



Judicial Review of Rescissions and Deferrals Under the Impoundment Control Act

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On May 8, 2018, the Trump Administration [proposed](#) rescissions totaling approximately \$15.4 billion of unobligated funds appropriated in prior fiscal years. The proposed rescissions target funds appropriated for a variety of federal activities, including, but not limited to, animal and plant health programs, rural rental assistance, U.S. Forest Service land acquisition, loans to automobile manufacturers to produce advanced technology vehicles, and funding to states under the Children’s Health Insurance Program (CHIP). In many cases, the proposed rescissions relate to programs whose authority has lapsed or programs that are not expected to require the amounts proposed to be rescinded under current spending projections. As a result, the Office of Management and Budget (OMB) [estimates](#) that the proposed rescission of \$15.4 billion in appropriated funds would translate to a \$3 billion reduction in outlays from the Treasury.

A proposed rescission is one of two types of presidential actions authorized under the [Impoundment Control Act of 1974](#) (ICA), which was enacted to regularize the process by which the Executive impounded, or withheld, funds that had been appropriated by Congress. Although impoundments of federal funds have been made by the executive branch as far back as the [Jefferson Administration](#) to avoid waste or inefficient spending, it was the increased use of impoundments [during the 1970s](#) in furtherance of broader policy or economic goals that precipitated the enactment of the ICA.

Under the ICA, the President may propose [rescissions](#) of budget authority by sending a special message to both houses of Congress specifying the amount of funds to be rescinded. The special message must include the specific project or governmental functions involved with the funds; the reasons for the rescission; the fiscal, economic, and budgetary effects of the proposed rescission; and all facts, circumstances, and considerations bearing upon the proposed reservation and the estimated effect of the proposed rescission on the objects, purposes, and programs for which the budget authority had been provided. The ICA also authorizes [deferrals](#) of budget authority, which are temporary delays in the release of funds for obligation. No deferrals were included as part of the May 8 special message.

As discussed in this [CRS report](#), the transmittal of a special message proposing rescissions under the ICA does not automatically result in the permanent rescission of such funds. Instead, once the special message is received, the ICA provides [expedited procedures](#) under which Congress may consider legislation approving some or all of the proposed rescissions, referred to as a “[rescission bill](#).” If legislation

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providing for such rescissions is not enacted within 45 days of [continuous session](#) after receipt of the special message, the ICA states that the funds which were proposed to be rescinded “[shall be made available for obligation](#).” Following the President’s May 8 special message, [H.R. 3](#) was introduced, rescinding [most of the funds](#) proposed in the President’s special message.

While Congress considers such legislation, a related issue arises that may be addressed in the judicial branch: namely, whether the actions taken by the President under the ICA are subject to judicial review. Although the applicable case law is not extensive, courts have found such actions to be justiciable in certain circumstances, and have gone so far as to hold purported impoundments under the ICA to be unlawful when the impoundments conflict with other statutory directives requiring funds to be made available for obligation.

For example, in *Maine v. Goldschmidt*, the State of Maine successfully challenged President Carter’s deferral under the ICA of Federal-Aid Highway Act (FHWA) funds. The deferral, undertaken to combat inflation, had the effect of cutting the amount of highway funds available to Maine for FY1980 by approximately \$46.5 million. While conceding that the FHWA did not itself authorize any delays in making funds available for obligation, the Carter Administration argued that the ICA provides an “independent statutory basis for the President’s action.” However, the court noted that a “[disclaimer](#)” provision of the ICA stated that the ICA shall not be construed as “superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.” After closely inspecting the statutory scheme under the FHWA for the allocation of funds among the states, the court concluded that it was a “mandatory obligation” statute and held that the ICA was consequently inapplicable to it. Consistent with this holding, the court granted an injunction to the state barring the Secretary of Transportation “from rescinding, reducing, deferring, impounding or otherwise refusing to make [the highway funds] available for obligation.” Similar results were obtained in challenges to the same deferral action brought by other [states](#), though not uniformly. Although Congress subsequently enacted [legislation](#) disapproving of the deferrals, rendering these cases moot, the litigation prompted the Comptroller General to issue a [1982 opinion](#) agreeing with the majority of the courts’ application of the disclaimer provision to the FHWA.

What takeaways can be gleaned from these cases with respect to the potential for judicial review of the pending proposed rescissions? First, it seems that the particular statutory authority under which the funds in question are provided informs whether it is the type of “mandatory spending” statute that removes the applicability of the ICA. In the words of the Comptroller General’s 1982 [opinion](#), this question does not turn simply on whether a statute uses the word “shall,” but requires consideration of the statute as a whole to “ascertain congressional intent.”

Second, before a federal court reaches the merits of that question, it may be required to ask what harm, if any, the plaintiff has suffered as a result of the impoundment. Maine and other states demonstrated that they would suffer a real monetary loss as a result of the deferral. Establishing this kind of concrete injury that is fairly traceable to the Executive’s action under the ICA is a necessary element to [invoking the court’s jurisdiction under Article III of the Constitution](#). For at least some of the rescissions proposed by the Trump Administration, this injury may be difficult to establish as OMB has concluded that the affected programs would still be fully funded through other means, that there would be [no effect on planned outlays](#), or that the authority to obligate new funds [has expired](#). Insofar as these characterizations are correct and there is no concrete injury arising from the proposed rescissions under the ICA, there is unlikely to be any opportunity for judicial review of those proposals.

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