

Uncertainty surrounds quick relief from foreign aid cuts

By Paul M. Krawzak and Kellie Mejdrich, CQ



Mulvaney gives a thumbs-up, of sorts, during recent budget talks on Capitol Hill. (Bill Clark/CQ Roll Call file photo)

Lawmakers and stakeholders opposed to the possible cancellation of more than \$4 billion in previously appropriated foreign assistance funds have limited options to combat the White House's move, expected sometime this week.

The quickest route could be a lawsuit by aid groups and federal contractors that receive State Department and U.S. Agency for International Development funds seeking an immediate injunction, which would block such "rescissions" from taking effect.

The reason for such urgency is that authority to obligate the targeted funds lapses after Sept. 30, and the simple act of submitting the cuts package would result in a freeze lasting 45 legislative days — or beyond the funds' expiration. The Government Accountability Office has already ruled that such a move would violate the 1974 budget law establishing the modern rescissions

process, since it would nullify a requirement that Congress approve any such cuts during that 45-day period or the money must be released.

There's already a draft legal complaint, reviewed by CQ Roll Call, that is circulating and could be filed shortly after the rescissions package is submitted to Capitol Hill, though a final decision hasn't been made. It's also unclear how quickly the U.S. District Court for the District of Columbia, where the case would be filed, might act, though if plaintiffs can demonstrate irreparable harm it might move the court to act before the September deadline.

The draft complaint argues the executive branch has committed multiple violations of federal statutes, as well as the Constitutional "power of the purse" — by serving as a de facto veto power over enacted funding appropriated by Congress.

The complaint also says a commitment by the White House to protect accounts that fund projects supported by Ivanka Trump and Vice President Mike Pence but not others are arbitrary and without legal basis.

"While we all hope the White House will back down under political pressure, prudence dictates readying a backup plan," said Robert Nichols, an attorney who represents government contractors and nongovernmental humanitarian aid groups. "Several leading organizations have asked our firm for a legal strategy to return the funds to the State Department and USAID for expenditures as Congress intended. We are ready in case litigation becomes necessary."

Division in the ranks

There's some division among stakeholders about the most appropriate course of action, however. Some aid groups say it's unlikely they'd join a suit seeking an immediate injunction.

"The argument we're trying to make is these rescissions are harming people who desperately need our assistance around the world," said Bill O'Keefe, executive vice president for mission and mobilization at Catholic Relief Services. "They are the ones who have standing and we are representing them in the court of public opinion through the political process, and we think that's a more appropriate role for us."

Other options include a lawsuit by the U.S. comptroller general, but that process would likely be delayed since 1974 budget law dictates that the GAO first file an explanatory statement on why the cuts are illegal. After that statement is finalized, the GAO then has to wait 25 days before filing suit. Accordingly, a court ruling might not come until well after the Sept. 30 deadline.

For now, House Democratic leaders appear willing to let the GAO take the lead on any action following a rescission proposal. However, Democrats are also considering other options, such as writing an extended deadline for obligating the funds past Sept. 30 in a stopgap funding measure to extend at least some fiscal 2019 funding into the next fiscal year.

Lawmakers are likely to require such an interim appropriations measure, known as a continuing resolution, since Congress hasn't passed any of the 12 annual spending bills. Inserting language

into the CR ordering the administration to release the funds, or extending their availability, would be a risky move though because if President Donald Trump vetoes the measure it could lead to another partial government shutdown.

It's already clear Congress will not approve the rescission. House Speaker [Nancy Pelosi](#), D-Calif., said in a [letter](#) to Treasury Secretary Steven Mnuchin that the House would not act on the request. Republicans as well as Democrats [have objected](#) to the rescission plan, though Senate Majority Leader [Mitch McConnell](#), R-Ky., has not made any statements about it.

“This matter has been thoroughly reviewed. Both law and precedent support potential action here,” a senior administration official said in a statement. “The real issue here is that some in Congress seem more concerned about spending American taxpayer dollars on solar panels in the Caribbean than reducing the wasteful spending in Washington.”

USAID currently runs a program, with offices in Jamaica and Barbados, that aims to wean Caribbean nations off of imported oil by making grants available for renewable energy projects.

Some lawmakers and staff are worried the request will get in the way of completing fiscal 2019 appropriations. “Rescissions like this, especially so late in the year with the attending legal issues, erode trust and make it that much harder to negotiate in good faith,” a House Democratic aide said.

Uncharted waters

Some observers believe the real purpose of the Office of Management and Budget in issuing the rescission is to test whether current law allows the administration to use the process to in effect cancel spending authority without congressional action. The GAO and OMB have issued clashing legal opinions.

In a Dec. 10, 2018 letter to the House Budget Committee, the GAO said the law does not permit funds to be withheld through their date of expiration without congressional action. In the letter, Thomas H. Armstrong, the GAO's general counsel, wrote that the Constitution “provides no mechanism for the President to invalidate a duly enacted law.”

OMB argues that the law is silent on when the president may propose rescissions, meaning he or she can withhold funds late in the year even if they would expire before the 45 day period is over.

“The text of the [1974 budget law] places no limit on how late in the fiscal year a President may propose funds for rescission or withhold funds pending Congressional consideration of a rescission proposal,” Mark R. Paoletta, general counsel for OMB, wrote in a Nov. 16, 2018 letter to the GAO. He added that there is “bipartisan historical precedent for budget authority being withheld late in the fiscal year pursuant to a ... rescission proposal, including withholding such amounts through the end of the fiscal year.”

OMB said the GAO did not object to the late breaking rescissions in the past.

The GAO addressed that claim in its December letter, saying it overruled its “prior inconsistent opinions” following subsequent Supreme Court decisions and amendments to the 1974 budget law.

The path forward is somewhat uncharted. Since the 1974 law was enacted, the GAO has only filed suit once against an administration to release budget authority withheld under a rescission. That occurred in April 1975, when Comptroller General Elmer B. Staats took President Gerald Ford to court over the cancellation of \$264 million in funds for a subsidized housing program.

That case dragged on until it was dismissed seven months later.

Ford initially sought to defer the funding temporarily, but the GAO said the action should have been classified as a rescission. After withholding the funds for 45 days, the administration still refused to make the money available for obligation. That refusal spurred the GAO to file suit.

The funds were set to expire in August 1975. Days before, the court granted a GAO request to record the funds as obligated pending further court action, which prevented them from expiring on schedule.

The suit ultimately was dismissed after a surprise announcement by then Housing and Urban Development Secretary Carla Hills in October 1975 that the administration would reactive the subsidy program in a revised form, freeing up the funds for obligation.

Whatever the legal or legislative response may be, stakeholders thus far appear to be placing the administration's decision to seek cancellation of the foreign aid funds squarely at the feet of acting White House Chief of Staff Mick Mulvaney, who is still technically OMB director as well.

As Catholic Relief Services' O'Keefe put it: "Mulvaney is the Grinch who stole August."

Rachel Oswald contributed to this report.