MEMORANDUM

TO: Mary Anne Gibbons
FROM: Jeffrey S. Bucholtz
DATE: April 5, 2013
RE: Implementation of 5-day delivery proposal

EXECUTIVE SUMMARY

You have asked our opinion on several matters related to the Postal Service’s proposal to discontinue Saturday delivery of First-Class and Standard mail beginning in early August 2013. Specifically, this memorandum addresses the following questions:

1. Whether the full-year continuing resolution for Fiscal Year 2013 carries forward the 6-day delivery proviso attached to the Postal Service’s FY 2012 Budget appropriation.

2. Whether the 6-day proviso may be satisfied through Saturday delivery of Express Mail, Priority Mail, and parcels, as suggested in floor statements by the Chairman of the House Government Oversight Committee.

3. Whether the Postal Service may avoid the 6-day proviso by refusing the appropriated funds to which it is attached.

4. Whether the fiduciary duty owed by Governors of the Postal Service authorizes them to decline to comply with the 6-day proviso.

5. What risks would be entailed by implementing the 5-day delivery proposal notwithstanding the appropriations rider.

6. Whether the Postal Service could ask the President to invoke the Impoundment Control Act to obtain rescission of the reimbursement appropriation containing the 6-day rider.

In brief, we conclude that the continuing resolution does carry forward the 6-day delivery proviso and that the proviso prohibits cancelling Saturday delivery of First-Class and Standard mail. Although GAO is mistaken that the proviso has any legal force apart from its attachment
to appropriated funds, the Postal Service very likely cannot refuse to accept the reimbursement appropriation, either under the Impoundment Control Act (if that Act applies) or under the constitutional separation of powers (if it does not). Contrary to suggestions made by certain Members of Congress, the Governors’ fiduciary duty to the public does not permit them to violate the 6-day proviso in order to maintain fiscal solvency, and proceeding with such a plan would entail substantial risks, including removal for cause, action by the Comptroller General, or judicial review. It is possible, however, to ask the President to invoke the Impoundment Control Act to obtain speedy congressional consideration of a request to rescind the reimbursement appropriation to which the 6-day delivery proviso is attached.

BACKGROUND

Federal law requires the Postal Service to carry certain material for the blind, overseas voters, and certain foreign diplomats free of charge. 39 U.S.C. §§ 3217, 3403-06. To compensate for this revenue forgone, Congress has authorized the Postal Service to receive an annual appropriation for reimbursement. Id. § 2401(c). The Postal Service’s annual request for reimbursement must also include an estimate of revenue that will be forgone in the fiscal year, along with a true-up amount to reconcile prior-year estimates with actual mail volume. Id. (authorizing an annual appropriation of “a sum determined by the Postal Service to be equal to the difference between the revenues the Postal Service would have received if [the statutes requiring that free mail carriage] had not been enacted and the estimated revenues to be received on mail carried under such sections”). Because Congress provided insufficient reimbursement appropriations in Fiscal Year (FY) 1991 through FY 1993, it has also authorized the Postal Service to receive an annual appropriation of $29 million to compensate for the deficiency. Id. § 2401(d).

Congress has traditionally conditioned the Postal Service’s annual reimbursement appropriation on, among other things, the continuation of 6-day delivery of the mail. E.g., Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786 (FY 2012 Budget).

Until FY 1999, revenue-forgone appropriations to the Postal Service were “regular” appropriations—i.e., appropriations for the same fiscal year governed by the budget. See, e.g., Postal Service Appropriations Act, 1988, Pub. L. No. 100-202. But in the FY 1999 budget, Congress began funding part or all of the Postal Service’s revenue-forgone reimbursement using “advance appropriations.” An advance appropriation is “[b]udget authority in an appropriation act that becomes available 1 or more fiscal years after the fiscal year for which the appropriation act was enacted.” Government Accountability Office, A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP, at 8 (2005). When Congress enacts an advance appropriation, the appropriated amount “is not included in the budget totals of the year for which the appropriation act is enacted but rather in those for the fiscal year in which the amount will become available for obligation.” Id. The Office of Management and Budget provides a similar explanation: http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/aaa.pdf

For example, in the FY 1999 budget, Congress appropriated $71,195,000 to the Postal Service for revenue forgone, but delayed payment of the entire amount until October 1, 1999—
the first day of FY 2000. See Postal Service Appropriation Act, 1999, Pub. L. No. 105-277 ("none of the funds provided shall be available for obligation until October 1, 1999"). Thus, the appropriated funds were counted against the federal budget in FY 2000 rather than FY 1999. In subsequent years, Congress sometimes relied on a mixture of regular and advance appropriations to fund the Postal Service’s reimbursement. In the FY 2010 budget, for example, Congress appropriated "$118,328,000, of which $89,328,000 shall not be available for obligation until October 1, 2010." Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3200.

The most recent act specifically appropriating money to the Postal Service is the FY 2012 Budget. Enacted December 23, 2011, that Budget contained no “regular” appropriation to the Postal Service; the entire $78,153,000 appropriated amount took the form of an advance appropriation, “not…available for obligation until October 1, 2012,” i.e., the first day of FY 2013. 125 Stat. 786, 923. Like previous Postal Service appropriations, the FY 2012 Budget contained the proviso requiring the continuation of 6-day service. Id.

The text of the 2012 appropriation reads in full (id.):

For payment to the Postal Service Fund for revenue forgone on free and reduced rate mail, pursuant to subsections (c) and (d) of section 2401 of title 39, United States Code, $78,153,000, which shall not be available for obligation until October 1, 2012: Provided, That mail for overseas voting and mail for the blind shall continue to be free: Provided further, That 6-day delivery and rural delivery of mail shall continue at not less than the 1983 level: Provided further, That none of the funds made available to the Postal Service by this Act shall be used to implement any rule, regulation, or policy of charging any officer or employee of any State or local child support enforcement agency, or any individual participating in a State or local program of child support enforcement, a fee for information requested or provided concerning an address of a postal customer: Provided further, That none of the funds provided in this Act shall be used to consolidate or close small rural and other small post offices in fiscal year 2012.

DISCUSSION

A. The FY 2013 Continuing Resolution Carries Forward The 6-Day Service Proviso

1. Congress has not passed a regular budget for FY 2013. Instead, on March 26, 2013, the President signed H.R. 933, a full-year continuing resolution for this fiscal year (the “FY 2013 CR”). A continuing resolution “provides budget authority for federal agencies, specific activities, or both to continue in operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year.” General

The FY 2013 CR contains several provisions pertinent here. Section 1101(a) appropriates, for FY 2013,

[s]uch amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2012 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this joint resolution, that were conducted in fiscal year 2012, and for which appropriations, funds, or other authority were made available in [certain FY 2012 budget acts].

Section 1102 provides that “[a]ppropriations made by section 1101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.” Section 1105 says that “[e]xcept as otherwise expressly provided in this division, the requirements, authorities, conditions, limitations, and other provisions of the appropriations Acts referred to in section 1101 shall continue in effect through [the end of the Fiscal Year].” Finally, section 1111, which was not included in the previous partial-year CR, provides as follows:

With respect to any discretionary account for which advance appropriations were provided for fiscal year 2013 or 2014 in an appropriations Act for fiscal year 2012, in addition to amounts otherwise made available by this division, advance appropriations are provided in the same amount for fiscal year 2014 or 2015, respectively, with a comparable period of availability.

Section 1111 plainly carries forward the Postal Service’s reimbursement appropriation from the FY 2012 Budget because it was an “advance appropriation . . . provided for fiscal year 2013 . . . in an appropriations Act for fiscal year 2012.” Id. As we explain below, it is also reasonably clear that § 1111 will be construed to incorporate the conditions under which the original funds were appropriated.

2. Congress’s historical practice has been not to carry forward advance appropriations in partial-year CRs, but instead to wait until a regular budget or full-year CR is enacted. Partial-year CRs typically include the language of §§ 1101 and 1102—thereby continuing regular appropriations from the prior year—but not that of § 1111, or § 1105. Compare Department of Defense and Full-Year Continuing Appropriation Act, 2011, Pub. L. No. 112-10, with Continuing Appropriations Act, 2011, Pub. L. 111-242. Full-year CRs generally contain all four provisions. See Department of Defense and Full-Year Continuing Appropriation Act, 2011, Pub. L. No. 112-10; Revised Continuing Resolution. 2007, Pub. L. No. 110-5. The natural inference
from this history is that §§ 1101 and 1102 by themselves (or the identical provisions found in partial-year CRs) do not carry forward the advance appropriations described in § 1111. Otherwise, § 1111 would be rendered impermissibly superfluous. See Corley v. United States, 556 U.S. 303, 314 (2009) (“[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)).

It could be argued that because § 1111 (unlike §§ 1101, 1102, and 1105) does not contain any express provision that its carried-forward appropriations are made subject to their original conditions, the provisos attached to them have not been carried forward. Admittedly, it is odd that both §§ 1102 and 1105 refer only to appropriations made by § 1101; neither explicitly requires that appropriations made by § 1111 be subject to their original conditions and limitations. See FY 2013 CR § 1102 (“Appropriations made by section 1101 shall be available to the extent and in the manner . . . ”) (emphasis added); id. § 1105 (“conditions, limitations, and other provisions of the appropriations Acts referred to in section 1101 shall continue in effect”) (emphasis added). But nevertheless § 1105 literally covers our case: the 6-day proviso, like the rest of the Postal Service’s appropriation in the 2012 Budget, is contained in the acts referred to by § 1101(a)(2), “[t]he Financial Services and General Government Appropriations Act, 2012 (division C of Public Law 112-74).”

Even if that were not true, or if §§ 1101, 1102, and 1105 were interpreted to deal only with regular appropriations, there is no realistic possibility that a court would accept that § 1111 frees federal agencies from the conditions attached to advance appropriations. Section 1111 tracks the language historically employed by Congress to carry forward advance appropriations. See Department of Defense and Full-Year Continuing Appropriation Act, 2011, Pub. L. No. 112-10, § 1118 (“With respect to any discretionary account for which advance appropriations were provided for fiscal year 2011 or 2012 in an appropriations Act for fiscal year 2010, in addition to amounts otherwise made available by this Act, advance appropriations are provided in the same amount for fiscal year 2012 or 2013, respectively, with a comparable period of availability.”); Revised Continuing Resolution, 2007, Pub. L. No. 110-5, § 109 (“With respect to any discretionary account for which advance appropriations were provided for fiscal year 2007 or 2008 in an appropriations Act for fiscal year 2006, the levels established by section 101 shall include advance appropriations in the same amount for fiscal year 2008 or 2009, respectively, with a comparable period of availability.”). These prior enactments confirm that § 1111 is a boilerplate provision intended to adopt Congress’s ordinary procedures for continuing resolutions. And there is no reason for Congress to make a general practice of dispensing with conditions on spending when the spending happens to take the form of an advance appropriation subject to § 1111, rather than a regular appropriation subject to § 1101. Absent any reason to believe that Congress actually intended this boilerplate language to lift the conditions attached to advance appropriations, such an interpretation would likely be rejected as one of the “absurdities of literalism that show that Congress could not have been writing in a literalistic frame of mind.” Corley, 129 S. Ct. at 1568.
B. Discontinuing First-Class And Standard Mail Delivery On Saturdays Would Violate the 6-Day Delivery Proviso

Because we conclude that the FY 2013 CR carries forward the 6-day delivery proviso, the next question is whether the Postal Service would violate that proviso by discontinuing First-Class and Standard mail delivery on Saturdays, but maintaining 6-day delivery of Express Mail, Priority Mail, and parcels. We think the answer unambiguously is yes.

1. “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985). The text of the 6-day service proviso requires that “6-day delivery and rural delivery of mail shall continue at not less than the 1983 level.” Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786, 923. Even if the statute did not explicitly refer to 1983 delivery levels, the words “6-day…delivery of mail” would probably be best read to refer to the thing most commonly meant by “mail,” i.e., First-Class and Standard mail.

That interpretation is supported by the full phrase “6-day delivery and rural delivery of mail” (emphasis added). The phrase “delivery of mail” should be given the same meaning in the statute when modified by both 6-day and rural. But it is very unlikely that Congress meant to permit the Postal Service to discontinue all rural delivery of First-Class and Standard mail so long as parcels could still be delivered to rural addresses. Because that result would follow from the proposed interpretation, it is very likely to be incorrect.

But the additional phrase “at not less than the 1983 level” removes all doubt. That phrase ensures that the Postal Service must not only deliver some mail on Saturdays, but must provide the same “level” of Saturday delivery it provided in 1983. In our view, there is no colorable argument that “the 1983 level” could refer to the delivery only of Express Mail, Priority Mail, and parcels. In 1983, as we understand it, First-Class Mail and Standard Mail were delivered to most places on Saturdays and comprised the vast majority of all postal volume. As a result, discontinuing Saturday delivery of those types of mail cannot be reconciled with any plausible view of what it means to continue “the 1983 level” of “6-day delivery . . . of mail.”

The history of the 6-day rider also suggests that its very purpose was to preempt the Postmaster General’s warning that 6-day delivery of all mail might be discontinued. As we understand the background, the rider originated in response to a congressional threat to cut Postal Service funds as part of a 1980 anti-inflation initiative. When the Postmaster General warned that these cuts would likely result in the cancellation of a delivery day, Congress enacted the 6-day delivery proviso. Moreover, the most recent example available to Congress of Saturday-delivery suspension—a brief period in 1957—reportedly involved “no deliveries on Saturdays, except special deliveries.” Jay Walz, “Post Office Ends Saturday Service Till It Gets Funds,” New York Times, Apr. 12, 1957, at 1. To the extent Congress had this episode in mind, it is unlikely the 6-day proviso was meant to permit, rather than to prohibit, a repetition of that solution.
2. The most promising counterargument, though we do not think it ultimately is colorable, is based on a floor statement during debate on the FY 2013 CR by Rep. Darrell Issa, the Chairman of the House Government Oversight Committee, which has responsibility for the Postal Service’s authorizing legislation. Chairman Issa opined in that capacity that maintaining Saturday delivery only of Express Mail, Priority Mail and parcels would be consistent with the 6-day proviso.¹ For several reasons, however, this snippet of legislative history is not likely to be persuasive.

First, legislative history is not to be consulted unless the text of a statute is ambiguous. *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1266 (2011) (“Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.”) (emphasis added)); *United States v. Gonzales*, 520 U.S. 1, 6 (1997). In our view, the text of the 6-day rider is not ambiguous on this point. The Postal Service must continue Saturday delivery of “mail” at “the 1983 level.” While that phrase is susceptible to some ambiguity at the margins—for example, whether it would be permissible to discontinue Saturday delivery to a few locations, or of less common classes of service—it cannot be read to permit cancellation of the two largest classes of service. Legislative history cannot alter the plain text of the rider.

Second, even if legislative history could be consulted, Chairman Issa’s statement is not powerful evidence of congressional intent. Courts now “exercise extreme caution” before relying on “a statement made in floor debate” to interpret a statutory text. *Natural Resources Defense Council v. EPA*, 706 F.3d 428, 437 & n.9 (D.C. Cir. 2013); *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 875 (D.C. Cir. 1996). And even when legislative history was more frequently consulted, the Supreme Court made clear that “the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). Chairman Issa, moreover, is not even the sponsor of the FY 2013 CR or the chairman of the Appropriations Committee: He is instead the chairman of the committee with substantive authority over the Postal Service’s authorizing legislation, giving him a special interest in the CR’s effect on the Postal Service, but no special insight into the intention of the CR’s drafters. And although it is true that no Member of Congress disputed Chairman Issa’s interpretation on the floor, the Supreme Court has rejected such silence as a proper basis for interpreting a statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 457 n.15 (2002) (“[T]he dissent’s additional reliance on the absence of a response to the Senators’ explanation simply makes no sense. . . . [W]here we to adopt this form of statutory interpretation, we would be placing an obligation on Members of Congress not only to monitor their colleague[s’] floor statements but to read every word of the Congressional Record including written explanations inserted into the record. This we will not do.”).

¹ http://youtu.be/UbhB0DttNs4
Third, Chairman Issa’s statement does not purport to interpret language in the bill under consideration before the 113th Congress, i.e., the FY 2013 CR. The CR does not itself contain the 6-day service proviso, but rather a blanket provision carrying forward all advance appropriations from certain previous budgets. Instead, it is the 2012 Budget, enacted by the 112th Congress, that contains the language to be interpreted. “And whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made after the bill in question has become law.” Barber v. Thomas, 130 S. Ct. 2499, 2507 (2010); accord Doe v. Chao, 540 U.S. 614, 626–27 (2004) (Justices who consult legislative history are “wary about expecting to find reliable interpretive help outside the record of the statute being construed,” and thus “subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment” (quotation marks omitted)).

For these reasons, we do not think Chairman Issa’s statement will affect the plain meaning of the 6-day delivery rider included in the FY 2012 Budget. Nor do we think any reasonable legal argument exists that the Postal Service would remain in compliance with that rider if it discontinued Saturday delivery of First-Class and Standard mail.

C. The Postal Service Very Likely Cannot Avoid the 6-Day Rider By Declining Appropriated Funds

We have also considered whether the Postal Service could avoid the strictures imposed by the 6-day delivery proviso by refusing to accept the reimbursement funds appropriated by the FY 2013 CR. For the reasons that follow, we think the answer is no. Although we think GAO is wrong that the 6-day proviso has any force apart from its attachment to appropriated funds, we conclude that either the Congressional Budget and Impoundment Control Act of 1974 or (if that Act does not apply) the constitutional separation of powers would very likely forbid the Postal Service from withholding budget authority because of a disagreement with Congress over a policy matter.

1. By letter of March 21, 2013, GAO offered its opinion that the legal force of the 6-day service proviso is not “tied to the receipt of annually appropriated funds for revenue foregone,” but rather is “a legislative directive establishing an operational standard for USPS.” GAO Letter at 4 (quotation marks omitted). With respect, we think this conclusion is unsupportable.

It is undisputed that, absent amendment, the discretion conferred on the Postal Service by its permanent authorizing legislation would permit it to establish a 5-day delivery schedule.²

² The authorizing statute requires the Postal Service to “provide prompt, reliable, and efficient services to patrons in all areas,” 39 U.S.C. § 101(a), “give the highest consideration to the requirement for the most expeditious...delivery of important letter mail,” id. § 101(e), “receive, transmit, and deliver throughout the United States, its territories and possessions...written and printed matter, parcels, and like materials,” id. § 403(a), “maintain an efficient system of collection, sorting, and delivery of the mail nationwide,” id. § 403(b)(1), and “provide for the...delivery...of mail,” id. § 404(a)(1).
Although Congress could repeal that authority in an appropriations bill, United States v. Will, 499 U.S. 200, 222 (1980), there is a “very strong presumption” in the law that appropriations acts do not modify the substantive law in this way, Building & Const. Trades Dep’t, AFL-CIO v. Martin, 961 F.2d 269, 273 (D.C. Cir. 1992) (citing Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978)). That presumption is an application of the “‘cardinal rule . . . that repeals by implication are not favored,’” except that the rule “applies with even greater force when the claimed repeal rests solely on an Appropriations Act.” Hill, 437 U.S. at 189–90 (quoting Morton v. Mancari, 417 U.S. 535, 549 (1974)). The reason is that “[w]hen voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden”—not that the appropriations measure itself is making those purposes lawful by repealing whatever other statutes might regulate the subject. Hill, 473 U.S. at 190.3

GAO, however, erroneously reverses this presumption. The only reason it gives for construing the 6-day rider as more than an appropriations condition is that “[n]o language in the [6-day proviso] indicates that its applicability is predicated upon and restricted to amounts appropriated in the 2012 Appropriations Act or in any other fact.” GAO Letter at 4. But the absence of language confirming the ordinary presumption against implied repeals proves nothing; to count as substantive legislation, the 6-day proviso must contain language rebutting that presumption, and GAO points to none. GAO’s comment is also wrong. There is indeed statutory language tying the 6-day rider to the appropriation: The words “[p]rovided further” serve no grammatical function other than to condition the receipt of the appropriated sum on compliance with the condition.

In sum, we conclude that the 6-day proviso does not require the Postal Service to maintain Saturday delivery unless it accepts the appropriated reimbursement funds.


3 Another reason the rule makes sense in the appropriations context is that the Appropriations Committees “ha[ve] no jurisdiction over the subject” of underlying authorizing legislation that would be purportedly repealed by appropriations bills, and therefore would normally have held no hearings or investigative proceedings in an effort to establish sound substantive policy. See Hill, 473 U.S. at 191. For that reason, the “rules of both the Senate and the House of Representatives prohibit ‘legislating’ in appropriation acts. However, this merely subjects the provision to a point of order and does not affect the validity of the legislation if the point of order is not raised, or is raised and not sustained. Thus, once a given provision has been enacted into law, the question of whether it is ‘general legislation’ or merely a restriction on the use of an appropriation, that is, whether it might have been subject to a point of order, is academic.” Red Book, Vol. I, at 2-34.
The ICA describes two kinds of impoundment actions that can be proposed by the Executive: rescissions and deferrals. A rescission is a total cancellation of an appropriation, and it can be accomplished only by legislation. See 2 U.S.C. § 683(b). A “deferral of budget authority,” by contrast, means “[A] withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law.” Id. § 682(1). Unlike a proposed rescission, a deferral request does not require legislative action for approval, see id. § 684, but labeling a rescission as a deferral will not prevent adverse congressional action. GAO will treat a deferral proposal as a de facto rescission if its timing is such that “funds could be expected with reasonable certainty to lapse before they could be obligated, or would have to be obligated imprudently to avoid that consequence.” Red Book, Vol. I, at 1-33 to 1-34; see also 2 U.S.C. § 686(b) (if the Comptroller General believes the President has incorrectly classified a deferral or rescission request, he must “make a report to both Houses of Congress setting forth his reasons”).

The ICA imposes specific restrictions on deferrals of budget authority. Deferrals may not be proposed beyond the current fiscal year, id. § 684(a), and are permissible only for certain purposes. In a subsection titled “Consistency with legislative policy,” the law provides that:

Deferrals shall be permissible only—

(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.

No officer or employee of the United States may defer any budget authority for any other purpose.


These provisions, if applicable, would certainly preclude the Postal Service from refusing reimbursement funds absent a successful request for rescission of the appropriation. Refusing the funds would be at least a deferral within the meaning of the ICA, since it would involve “withholding” or “reclud[ing]” the “expenditure of budget authority.” 2 U.S.C. § 682(1)(A) and (B). And because that deferral would be for the purpose of avoiding compliance with the 6-

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4 In cases of rescission proposals, the special message or report triggers a 45-day window within which Congress must approve the rescission by legislation. 2 U.S.C. § 683(b). Otherwise, the funds “shall be made available for obligation.” Id.
day service proviso, rather than for one of the permissible purposes enumerated by Congress, it would violate the Act’s restrictions. We have not identified any argument to the contrary.

Violating the ICA entails a risk of legal action. The Act provides that “[w]henever...the head of any department or agency of the United States, or any officer or employee of the United States proposes to defer any budget authority provided for a specific purpose or project, the President shall transmit to the House of Representatives and the Senate a special message” defending the deferral. Id. § 684(a). If the President fails to do so, the Comptroller General must send a report on the deferral, which has the same legal effect as a special message. Id. § 686(a). The Comptroller General also has power to bring an enforcement action in district court to prevent an unlawful impoundment. See id. § 687.5

3. As we have indicated, there is a substantial question whether the ICA applies to the Postal Service. A provision of the Postal Reorganization Act of 1970 provides:

Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.


A literal reading of this provision may exempt the Postal Service from the ICA. “Federal law[s] dealing with . . . budgets, or funds” do not apply to the Postal Service, § 410(a), and it is difficult to see how the Congressional Budget and Impoundment Control Act is not a “law dealing with . . . budgets, or funds.”

Two basic canons of statutory construction support that reading. First, “it is a commonplace of statutory construction that the specific governs the general.” Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992). “The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a

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5 “If, under this chapter, budget authority is required to be made available for obligation and such budget authority is not made available for obligation, the Comptroller General is hereby expressly empowered, through attorneys of his own selection, to bring a civil action in the United States District Court for the District of Columbia to require such budget authority to be made available for obligation, and such court is hereby expressly empowered to enter in such civil action, against any department, agency, officer, or employee of the United States, any decree, judgment, or order which may be necessary or appropriate to make such budget authority available for obligation.” Id.
specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.” RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012). Because § 410(a) deals with the Postal Service in specific terms, while the ICA is a general law dealing with the federal budget that does not mention the Postal Service, the general/specific canon suggests that the Postal Service’s exemption from budget laws trumps the ICA’s seemingly comprehensive coverage.

Second, there is the canon against implied repeals. Mancari, 417 U.S. at 549. Because the ICA postdates the enactment of § 410(a), it would normally be read not to impliedly repeal the Postal Service’s pre-existing exemption. That presumption is probably strengthened in this case by Congress’s decision to enumerate, in § 410(b), specific statutes that do apply to the Postal Service notwithstanding § 410(a). It would be odd for Congress to expand that specifically enumerated list through the disfavored mechanism of implied repeal. The Second Circuit has invoked the implied-repeal doctrine to reject an attempt to subject the Postal Service to the Paperwork Reduction Act. Kuzma v. USPS, 798 F.2d 29, 32 (1986) (“No specific reference to the USPS is made in the [Paperwork Reduction Act], which was enacted ten years after the Postal Reorganization Act, and we adhere to the rule that repeals by implication are not favored. In contrast, the Postal Rate Commission is referred to specifically as an agency subject to the requirements of the [Paperwork Reduction Act]. See 44 U.S.C. § 3502(10). It is clear, therefore, that Congress could have explicitly subjected the USPS to the terms of the PRA had it wished to do so.”).

But we do not think it clear that the Postal Service is exempt from the ICA. There is authority interpreting § 410(a) to cover only those federal laws related to the “efficient day-to-day management” of the Postal Service’s business. City of Rochester v. United States Postal Service, 541 F.2d 967 (2d Cir. 1976) (Postal Service subject to National Environmental Policy Act because § 410(a) “is ‘managerial’ in orientation” while NEPA is “policy-oriented”); Chelsea Neighborhood Association v. USPS, 516 F.2d 378, 383 (2d Cir. 1975) (despite § 410(a), Postal Service is subject to NEPA, a law “designed to cover almost every form of significant federal activity”). While these older decisions reflect a purposive method of interpreting federal statutes, they do provide a hook for a reviewing court to reach what it will surely think is the sensible outcome; it is difficult to imagine why Congress would want the Postal Service to be exempt from procedures governing impoundment of appropriated funds, since receipt of such appropriations (and the accompanying need to abide by their conditions) is not a respect in which the Postal Service is like an ordinary business needing to operate with greater freedom.

4. Nevertheless, even though we think it is arguable that the Postal Service is not subject to the ICA, prevailing on that argument will not aid our cause unless, in the absence of the ICA, the Postal Service would have the right to refuse funds appropriated for obligation by Congress. The great weight of authority on that score—cases decided during President Nixon’s attempt to use impoundment to combat inflation—suggests the Postal Service would not have that right. See State Highway Comm’n v. Volpe, 479 F.2d 1099, 1114 (8th Cir. 1973) (“We find nothing within these provisions of the Act which explicitly or impliedly allows the Secretary to withhold approval of construction projects for reasons remote and unrelated to the Act . . . . To reason
that there is implicit authority within the Act to defer approval for reasons totally collateral and remote to the Act itself requires a strained construction which we refuse to make. It is impossible to find from these specific grants of authority discretion in the Secretary to withhold approval on projects Congress has specifically directed because of a system of priorities the Executive chooses to impose on all expenditures.

It would be one thing if Congress purported to authorize the Postal Service to exercise discretion to refuse appropriated funds; but in the absence of such explicit authorization, the 6-day delivery rider will not likely be construed to permit unilateral impoundment. *Cf. Train v. City of New York, 420 U.S. 35, 47 (1975)* (President’s decision leading to “withholding of authorized funds cannot be squared with the statute”). Even the President’s power to impound funds appropriated by Congress is constitutionally doubtful. *See Guadamuz v. Ash, 368 F. Supp. 1233, 1244 (D.D.C. 1973)* (“Money has been appropriated by the Congress to achieve the purposes of both programs and the Executive has no residual constitutional power to refuse to spend these appropriations.”); *Oneida County v. Berle, 49 N.Y.2d 515, 522 n.6 (1980)* (“Federal courts have rebuffed claims that the Federal Constitution invests the president with inherent power to impound lawful appropriations.”) (citing cases). Compared to the President, the Governors of the Postal Service stand in a weaker position, as their office was created by Congress and they have no independent constitutional power. Because federal statutes are construed to avoid raising serious constitutional questions, *see Ashwander v. TVA, 297 U.S. 288, 341–356 (1936)* (Brandeis, J., concurring), it is doubtful that a court would conclude that the Postal Service has authority to refuse appropriated funds.

D. The Governors of the Postal Service May Not Invoke Broad Fiduciary Duties As Grounds To Violate The 6-Day Delivery Proviso

On March 21, 2013, Chairman Issa and Senator Tom Coburn, the ranking member of the Senate Committee on Homeland Security and Government Affairs, sent letters to the Postal Service’s Board of Governors urging them to move forward with plans to implement 5-day delivery. The letters first asserted that the 6-day rider does not prevent implementation of the Postal Service’s plan because “[a]s proposed, the Postal Service is not eliminating a day of service, but is merely altering what products are delivered on what day to maintain a sustainable level of service.” Letter at 1–2. As explained in section B, *supra*, we unfortunately do not believe that there is a reasonable argument that the 5-day delivery plan proposed by the Postal Service comports with the 6-day rider. After asserting that the Postal Service’s plan would satisfy the 6-day rider, the letter appeared to suggest that the Governors of the Postal Service have a broader fiduciary duty to implement the 5-day delivery plan *regardless* of whether that plan comports with the 6-day rider: “What’s more, we believe that the Board of Governors has a fiduciary responsibility to utilize its legal authority to implement modified 6-day mail delivery as recently proposed. The deficits incurred by the Postal Service and the low level of liquidity under which it is operating leaves it in a perilous position; one that demands implementation of all corrective actions possible.” Letter at 2.

You have asked us to consider whether the Governors’ fiduciary responsibilities to the public entitle or require them to proceed with the proposal to move to 5-day delivery of First
Class and Standard mail notwithstanding the appropriations proviso. In our view, any consideration of the prospect of ignoring a duly enacted federal statute must be undertaken with the greatest possible caution. In general, "an agency is not free simply to disregard statutory responsibilities." *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

Whether the Executive Branch has any legal power to violate positive law, or whether such action (even when pragmatically justified as necessary) is essentially an extra-legal prerogative, is a matter of sustained and unresolved debate. *Compare* Letter of Thomas Jefferson to John C. Breckenridge (Aug. 12, 1803) (acknowledging that Executive action in completing the Louisiana Purchase was "an act beyond the Constitution" and arguing that Congress "in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify & pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it."), *with* President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) (defending legality of President’s unilateral suspension of habeas corpus on the ground that "[t]he whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. . . . [A]re all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated? Even in such a case would not the official oath be broken if the Government should be overthrown, when it was believed that disregarding the single law would tend to preserve it?"). The political branches have generally avoided bringing that debate to a head by reserving invocation of the prerogative power for the President alone, and only in cases of extreme necessity. We do not think this even arguably presents such a case.

A closer question would be presented if two federal laws genuinely established two valid and irreconcilable obligations, so that compliance with both would be actually impossible. Such a circumstance would be rare because apparent conflicts between statutes are normally resolved by reference to interpretive default rules, such as the presumption against implied repeals and the general/specific canon discussed earlier. *RadLAX*, 132 S. Ct. at 2071; *Mancari*, 417 U.S. 549. Here, while the Governors do have fiduciary obligations to the public, the appropriations proviso is a very specific limitation on how the Postal Service may exercise its judgment. For that reason, even if the Postal Service were unable to satisfy all its financial obligations, it is doubtful that it could choose to save money by violating a specific congressional limitation rather than through the exercise of its more general powers, including the power to raise rates.

Nor do we think that the fact that the 6-day requirement is contained in an appropriations rider, rather than in permanent legislation, affects the analysis. Appropriations laws, once enacted by Congress and signed by the President, are binding like any other statutes. *See City of Chicago v. U.S. Dep’t of Treasury, Bureau of Alcohol, Tobacco and Firearms*, 423 F.3d 777, 782 (7th Cir. 2005) ("[A court] cannot ignore clear expressions of Congressional intent, regardless of whether the end product is an appropriations rider or a statute that has proceeded through the more typical avenues of deliberation."). Although internal rules of the House and Senate govern which committees have jurisdiction over different kinds of measures and prohibit "legislating" in appropriations acts, those rules are enforceable only through a Member’s
decision to raise a point of order. A violation of Congress’s internal rules “does not affect the validity of the legislation if the point of order is not raised, or is raised and not sustained.” Red Book, Vol. I, at 2-34; see also Will, 499 U.S. at 222 (Congress can alter the substantive law in appropriations acts if its intention to do so is clear); The Last Best Beef, LLC v. Dudas, 506 F.3d 333, 338 (4th Cir. 2007) (“While the canon of statutory interpretation disfavoring implied repeals in appropriations bills is strong, it is still just a canon of interpretation. It is not an absolute rule.”). The 6-day rider has been enacted into law and as such it is binding; the internal legislative process that led to its enactment is academic.

A final point is that as an independent agency without the powers and protections of the presidency, the Postal Service should tread carefully in the highly controversial area of potential open disobedience of a federal statute—for however sound its arguments (whether legal or practical) for disobedience, those arguments will ultimately be judged by the political branches. Without support from Congress or the President, efforts to avoid compliance with enacted law are not likely to succeed.

That distinguishes this case from the Postal Service’s decision, in 2011, to temporarily suspend statutorily required payments to the Federal Employees Retirement System (FERS). On that occasion, as we understand it, the Postal Service had over-contributed to FERS and was facing a budget shortfall that could have impaired its ability to make good its payroll obligations. Even if such action were unlawful, the lack of significant opposition by the political branches suggested that it could be safely managed. As discussed in the next section, however, we think substantial risks would attend a decision not to comply with the 6-day rider here.

E. Risks of Proceeding With the 5-day Delivery Proposal

Deciding to proceed with 5-day delivery despite the appropriations rider would entail a number of risks. First, violating a federal law would likely supply cause for the President to remove the Governors. Although the Supreme Court has never precisely defined what would constitute cause for removal, it has said that the good-cause standard enables the President to ensure that an independent officer “is competently performing his or her statutory responsibilities in a manner that comports with” applicable legislation. Morrison v. Olson, 487 U.S. 654, 692–93 (1988). Second, if the Comptroller General believes the ICA applies to the Postal Service, he could bring a civil action against the Governors to restrain an unlawful deferral of budget authority. 2 U.S.C. § 687.

Third, a decision of the Postal Service to discontinue Saturday delivery might be subjected to judicial review. Although 39 U.S.C. § 410(a) exempts the Postal Service from ordinary judicial review under the Administrative Procedure Act, the D.C. Circuit has held that the Postal Service is subject to traditional “nonstatutory” judicial review for ultra vires actions in excess of its statutory authority. Aid Ass’n for Lutherans v. USPS, 321 F.3d 1166, 1173 (2003); see American School of Magnetic Healing v. McAnulty, 187 U.S. 94 (1902) (Postal Service case); Chamber of Commerce v. Reich, 74 F.3d 1322, 1327-31 (D.C. Cir. 1996). That doctrine reflects a “narrow exception” to the bar on judicial review, “closely paralleling the historic
origins of judicial review for agency actions in excess of jurisdiction.” *Lutherans*, 321 F.3d at 1173 (quoting *Griffith v. FLRA*, 842 F.2d 487, 492 (D.C. Cir. 1988)).

Because the contours of this nonstatutory review doctrine are vague, we cannot be sure whether a court would permit a plaintiff to obtain judicial review of a violation of the 6-day proviso. On the one hand, we do think the statute unambiguously prohibits the discontinuation of First-Class and Standard mail delivery on Saturdays; the clearer the statutory violation, the more likely a court is to invoke review of *ultra vires* actions. On the other hand, the fact that the 6-day proviso is an appropriations rider, rather than permanent legislation, may present different issues. Where only an appropriations proviso is concerned, a violation may be less likely to strike a court as the kind of grave departure from an agency’s jurisdiction that amounts to *ultra vires* action. Further, it is not clear that the appropriations proviso confers any legal rights on specific members of the public, *cf. Reich*, 74 F.3d at 1328, 1330 (emphasizing importance of plaintiff’s holding a legal right under the applicable statute); *McAnulty*, 187 U.S. at 108 (same), much less confers on them a private cause of action on which to sue.

But while there are reasonable arguments against the availability of nonstatutory judicial review, as a practical matter it may make no difference. At best, the question is close—the kind of issue about which reasonable judges might disagree. But because plaintiffs could bring suits challenging 5-day delivery throughout the country, the Postal Service would have to run the table and win every case in every court. That seems extraordinarily unlikely, especially because the violation would be so clear on the merits; the absence of any defense on the merits would make courts less likely to be fastidious about limiting nonstatutory judicial review and insisting on an express grant by Congress of a private right of action.

We do not believe, however, that the Governors would be subject to personal liability in a private suit. Because the Postal Service is covered by the Westfall Act, 28 U.S.C. § 2679; see 39 U.S.C. § 409(c) (“The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.”), a Federal Tort Claims Act action against the United States will generally be the exclusive remedy for tort claims arising out of their acts and omissions in the scope of their employment, 28 U.S.C. § 2679(b)(1). Under the Westfall Act, once the Attorney General certifies that the defendant is a federal officer acting in the scope of his office or employment, the United States is substituted as the party defendant, and the officer is dismissed from the suit; if the Attorney General fails to so certify, the defendant can petition the court to make that finding directly. *Id.* § 2769(c), (d)(1)-(3). Because any official action by the Governors adopting 5-day delivery would be taken within the scope of their employment, they should be dismissed from any tort suit resulting from that action.

Although there is an exception to the Westfall Act for constitutional torts, see 28 U.S.C. § 2679(b)(2)(A); see generally *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389 (1971), it is difficult to see how that exception could apply here. Refusing appropriated funds to escape a proviso may well be unlawful, but it does not violate the constitutional rights of a private person—at least under any extant constitutional doctrine. And because the *Bivens* remedy is an implied constitutional cause of action, the Supreme Court has been “reluctant to
extend *Bivens* liability to any new context or new category of defendants.” *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (quotation marks omitted). Thus, even if there were some private constitutional right to block impoundments by federal agencies or to insist on compliance with appropriations riders, we think it is highly unlikely that the courts would permit a private plaintiff to obtain damages from the Governors in their individual capacity under *Bivens*.

**F. The Postal Service Could Ask The President to Invoke the ICA And Rescind Its Reimbursement Appropriation**

Finally, you asked whether the President could invoke the ICA on behalf of the Postal Service in order to obtain a rescission of the reimbursement appropriation. This question is essentially political, calling for pragmatic judgments about the expenditure of political capital with the President and allies in Congress. But as a legal matter, if the President agrees, we think it is likely the simplest solution to the present dilemma.

When the President determines that budget authority “should be rescinded for fiscal policy or other reasons,” he “shall transmit to both Houses of Congress a special message specifying” the reasons for the rescission. 2 U.S.C. § 683(a). Congress then takes up a rescission bill using statutorily prescribed, streamlined procedures with limited debate. *Id.* § 688. If the bill passes, the appropriation is cancelled.

We see no impediment to the President’s exercise of this authority. Although there is some doubt about whether the ICA applies to “the exercise of the powers of the Postal Service” in light of 39 U.S.C. § 410(a), the President’s own determination that a rescission is prudent and his transmittal of a special message to Congress is not an exercise of the Postal Service’s powers; it is an exercise of the President’s powers under the ICA.

The only wrinkle to this approach is that GAO’s recent opinion letter suggests that the 6-day proviso is not linked to the underlying appropriation, but rather is independent substantive legislation. If that is true, rescinding the reimbursement appropriation would do no good. Nevertheless, we are not very troubled by that argument. In our view, GAO’s argument that the 6-day rider is unconnected to the appropriation is weak, and it would be wholly refuted by congressional action rescinding the reimbursement appropriation for the very purpose of eliminating the 6-day rider.