RRJ].

would also help prevent violations, as civil servants asked to take steps they believe violate the Act would be able to point to such investigations as a potential reason not to take the steps.

The final problem with respect to GAO's authorities under the Act relates to the timing of potential lawsuits to require agencies to make budget authority available for obligation. The Act currently allows such lawsuits after giving Congress twenty-five days to consider the circumstances,[240] essentially providing time for agencies to release the funds of their own accord and for Congress to tell GAO to stand down if it so chooses.[241] But this length of time presents a problem when administrations try to run out the clock on the fiscal year, letting funds expire without congressional approval when there is no reasonable way that Congress can act before the fiscal year ends.[242] Shortening this time frame and providing flexibility would both incentivize agencies to release the funds in a timely fashion and allow Congress to bless the filing of a lawsuit that would require the release of the funds before they expire.

d. Programmatic Delay

The fourth gap in the Impoundment Control Act is the lack of discussion of the nonstatutory category of "programmatic delay" that GAO has developed.

This gap is a problem for two reasons. First, the exception is in some tension with the statutory language yet appears to have sidestepped and even superseded the process for congressional consideration of deferrals. Second, the primary question for evaluating an action as a permissible programmatic delay revolves around motive and intent, which is both hard for GAO to evaluate and incommensurate with Congress's rationale for assessing deferrals in the first place.

First, as to the statutory language, as originally passed, the Impoundment Control Act contemplated two kinds of deferrals, both programmatic deferrals and policy deferrals. As the D.C. Circuit explained of that initial regime,

> The majority of proposed deferrals are routine "programmatic" deferrals, by which the Executive Branch attempts to meet the inevitable contingencies that arise in administering congressionally funded agencies and programs. Occasionally, however, the President will seek to implement "policy" deferrals, which are intended to advance the broader fiscal policy objectives of the Administration. The critical distinction

240 2 U.S.C. § 687.

241 *See supra* notes 158–59 and accompanying text.

242 U.S. Gov't Accountability Off., *supra* note 114, at 13–14.

> between "programmatic" and "policy" deferrals is that the former are ordinarily intended to *advance* congressional budgetary policies by ensuring that congressional programs are administered efficiently, while the latter are ordinarily intended to *negate* the will of Congress by substituting the fiscal policies of the Executive Branch for those established by the enactment of budget legislation.[243]

When the D.C. Circuit struck down the deferral provision in its entirety as inseverable from the unconstitutional one-house veto provision, Congress revised the Impoundment Control Act to eliminate the potential for policy deferrals.[244] That left, apparently, deferrals of the programmatic kind.

This is exactly the kind of deferral that GAO now treats as a programmatic delay falling outside the Impoundment Control Act. Compare the D.C. Circuit's example of a programmatic deferral under the Act against GAO's definition of a programmatic delay that falls outside the Act. The D.C. Circuit explained, "consider a congressional appropriation of $10,000,000 to construct a new highway between Washington, D.C. and New York. If inclement weather threatened completion of the construction project, the President might seek to defer the expenditure of the appropriated funds for 'programmatic' reasons."[245] But GAO might now treat this as a programmatic delay rather than a deferral: "A programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency's reasonable and good faith efforts to implement the program."[246] That is, the inclement weather would likely constitute an "operational factor[]" that, under GAO's interpretation, would take this out of the Impoundment Control Act altogether, meaning that the agency would not need to send a special message to Congress reporting it.[247]

This reading seems to ignore the definition of a deferral in the statute that allows agencies to defer "to provide for contingencies."[248] In other words, Congress did not *ban* deferrals on this ground; it simply wants to know about them. GAO's current treatment of programmatic delay allows agencies to sidestep the notice requirements of the Act. It is notable that there have been no deferral notices to Congress in

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243 City of New Haven v. United States, 809 F.2d 900, 901 (D.C. Cir. 1987).

244 *See supra* notes 147–52 and accompanying text; *see also* H.R. Rep. No. 100-313, at 67 (1987) (Conf. Rep.), https://budgetcounsel.files.wordpress.com/2016/10/1987-09-21-bbedcra-pl100-119-c-rpt-100-313-hjr324.pdf [https://perma.cc/FT6G-KZB3] (noting that the revised deferral provision "codifies the *New Haven* decision").

245 *City of New Haven*, 809 F.2d at 901 n.2.

246 U.S. Gov't Accountability Off., *supra* note 15, at 2-50.

247 *See* U.S. Gov't Accountability Off., *supra* note 15, at 2-50.

248 2 U.S.C. § 684(b)(1).

the twenty-first century,[249] even though it is inconceivable that agencies have not had to routinely adjust their spending to provide for contingencies during this time.

The point of the special notice under the Impoundment Control Act is that Congress might want to express its disapproval of a deferral, even if the executive branch made it for legally permissible reasons.[250] Consider GAO's assessment of three recent high-profile, rather than routine, inquiries into whether a delay was a permissible programmatic delay or an impermissible policy deferral, none of which was reported to Congress under the Act.

GAO investigated the Trump Administration's controversial holds on funds meant for Ukraine in the summer of 2019 in two separate inquiries. In the first inquiry, GAO determined that OMB's actions in withholding from obligation Department of Defense funds meant for Ukraine constituted an improper policy-based deferral.[251] This finding was based on OMB's explanation that the withholding was in order to make sure that the funds were spent in alignment with the President's foreign policy, while the statute itself did not confer discretion in spending on the President.[252] In the second inquiry, GAO determined that OMB's actions in withholding from obligation State Department funds meant for Ukraine during exactly this same time period constituted a permissible programmatic delay.[253] This finding was based in part on the substantial statutory discretion granted to the President to award these funds, making the time spent on interagency policy discussions over the best uses for these funds programmatic.[254]

In other words, the permissibility of the very same kinds of activities—the administration's pause in order to assess the use of funds intended for Ukraine against the President's policy goals—turned on a technicality, the amount of discretion in the underlying statutes. But nothing turned on whether Congress would want to know about these plans to delay spending the funds, whether as a "contingenc[y]" or "as

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249 Office of Management and Budget, Analytical Perspectives: Budget of the U.S. Government Fiscal Year 2017 103, https://obamawhitehouse.archives.gov/sites/default/files/omb/budget/fy2017/assets/ap_9_concepts.pdf [https://perma.cc/5FWT-6UZ2] ("The last time the President initiated the withholding of funds was in fiscal year 2000.").

250 *See id.*

251 B-331564, *supra* note 77, at 6.

252 *Id.* at 6–7.

253 B-331564.1, *supra* note 77, at 1; U.S. Gov't Accountability Off., 331564.2, Office of Management and Budget—Reconsideration—Application of the Impoundment Control Act to 2019 Apportionment Letters and a Congressional Notification for State Department Foreign Military Financing 1 (2022), https://www.gao.gov/assets/b-331564.2.pdf [https://perma.cc/MQ6P-9HH8].

254 B-331564.1, *supra* note 77, at 12–13; U.S. Gov't Accountability Off., *supra* note 253, at 3–5.

specifically provided by law,"[255] which is the point of the Impoundment Control Act's provisions governing special notices for deferrals.

In the other example of recent examinations into potential Impoundment Control Act violations, GAO considered the Biden Administration's contested "pause" on the obligation of funds to build the wall at the southern border that the Trump Administration had begun.[256] Here, GAO determined that the delay was a permissible programmatic delay rather than an impermissible policy-based deferral.[257] It did so because the Biden Administration had decided not to waive certain statutory requirements that the Trump Administration had waived, and thus the statutory requirements constituted programmatic reasons for the delay[258]—even though the decision not to waive was itself a policy choice, and even though these programmatic reasons are easily characterized as "to provide for contingencies" or "as specifically provided by law" under the Impoundment Control Act.[259] In this instance, too, the Act contemplates that Congress should have the opportunity to reject the administration's slow-walking.

The second problem with the nonstatutory category of programmatic delay involves its connection to motive and intent. GAO's determination that "intent is a relevant factor" in distinguishing impermissible deferrals from permissible programmatic delays brings its own problems.[260] Vought and Paoletta argue that "[s]uch a subjective inquiry is not a helpful tool for Congress's oversight of Federal spending."[261] They are right. The Impoundment Control Act provides that Congress should have the opportunity to reject delays even based on proper motive.

In fact, intent or motive are unusual considerations in legal evaluations of executive branch actions. Instead, courts typically assess whether such actions were "arbitrary and capricious," which, in its classic formulation, requires the agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[262] The closest

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255 2 U.S.C. § 684(b)(1), (3).

256 U.S. Gov't Accountability Off., *supra* note 162, at 2.

257 *Id.* at 1.

258 *Id.* at 10–11, 16.

259 2 U.S.C. § 684(b)(1), (3).

260 U.S. Gov't Accountability Off., *supra* note 15, at 2-50 ("Since intent is a relevant factor, the determination requires a case-by-case evaluation of the agency's justification in light of all of the surrounding circumstances."); *see also* Schick, *supra* note 16, at 407 ("GAO cannot always distinguish between delays caused by prudent management and delays prompted by policy motives.").

261 Letter from Vought & Paoletta, *supra* note 174, at 12.

262 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

the Supreme Court has come to importing a motive standard into this review is in *Department of Commerce v. New York*,[263] where a bare majority—which no longer sits on the Court—held that a pretextual but otherwise rational explanation could render agency action illegitimate, sufficing to make an otherwise acceptable explanation arbitrary and capricious.[264] But even this standard, should it survive the change in the Court's membership, is difficult to meet, requiring that an explanation be entirely "contrived" in order to be deemed unacceptably pretextual, and permitting agencies to have "both stated and unstated reasons for a decision."[265]

The analogy is imperfect, as GAO is not a court, and is not reviewing potential impoundments under the Administrative Procedure Act in any event. In addition, the Administrative Procedure Act's arbitrary and capricious standard does not apply to presidential or OMB actions,[266] even though GAO's review of potential impoundments is often an inquiry into such actions. But the standard does show some of the difficulties in determining the intent of a multimember decision, which is likely to have different rationales; even courts using legislative history to construct congressional "intent" rely on published documents rather than interviews of individual legislators.[267]

Even more important, however, is that purity of motive might from Congress's perspective be irrelevant to whether it would want to reject delays in spending. Consider the Trump Administration's hold on Ukraine spending, one aspect of which GAO deemed permissible in motive and the other of which GAO deemed impermissible in motive.[268] From Congress's perspective, however, the question is the same: Does Congress want the funding to go to Ukraine speedily or not? The same is true of the Biden Administration's pause on border wall construction. Clearly the pause aligned with the administration's substantive rejection of the previous administration's policy choices. Even if the delay is permissible as "specifically provided by law" in light of the administration's decision not to waive certain statutory requirements, however, the Impoundment Control Act still explicitly provides Congress the opportunity to reject the deferral and hurry the administration along.[269]

The nonstatutory category of programmatic delay thus seems to have taken over the notice requirement for deferrals and therefore undercut an important lever for congressional control of executive branch spending discretion.

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263 139 S. Ct. 2551 (2019).

264 *Id.* at 2574.

265 *Id.* at 2575–76.

266 *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

267 *See* Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. Rev. 1613, 1615–17 (2014).

268 *See supra* notes 251–54 and accompanying text.

269 *See supra* note 259 and accompanying text.

e. Underinclusiveness

The final gap in the Impoundment Control Act concerns its sole focus on impoundments as the central problem of aggressive executive branch budget execution.

This focus makes sense given the statute's origin as a response to Nixon's use of impoundments as a key policy strategy.[270] In the twenty-first century, however, it is aggressive types of presidential *spending*, not presidential *nonspending*, that is the core issue.

Consider, for example, the Obama Administration's controversial reading of statutory language in the Affordable Care Act to authorize it to provide tax credits for purchases of health insurance plans on federal exchanges, to enable it to use a permanent tax credit appropriation to fund cost-sharing reduction payments to health insurance companies, and to prioritize making payments to insurance companies for a transitional reinsurance program over allocating payments to the Treasury.[271] Or consider the Trump Administration's boundary-pushing reading of a host of statutory provisions to permit transferring billions of dollars from other accounts to fund wall building at the southern border.[272] Or consider the Biden Administration's expansive reading of the post-9/11 HEROES Act[273] to enable it to provide across-the-bar student debt relief, adding billions to the deficit in so doing.[274]

Each of these instances represents a classic example of presidential power of the purse issues in the twenty-first century. Yet the Impoundment Control Act, although designed to return the power of the purse to Congress after aggressive executive action, has nothing to say about them.

To be sure, there is some backstop to these executive actions in the form of judicial review. But not always; judicial review over spending decisions can flounder over justiciability problems like standing, cause of action, and reviewability.[275] Even when a court gets to the merits of such a case, it can sometimes take years to resolve.[276] Even if a court strikes down a spending decision as inconsistent with the statute the

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270 *See supra* notes 137–41 and accompanying text.

271 *See* Sohoni, *supra* note 38, at 1688–93.

272 *See, e.g.*, Metzger, *supra* note 37, at 1169–71.

273 Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (codified at 20 U.S.C. §§ 1098aa–1098ee).

274 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2363–65 (2023); *see also* Letter from Phillip Swagel, Dir., Cong. Budget Off., to Hon. Richard Burr, Ranking Member, S. Comm. on Health, Educ., Lab., & Pensions, & Hon. Virginia Foxx, Ranking Member, H. Comm. on Educ. & Lab., 2–3 (Sept. 26, 2022), https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf [https://perma.cc/3GDT-XGNY] (discussing effect of plan on deficit).

275 Sohoni, *supra* note 38, at 1706–07; Metzger, *supra* note 37, at 1120–24; Lawrence, *supra* note 39.

276 Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 88.

administration claims authorizes it, persistent administrations work to find other means to accomplish the same policy goals.[277] And even though courts were able to weigh in on Nixon-era impoundments, Congress nevertheless saw a need to design a fast-track method for itself to respond to impoundments.[278] The Impoundment Control Act even specifies that nothing in the Act "shall be construed as . . . affecting in any way the claims or defenses of any party to litigation concerning any impoundment,"[279] underscoring that Congress viewed the fast-track mechanisms for its own review of proposed rescissions and deferrals to complement lawsuits. The fact that courts can sometimes play a role in cabining executive overreach does not undercut the value of Congress protecting its own prerogatives through its own powers.[280]

In addition, judicial review will only cabin actions that are actually in conflict with the underlying statute. So, too, will GAO's review under the Antideficiency Act or any other appropriations law requirement. That an action is permissible as a matter of law is no answer to the question of whether Congress would approve of it as a matter of policy.

For example, GAO concluded that the Trump Administration's transfer of funds to build the wall was consistent with statutory requirements.[281] Yet Congress still used its fast-track authority under the National Emergencies Act[282] to reject the President's emergency declaration on which the transfer in part relied, even though it did not ultimately have enough votes to override the President's veto.[283]

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277 *See, e.g.*, The White House, *FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers* (June 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/30/fact-sheet-president-biden-announces-new-actions-to-provide-debt-relief-and-support-for-student-loan-borrowers/ [https://perma.cc/X34V-DBT6] (announcing new actions the same day the Supreme Court invalidated the administration's initial plan). *Compare* U.S. Gov't Accountability Off., B-285066, HUD Gun Buyback Initiative (2000) (finding that HUD did not have appropriations authority to pursue a certain gun buyback initiative), *with* U.S. Gov't Accountability Off., B-285066.2, Operation Safe Home (2000) (finding that HUD did have appropriations authority to pursue a different gun buyback initiative); *cf.* Fisher, *supra* note 5, at 192 (explaining that even though the Supreme Court struck down one of Nixon's impoundments, "[t]he Administration achieved its purposes even while losing in court" because, since "litigation had lasted for two years . . . [t]he program had been stretched out[] [and] the deadlines established by Congress were now impossible to meet").

278 Train v. City of New York, 420 U.S. 35 (1975); Fisher, *supra* note 5, at 189–201.

279 2 U.S.C. § 681(3).

280 *See* Chafetz, *supra* note 138, at 1–6.

281 U.S. Gov't Accountability Off., B-330862, Department of Defense—Availability of Appropriations for Border Fence Construction 6–15 (2019), https://www.gao.gov/assets/b-330862.pdf [https://perma.cc/GGX5-E6AK].

282 50 U.S.C. § 1601.

283 *See* Tamara Keith, *If Trump Declares An Emergency To Build The Wall, Congress Can Block Him*, NPR (Feb. 11, 2019, 5:00 AM), https://www.npr.org/2019/02/11/693128901/

Or take another example outside the context of appropriations law that is well known to administrative law practitioners: the Department of Transportation's decision to implement as a motor vehicle safety standard an option for an "ignition interlock," part of the background to the agency's action considered in *State Farm*.[284] There was no doubt that this was a permissible option under the statute.[285] But because this option was "highly unpopular" with consumers, Congress swiftly amended the Act to prohibit the agency from offering that regulatory option.[286]

Congress can, in principle, always enact new legislation, as it did with ignition interlock, to forbid the executive branch from taking a previously allowable action.[287] But it is harder and harder for Congress to enact laws under its ordinary processes in the contemporary era given the interaction between various institutional and political barriers.[288] This is one reason for framework statutes such as the National Emergencies Act or the Impoundment Control Act that modify Congress's ordinary procedures: to act as a coordination device that solves collective action problems.[289] And this was exactly the purpose of the Impoundment Control Act's fast-track procedures: to provide Congress with an easy path for a speedy response to the executive branch's impoundment efforts.[290] This is why, in an era where aggressive presidential spending, rather than presidential nonspending, an important area of power of the purse conflicts, the absence of a ready opportunity for Congress to respond swiftly is a problem.

II. Modernizing the Antideficiency Act and the Impoundment Control Act

In 2023, House Democrats reintroduced legislation that would address many of the problems with the Antideficiency Act and the

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if-trump-declares-an-emergency-to-build-the-wall-congress-can-block-him [https://perma.cc/FYV9-EWWY]; Reuters Staff, *U.S. Senate Fails to Override Trump Veto of Bill to End Border Emergency*, Reuters (Oct. 17, 2019, 9:51 PM), https://www.reuters.com/article/us-usa-trump-congress-emergency/u-s-senate-fails-to-override-trump-veto-of-bill-to-end-border-emergency-idUSKBN1WW32R [https://perma.cc/VFT3-KNTT].

284 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 35–36 (1983).

285 *Id.* at 33–36.

286 *Id.* at 36.

287 *See* Todd D. Rakoff, Gillian E. Metzger, David J. Barron, Anne Joseph O'Connell & Eloise Pasachoff, Gellhorn & Byse's Administrative Law: Cases and Comments 895 (13th ed. 2023).

288 *Id.* at 895–97.

289 *See* Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. Contemp. Legal Issues 717, 733, 741 (2005).

290 *See* Chafetz, *supra* note 138, at 65.

Impoundment Control Act discussed above.[291] The proposed reforms are commonsense, nonpartisan changes that reasonably seek to impose a few substantive limits on the executive branch while providing Congress with sufficient information to know what is taking place in budget execution. The reforms have received wide approval from a broad array of civil society organizations from across the political spectrum.[292]

As noted earlier, this is not the first time these reforms have been contemplated. The last two Congresses also considered similar legislation, two standalone bills and three riders incorporated into appropriations bills, to achieve these goals.[293] While the standalone legislation has not yet passed, the riders proposed as part of the appropriations process have passed multiple times.[294] One critical provision mandating apportionment transparency was also made permanent through a rider.[295] The comparative success of the riders thus far suggests that congressional stakeholders adopting an institutional stance as they engaged in the give-and-take between Congress and OMB over control of congressional spending may have been more inclined—or able to come together quietly—to support these reforms. The institutionalist approach thus appears to be especially important to passage of this legislation, both within and beyond the appropriations context.

However, the standalone reform bills got caught up in partisan crosshairs in the previous two Congresses, particularly in the House, which was much more active on these issues. First, rather than frame the power of the purse proposals solely as institutional reforms that would constrain presidents and empower Congress regardless of party, the Democratic chair of the House Budget Committee also framed the initial Congressional Power of the Purse Act as responding to the "Trump [Administration]'s Systemic Abuse of Executive Spending Authority."[296]

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291 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. (2023). The bill was referred to nine relevant committees, where it has remained. *See* H.R. 5048, 118th Cong. (July 27, 2023), https://www.congress.gov/bill/118th-congress/house-bill/5048/all-actions?q=%7B%22search%22%3A%5B%22hr5048%22%5D%7D&s=1&r=1 [https://perma.cc/R6B6-BSHU].

292 *See, e.g.*, *Power of the Purse Coalition Shares 2022 Priorities With Congress*, NAT'L TAXPAYERS UNION (Jan. 31, 2022), https://www.ntu.org/publications/detail/power-of-the-purse-coalition-shares-2022-priorities-with-congress [https://perma.cc/28YR-EJHT] (explaining that this "ideologically diverse collection of civil society groups focused on helping Congress reclaim and effectively reassert its traditional purview over tax and spending matters" supports the Power of the Purse Act); *Letter Announcing the Power of the Purse Coalition*, PROTECT DEMOCRACY (July 1, 2020), https://protectdemocracy.org/work/power-of-the-purse-coalition/ [https://perma.cc/26SW-SVLQ] ("Organizations across the ideological spectrum announce the formation of a coalition to support Congress in asserting its own power over the purse.").

293 *See supra* notes 26–31 and accompanying text.

294 *See infra* note 315 and accompanying text.

295 *See supra* notes 86–88 and accompanying text.

296 *See House Budget Committee Investigation Exposes Trump Administration's Systemic Abuse of Executive Spending Authority*, HOUSE COMM. ON THE BUDGET (Nov. 20, 2020),

Second, the Congressional Power of the Purse Act subsequently became incorporated into one of the House Democrats' major pieces of omnibus legislation, the Protecting Our Democracy Act, which passed the House in December 2021 on an almost entirely party line vote.[297] In the Senate, the Democratic chair of the Senate Appropriations Committee initially led introduction of the power of the purse reforms with support from every Senate Democratic member of that committee, blending the institutional focus of the appropriations committee with partisan alignment.[298] In the next Senate, the legislation was similarly introduced only by Democrats, this time in the authorizing committee.[299]

Yet that the standalone legislation has been framed in partisan ways does not mean that its reforms have a partisan valence. In addition to the support for the reforms across left-, right-, and center-leaning organizations,[300] the reforms enacted in consecutive Consolidated Appropriations Acts could not have become law without buy-in from congressional Republicans throughout the appropriations process.[301] It is also telling that Republican statements opposing the Protecting Our Democracy Act made no mention of the power of the purse reforms at all, perhaps indicating that these were not the subject of Republican concern.[302]

This inference is strengthened by the Biden Administration's negative response to apportionment transparency, one of the reforms that subsequently became permanent law[303]—a reform that the

https://democrats-budget.house.gov/news/press-releases/house-budget-committee-investigation-exposes-trump-admin-s-systemic-abuse [https://perma.cc/2M4G-XCN6].

297 Protecting Our Democracy Act, H.R. 5314, 117th Cong. (2021). Representative Adam Kinzinger (R-IL), joined all of the Democrats as the sole Republican supporter of the Act. *Roll Call 440 | Bill Number: H.R. 5314*, Off. of the Clerk, U.S. House of Representatives (Dec. 9, 2021, 4:07 PM), https://clerk.house.gov/Votes/2021440 [https://perma.cc/33WB-8N7Q]. The Senate considered a related bill, but it did not make it out of committee. S. 2921, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/2921/all-actions [https://perma.cc/XSR2-VL2W].

298 *See* Cosponsors, S. 3889, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/senate-bill/3889/cosponsors [https://perma.cc/48SY-SYSH]; *Shelby, Leahy Announce Senate Appropriations Subcommittee Leadership for 116th Congress*, U.S. Senate Comm. on Appropriations (Jan. 9, 2019), https://www.appropriations.senate.gov/news/shelby-leahy-announce-senate-appropriations-subcommittee-leadership-for-116th-congress [https://perma.cc/42KM-Y2S6].

299 *See* Protecting Our Democracy Act, S. 2921, 117th Cong. (2021).

300 *See supra* note 292.

301 *See* Ron Elving, *Departing Senate Budget Chiefs Leave a Legacy of Bipartisanship in a Fraught Era*, NPR (Jan. 2, 2023, 5:02 AM), https://www.npr.org/2023/01/02/1146335491/departing-senate-budget-chiefs-leave-a-legacy-of-bipartisanship-in-a-fraught-era [https://perma.cc/HVU9-WLZE].

302 *See* 167 Cong. Rec. H7560 (daily ed. Dec. 9, 2021) (Statements of Reps. Crawford, Stewart, Miller, McClintock, and Davis) (reflecting general Republican opposition to other parts of the bill but no Republican reference to the Power of the Purse reforms, while the only references to the Power of the Purse reforms were from Democrats in support).

303 *See supra* notes 86–88 and accompanying text.

Administration rejected as unnecessarily intruding on OMB's operations[304] in language that echoed President Trump's opposition to this proposal in previous appropriations bills.[305] The fact that a Democratic Congress ultimately included apportionment transparency requirements against the wishes of a President from its own party and applied those requirements to that President, too, further suggests that the reforms have an institutional rather than a partisan flavor, regardless of the initial packaging.[306]

In addition, the proposed reforms to GAO's authority[307] largely echo other recent legislation, initially proposed by Republicans and ultimately supported by bipartisan majorities, that expanded GAO's ability to obtain information from agencies.[308] In general, members

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304 Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administration Policy: H.R. 4502—Labor, Health and Human Services, Education, Agriculture, Rural Development, Energy and Water Development, Financial Services and General Government, Interior, Environment, Military Construction, Veterans Affairs, Transportation, and Housing and Urban Development Appropriations Act, 2022 10 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/SAP-H.R.-4502.pdf [https://perma.cc/SB7P-ZGYL]; Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administration Policy: H.R. 8294—Transportation, Housing and Urban Development, Agriculture, Rural Development, Energy and Water Development, Financial Services and General Government, Interior, Environment, Military Construction, and Veterans Affairs Appropriations Act, 2023 6 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/07/H.R.-8294-SAP.pdf [https://perma.cc/U47K-J9TJ].

305 *See* Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administration Policy: H.R. 7617—Defense, Commerce, Justice, Science, Energy and Water Development, Financial Services and General Government, Homeland Security, Labor, Health and Human Services, Education, Transportation, Housing, and Urban Development Appropriations Act, 2021 16–17 (2020), https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/07/SAP-H.R.-7617-1.pdf [https://perma.cc/K98X-9YP2]; Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administration Policy: H.R. 3351—Financial Services and General Government Appropriations Act, 2020 2 (2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/06/SAP_HR-3351.pdf [https://perma.cc/M8SA-U2YL].

306 Matthew B. Lawrence, *Apportionment Transparency in the 2022 CAA: The Return of Congressional Institutionalism?*, Yale J. on Regul. Notice & Comment Blog (2022), https://www.yalejreg.com/nc/apportionment-transparency-in-the-2022-caa-the-return-of-congressional-institutionalism-by-matthew-b-lawrence/ [https://perma.cc/Q4HJ-JF6W].

307 *See infra* notes 371–97 and accompanying text.

308 The GAO Access and Oversight Act of 2017, Pub. L. No. 115-3, 131 Stat. 7, expanded GAO's ability to obtain information and records from agencies and reiterated its ability to sue in court when agencies decline to provide what GAO requests. This Act stemmed from a conflict during the Obama Administration over GAO's access to a database held by HHS. *See* Press Release, Senator Susan Collins, Senators Demand Transparency After HHS Directs States Not to Comply with GAO Audit (Mar. 16, 2021), https://www.collins.senate.gov/newsroom/senators-demand-transparency-after-hhs-directs-states-not-comply-gao-audit [https://perma.cc/6JKG-55SP]; *see also* GAO Access to National Directory of New Hires, 35 Op. O.L.C. 106 (2011), https://www.justice.gov/d9/opinions/attachments/2021/02/18/2011-08-23-gao-ndnh.pdf [https://perma.cc/PC2Q-E6K6]. Passing the Act was one of the achievements touted by the Trump Administration within its first 100 days. *See* Tamara Keith, *White House Touts 'Historic' 28 Laws Signed By Trump, But What*

of both parties have historically favored GAO's work as an important mechanism of congressional oversight for both the majority party and the minority party at any given time.[309] The expansions to GAO's authority contemplated by the Power of the Purse Act thus sound, once more, in institutional rather than partisan tones.

This Part makes the case that Congress should adopt the reforms in the Congressional Power of the Purse Act in order to address the problems with the Antideficiency Act and the Impoundment Control Act law. They are sensible reforms that ought to secure broad endorsement from both parties in Congress. Until they pass, they ought to remain on the congressional agenda, regardless of which party is in power at either end of Pennsylvania Avenue.[310] This Part also argues that the reforms are underinclusive, as they failed to address the problem of programmatic delay and aggressive, but potentially legal, executive spending. Subsequent efforts to modernize the Antideficiency Act and Impoundment Control Act ought to incorporate responses to these problems as well.

Rather than walking through the Congressional Power of the Purse Act itself, however, this Part abstracts its sensible reforms into three categories of action under the Antideficiency Act and Impoundment Control Act: first, reforms that address transparency and informational deficits; second, reforms that enhance substantive limits on OMB and agencies; and third, reforms that enhance GAO's authorities. A fourth category of reforms addresses recommendations that are missing from the Congressional Power of the Purse Act: those better aligning the Impoundment Control Act's scope with its purpose considering current executive practices.

A. Transparency and Informational Reforms

Three separate transparency and informational reforms would be valuable: an improvement of the recent requirements for apportionment transparency, to make it easier to find directions that may conflict with or expand beyond congressional spending goals; disclosure of

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Are They?, NPR (Apr. 27, 2017, 6:00 AM), https://www.npr.org/2017/04/27/525753448/white-house-touts-historic-28-laws-signed-by-trump-but-what-are-they [https://perma.cc/K6SM-RC4Q]. It passed by voice vote in the House without controversy and 99–0 in the Senate. *See* H.R. 72, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/72/actions [https://perma.cc/L8KL-LLED].

309 *See* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 Tex. L. Rev. 1137, 1180 (2014).

310 The Power of the Purse Act also contained a separate subtitle that would have amended the National Emergencies Act, *see* H.R. 5314, Tit. V, subtit. C, as well as some additional provisions not core to the Antideficiency Act and Impoundment Control Act reforms that are the focus of this Article, *see infra* note 325. While these other aspects of the Power of the Purse Act may have merit, they lie beyond the scope of my project here.

expenditures and obligations made during shutdowns, to prevent or assess potential Antideficiency Act violations; and disclosure of expired or canceled unobligated appropriations, to prevent or assess potential Impoundment Control Act violations.

1. *Information About Apportionment*

The first major category of transparency reform is over OMB's apportionments.[311] Happily, the Consolidated Appropriations Acts of 2022 and 2023 just made important interventions to ensure apportionment transparency. As discussed above, the Consolidated Appropriations Act of 2022 included a provision that required OMB to create a public-facing website on which to share each apportionment for that fiscal year, including a written explanation from the approving OMB official of any associated footnote.[312] Another provision required OMB to identify all delegations of apportionment authority in the Federal Register, to update the information in the Federal Register whenever the delegated authority changes, and to provide a written explanation to the "appropriate congressional committees" explaining why any such delegated authority was changed.[313] These changes were made permanent in the Consolidated Appropriations Act of 2023.[314]

In addition, the Consolidated Appropriations Acts of 2022, 2023, and 2024 each contained a provision requiring agencies to notify the committees on the budget, on appropriations, and "any other appropriate congressional committees" if OMB's apportionments were made late, were conditioned on agencies' further action, or would hinder their ability to prudently obligate the funds.[315] These provisions, however, have not yet been made permanent.

The permanent requirements, supported by the thus-far temporary reporting requirements, go a long way toward remedying the problem of apportionment secrecy. OMB's apportionments are final actions that have the force of law; agencies cannot ignore them without violating the Antideficiency Act.[316] Yet until these requirements went into place, Congress and the public had no way of knowing what OMB's instructions were or whether political officials had taken over the ministerial task

[311] *See supra* notes 82–88 and accompanying text.

[312] Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. E, § 204(b)–(c), 136 Stat. 49, 256–57.

[313] *Id.* div. E, § 204(d).

[314] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, § 204, 136 Stat. 4459, 4467, 4718 (2022).

[315] Consolidated Appropriations Act, 2022, div. E, § 749; Consolidated Appropriations Act, 2023, div. E, § 749; Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. B, § 749, H.R. 2882, 118th Cong. § 749.

[316] *See supra* note 76 and accompanying text.

of senior civil servant apportionment; as a result, lines of accountability were blurred, and agencies' sources of authority were obfuscated.

At the same time, given the difficulty of making sense of apportionment disclosure,[317] more work should be done to improve transparency in this arena. Three sets of improvements would help.

First, Congress ought to require that OMB's website be made more user-friendly—for example, with titles that reflect program names, with identifications of where apportionment footnotes appear, with clearly identified changes between apportionments for the same program or activity over the course of the fiscal year, and with direct links to appropriation language and the President's own budget request and supporting materials for each program.[318] These moves would help Congress and the public put the disclosures in context, turning numbers into meaning. Such changes would be of a piece with other disclosure requirements and associated improvements to budget information that Congress has been directing over the past two decades.[319]

Second, the reporting requirements for delayed or conditioned apportionments ought to be made permanent. The reports also ought to be made available on a public-facing website, perhaps on the websites of the budget and appropriations committees, to assist with "fire-alarm oversight."[320] Civil society organizations with an interest in particular programs can play a role in urging Congress to act on questionable or troubling reports.

And third, Congress ought to expand its institutional capacity to read and understand agency and OMB budget data, both within committees and within GAO. The decline in congressional capacity is its own critical topic, both on its own and in the context of the rise of

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317 *See supra* notes 90–97 and accompanying text.

318 For example, OMB already provides lots of information about the President's Budget Request on its website, and it indicates changes between requests over time. *See President's Budget*, The White House: OMB, https://www.whitehouse.gov/omb/budget/ [https://perma.cc/7DUJ-QL2D]. The apportionment documents could be clearly situated among these documents with cross-references.

319 *See, e.g.*, *Background*, USAspending, https://www.usaspending.gov/about [https://perma.cc/MP6F-Z7WB] (describing three statutes passed by Congress between 2006 and 2014 focused on spending transparency); CARES Act, Pub. L. No. 116-136, § 15010(g), 134 Stat. 281, 539 (2020) (codified as 15 U.S.C. § 636) (requiring Pandemic Response Accountability Committee to create a public-facing website to provide "easy to understand" information on pandemic spending); Congressional Budget Justification Transparency Act, Pub. L. No. 117-40, 135 Stat. 337 (2021) (requiring public disclosure of agencies' budget justification submissions and appropriations requests on a website created and maintained by OMB). To the extent that placing technical specifications for government websites in permanent law risks enshrining what will become outdated before too long, report language or annual riders could require regular updating.

320 *See* Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am. J. Pol. Sci. 165, 166 (1984).

presidentialism.[321] This recommendation calls out expertise in understanding budget execution as worthy of attention in this more general conversation.

2. *Information About Activities During a Shutdown*

Because Congress is currently without sufficient information to assess the legal and policy choices different agencies and administrations make during a shutdown,[322] Congress ought to require that agencies provide program-by-program information about any expenditure or obligation made during a lapse in appropriations.[323] The requirement should specify that agencies must include information about both "excepted activities" and "excepted personnel"—that is, the tasks that the executive branch kept functional as well as the people to run them.[324] Beyond a simple list, agencies should also be required to include an analysis of the legal authority for such spending, whether connected to OLC opinions or otherwise.[325] Where agencies make different choices than they have historically, they ought to explain the legal or policy rationale for these choices.

As GAO explained this reform in its own recommendation advocating it, this reform would have two benefits.[326] First, it would give Congress sufficient information to assess potential violations of the Antideficiency Act and to determine whether to modify the agency's authority.[327] Second, it would encourage agencies to hew more closely to the law.[328] While GAO did not mention it, there is also a third benefit: it would enhance accountability for the President, OLC, and OMB. OMB is ultimately making decisions about whether to approve or disapprove agencies' shutdown plans and is doing so against the backdrop of OLC interpretations.[329] To require articulation and justification of the

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321 *See generally* Congress Overwhelmed: The Decline in Congressional Capacity and Prospects for Reform (Timothy M. LaPira et al. eds., 2020).

322 *See supra* notes 100–07 and accompanying text.

323 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 513 (2023); 31 U.S.C. § 1105(a)(42).

324 *See* Cong. Rsch. Serv., RL34680, Shutdown of the Federal Government: Causes, Processes, and Effects 10 Box 3 (2018).

325 Another provision of the Power of the Purse Act would have generally required publication of all final OLC opinions on budget or appropriations law, with limited exceptions for classified material and other specifically described sensitive matters. Protecting Our Democracy Act, H.R. 5314, 117th Cong. § 524 (2021); *see also* DOJ OLC Transparency Act, S. 3858, 117th Cong. (2022) (requiring publication of all OLC opinions within forty-eight hours of their issuance). While this general transparency requirement has merit, further analysis lies beyond the scope of this Article focusing on remedying gaps in the Antideficiency Act and the Impoundment Control Act.

326 U.S. Gov't Accountability Off., *supra* note 114.

327 *Id.* at 7.

328 *Id.*

329 Pasachoff, *supra* note 8, at 2233.

plans would require taking ownership and accepting the political consequences from the public and from Congress.

The Power of the Purse Act would require such disclosures to be made in the President's Budget each spring.[330] Depending on when a shutdown occurs, though, this regularized timing may not allow enough flexibility for Congress to respond in the next appropriations cycle. If a shutdown occurs in March, for example, but the President's Budget was submitted the previous month, the next fiscal year would be half over by the time the next President's Budget was submitted.[331] A better choice would be to require the submission of this information within a certain number of days after the lapse in appropriations ends—say, thirty or sixty days.

3. *Information About Unobligated and Expired Appropriated Funds*

To enhance its ability to assess potentially hidden impoundments,[332] Congress ought to require disclosure of sums that agencies did not use before they expired and became no longer available.

Most appropriated funding is available for agencies to obligate for the current fiscal year but expires at the end of that fiscal year.[333] Some appropriated funding is available for more than one year but expires within a particular time frame.[334] Once funding in either category is no longer available to obligate ("expired"), agencies have five years within which they can use the funding to satisfy obligations the agencies made when the sums were available to use.[335] After the five years are over, any remaining sums are "canceled."[336]

For the most part, small sums of unobligated appropriations do not necessarily indicate an improper impoundment. As GAO explains, "Under sound administrative funds control practices, agencies may obligate cautiously in order to cover unanticipated liabilities" and avoid "violating the Antideficiency Act."[337] Indeed, after a year-long review of

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330 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 513 (2023); 31 U.S.C. § 1105(a)(42).

331 *See* Drew C. Aherne, Cong. Rsch. Serv., R47235, The Congressional Budget Process Timeline (2023); *see also* Cong. Rsch. Serv., R41759, Past Government Shutdowns: Key Resources (2021).

332 *See supra* note 233 and accompanying text.

333 U.S. Gov't Accountability Off., *supra* note 15, at 2–9.

334 *Id.* A third kind of classification based on duration is "no-year appropriations," which are available for an indefinite period, typically "until expended." *Id.*; *see also supra* note 178 and accompanying text.

335 31 U.S.C. § 1553(a).

336 *Id.* § 1552(a).

337 U.S. Gov't Accountability Off., B-331298, Department of Commerce—Application of the Impoundment Control Act to Appropriations Enacted in Fiscal Years 2018 and 2019 5 (2020).

a subset of canceled appropriations over ten fiscal years, as required by the National Defense Authorization Act of 2020, GAO concluded that program-specific factors, such as unexpectedly lower needs or unpredictable year-to-year costs, explained most of the cancellations in the sample.[338] At the same time, "[l]arge unobligated balances . . . may indicate an improper impoundment."[339] And Congress has no ready regular method of spotting circumstances when such large unobligated balances remain.

The Power of the Purse Act would add to the annual reporting requirements for the President's Budget a requirement to report on unobligated expired balances and balances canceled because their period of availability had ended.[340] These provisions are sensible informational requirements of a piece with the numerous other reporting requirements that already exist for the President's Budget[341] and ought to be reintroduced. GAO's recent study of a subset of canceled sums provides a helpful baseline against which to evaluate future disclosures.[342]

B. *Enhancing Substantive Limits on OMB and Agencies*

Three substantive reforms to OMB's authority are in order: clarifying the limited scope of the apportionment power; requiring timely apportionment; and restricting the ability to propose rescissions or deferrals in the final ninety days of the fiscal year. In addition, Congress should impose three substantive reforms on agencies: making agencies report and explain their disagreements with GAO's findings of Antideficiency Act violations; adding the potential for civil penalties for violations of the Impoundment Control Act; and requiring identification and explanation of whether Antideficiency Act violations merited criminal investigation.

1. *Limits on OMB*

First, the Antideficiency Act ought to clarify that the power to apportion appropriated spending is not an independent source of policy authority.[343] This could be accomplished by inserting the word "only" before the statutory explanation of the goals of apportionment: for those sums appropriated for a definite time period, apportionment may

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338 U.S. Gov't Accountability Off., GAO-21-432, Federal Budget: A Few Agencies and Program-Specific Factors Explain Most Unused Funds 1 (2021).

339 U.S. Gov't Accountability Off., *supra* note 114, at 12 n.55.

340 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. §§ 511–512 (2023) (adding 31 U.S.C. § 1105(a)(40)–(41)).

341 *See* 31 U.S.C. § 1105(a)(1)–(39).

342 *See supra* note 338.

343 *See supra* notes 68–79 and accompanying text.

be conducted *only* "to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period," and for those sums appropriated for an indefinite time period, apportion may be conducted *only* "to achieve the most effective and economical use."[344] In addition, the provision that currently allows OMB officials conducting the apportionment to do so "as the official considers appropriate" should be modified to add the words "in keeping with" the previous provision defining the limited goals of apportionment.[345] These changes would cabin the ability of OMB to apportion funds in a way that furthers substantive presidential priorities disconnected from the purpose of the funding instead of to prevent agencies from running out of funds too quickly.

Second, the Antideficiency Act ought to require OMB to apportion all funds in time for agencies to be able to make sensible use of them before the funds expire. This could be accomplished by adding a time period for *reapportionment* to the time periods that already exist in the Act for *initial* apportionment.[346] The Congressional Power of the Purse Act would require all apportionments to "make available all amounts for obligation in sufficient time to be prudently obligated," not later than ninety days before the appropriation would expire.[347] This time period is a reasonable limit, not unduly requiring speedy obligation while still allowing for some end-of-fiscal-year flexibility.

The Consolidated Appropriations Acts of 2023 and 2024 included a modified version of this latter suggestion by focusing on agency disclosure of OMB's failure to do so rather than on limiting OMB from doing so in the first place. Agencies are now required to notify the Committees on the Budget and Appropriations and "any other appropriate congressional committees" if "an approved apportionment received by the department or agency may hinder the prudent obligation of such appropriation."[348] Providing Congress with this information is important, but clarifying substantive limits on OMB's actions would strengthen Congress's hand in responding to the misuse of apportionment power. The ninety-day limit initially contemplated by the Congressional Power of the Purse Act would also helpfully provide a specific deadline,

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344 31 U.S.C. § 1512(a).

345 *Id.* § 1512(b)(2).

346 *Id.* § 1512(a) (permitting reapportionment without limit); *id.* § 1513(b) (providing time limits for initial apportionment but remaining silent on any deadlines for reapportionment).

347 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 501(a) (2023).

348 Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, § 749, 136 Stat. 4459, 4718 (2022); Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. B, § 749, H.R. 2882, 118th Cong. § 749.

in keeping with the other time limits for apportionment in the Antideficiency Act.[349]

The Congressional Power of the Purse Act would have added this provision to the Impoundment Control Act as a means of limiting end-of-year impoundments,[350] but it would be better to include these basic instructions for how apportionment ought to operate in the law governing apportionments in the first instance.

What the Congressional Power of the Purse Act got right in this regard is a further limit on deferral or rescission within ninety days before the end of the fiscal year[351]—banning what Vought and Paoletta called a "pocket rescission."[352] Allowing the President to effectively unilaterally cancel a spending law not only runs counter to the intent of the Impoundment Control Act;[353] it also incentivizes last-minute presidential proposals at a time when Congress is already bogged down at the end of the fiscal year in negotiations over the next year's appropriations bills and cannot realistically respond. There are few circumstances in which a President would discover information at the end of the fiscal year that would require an immediate downward adjustment of resources. Congress thus ought to modify the Impoundment Control Act to explicitly limit the President from deferring or otherwise withholding from obligation any funding during the ninety-day period before its budget authority expires.

2. *Requirements for Agencies*

First, Congress ought to require agencies to report to Congress when GAO has determined they have violated the Antideficiency Act instead of letting agencies ignore these determinations when they disagree.[354] As explained above, letting agencies ignore GAO's findings—or requiring OMB approval to report GAO's findings where agencies may actually agree with GAO on the merits but are forced to comply with OMB—leaves Congress without meaningful insight into why the executive branch thinks GAO's determination is wrong.[355] Requiring agencies to *report* GAO's findings is not the same thing as requiring agencies to

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349 *See, e.g.*, 31 U.S.C. § 1513(b)(2)(B) (specifying that initial apportionments be made "not later than . . . 30 days after the date of enactment of the law by which the appropriation is made available").

350 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 501(a) (2023) (adding § 1018(b) to Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332).

351 *Id.* (adding § 1018(a) to Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332).

352 *See supra* notes 209–10 and accompanying text.

353 *See supra* note 218 and accompanying text.

354 *See supra* notes 111–19 and accompanying text.

355 *See supra* note 118 and accompanying text.

agree with GAO's findings. To the contrary, in fact; as the Congressional Power of the Purse Act would sensibly add, where agencies disagree with GAO's determinations, they must simply explain to Congress why they disagree.[356]

This requirement of a reasoned response does not unduly impinge on executive authority. The Antideficiency Act already requires agencies to report violations and the actions they have taken in response;[357] this expansion would merely clarify that they should explain their views where they disagree with GAO's findings. Nor is it overly burdensome; to the contrary, it reflects the default position that OMB has historically taken, as well as OMB's current internal requirement.[358]

Second, Congress ought to expand upon the reporting requirement added in the 2023 and 2024 Consolidated Appropriations Acts for violations of the Impoundment Control Act.[359] This requirement parallels the currently existing reporting requirements for violations of the Antideficiency Act.[360] For the same reasons just explained, Congress ought to expand this new requirement to make agencies report and explain their views on GAO determinations of Impoundment Control Act violations even where agencies disagree with GAO's findings,[361] just as the Congressional Power of the Purse Act would add.[362] This change also ought to be made permanent.

Third, Congress ought to import the Antideficiency Act's administrative penalty structure into the Impoundment Control Act, as the Congressional Power of the Purse Act would do.[363] The goal would not be to catch out unwary well-meaning civil servants in innocent cautious behavior, but rather to provide an incentive for civil servants to refuse to comply with illegal directions without privileging decisions to spend over decisions not to spend.[364] Further clarifying the relationship between programmatic delay and illegal deferrals under the Impoundment Control Act, as proposed below, would help provide assurance

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356 Protecting Our Democracy Act, H.R. 5048, 118th Cong. § 522 (2023) (amending 31 U.S.C. §§ 1351, 1517).

357 31 U.S.C. §§ 1351, 1517(b).

358 *See supra* notes 115–17 and accompanying text.

359 Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, § 748, 136 Stat. 4459, 4718 (2022); Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. B, § 748, H.R. 2882, 118th Cong. § 748.

360 *See* 31 U.S.C. §§ 1351, 1517(b).

361 *See supra* notes 354–57 and accompanying text.

362 Protecting Our Democracy Act, H.R. 5048, 118th Cong. § 505(a) (2023) (adding § 1020(b) to Pub. L. 93–344, Title X).

363 *Id.*

364 *See supra* notes 225–26 and accompanying text.

that agency employees would not be on the hook for potential violations when they are following well-established practices.[365]

The Congressional Power of the Purse Act would not import the Antideficiency Act's criminal penalty structure into the Impoundment Control Act,[366] and especially in light of the absence of such prosecutions, that seems like a reasonable choice; the potential for civil penalties would be a sufficient incentivizing addition. At the same time, the absence of information about the extent of investigation into Antideficiency Act violations that may have risen to the level of "knowing[] and willful[]" is a problem.[367] As long as the potential for criminal penalties for Antideficiency Act violations remains on the books, its power is weakened if it appears irrelevant.[368]

As the final requirement on agencies, therefore, Congress ought to require that the Department of Justice identify whether each reported Antideficiency Act violation merited a criminal investigation and explain to Congress its decisions. The Congressional Power of the Purse Act would do just this.[369] These responses need not be burdensome, as most of the time, the absence of the required mens rea will be readily apparent. Yet elevating attention to the Department of Justice's review of violations for potential criminal charges is especially important in light of GAO's recent determinations that it regarded certain operational decisions during a government shutdown to be categorically

365 *See infra* notes 401–10 and accompanying text. In addition, as to both Antideficiency Act and Impoundment Control Act violations, Congress could consider adding a reliance defense along the lines developed by Zachary Price in the broader question of "whether executive-branch legal opinions approving" conduct later determined to be illegal "immunize[s] participants against future liability." Zachary S. Price, *Reliance on Executive Constitutional Interpretation*, 100 B.U. L. Rev. 197, 200 (2020). Price argues that "[r]eliance on a signed OLC or Attorney General opinion should provide a due process defense in any subsequent civil or criminal government enforcement action, but only insofar as the opinion's conclusions were objectively reasonable," while "[r]eliance on any other executive directive, including presidential signing statements and legal determinations reached through interagency dialogue, should support such a defense only insofar as the legal conclusions at issue either accorded closely with past OLC or Attorney General opinions or were objectively correct in the reviewing court's view." *Id.* at 202. Applied in the context of Antideficiency Act and Impoundment Control Act violations, such a reliance defense would place GAO in the role of the reviewing court as an initial interpretive matter, although GAO decisions would merely provide information to agencies, Congress, and perhaps ultimately courts about its perception of the reasonableness of such reliance, since it is agencies themselves, not GAO, that decide whether to apply any administrative penalties.

366 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 505(a) (2023) (adding § 1020(b) to Pub. L. 93–344, Title X).

367 *See supra* notes 120–23 and accompanying text.

368 *See supra* notes 122–24 and accompanying text.

369 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 523 (2023); 31 U.S.C. §§ 1350(b)(2), 1519(b)(2).

unlawful and that it would treat equivalent conduct in the future as willful violations.[370]

Information about the Department of Justice's investigation of violations as knowing and willful, including information about why violations were determined *not* to be knowing and willful, would serve three functions. It would allow Congress to better assess how and whether to respond to violations by modifying the agency's substantive statutes or including directions in appropriations acts. In addition, it would improve the deterrent effect of the threat of criminal sanctions if agency employees see that criminal sanctions are actually considered and that Congress will review the Department of Justice's assessments as background for its own institutional decisions. Finally, it would provide helpful information as to whether to retain the apparently never-used criminal penalty in the Antideficiency Act (or, from the other direction, perhaps even as to whether to import it into the Impoundment Control Act as well).

C. Enhancing GAO's Authorities

GAO's authority to conduct investigations and obtain information relating to potential Antideficiency Act and Impoundment Control Act violations ought to be strengthened in multiple ways. All of these recommendations would tweak existing authorities rather than propose major overhauls. Each would help Congress, both the majority and the minority,[371] obtain information to conduct oversight, regardless of which party holds the White House.

1. Antideficiency Act Investigations

To address the problem of agencies not complying with GAO requests for records as part of its investigation of potential Antideficiency Act violations,[372] Congress ought to clarify the scope of GAO's

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370 *See, e.g.*, U.S. Gov't Accountability Off., B-331132, *supra* note 108, at 10 (2020) (finding that OMB violated the Antideficiency Act when it reviewed regulatory materials during a government shutdown and that it would consider future such violations to be knowing and willful); U.S. Gov't Accountability Off., B-331093, U.S. Department of the Treasury—Tax Return Activities During the Fiscal Year 2019 Lapse in Appropriations 12 (2020) (finding that the Department of the Treasury violated the Antideficiency Act when it processed tax returns and issued tax refunds during a government shutdown and that it would consider future such violations to be knowing and willful); U.S. Gov't Accountability Off., B-331091, *supra* note 108, at 11 (2020) (finding that the National Archives and Records Administration did not have specific statutory authority to publish certain documents in the Federal Register during a government shutdown and that it would consider future such violations to be knowing and willful).

371 *Cf.* Farber & O'Connell, *supra* note 309, at 1180 (noting utility of GAO investigations both to majority and minority).

372 *See supra* notes 125–31 and accompanying text.

authority in its organic statute. The Congressional Power of the Purse Act would sensibly make each of the three following modifications.[373]

GAO should be provided with clear authority to request information and records related to budget and appropriations law, given its core responsibilities in this area.[374] This authority is arguably already contained in its ability to request information and records as required "to discharge the duties of the Comptroller General (including audit, evaluation, and investigative duties),"[375] but given agencies' occasional reluctance to provide material in support of Antideficiency Act violations, further clarification would help.[376]

Congress should also provide a timeframe within which an initial response from the agency is expected, such as the twenty days contemplated by the Congressional Power of the Purse Act,[377] in keeping with the twenty-day timeframe already required for an agency head to explain why a record is being withheld or to produce the record.[378] This timeframe is also of a piece with other timeframes GAO expects in its work with agencies as spelled out in its agency protocols—for example, fourteen days to schedule an initial entrance conference for a new investigation and seven to thirty days to comment on a draft product.[379]

And just as with its ability to bring a civil lawsuit to obtain such records under its existing authority for its "audit, evaluation, and investigative duties,"[380] Congress ought to include an equivalent authority for its budget and appropriations law work.[381] While GAO has only once brought a lawsuit under its investigative powers, the potential to do so lies behind its conversations with agencies reluctant to share information, and it therefore serves as a useful counterweight to agency resistance.[382]

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373 The House-passed version of the Financial Services and General Government appropriations bills for Fiscal Year 2023 also contained these three requirements, although they did not make it into the final appropriations law. Financial Services and General Government Appropriations Act, H.R. 8294, 117th Cong. Div. D, Title VII, § 749(a)–(b) (2023).

374 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 521 (2023) ("Requirement to respond to requests for information from the Comptroller General for budget and appropriations law decisions.").

375 31 U.S.C. § 716(a)(1).

376 *See supra* notes 132–36 and accompanying text.

377 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 521 (2023); 31 U.S.C. § 722(a).

378 31 U.S.C. § 716(b)(1).

379 U.S. Gov't Accountability Off., *supra* note 237, at 3, 9, 13.

380 31 U.S.C. § 716(a)(1); *see also id.* § 716(c)–(d).

381 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 521 (2023); 31 U.S.C. § 722(b)(2).

382 *See, e.g.*, T.J. Halstead, The Law: Walker v. Cheney*: Legal Insulation of the Vice President from GAO Investigations*, 33 Presidential Stud. Q. 635, 636, 643 (2003) (describing how litigation authority provides "leverage in convincing executive entities to either provide requested information or to invoke" the statutory exceptions for providing such access based on a connection to "foreign intelligence or counterintelligence activities"); *see also* U.S. Gov't Accountability Off.,

2. *Impoundment Control Act Investigations*

To address the problems connected with GAO's authority to provide useful information to Congress about Impoundment Control Act violations,[383] Congress ought to make five changes, as the Congressional Power of the Purse Act sensibly seeks to do.[384]

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supra note 237, at 24 ("Although it is GAO's strong preference to resolve access issues at the lowest organizational levels at an agency, the Congress has authorized GAO (and recently reaffirmed this right in the GAO Access and Oversight Act of 2017) to enforce its access to agency records in court.").

To be sure, there is some question as to whether GAO has standing to bring such a suit. In *Walker v. Cheney*, for example, the district court held that the Comptroller General "does not have the personal, concrete, and particularized injury required under Article III standing doctrine, either himself or as the agent of Congress," to sue to obtain documents from the Vice President. *See* 230 F. Supp. 2d 51, 53 (D.D.C. 2002). However, while *Walker* did not purport to limit the analysis to the special case of suing a constitutional officer, the opinion was clearly centered around that particular context. *See id.* ("no court has ever before granted what the Comptroller General seeks—an order that the President (or Vice President) must produce information to Congress (or the Comptroller General."). GAO did not appeal, likely because of political pressure, *see* Halstead, *supra* note 382, at 645–46, and the D.C. Circuit has never adopted the *Walker* holding nor analysis. In addition, the doctrine of congressional standing to obtain information has grown considerably since then, and it is not at all clear that the case would come out the same way today. *See, e.g.*, Maloney v. Murphy, 984 F.3d 50, 54 (D.C. Cir. 2020) (holding that eight members of a congressional committee had standing to enforce their right to information under 5 U.S.C. § 2954 because "[a] rebuffed request for information to which the requester is statutorily entitled is a concrete, particularized, and individualized personal injury, within the meaning of Article III"), cert. granted sub nom. Carnahan v. Maloney, 22-425 (May 15, 2023) (June 26, 2023) (judgment vacated and case remanded after respondents entered a voluntary dismissal in the district court); Comm. on Judiciary, U.S. House of Representatives v. McGahn, 968 F.3d 755, 760–61 (D.C. Cir. 2020) (en banc) (holding that committee had standing to enforce subpoena seeking information from former White House counsel); Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Holder, 979 F. Supp. 2d 1, 9–16 (D.D.C. 2013) (holding that committee had standing to enforce subpoena seeking information from Attorney General); Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 55–56 (D.D.C. 2008) (holding that committee had standing to enforce subpoena seeking information from senior presidential advisors). Moreover, *Walker v. Cheney* included details that could conceivably make a difference in a subsequent case even under its restricted vision for institutional standing (such as whether committee chairs authorized the lawsuit on their committee stationery rather than on their personal stationery, 230 F. Supp. 2d at 57, 57 n.2, or whether committees themselves otherwise sought the documents, *id.* at 68). And Congress responded to the *Walker* court's observation that Congress had not "expressly authorized" the GAO to file a lawsuit in that case, *id.*, by adding to the records provision an instruction that "In reviewing a civil action under this section, the court shall recognize the continuing force and effect of the authorization in the preceding sentence [to seek records] until such time as the authorization is repealed pursuant to law." 31 U.S.C. § 716(a)(1) (added by Pub. L. No. 115-3, 131 Stat. 7 (2017)). In any event, this proposal merely tweaks the existing statutory regime rather than seeks to add a significant new authority for GAO. Unless and until the weight of authority suggests the absence of standing, GAO's ability to sue for information remains a viable path.

383 *See supra* notes 227–39 and accompanying text.

384 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 503 (2023) ("Updated Authorities for and Reporting by the Comptroller General"); *id.* § 504 ("Advance Congressional Notification and Litigation").

First, Congress ought to require GAO to report to Congress even those violations that have been remedied,[385] just as Congress has required for Antideficiency Act violations.[386] Such information would provide helpful oversight information both on a case-by-case basis and overall.

Second, Congress ought to change the effect of GAO's reporting of ongoing noncompliance when the President has failed to issue a "special message" to Congress under the Act.[387] Instead of letting GAO's report serve the same function as a presidential "special message," thereby providing temporary permission for the withholding, GAO's report ought to alert Congress to the fact that there is a problem under the Act without blessing the executive action.[388]

Third, Congress ought to ensure that GAO's authorities to investigate Impoundment Control Act violations include the same ability to obtain relevant information and records discussed above.[389] In principle, modifying GAO's organic statute to allow for this information would accomplish this goal.[390] In practice, because the Impoundment Control Act specifies particular authorities GAO has under that Act,[391] and the absence of references to such authorities would raise questions about whether GAO actually was empowered to do so, it would make sense for the Act itself to spell out this ability, or at the very least clarify that GAO's preexisting statutory authority applied here as well.[392]

Fourth, just as with the proposal to make the ability to obtain information and records related to budget and appropriations law inquiries enforceable in court, as discussed above,[393] in keeping with GAO's already existing authority to bring such lawsuits in support of its "audit, evaluation, and investigative duties,"[394] the litigation authority already contained in the Impoundment Control Act should be expanded to include the ability to bring a civil suit for such information and records.[395]

Finally, Congress ought to reduce the waiting period between GAO's notifying Congress that an agency is improperly withholding

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385 *Id.* § 503 (adding 2 U.S.C. § 686(c)(1)).

386 *See supra* note 60 and accompanying text.

387 *See supra* notes 230–31 and accompanying text.

388 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 503(a)(1) (2023) (deleting the last sentence of 2 U.S.C. § 686(a)).

389 *See supra* notes 374–76 and accompanying text.

390 *See supra* note 374 and accompanying text.

391 2 U.S.C. §§ 686–687.

392 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 503 (2023) (adding 2 U.S.C. § 686(c)(2)).

393 *See supra* notes 380–82 and accompanying text.

394 31 U.S.C. § 716(a)(1); *see also id.* § 716(c)–(d).

395 Protecting Our Democracy Act, H.R. 5048, Title V, Congressional Power of the Purse Act, 118th Cong. § 504 (2023) (amending 2 U.S.C. § 687); *see also supra* note 382 (discussing the issue of GAO's standing to pursue information to which it is statutorily authorized).

funds and bringing a lawsuit to compel the release of the funds. This recommendation is in keeping with the other proposals to ensure that improper impoundments do not lead to budget authority expiring at the end of the fiscal year without having been obligated.[396] The Congressional Power of the Purse Act would address this problem in a sensibly nuanced way, reducing the overall timeframe for congressional consideration before filing from twenty-five days to fifteen days, with the opportunity for an even shorter timeframe "if the Comptroller General finds (and incorporates the finding in the explanatory statement filed) that such delay would be contrary to the public interest."[397] The idea would be to incentivize either speedy release of the funds at the end of the fiscal year or sufficient time to allow a court to intervene before the budget authority expired.[398]

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396 *See supra* notes 346–53 and accompanying text.

397 Protecting Our Democracy Act, H.R. 5048, Title V, Congressional Power of the Purse Act, 118th Cong. § 504 (2023) (amending 2 U.S.C. § 687).

398 Whether GAO would have standing to bring such a lawsuit is an open question (distinct from the question of standing to pursue statutorily entitled information, *see supra* note 382). As noted earlier, *supra* note 159, the only time GAO sued in an effort to get the administration to release improperly impounded funds, the administration ultimately released the funds and the lawsuit was dismissed as moot. OGC-77-20, *supra* note 159, at 224. But before releasing the funds, the Ford administration filed a motion to dismiss challenging the constitutionality of the provision authorizing GAO to bring the lawsuit. *Id.* at 220. The arguments were that the Comptroller General, the head of GAO, was a legislative officer trying to bring an action to enforce the law, an executive action, and that with the government on both sides of the v., there was no actual case or controversy. *See id.* at 220–21. GAO responded that it was suing to compel the executive branch to execute the law by releasing the funds in question rather than performing an executive function; that the Comptroller General was not clearly a solely legislative officer; and that even if he was, all the lawsuit was doing was protecting legitimate legislative interests in ensuring that its decisions under the Impoundment Control Act were not ignored by executive officers. *Id.* at 221.

After Bowsher v. Synar, 478 U.S. 714 (1986), it can no longer be suggested that the Comptroller General is not a legislative officer. But as the law of congressional standing has developed, it is unclear whether GAO as a legislative entity would have standing to maintain a lawsuit to compel the release of funds. *See* Raines v. Byrd, 521 U.S. 811, 814, 821 (1997) (holding that six members of Congress did not have standing to challenge the Line Item Veto Act as unconstitutional in part because their claim was not based on "specially unfavorable treatment" of those members as compared to all members of Congress); U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 13 (D.C. Cir. 2020), *vacated as moot*, Yellen v. U.S. House of Representatives, 142 S. Ct. 332 (2021) (holding that the entire House of Representatives did have standing to challenge a particular use of funds as going beyond the relevant appropriations act because it had a distinct institutional injury against its "unilateral authority to prevent expenditures"); *see also* Metzger, *supra* note 37, at 1167 (suggesting that "[p]articularly when a lack of congressional standing would allow the executive branch to violate an appropriations provision with legal impunity, the separation of powers may be better served by allowing Congress to sue, especially since doing so may give the executive branch more reason to negotiate with Congress in the first place"). As with the suggestions about lawsuits to enforce GAO's pursuit of information, *see supra* note 382, these suggestions merely tweak the already existing litigation regime, which remains viable until clearly established otherwise.

D. Aligning the Impoundment Control Act to Respond to Contemporary Executive Practices

The last set of reforms this Article proposes do not stem from the Congressional Power of the Purse Act at all. Rather, they reflect additional efforts to align the scope of the Impoundment Control Act with contemporary executive practices. The first recommendation calls for clarifying that special messages are required even in the context of the GAO-created category of programmatic delay.[399] The second recommendation calls for adding fast-track authority to allow Congress to respond to certain categories of executive spending.[400]

1. Incorporating Programmatic Delay into Deferral

The category of programmatic delay is in tension both with the language and purpose of the Impoundment Control Act. Congress would seem, therefore, to have two choices: it could explicitly incorporate programmatic delay as an exception to the category of deferral, or it could reject programmatic delay as an exception to the notice requirement.

Given the fact-intensive nature of programmatic delay inquiries,[401] however, it is difficult to imagine a statutory definition of programmatic delay that would not provide the opportunity for the executive branch to sidestep the Act completely. Rejecting programmatic delay as an exception to the notice requirement is thus the better option. Congress ought to provide that where agencies are now relying on programmatic delay to avoid notifying Congress about their delays in obligating or expending budget authority, they should no longer do so, and should instead alert Congress to all such delays under the special message process contemplated by the Impoundment Control Act.

This change would not need to overburden agencies. They already have to establish the relevant details required in a special message in order to get permission from OMB to engage in the requested programmatic delay.[402] Nor would this change have to overburden OMB; now that apportionments and footnotes have to be published as a matter of course, the relevant information is already in some sense being disclosed (although in a not-easily-understandable way).[403] Pulling it together with the details of the special message requirements would not be that much harder.

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399 *See supra* notes 243–67 and accompanying text.

400 *See supra* notes 271–90 and accompanying text.

401 U.S. Gov't Accountability Off., *supra* note 15, at 2-50.

402 *Compare* Off. of Mgmt. & Budget, *supra* note 74, at § 120.48 (requiring agencies submit to OMB requests for reapportionment, including requests due to "[p]rogrammatic changes"), *with id.* § 112.8 (outlining the information to be included in requests for deferral).

403 *See supra* note 312 and accompanying text.

Nor would the receipt of additional special messages have to overburden Congress. Congress clearly envisioned when it first passed the Impoundment Control Act that it would receive deferral notices as a matter of course, without fearing that the workload would be impossible.[404] That is, the statute itself contemplates bulk special messages.[405] So did the legislative history. The House Report explained that if Congress had to affirmatively approve every time the executive branch delayed spending money, the "legislative process would be disrupted by the flood of approvals that would be required for the normal and orderly operation of the government."[406] The veto contemplated by the House would "permit Congress to focus on critical and important matters, and save it from submersion in a sea of trivial ones."[407] The "trivial" ones were nonetheless expected to be reported to Congress.

To help focus its attention on the "critical and important" ones, Congress should post the special messages on a public-facing website, perhaps on the websites of the budget and appropriations committees, where not only staff, but also civil society organizations with particular interests in specific programs can elevate potentially problematic delays for Congress's consideration.[408]

If at that point Congress wants further information about whether the deferrals are for a statutorily authorized reason or for an improper policy-based reason, Congress could ask GAO to assess the underlying action. But intent and motive should not be determinative as to whether Congress has the opportunity to consider an impoundment resolution.[409] Congress should be able to express its disapproval of a delay even if GAO determines that the delay is consistent with law or a result of contingencies, as with President Trump's delay of State Department funds to Ukraine or President Biden's delay in obligating funds for the wall.[410]

2. *Spending Releases*

To incorporate into the Impoundment Control Act a response to the contemporary problem of executive spending based on expansive interpretations of spending statutes, Congress ought to add a fast-track mechanism to review the administration's policy choices stemming

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404 *See* Schick, *supra* note 16, at 402–03.

405 2 U.S.C. § 684(a) ("A special message may include one or more proposed deferrals of budget authority.").

406 City of New Haven v. United States, 809 F.2d 900, 907 (D.C. Cir. 1987) (citing H.R. Rep. No. 658, 93d Cong. 41 (1973)).

407 *Id.* (citing H.R. Rep. No. 658, 93d Cong. 41 (1973)).

408 *See supra* note 320 and accompanying text.

409 *See supra* notes 260–69 and accompanying text.

410 *See supra* notes 250–59 and accompanying text.

from such interpretations. This mechanism should be based on the framework that is already in place in the Act to review special messages proposing rescission or deferral.[411] If the opposite of an "impoundment" is a "release,"[412] Congress's consideration might be called a "release resolution."

Fully fleshing out what such a system should look like is beyond the scope of this Article. Instead, the design of such a system ought to be subject to the kind of public debate that led to the proposals underlying the Congressional Power of the Purse Act. To help start the conversation, the paragraphs that follow first identify key questions to ask in designing the mechanism and then make the case for the value of such a mechanism.[413]

One design question is what executive actions around spending should constitute a "release" that would be subject to a "release resolution." Those that add to the deficit only? If so, by whose calculation? Those that involve only obligation or expenditure beyond a certain amount? If so, what amount?

A second design question is whether the President should be required to submit a special message to Congress describing such releases the way she is required to do for rescissions and deferrals[414] or the way the Congressional Review Act requires rules to be submitted to Congress before they can take effect.[415] Would special messages help focus legislative attention on the subject of the releases, or would they be unnecessary since presidential releases tend to be more public than impoundments? Whether there is a special message requirement or not, within what time frame would the release resolution have to be introduced? If there is no special message requirement, what would trigger the start of the clock for introducing the release resolution?

A third design question is what the ultimate legal outcome of the fast-track mechanism should be. Affirmative approval by Congress, as with a rescission bill, such that the policy choice cannot go into effect without Congress's approval?[416] An "express[ion] [of] disapproval," as with the "impoundment resolution" considering a deferral, such that the administration's action can go into effect but only against the backdrop

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411 2 U.S.C. § 688.

412 *Impound*, Merriam-Webster.com Thesaurus, https://www.merriam-webster.com/thesaurus/impound [https://perma.cc/6UYK-Y4PA].

413 For consideration of recent proposals to create other fast-track review mechanisms, see, for example, Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 Harv. J. L. & Pub. Pol'y 773 (2022); Aaron-Andrew P. Bruhl, *The Supreme Court Review Act: Fast-Tracking the Interbranch Dialogue and Destabilizing the Filibuster*, 25 U. Pa. J. Const. L. 1 (2023).

414 2 U.S.C. § 685(e)(1).

415 *See* 5 U.S.C. § 801(a)(1)(A); *see also* Bridget C.E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, 70 Am. U. L. Rev. 387, 394–95 (2020).

416 *See* 2 U.S.C. § 681(3).

of congressional disapproval, a result for which the President would have to weigh the downstream political consequences?[417] A possibility to affirmatively reject the administration's action, as with the Congressional Review Act, such that the policy choice can go into effect unless Congress affirmatively rejects the rule subject to a potential veto and veto override?[418]

A robust public conversation, both inside and outside Congress, can help shed light on these important design questions, identifying and assessing the tradeoffs from different perspectives.

Moving from design questions to evaluation: Adding a fast-track mechanism would help assert legislative control over controversial executive spending choices, as befitting Congress's power of the purse. Having a ready-made path for privileged consideration of a spending choice would increase the likelihood of a congressional response because fast-track mechanisms provide a way around the hurdles of a number of vetogates.[419] Such a mechanism would not guarantee a congressional response, of course, nor would it guarantee that a congressional response would succeed.[420] But procedural paths open up possibilities,[421] and requiring the President to weigh the possibility of congressional response and grapple with the consequences of a rejection would likely affect presidential consideration of the action itself and its political costs.[422]

In addition, a fast-track mechanism would be institutionally valuable even if Congress does not always succeed in using it. Waiting to see whether the Supreme Court blesses the legality of a particular executive branch spending action and weighing in either as litigant or amicus curiae in the meantime puts Congress in the role of supplicant and secondary player rather than coequal branch in a tripartite government. More importantly, the Supreme Court only rules on the legality, not the wisdom, of policy. Congress ought to have a realistic path toward rejecting a particular spending decision even if it is legal but counter to congressional desires. If Congress's role is primary policymaker in

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417 2 U.S.C. § 682; *see also supra* notes 147–52 and accompanying text (explaining how Congress changed this provision after the Supreme Court struck down one-house vetoes in *Chadha*).

418 *See* 5 U.S.C. § 802.

419 *See* Garrett, *supra* note 289, at 754.

420 For example, although Congress voted to reject President Trump's emergency declaration, it did not have enough votes to override his veto. *See supra* note 282 and accompanying text.

421 *See* Garrett, *supra* note 289, at 720, 733 (noting that all decisions made under framework legislation could also have been made under ordinary procedural mechanisms).

422 In the case of the congressional rejection of President Trump's emergency declaration, for example, although he did not ultimately walk back from his action, the President had to issue the first veto of his presidency and grapple with intraparty opposition. *See* Michael Tackett, *Trump Issues First Veto After Congress Rejects Border Emergency*, N.Y. Times (Mar. 15, 2019), https://www.nytimes.com/2019/03/15/us/politics/trump-veto-national-emergency.html [https://perma.cc/7ZRX-BYCU].

general, and primary holder of the purse in particular, then finding a way through the barriers of ordinary lawmaking is a useful project even if Congress lets stand questionable assertions of executive spending power at times.

Conclusion

As Gillian Metzger has powerfully argued, public law must do a better job of "taking appropriations seriously."[423] This Article demonstrates that reforming doctrine, the subject of her article,[424] is not the only way to do that. The Power of the Purse statutes themselves should be modernized to account for the gaps that have become apparent in this era of presidential control. By doing so, Congress can give itself the tools to play a stronger institutional role in overseeing and pushing back at executive overreach.

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423 *See generally* Metzger, *supra* note 37.

424 *Id.* at 1155–71.