No. 25A269

In the Supreme Court of the United States

DEPARTMENT OF STATE, et al.,
Applicants,
v.
AIDS VACCINE ADVOCACY COALITION, et al.,
Respondents.

On Application for Partial Stay of the Injunction Issued by the United States District Court for the District of Columbia

BRIEF FOR AMICUS CURIAE ALAN B. MORRISON IN SUPPORT OF RESPONDENTS

Alan B. Morrison
Counsel of Record
George Washington University Law School
2000 H Street NW
Washington D.C. 20052
202 994 7120
abmorrison@law.gwu.edu

September 11, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Statutes

INTEREST OF THE AMICUS[1]

This brief is submitted by Alan B. Morrison who is an associate dean at the George Washington University Law School where he teaches constitutional law. He filed briefs amicus curiae in these cases at both the merits and rehearing en banc stages in the Court of Appeals. Those briefs focused on the Government's argument that the Impoundment Control Act of 1974, 2 U.S.C. §§ 681, et seq. (ICA), eliminates any right of private parties to sue over claims that federal agencies have wrongfully refused to spend funds appropriated by Congress.

Amicus has considerable direct experience regarding impoundments both before and after that Act was passed. He was counsel for twenty-four Senators who filed an amicus brief (and were invited to present oral argument) opposing the impoundment in *State Highway Comm'n of Mo. v. Volpe*, 479 F.2d 1099 (8th Cir. 1973). He was lead counsel or co-counsel in a number of other impoundment challenges both before and after the ICA was enacted, including *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136 (1975) (the companion case to *Train v. City of New York*, 420 U.S. 35 (1975)), and *City of New Haven v. United States,* 809 F.2d 900 (D.C. Cir. 1987).

---

[1] No person other than amicus authored this brief in whole or in part or contributed money that was intended to support the preparation or submission of this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

There are two basic propositions of law that defeat the request for a stay of the order of the District Court. Before turning to the legal flaws in that request, the request should be denied for another reason. The main concern of the plaintiffs at this moment is not that they immediately receive the money to which they are entitled, but that the funds not lapse on September 30, 2025. As courts of equity, the federal courts surely have the power to prevent the unjust result of having these funds lapse when plaintiffs have made a strong showing of entitlement as the lower courts have found. In the District Court's preliminary injunction order, it specifically gave the Government the option to request that the Court "extend the relevant expiration dates of the funds" in order to eliminate the pressure for an immediate decision (App 220a). The failure of the Government to seek to avoid that time crunch by taking up the District Court's suggestion is reason alone to deny its request to stay that court's order.

On the merits, contrary to the Government's submission, the Impoundment Control Act of 1974, 2 U.S.C. §§ 681 et seq. (ICA), does not preempt or preclude claims by persons entitled to compete for or obtain appropriated funds. Both before and after the enactment of the ICA, federal courts, including this Court, entertained lawsuits by persons injured by wrongful impoundments and ruled on the merits, generally against the withholding. Nothing in the ICA changed the availability of private litigation to prevent unlawful impoundment.

Second, the ICA allows the President to rescind appropriated funds only if Congress has approved his proposed rescission. But if Congress has not approved the rescission within the 45 days allowed by the ICA, the law appropriating the funds controls. At that point, the constitutional limits on the ability of the President to refuse to spend appropriated funds under *Clinton v. City of New York,* 524 U.S. 417 (1998), require that the funds be obligated. The fact that there may or may not have been a violation of the ICA is irrelevant. Unless the President has an independent authority to refuse to spend the money, which he does not, he must spend it.

ARGUMENT

THE APPLICATION FOR A STAY SHOULD BE DENIED.

I. The ICA Does Not Preclude Actions by Private Parties to Enforce Laws Appropriating Federal Funds.

To read the application for a stay, one would never know that there is a long history before ICA, as well as cases following it, in which the courts have regularly enforced appropriations laws when the President has sought to impound funds under them. These include *State Highway Comm'n of Mo. v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), *Train v. City of New York*, 420 U.S. 35 (1975), and *City of New Haven v. United States,* 809 F.2d 900 (D.C. Cir. 1987). There is not a word in the ICA that hints that the ICA would have the preclusive effect that the Government asserts when the whole thrust of the Act was to make it more difficult, not easier, for the President to refuse to spend appropriated funds, let alone to overturn all the prior cases to the contrary.

Impoundment cases have always been about whether the refusal to spend appropriated funds was lawful. It is of no legal significance that the lower court initially ruled that a claim could be directly brought against the President, whereas the case is now one under the Administrative Procedure Act, 5 U.S.C. § 702, against the agencies that spend the appropriated funds. Either way, the most directly applicable precedent is *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 579 (1952), in which the defendant was an agency head acting at the direction of the President, and the Court had no difficulty upholding the claim that the President lacked statutory authority to take control of the steel mills. Whether *Youngstown* is viewed as a ruling on the President's statutory powers, or a holding that, because he did not have a statutory basis to act, his executive order was unconstitutional, is of no consequence. So here, it is irrelevant whether the illegality is that the President exceeded his constitutional authority or his statutory powers because the result in either case is the same.

The Government's principal merits argument is that the passage of the ICA wiped out the right of private parties to sue to halt unlawful rescissions. According to the Government, but no longer the panel in the Court of Appeals, the ICA effectively overturned all the prior cases that allowed suits to prevent impoundments. If the Government is correct, the Court of Appeals (and the Department of Justice) failed to note that momentous change in 1987 where the challenge to the deferral at issue in *City of New Haven* was sustained.

The undisputed goal of the ICA was to prevent unilateral rescissions, which is directly contrary to the Government's conclusion that private parties could no longer sue to prevent impoundments. There is also no textual support for that conclusion, and the disclaimer in 2 U.S.C. § 681 is to the contrary, providing that the ICA "shall not be construed as ...(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment."

The Government argues that 2 U.S.C. § 687, which authorizes the Comptroller General, an agent of Congress, *Bowsher v. Synar,* 478 U.S. 714 (1986), to assist Congress in enforcing the ICA, is the exclusive means by which the President may be restrained from impounding appropriated funds. Under that provision, the Comptroller General may, if he determines that an agency has not made funds available for obligation, bring suit "to require such budget authority to be made available for obligation." The availability of that avenue to redress impoundments says nothing about whether it is exclusive means to do so. In light of the substantial history of private plaintiffs successfully suing to stop unlawful impoundments, and the absence of any language of exclusivity in the ICA, the Government's exclusivity argument is without merit.

There are several additional significant flaws in the Government's argument. The Comptroller General must first learn about the unlawful withholdings, which is made more difficult when the President, as he did here, fails to send the messages required by sections 683 and 684. Then the Comptroller General must investigate the alleged withholding to determine whether it is lawful, and if not, section 687 also

requires that he must file an explanation for his conclusion with the Speaker of the House of Representatives and the President of the Senate, and then wait another 25 days before filing suit. Even if a suit is successful, the ICA does not assure that the beneficiaries of federal programs will be able to use any favorable judgment on the basic issue of impoundment to obtain the funds that were illegally withheld. In addition, the law is entirely discretionary, and when Congress is controlled by the President's party, it is highly unlikely that the Comptroller General will sue the President, let alone bring suits to cover every impoundment. In short, if Congress wanted to replace private enforcement with the Comptroller General, it would never have provided such a limited substitute. [2]

Finally, Congress's attitude toward impoundment is exemplified in the aftermath of the *City of New Haven* decision. As originally enacted, the deferral authority in section 684 was subject to a one-House veto, which was subsequently declared unconstitutional in *INS v. Chadha,* 462 U.S. 919 (1983). The Government argued that the deferral authority nonetheless survived, but the D.C. Circuit had no

---

[2] Given its long history of opposing efforts by Congress to bring suits against the Executive Branch, the Department of Justice would likely move to dismiss any suit under section 687. *See Carnahan v. Maloney,* S. Ct., No. 22-425 (2023), in which the question presented by the Solicitor General was "Whether individual Members of Congress have Article III standing to sue an executive agency to compel it to disclose information that the Members have requested under 5 U.S.C. 2954." The *Carnahan* petition was granted, but the case was not decided because the plaintiffs moved to dismiss on mootness grounds. *See also* the concluding sentence in note 1 of the Application for a Stay: "Nor does this case raise any issue about whether suits by the Comptroller General against the Executive Branch are cognizable under Article III."

trouble concluding that the deferral provision could not stand on its own, with no check, because section 684

> was designed specifically to provide Congress with a means for controlling presidential deferrals. As a consequence of the Supreme Court's decision in *Chadha,* however, that section has been transformed into a license to impound funds for policy reasons. This result is completely contrary to the will of Congress, which in amending the Anti-Deficiency Act sought to *remove* any colorable statutory basis for unchecked policy deferrals. We cannot imagine that Congress would have acted in complete contravention of its intended purposes by enacting section [684] without a legislative veto provision.

City of New Haven, 809 F.2d at 909 (emphasis in original). Shortly thereafter, Congress amended section 684 to its current version, which allows the President to make limited non-policy deferrals, Pub. L. 100–119, 101 Stat 754, section 206 (1987), yet the Government's position would effectively enable the President to make policy deferrals on a wholesale basis unless the Comptroller General decided to sue over each of them. *See also In re Aiken County,* 725 F.3d 255, 260 (D.C. Cir. 2013) where the D.C. Circuit, in an opinion written by then-Judge Kavanaugh, issued a writ of mandamus against the Nuclear Regulatory Commission, which had refused to spend funds that Congress had directed it to spend, observing that "the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress."

It is simply not credible that the Congress that enacted the ICA in 1974, in response to the unlawful impoundments of President Nixon, and the Congress that strengthened the ICA in 1987, would have included in the ICA provisions that would

essentially enable the President to engage in wholesale rescissions even though every portion of the ICA points in the other direction.

II. The Inability of Congress to Act on a Rescissions Request Can Not Authorize the Requested Rescission.

The Government seeks to justify its refusal to spend the remaining $4 billion in appropriated funds by a device known as a "pocket rescission," apparently seeking to analogize it to the pocket veto specifically provided to the President in the final sentence in Article I, section 7, clause 2 of the Constitution. As noted, once the President sends a rescission request to Congress, Congress has 45 days within which to approve the request. If both Houses of Congress approve the request (and the President signs it), it becomes a law, superseding the original law. If Congress does not agree to change the law, the funds must be obligated in accordance with the original appropriations law.

The Government argues that if, for example, a rescission message is sent to Congress on August 20th, and the 45 days would not expire until early October, the ICA, by its terms, would not prevent the President from impounding those funds. But that only gets the President part way home. As the pre-ICA cases held, unless the appropriations statute gave the President discretion not to spend the money (which these do not), the President must spend the funds. Nonetheless, the President seems to argue that the ICA would impliedly authorize him in that situation to rescind any funds for which no action was taken during the prescribed 45 days.

In fact, under the ICA, Congress will almost always have much more than 45 calendar days to act, and hence the law presents a wider window (greater loophole) for pocket rescissions. The operative provisions are section 682(3), which provides that the days for passing on a rescission request are "45 calendar days of continuous session" of both Houses, as further defined (and expanded) by section 682(5). Under the latter provision "an adjournment of more than 3 days to a day certain shall be excluded in the computation of the 45-day period." Given the traditional month long August recess, unless the message is sent to Congress by the end July, the 45 days are unlikely to expire before the end of the fiscal year on September 30th. Indeed, July 31st may be too late if, as happened this year, the House adjourned on July 24th and did not reconvene until September 8th. Again, the size of this loophole underscores the conclusion that as a matter of construction of the ICA, Congress never gave the President a pocket rescission power under the ICA.

But even if the ICA did not bar pocket rescissions, the Constitution does. The problem for the President is that, even when Congress enacted a statute expressly allowing the President to refuse to spend specific items in an appropriations law, this Court held that the statute seeking to give the President that power was unconstitutional. *Clinton v. City of New York,* 524 U.S. 417 (1998). The statute at issue there —the Line Item Veto, 110 Stat. 1200—allowed a President, within five calendar days (excluding Sundays) of signing a bill into law, to send a message to Congress selecting specific spending items in an appropriations law that he wished to "cancel," *i.e.,* decline to spend. The law allowed the President to do that for

essentially any reason the President wanted, which included policy disagreements with Congress, as well as to stop what he considered to be wasteful spending. Unlike under the ICA, the President did not have to give his reasons or provide any other information, but like the ICA, there were provisions that provided reasonable assurances that Congress would be able to vote to reject or approve each item that the President proposed to be canceled. Under that Act, the failure of Congress to enact a law to override the President's cancellation, or the failure of Congress to override a veto of a law that Congress did enact, would result in the cancellation being upheld. By contrast, under the ICA, the failure of Congress to support a President's proposed rescission results in the rescission being denied.

The Court in *Clinton* struck down the Line Item Veto as inconsistent with Article I, section 7, which requires that all laws, including laws that alter or repeal existing laws, must be approved by both Houses of Congress and signed into law by the President (or have his veto overridden by two-thirds of both Houses). The Court ruled that once the President signed the original appropriations bill into law, any cancellations of items in that bill must go through the same law-making steps. Because the cancellation process in the Line Item Veto Act did not provide for the affirmative approval of Congress, it violated Article I, section 7. Because the President may not constitutionally refuse to spend appropriated funds even with Congress's express authorization, he surely cannot do it when Congress fails to act on his proposed rescission request within the 45 days provided by the ICA.

CONCLUSION

For the foregoing reasons, as well as those set forth in the oppositions of the plaintiffs, the Application for a Stay should be denied.

Respectfully Submitted,

Alan B. Morrison
George Washington University Law School
2000 H Street NW
Washington D.C. 20052
(202) 994 7120
abmorrison@law.gwu.edu
Counsel for the Amicus

September 11, 2025