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The Limits of Executive Power: Impoundment of Funds

A major constitutional controversy has recently developed over President Nixon's impoundment of billions of dollars¹ of congressionally approved funds. The issue has sparked an acrimonious debate between the executive and the Congress, and, increasingly, has found its way into the courts. More importantly, it brings into question the continued vitality of the separation of powers doctrine; a doctrine intended to prevent the accumulation of all powers in the hands of any one branch, a situation which James Madison viewed as "the very definition of tyranny."² Professor Philip Kurland, however, recently concluded that the separation of powers concept was on its "sickbed"³ while another commentator observed that its principles have been subverted.⁴

Unfortunately, both commentators are correct. The years since Theodore Roosevelt's presidency have witnessed a continual drive for executive hegemony and its related congressional emasculation. Presidents have taken on ever-greater powers while Congress' importance in governing the nation has declined. This has occurred despite the founders' constitutional scheme granting extensive and explicit powers to Congress but few definite powers to the executive. The impoundment controversy, viewed within this framework, is more than simply another battle between two co-equal branches of government. If the executive is victorious in the present battle over budgetary control, the drift toward an executive-dominated government will be nearly complete, and the separation of powers concept will be rendered practically meaningless.

I. Budget Authority and Impoundment

Amounts available for expenditure are termed budget authority,⁵ and to enact such authority Congress follows one of two methods. Traditionally, Congress first enacts legislation authorizing a particular program and later appropriates specific sums to be expended for the program.⁶ An authorization

1. Estimates of the total amount of funds impounded fluctuate. See p. 361 and notes 17-19 *infra*.

2. THE FEDERALIST No. 47 at 139 (R. Fairfield ed.) (J. Madison).

3. Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619, 621.

4. Forkosch, *The Separation of Powers*, 41 U. COLO. L. REV. 529, 532 (1969).

5. BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974, 315 (1973) [hereinafter cited as 1974 BUDGET].

6. *Id.* at 323.

alone is insufficient to enact budget authority. An impoundment occurs when the executive refuses to spend the appropriated funds.

Other programs receive budget authority by a different procedure. As in the traditional procedure, Congress first authorizes the program. Contract authority is then issued to the applicable agency, granting it the authority to incur obligations. However, contract authority does not authorize expenditures. Payment of obligations must await a congressional appropriation, which is uniformly given and which permits expenditure of funds to pay the previously incurred obligations.⁷ Funds for programs whose budget authority is obtained by the contract authority process are impounded when the executive fails to approve contracts for the total contract authority approved by Congress.

Commentators differ in their definitions of impoundments.⁸ An impoundment will be defined herein as any executive refusal to expend approved budget authority which is contrary to the intention of Congress and not explicitly authorized by statute. Thus, not all refusals to spend may properly be termed impoundments. Funds may be "reserved" *i.e.*, not spent, in order to provide for unforeseen occurrences which would otherwise create a need for supplemental appropriations.⁹ Reservations may also be instituted to "effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available."¹⁰ In addition, many appropriations acts specifically provide that the funds are available until expended, even if the expenditure does not occur during the fiscal year in which the appropriation was enacted.¹¹ In a limited number of situations, therefore, an executive refusal to spend funds is warranted by statute. Prior to 1969, the overwhelming majority of impoundments were enacted pursuant to statute. These situations, however, are more correctly referred to as reservations of funds, rather than impoundments. A true impoundment controversy arises only when the failure to spend frustrates the intent of Congress and where no statute authorizes a fund reservation.

7. *Id.* at 315-16.

8. See, *e.g.*, Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124 (1969); Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 43 N. CAR. L. REV. 502, 511-12 (1965); Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons Systems Appropriations*, 57 GEO. L.J. 1159, 1163 n.22 (1969); Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 n.1 (1973); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636 n.2 (1973).

9. The Antideficiency Act, 31 U.S.C. § 665(c)(1) (1970).

10. 31 U.S.C. § 665(c)(2) (1970).

11. 1974 BUDGET 316-17.

A. *The Origin of the Current Dispute*

The impoundment issue has recently been brought to the forefront for two reasons: (1) The recent use of impounding as a tool to replace congressional policy determinations with those of the executive; and (2) the continually increasing amounts of funds impounded since the Nixon Administration took office in 1969.

Impounding funds is not a recent phenomenon;¹² its modern day roots lie in President Franklin Roosevelt's wartime administration.¹³ The rationale then given leaned heavily on the powers of the President during war.¹⁴ Impoundments prior to 1969 generally involved defense programs and did not spread to civilian spending.¹⁵ In contrast, "[a]n entirely different situation has developed under the Nixon Administration [F]unds have been withheld from domestic programs because the President considers those programs incompatible with his own set of budget priorities."¹⁶

Moreover, the Nixon Administration has impounded more funds than any one previously. In 1971, impounded funds totaled nearly \$12.8 billion.¹⁷ At the end of fiscal year 1973, the Office of Management and Budget estimated that more than \$7.7 billion was being impounded.¹⁸ It appears that this amount is greatly underestimated; the actual total might reach \$18 billion.¹⁹

This attempted expansion of presidential power has brought a response from the judicial and legislative branches of the government. Congress has

12. Recent scholarship has demonstrated, however, that Administration claims that President Jefferson impounded funds appropriated for 15 gunboats in 1803 is inaccurate. See *Joint Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 365 (1973) (statement of Joseph T. Sneed, Deputy Attorney General) [hereinafter cited as *1973 Hearings*]. It appears that Jefferson merely delayed spending the funds for a year. The appropriation was then spent on "models most approved by experience." S. REP. NO. 93-121, 93d Cong., 1st Sess. 10-13 (1973).

13. The origins of the first modern impoundments are set forth in Williams, *The Impounding of Funds by the Bureau of the Budget*, in *1973 Hearings* 844.

14. See Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 STAN. L. REV. 1240, 1242 (1970).

15. *Id.* at 1243. Although Roosevelt impounded funds appropriated for domestic public works programs, his goal was "to lessen inflationary pressures [during wartime] and to check the diversion of scarce materials from defense production." Williams, *supra* note 13, at 844.

16. L. FISHER, *PRESIDENT & CONGRESS* 125 (1972).

17. *1973 Hearings* 877-79 (OMB, *Amounts Withheld From Obligation by Agency and Account* (Feb. 1971)).

18. OMB, *Report Under the Federal Impoundment and Information Act*, 38 Fed. Reg. 19581-602 (1973).

19. See H.R. REP. NO. 93-336, 93d Cong., 1st Sess. 3 (1973).

held hearings,²⁰ and has drafted and approved legislation²¹ which attempts to curtail and control executive impoundment. Of greater importance is that the judicial branch has had to mediate the dispute between the executive and Congress. In so doing, the courts surprised commentators²² and executive officials²³ who had prophesized that, for a variety of procedural reasons,²⁴ courts would decline jurisdiction and leave the impoundment question to the two remaining branches to solve by the political process.²⁵ Federal courts have overruled executive impoundments in twenty-seven²⁶ of thirty-

20. See, e.g., *1973 Hearings; Hearings on the Termination and Cutbacks by the Administration of Farm and Rural Programs Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 1st Sess. (1973); *Hearings on H.R. 5193 and Related Bills Before the Comm. on Rules of the House of Representatives on Impoundment Reporting and Review*, 93d Cong., 1st Sess. (1973); *Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) [hereinafter cited as *1971 Hearings*].

21. S. 373, 93d Cong., 1st Sess. (1973) passed by Senate, 119 CONG. REC. S 12169, S 12220 (daily ed. June 27, 1973); H.R. 8480, 93d Cong., 1st Sess. (1973) passed by House, 119 CONG. REC. H 6597, H 6626 (daily ed. July 25, 1973); S 2027, 92d Cong. 1st Sess. (1971), 117 CONG. REC. 18863 (1971); S. 2581, 92d Cong., 1st Sess. (1971), 117 CONG. REC. 33433 (1971).

22. See Fisher, *supra* note 8, at 128-29; Miller, *supra* note 8, at 533.

23. See *1973 Hearings* 365 (statement of Joseph T. Sneed, Deputy Attorney General).

24. E.g., the political question, standing and sovereign immunity doctrines.

25. Only three courts have so held. See *Brown v. Ruckelshaus*, 364 F. Supp. 258 (C.D. Cal. 1973); *Housing Authority v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972); *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971).

26. *City of New York v. Train*, No. 73-1705 (D.C. Cir. Jan. 23, 1974), *aff'g* *City of New York v. Ruckelshaus*, 358 F. Supp. 669 (D.D.C. 1973) (Federal Water Pollution Control Act Amendments of 1972); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), *aff'g* 347 F. Supp. 950 (W.D. Mo. 1972) (Federal Aid Highway Act of 1956); *Community Action Program Executive Directors Ass'n v. Ash*, 365 F. Supp. 1355 (D. N.J. 1973) (Economic Opportunity Act of 1964); *Seafarers Int'l Union v. Weinberger*, 363 F. Supp. 1053 (D.D.C. 1973) (Public Health Service Hospitals); *Pennsylvania v. Lynn*, 362 F. Supp. 1363 (D.D.C. 1973) (urban housing program subsidies); *Pealo v. Farmers Home Administration*, 361 F. Supp. 1320 (D.D.C. 1973) (rural housing program subsidies); *National Council of Community Mental Health Centers v. Weinberger*, 361 F. Supp. 897 (D.D.C. 1973) (Community Mental Health Centers Act); *Campaign Clean Water v. Ruckelshaus*, 361 F. Supp. 689 (E.D. Va.), *rev'd and remanded for evidentiary hearing*, *Campaign Clean Water v. Train*, No. 73-1745 (4th Cir. Dec. 10, 1973) (Federal Water Pollution Control Act Amendments of 1972); *Oklahoma v. Weinberger*, 360 F. Supp. 724 (W.D. Okla. 1973) (Library Services and Construction Act of 1956); *Minnesota v. Weinberger*, 359 F. Supp. 789 (D. Minn. 1973) (Social Security Act Amendments); *Minnesota Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1973) (Indian Education Act of 1972); *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973) (Economic Opportunity Act of 1964); *Berends v. Butz*, 357 F. Supp. 143 (D. Minn. 1973) (Agricultural Act of 1961 emergency loan program); *Pennsylvania v. Weinberger*, Civil No. 1606-73 (D.D.C. Dec. 11, 1973) (Elementary and Secondary Education Act of 1965); *Louisiana v. Weinberger*, Civil No. 73-1763 (E.D. La. Nov. 30, 1973) (National Defense Education Act of 1958); *Pennsylvania v. Weinberger*, Civil No. 1125-73 (D.D.C. Nov. 21, 1973) (Elementary and Secondary Education Act of 1965, Vocational Education Act of 1963, Adult Education Act of 1966); *National League for Nursing v. Ash*, Civil No. 1316-73 (D.D.C. Nov. 19, 1973) (Nurse Training

one²⁷ cases recently brought before them, and have failed to decide on the merits in only three²⁸ of those actions.

B. *The Constitutional Issue*

The basic contention of the Administration is that the executive has inherent power to impound funds, regardless of congressional intent or statutory language mandating spending.²⁹ In support, spokesmen cite the "inherent" power of the President under the Constitution.³⁰

The Constitution makes no specific mention of impoundment, thus any executive power to impound needs to be implied from the document.

Act of 1971); *Am. Ass'n of Colleges of Podiatric Medicine v. Ash*, Civil No. 1139-73 (D.D.C. Oct. 26, 1973) (Public Health Service Act); *Illinois ex rel. Bakalis v. Weinberger*, No. 73 C 1642 (N.D. Ill. Oct. 25, 1973) (National Defense Education Act of 1958); *Washington v. Weinberger*, Civil No. 410-73C2 (W.D. Wash. Oct. 5, 1973) (National Defense Education Act of 1958); *Texas v. Fri*, Civil No. A-73-CA-38 (D. Tex. Oct. 2, 1973) (Federal Water Pollution Control Act Amendments of 1972); *Massachusetts v. Weinberger*, Civil No. 1308-73 (D.D.C. July 26, 1973) (National Defense Education Act of 1958); *Martin-Trigona v. Ruckelshaus*, No. 72 c 3044 (N.D. Ill. June 29, 1973) (Federal Water Pollution Control Act Amendments of 1972); *Bennet v. Butz*, No. 4-73 Civ 258 (D. Minn. June 28, 1973) (Food Stamp Act of 1964); *Minnesota v. Fri*, No. 4-73 Civ 133 (D. Minn. June 25, 1973) (Federal Water Pollution Control Act Amendments of 1972). *See generally* *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C. 1973).

27. Plaintiffs were granted no relief in *Brown v. Ruckelshaus*, 364 F. Supp. 258 (C.D. Cal. 1973) (Federal Water Pollution Control Act Amendments of 1972); *Local 2816, Am. Fed'n of Gov't Employees v. Phillips*, 360 F. Supp. 1092 (N.D. Ill. 1973) (Economic Opportunity Act of 1964); *Housing Authority v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972) (urban renewal funds) and *San Francisco Redevelopment Authority v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971) (urban renewal funds). In *Campaign Clean Water v. Train*, No. 73-1745 (4th Cir. Dec. 10, 1973) the district court's grant of summary judgment to the plaintiff was reversed and remanded for further fact finding. The court did not deny that the impoundment might be illegal, but disagreed that there was an adequate evidentiary basis for the lower court's conclusion that the executive's action arbitrarily frustrated legislative policy. Slip op. at 18. The opinion noted, however, that

[w]hen the executive exercises its responsibility under appropriate legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount as to make impossible the attainment of the legislative goal, the executive trespasses beyond the range of its legal discretion. Slip op. at 16-17.

28. *See* cases cited note 25 *supra*.

29. 1973 *Hearings* 383 (testimony of Joseph T. Sneed, Deputy Attorney General); 1971 *Hearings* 148, 160-61 (testimony of Caspar Weinberger, Deputy Director, Office of Management and Budget).

30. 1973 *Hearings* 368 (statement of Joseph T. Sneed, Deputy Attorney General). Additional support is claimed from statutes, *see* text accompanying notes 53-73 *infra*, and from historical precedent. As noted above, *see supra* note 12, the historical record is not conclusive. Even if it were,

[i]t may also be questioned whether the frequent exercise of a power unauthorized by law, by officers of the government, can ever by its frequency be made to stand as a just foundation for the very authority which is thus assumed.

The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 677 (1869). *See also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952).

According to Deputy Attorney General Joseph Sneed, the power is inherent in the grant of power to the President in article II, § 1, vesting the executive power in the President. Government counsel have argued that:

Just as Congress has implied powers . . . so does the President have implicit authority—under the executive power clause—in carrying out his constitutional obligation Essentially, this concept of “executive power” [is the] overall duty to run the government responsibly and efficiently.³¹

It is urged that to enable the President to fulfill his duty to responsibly and efficiently run the government, he must have the ability to impound funds appropriated by Congress. Without this power, “Presidential fiscal authority could be rendered largely ineffective.”³²

Any discussion of inherent presidential power must begin with the Supreme Court’s landmark opinion in *Youngstown Sheet and Tube Co. v. Sawyer*.³³ It was there argued that President Truman had inherent authority to seize steel mills to prevent their shutdown by a strike during the Korean War. Despite the broad authority normally granted to the executive in matters of national defense during wartime,³⁴ the Court held 6-3, that the seizure was in excess of lawful executive authority. Justice Douglas’ concurrence addressed the claim of inherent powers under article II and dismissed it, stating that “Article II which vests the ‘executive Power’ in the President defines that power with particularity.”³⁵ Although the multiple opinions in *Youngstown* make it difficult to state with assurance the Court’s consensus, it seems reasonable to conclude that “the investiture of the executive power in the President combined with the ‘faithful execution’ gave him no authority of a legislative nature.”³⁶ An impoundment, however, is clearly of a legislative nature, for it is an attempt to amend a congressional determination of the amount necessary to achieve a specific policy objective. When all funds for a program are impounded, it then results in an attempt to unilaterally repeal a legislative enactment.

President Truman, prior to seizing the mills, had asked Congress for such authority. Congress refused to grant that power. In its opinion, the Court made note of congressional opposition to the grant of this power,³⁷ lending credence to the theory that its holding was limited to cases which Congress

31. Defendants’ Opposition to Plaintiffs Motion for Preliminary Injunction at 15, *Pealo v. Farmers Home Administration*, 361 F. Supp. 1320 (D.D.C. 1973).

32. *Id.*

33. 343 U.S. 579 (1952).

34. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); *Ex Parte Endo*, 323 U.S. 283 (1944).

35. 343 U.S. at 632 (Douglas, J. concurring).

36. Goostree, *The Power of the President To Impound Appropriated Funds: With Special Reference to Grants In Aid To Segregated Activities*, 11 AM. U.L. REV. 32, 40 (1962).

37. 343 U.S. at 586.

had recently denied the President the power he later asserted. Although some argue that the *Youngstown* holding was considerably broader,³⁸ even under the narrow interpretation set forth above a strong argument may be made that *Youngstown*, by analogy, can be used to prohibit presidential impounding.

Congress was asked, several months prior to the numerous impoundments of early 1973, to grant the President the power to impound in order to remain within a proposed expenditure ceiling during fiscal year 1973.³⁹ The House agreed to give the President broad impoundment powers,⁴⁰ but the Senate amended the bill to limit impoundments to not more than 10% of any one program and to forbid the impounding of any funds for several favored programs.⁴¹ The final version of the bill, however, did not give the President an impoundment power, nor did it enact the proposed \$250 billion expenditure ceiling.⁴² These facts are directly analogous to the situation in *Youngstown*. In both cases the President requested congressional authority to take certain actions and in both cases Congress refused; immediately thereafter the President undertook the actions without Congress' approval. In *Youngstown* the Court held the executive's action unconstitutional. Thus for the President to impound, after being refused that authority by the Congress is, at least arguably, unconstitutional.

Moreover, claims of inherent constitutional authority to impound have had difficulty finding adherents even within the Nixon Administration. In 1969, Justice William Rehnquist, then Assistant Attorney General, Office of Legal Counsel, wrote, in reference to the authority of the President to impound funds for assistance to federally impacted schools:

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 broad power is supported by neither reason nor precedent

. . . .

It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend [T]he President has no mandate under the Constitution to determine national policy on assistance to education independent from his duty to execute such laws on the subject as Congress chooses to pass.⁴³

38. See Kauper, *The Steel Seizure Cases: Congress, The President And The Supreme Court*, 51 MICH. L. REV. 141 (1952).

39. H.R. 16810, 92d Cong., 2d Sess. (1972), 118 CONG. REC. H 8800 (daily ed. Sept. 26, 1972).

40. 118 CONG. REC. H 9402 (daily ed. Oct. 10, 1972).

41. *Id.* at S 18051, 18082 (daily ed. Oct. 13, 1972).

42. Pub. L. No. 92-599, 86 Stat. 1324 (Oct. 18, 1972).

43. 1973 Hearings 390, 393-95. (*Memorandum Re Presidential Authority To Impound Funds Appropriated for Assistance to Federally Impacted Schools*).

The second prong of the executive's constitutional argument is based on article II, § 3, which directs the President to "take care that the laws be faithfully executed." This provision, it is asserted, "authorizes and occasionally requires that the President withhold funds."⁴⁴ The argument is that pursuant to his duty to faithfully execute the laws, there are certain laws⁴⁵ which must be executed while others may be ignored.⁴⁶ This is so because:

[T]he Executive is confronted with apparently conflicting statutory directives seeming to mandate spending, on the one hand, and authorizing economy, on the other. In such situations, Congress frequently has not anticipated the conflict, and the two statutes must be harmonized based largely upon inferences as to probable Congressional intention.⁴⁷

In other words, to comply with some statutes, such as the debt limit, the executive decides not to comply with other statutes, such as the various appropriations bills.

The argument that the "faithful execution" clause⁴⁸ permits the executive to execute some laws and ignore others was rejected by the Supreme Court in 1838. *Kendall v. United States ex rel. Stokes*⁴⁹ involved the Postmaster General's refusal to credit Stokes, a government mail contractor, with payment and allowances which the Solicitor General, pursuant to an explicit congressional directive, had authorized. In the course of issuing a writ of mandamus to the Postmaster General, the Court, in dicta, noted the contention that the executive may refuse to execute some laws pursuant to the faithful execution clause and said that

[T]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.⁵⁰

Kendall thus stands for the proposition that the executive may not constitu-

44. 1971 *Hearings* 95 (testimony of Caspar Weinberger, Deputy Director, Office of Management and Budget).

45. The President, it is claimed, must execute the following laws: The Employment Act of 1946, 15 U.S.C. §§ 1021-25 (1970) *as amended* 15 U.S.C.A. § 1026 (Supp. 1973); The Antideficiency Act of 1950, 31 U.S.C. § 665 (1970); the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended*, Pub. L. No. 92-210, 85 Stat. 743 (1971); and the public debt ceiling, 31 U.S.C. § 757b (1970), *as amended* Pub. L. No. 92-599, 86 Stat. 1324 (1972).

46. This argument has been characterized as "absurd" by one commentator. Stassen, *supra* note 8, at 1183. Another has noted that "the high Constitutional duty to see that the laws are faithfully executed does not confer upon the President the discretion to determine what laws shall be executed and how much." Goostree, *supra* note 36, at 39.

47. 1973 *Hearings* 366 (statement of Joseph T. Sneed, Deputy Attorney General).

48. U.S. CONST. art. II, § 3.

49. 37 U.S. (12 Pet.) 524 (1838).

50. *Id.* at 613.

tionally refuse to spend funds which Congress has clearly directed be spent. Although *Kendall* is not compelling precedent for a court faced with an impoundment case,⁵¹ it does give a further indication that there is little constitutional support for the "faithful execution" argument.⁵²

Furthermore, if two laws are truly inconsistent, under the doctrine of repeal by implication,^{52a} the executive should enforce the more recent and specific of the two. One may assume that Congress enacted the current year's budget authority with full knowledge of the prior statute. Therefore, a congressional approval of budget authority that would cause the executive to violate another act may be seen as implicit authorization that, to the extent the two acts are incompatible, the more recent act should be faithfully executed.

C. Statutory Bases for Impoundment

Impoundments are also justified on the basis of the discretionary language in the appropriations and authorizing statutes.⁵³ Most appropriations statutes do not on their face mandate expenditure of all funds appropriated, nor do most authorizing statutes.⁵⁴ It has thus often been thought that "an appropriation is permissive rather than mandatory."⁵⁵

That the language of most statutes does not mandate full expenditure of the entire amount appropriated cannot be refuted. But the inquiry into the legality of impoundment does not end at this point, for as then Assistant Attorney General William Rehnquist stated before Congress, "on the question of trying to find a mandatory intent on the part of Congress, it is not a question of looking for the word 'shall' as opposed to 'may'."⁵⁶ Instead, the mandatory intent, if any, is to be construed from the overall language of

51. See 1973 Hearings 361-62 (statement of Joseph T. Sneed, Deputy Attorney General).

52. In *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973) the court cited *Kendall* in the course of an opinion rejecting the executive's right to impound.

52a. "[W]here a conflict is readily seen by an application of the later enactment . . . it is clear that the later enactment is intended to supersede the existing law." J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 2012 at 463 (3d ed. F. Horack, Jr. 1943).

53. 1973 Hearings 366 (statement of Joseph T. Sneed, Deputy Attorney General). The Solicitor General has recently taken the position, however, that the executive may impound even under a statute with mandatory wording. See Defendant's Application for Stay Pending Appeal at 2 *Lynn v. Pennsylvania*, 362 F. Supp. 1363 (D.D.C. 1973) (filed in the U.S. Sup. Ct.).

54. *But see* The Federal Aid Highway Act of 1956, 23 U.S.C. § 101(c) (1970). "It is the sense of Congress that under existing law no part of any sums authorized to be appropriated for expenditure . . . pursuant to the provisions of this title shall be impounded or withheld from obligation."

55. Miller, *supra* note 8 at 511. *But see* Davis, *Congressional Power To Require Defense Expenditures*, 33 *FORD. L. REV.* 39, 55; Stassen, *supra* note 8 at 1181 n.117.

56. 1971 Hearings 234.

the enabling statute, the authorization bill and the appropriations act.⁵⁷ This approach seems a preferable method of gauging the intent of Congress to direct spending for a particular program. This analysis, however, will not be helpful in every impoundment dispute, for legislation is often silent on the question of its mandatory nature. This may be because Congress has assumed that its approval of budget authority was an adequate indication of its decision that the funds be expended.

The real question, however, is not whether the executive must spend the full appropriation, nor is it whether Congress explicitly directed that he do so. The issue is whether the executive may refuse to spend funds when to do so would defeat congressional intent. Thus, a House committee has written that "[t]here is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds."⁵⁸ The President may, therefore, impound funds when the purpose for which the funds were provided has been fully accomplished. On the other hand, he may not impound funds when to do so would limit the reach of a congressional program.⁵⁹

Assuming *arguendo* that the permissive language of most appropriations statutes permits impoundments which result in a failure to carry out congressional intent, a question remains concerning the degree to which the congressional will may be thwarted. Most recent impoundments have withheld 50 to 100 percent of the program's budget authority. While Congress may have been willing to accept equal reductions in many programs,⁶⁰ it has not been willing to acquiesce in program reductions of this magnitude.

That the President may reduce a program by one-half or more arguably follows from the assertion of a constitutional and statutory impounding power. Since the Constitution does not mention an impoundment power, it obviously places no limit on its exercise. If, as contended, legislative appropriations are permissive and "merely establish a spending ceiling, not a floor,"⁶¹ there is no reason why the President need spend anything for a particular program.

Although the argument may be logically appealing, it fails to recognize an important factor in our constitutional framework—the President's lack of an item veto. An item veto would permit the President to disapprove particular portions or "items" of an appropriations measure. Nearly all appropriations are passed in the form of "omnibus" bills which include ap-

57. *Id.*

58. H.R. REP. NO. 1797, 81st Cong., 2d Sess. 311 (1950).

59. Davis, *supra* note 55, at 55; Stassen, *supra* note 8, at 1179.

60. See S. 373 93d Cong., 1st Sess. tit. II, § 202(b) (1973).

61. 1973 Hearings 841 (*Department of Justice Answers to Questions Concerning Impounding of Appropriated Funds Posed by Senator Ervin in His Letter of February 14, 1973, to the Deputy Attorney General*).

propriations for many distinct programs in different agencies and departments of the government. The executive must approve or disapprove the omnibus appropriation *in toto*—he may not select portions to disapprove while approving the balance. The power to impound, however, “amounts to an item veto as well as a retroactive veto.”⁶² Such a power would make a mockery of the legislative process by interfering with the normal give-and-take between the executive and the legislature in the lawmaking process. Congress would hesitate to negotiate with the executive over specific items in an appropriations bill if the executive, after acceding to a congressional request for increased budget authority for certain programs, were free to impound the increased authority.

The only explicit statutory authority for executive impoundment is contained in the Antideficiency Act.⁶³ It permits the executive to make apportionments of funds to avoid end of year deficiencies, or when the need arises for supplemental appropriations, to establish reserves with savings made possible by changes in requirements, greater efficiency, or other developments subsequent to the appropriation’s enactment.

The Administration contends that the Act should be broadly construed to include “inflationary pressures” among the developments subsequent to the appropriation which justify an impoundment.⁶⁴ But the language of the Act and its legislative history indicate that reserves were not to be instituted as a means to combat inflation.⁶⁵ The Act states that reserves may be established only when the funds “will not be required to carry out the purposes of the appropriation concerned.”⁶⁶ Furthermore, the legislative history shows that the apportionment tool “was to be a means of carrying out an activity, within the amount appropriated by Congress, rather than an instrument for curtailing or abolishing an activity.”⁶⁷

The Administration also asserts that the Employment Act of 1946⁶⁸ grants it authority to impound⁶⁹ in order to control inflation which, in turn, furthers the Act’s purpose of “promot[ing] maximum employment, production and purchasing power.”⁷⁰

A recent Senate Committee report analyzed the executive’s contention and concluded that “[u]se of the Employment Act to justify impounding funds . . . violates both the spirit and the letter of the Act.”⁷¹ The Act

62. Stassen, *supra* note 8, at 1205.

63. 31 U.S.C. § 665 (1970).

64. S. REP. No. 93-121, 93d Cong., 1st Sess. 4-5 (1973).

65. *Id.* at 5.

66. 31 U.S.C. § 665(c)(2) (1970).

67. S. REP. No. 93-121, 93d Cong., 1st Sess. 7 (1973).

68. 15 U.S.C. §§ 1021-25 (1970), *as amended*, 15 U.S.C. § 1026 (Supp. 1973).

69. 1973 *Hearings* 366 (statement of Joseph T. Sneed, Deputy Attorney General).

70. 15 U.S.C. § 1021 (1970).

71. S. REP. No. 93-121, 93d Cong., 1st Sess. 8-9 (1973).

is merely a general policy statement that the Federal Government promote "employment, production, and purchasing power." It does not grant any substantive impoundment power to the President.⁷² Moreover, impoundments can be viewed as a violation of the Act, for they reduce employment and production by withdrawing funds from the economy.⁷³

II. Attempted Judicial Resolution

In late 1972 and early 1973, the President ordered the impoundment of nearly \$18 billion earmarked for a variety of domestic programs.⁷⁴ Shortly thereafter, plaintiffs⁷⁵ challenged the impoundments in federal courts throughout the nation. The judiciary was then, for the first time, presented with the issue of the legality of executive impoundments of funds. The collective judicial answer to this question was clear—the President, unless he has been authorized by statute to do so, may not impound.⁷⁶

The Eighth Circuit in *State Highway Commission of Missouri v. Volpe*⁷⁷ was the first appellate court to rule on the impoundment question. The Secretary of Transportation impounded \$21.9 million of Missouri's \$115.7 million apportionment under the Federal-Aid Highway Act of 1956.⁷⁸ In affirming the district court's⁷⁹ grant of an injunction and a declaratory judgment ordering the release of the funds, the court set forth the decisional approach that has been followed by the lower courts.⁸⁰ The question involved, the court stated, was one of statutory construction, rather than constitutional interpretation.⁸¹ After analyzing the statute,⁸² the court

72. The original version of the Act did grant discretionary spending authority to the President. The final version omitted this power. *Id.* at 8.

73. *Id.*

74. *See supra* notes 26 and 27.

75. Plaintiffs were either individual beneficiaries of the program whose funds had been impounded, *see, e.g.*, *Pealo v. Farmers Home Administration*, 361 F. Supp. 1320 (D.D.C. 1973); or governmental or institutional sponsors of activities financed by the impounded funds, *see, e.g.*, *Pennsylvania v. Lynn*, 362 F. Supp. 1363 (D.D.C. 1973).

76. A preliminary question, of course, was whether the court possessed jurisdiction over suits challenging impoundments. The executive argued that anti-impoundment suits involved non-justiciable political questions for which the plaintiffs lacked standing to challenge and which, at any event, were barred by the doctrine of sovereign immunity. *See 1973 Hearings* 365 (statement of Joseph T. Sneed, Deputy Attorney General). Although this procedural argument has been more successful than those based upon the merits of the claimed right to impound, *see supra* note 28, it too has been overwhelmingly rejected by the lower courts.

77. 479 F.2d 1099 (8th Cir. 1973).

78. 23 U.S.C. §§ 101-44 (1970), *as amended*, 23 U.S.C.A. §§ 101-44 (Supp. 1973).

79. 347 F. Supp. 950 (W.D. Mo. 1972).

80. *But see Pealo v. Farmers Home Administration*, 361 F. Supp. 1320 (D.D.C. 1973) (*semble*); *Pennsylvania v. Lynn*, 362 F. Supp. 1363 (D.D.C. 1973) (*semble*).

81. The court stated that

[t]he fundamental issue is whether the Secretary possesses direct or implied

concluded that it found

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.⁸³

In adopting a statutory approach, the lower courts have implicitly followed the Supreme Court's direction that

a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'⁸⁴

Once this decisional approach was adopted, the answer to the question of the executive's right to impound was preordained. Congress does not pass legislation in the expectation that funds appropriated pursuant to the authorizing act will not be spent. It fully intends that its laws will be executed by the President. Thus, under this scheme, the sole inquiry becomes one of finding a legislative intent that the program be carried out.

This approach, with few exceptions,⁸⁵ has resulted in holdings that the executive may not impound at will. Given the limited scope of inquiry under this method, the result could hardly be otherwise. Nevertheless, to presume, as the courts have, that there is no statutory power to impound unless granted by Congress, is surely sound. If Congress wished to grant the President the power to impound funds it could easily do so by explicitly granting him that authority, as it has in the past.⁸⁶ Further, courts

authority to exercise contract controls . . . such authority, if it exists at all, must be gleaned from the language of the Act itself. 479 F.2d at 1111.

The District of Columbia Circuit apparently agrees with this approach. See *City of New York v. Train*, No. 73-1705 (D.C. Cir. Jan. 23, 1974).

82. 479 F.2d at 1111-14. The court was also persuaded by the Act's legislative history. *Id.* at 1114-15. The House report on the 1970 amendments said that:

[t]he withholding of highway trust funds as an anti-inflationary measure is a clear violation of the intent of Congress. . . . We again wish to emphasize the clear legislative intent that funds appropriated shall not be impounded or withheld from obligation.

H.R. REP. NO. 91-1554, 91st Cong., 2d Sess. (1970), *U.S. Code Cong. & Admin. News* 5401 (1970).

83. 479 F.2d at 1114.

84. *Richards v. United States*, 369 U.S. 1, 11 (1961). See 2 J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 2802 at 215 (3d ed. F. Horack, Jr. 1943).

85. *Housing Authority v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972). The court, however, dismissed the suit on the ground of lack of subject matter jurisdiction, holding that the action was an unconsented suit against the sovereign which raised non-justiciable political questions. In *Brown v. Ruckelshaus*, 364 F. Supp. 258 (C.D. Cal. 1973) the court dismissed the action for lack of standing, but went on to state that the statute did not require the allotment of all authorized funds.

86. Congress most recently gave the President explicit authority to impound in the Revenue Expenditure and Control Act of 1968, Pub. L. No. 90-364, tit. II, 82 Stat. 270 (1968). The Act permitted the President to impound to keep federal spending below \$180.1 billion in fiscal 1969. See also S. 373, 93d Cong., 1st Sess. tit. II, § 202(a) (1973).

should not infer from congressional silence that Congress has abandoned its constitutionally granted power over the purse.

While focusing on the statutory question, the courts have rarely discussed the constitutional aspects of the issue. Although it is understandable for lower courts to rely on a statutory rather than a constitutional basis for their decisions, it hardly aids in the resolution of the present crisis. So long as courts refrain from holding that impoundment is constitutionally prohibited, the executive will continue to impound while arguing that each statute under which funds are withheld grants discretion to impound. The judiciary may continue to rule that neither the statute nor the legislative history indicates any such discretion, but executive impoundments might nevertheless continue. Until the constitutionality of impounding is decided, Congress would never be certain whether its acts would be carried out, and the executive would be unable to prepare the nation's budget with a reasonable degree of certainty.

A decision defining the constitutional parameters of the executive's impoundment power is clearly necessary. Lower court impoundment decisions have prepared the issue for its final resolution, but they have been unable to provide a solution. That can only be accomplished by the Supreme Court.

III. Proposed Legislative Solutions

While Congress has encouraged attempts at a judicial resolution of the impoundment controversy,⁸⁷ it has not been content to leave the question solely to the judiciary. Shortly after the extent to which the Nixon Administration was impounding funds became apparent to Congress, a Senate subcommittee held hearings in 1971.⁸⁸ Various bills were introduced,⁸⁹ and after further hearings in 1973⁹⁰ legislation to gain a congressional voice in impoundment began to receive serious consideration.

Two different approaches have been considered. An example of one of them is contained in the Senate version of S. 373. That bill requires the President to send a message⁹¹ to Congress and to the Comptroller General within ten days after he or various other executive branch officials orders, approves or permits impoundment of any budget authority. A notice of the impoundment would also have to appear in the Federal Register within

87. Twenty-seven members of Congress appeared as *amici curiae* in *State Highway Commission v. Volpe*, urging affirmance of the district court's order to release the funds impounded.

88. *1971 Hearings*.

89. *See supra* note 20.

90. *See supra* note 21.

91. S. 373, 93d Cong., 1st Sess. § 2(a) (1973).

ten days.⁹²

The significant provision is contained in Section 3 which directs that the impoundment "shall cease . . . within sixty calendar days of continuous session after the message is received by Congress *unless the specific impoundment shall have been ratified by the Congress by passage of a concurrent resolution.*"⁹³ In addition, the Congress reserves the right to disapprove, by concurrent resolution, an impoundment, or any part thereof, prior to the end of the sixty-day period. A congressional disapproval makes mandatory the obligation of the impounded budget authority and precludes its re-impoundment. Section 5 provides for an expedited procedure for consideration of the concurrent resolution approving or disapproving the impoundment. Title II authorizes a ceiling on expenditures during fiscal 1974 while allowing the executive to reserve (i.e., impound) funds to remain within the ceiling. Any reservations, however, must be made proportionately from each functional and subfunctional budget category, thus preserving congressional budget priorities.⁹⁴

The other legislative approach is embodied in the House legislation, H.R. 8480.⁹⁵ That bill is substantially similar to the Senate's with the exception that Section 102 provides that any impoundment shall cease only if either House of Congress has *disapproved* the impoundment by a resolution enacted within sixty days of receipt of the President's impoundment message.

This difference is obviously of great significance, for it shifts the burden of approval and disapproval. While the House bill would approve an impoundment if neither house acted, the Senate version would ratify an impoundment only when a majority in both House and Senate voted in its favor. To disapprove impoundments under the Senate's proposal would require only inaction by either body. The House bill, on the other hand, necessitates the votes of a majority of either body to reject an impoundment. Since it is always easier for the Congress to sit idly by rather than pass the necessary resolution, the ultimate result will be that fewer impoundments will be sustained under the Senate version.

If the purpose of anti-impoundment legislation is to preserve Congress' power of the purse, then the Senate bill is surely stronger.⁹⁶ For to require,

92. *Id.* at § 2(f). Similar reporting requirements are presently mandated by the Federal Impoundment and Information Act, 31 U.S.C.A. § 581c-1 (Supp. 1973).

93. Emphasis added.

94. No funds may be reserved from funds approved for interest payments, veterans benefits and services, social security trust funds, public assistance and maintenance grants, food stamps, military retirement pay, medicaid and judicial salaries. S. 373, 93rd Cong., 1st Sess. § 202(b) (1973). These exemptions comprise an estimated 70 per cent of the total federal budget. See H.R. REP. No. 93-336, 93d Cong., 1st Sess., 21 (1973) (separate views of Congressman Anderson).

95. 93d Cong., 1st Sess. (1973).

96. *But see Hearings on H.R. 5193 and Related Bills Before the Comm. on Rules*

as the House bill does, that a new majority be obtained to reject an impoundment will result in greater ease of executive impoundment. It is questionable whether an approval of budget authority which has previously passed both houses should be required to pass one of those houses a second time. This becomes obvious when an impoundment message is viewed in its true form—as an amendment to an existing law. Any other amendment would need the approval of both legislative bodies to be enacted, rather than the disapproval of one. No apparent reason has been shown to justify treating impoundments differently from other proposed amendments. The Senate bill recognizes this and requires the President, if he desires to ask congressional authorization before impounding, to submit legislation in the form of a supplemental appropriations bill, subject to the committee system and approval of both houses. The House bill lacks these provisions and is significantly weaker for its omission.

Regardless of which anti-impoundment bill emerges from Congress, the issue will remain alive. Administration spokesmen have warned that the President will veto any legislation which, in his opinion, deters the exercise of his constitutional right to impound.⁹⁷

IV. Conclusion

The dispute over impoundment is a serious one which fundamentally threatens the balance of power within the federal government, and, as such, requires a certain and immediate resolution. Whether it will quickly be resolved is unclear. As stated above, attempts to legislate a solution seem destined to fail. Nor has an attempted judicial resolution proved successful thus far. Even though the courts have been nearly unanimous in their rejection of the President's asserted power to impound, the Administration has not receded from its claim.

In light of the inability of Congress or the lower courts to resolve the issue, a decision by the Supreme Court, explaining and delineating the bounds of the impoundment power, is sorely needed. For so long as the President continues to impound, Congress will be deprived of its rightful role as an equal partner in the federal budget-making process.

Neil M. Soltman

of the House of Representatives on Impoundment Reporting and Review, 93d Cong., 1st Sess. (1973) *passim*; Maass, *Anti-Impoundment: The House Bill Is Better*, *The Washington Post*, Aug. 30, 1973, § A, at 19, col. 2.

97. *Impounding Is Reaffirmed*, *The Washington Post*, Sept. 17, 1973, § A, at 1, col. 1, at 17, col. 3.