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Loretta Hagopian Garrison

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Notes

WHO DECIDES? THE STRUGGLE FOR CONTROL OVER THE FEDERAL GOVERNMENT'S SPENDING POWER*

Consistent with the historical legislative-executive budget relationship and The Steel Seizure Case, the President has no inherent constitutional power to not spend appropriated funds. The Impoundment Control Act is a clear statutory limitation on the President's discretion to implement policy impoundments. Crippled by the Chadha decision which held the legislative veto unconstitutional and the recent New Haven decision, the Impoundment Control Act should be amended to restore the constitutional authority of the Congress to establish national policy through the budget-making and appropriations process.

The ramifications of the Supreme Court's decision in *INS v. Chadha*¹ four years ago continue to plague the relationship between the executive and legislative branches as well as to occupy the attention of both courts and commentators. The principal issues have been the constitutionality of a variety of legislative veto provisions attached to some 250 separate statutes, and the extent to which the offending provisions can be excised from existing law without voiding the entire statute.²

Commentary immediately following *Chadha* and the demise of

* The author would like to thank Professors Chisolm, Durchslag and Leatherberry for their helpful criticism during the preparation of this Note.

1. 462 U.S. 919 (1983) (legislative veto device held to be an unconstitutional exercise of congressional power since it lacks approval by both Houses of Congress and presentment to the President).

2. The issue remaining after *Chadha* was establishing a severability standard to apply to the statutes with unconstitutional legislative veto provisions. The Supreme Court's decision in *Alaska Airlines v. Donovan*, 766 F.2d 1550 (D.C. Cir. 1985), *aff'd*, 107 S. Ct. 1476 (1987) affirmed the standard presuming viability of the statute, minus the unconstitutional veto, if what remains is an operative law. To defeat severability, the party arguing against severability must show that Congress would not have enacted the statute without the legislative veto provision.

Our charge is to save as much of the statute as we can, consistent of course with the underlying legislative intent. Only if we conclude that Congress would not have included a provision absent the constitutionally flawed portion is that provision to fall. The issue cannot be whether Congress preferred the statute with the unconstitutional provision over the same statute without that provision.

Id. at 1560.

the legislative veto was extensive.³ It generally foretold of a shift in the structural power relationship between the Congress and the President. In the 98th Congress, bills were introduced to provide for a constitutional amendment affirming the validity of a legislative veto mechanism as a legitimate legislative tool.⁴ Congress had used the legislative veto to ensure proper implementation of laws by the executive acting through its extensive administrative agency system. These bills, however, ultimately languished in the various committees. Instead, the Congress responded to the Supreme Court's pronouncement with a variety of alternative legislative mechanisms—fully constitutional—which formalize the working relationship between Congress and the President and limit the discretionary powers which had been gradually afforded to the President.⁵

The focus of this Note is the effect of *Chadha* on the Impoundment Control Act⁶ which is Title X of the Congressional Budget and Impoundment Control Act of 1974 ("Budget Act").⁷ The Budget Act extensively reformed the legislative budget process in an attempt by Congress to wrest control over spending allocations from the executive. The imposition of impoundment control stemmed in large measure from Congress' inability to contain a strong President's revision of statutory priorities regarding the spending of appropriated funds. The mechanism ultimately agreed to by both the President and Congress was a political accommodation which conveyed to the President the discretion to propose spending changes after enactment of appropriations bills.⁸ In addi-

3. For an extensive listing of this commentary see Note, *The Aftermath of Chadha: The Impact of the Severability Doctrine on the Management of Intragovernmental Relations*, 71 VA. L. REV. 1211, 1211 n.2 (1985). See also Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. ON LEGIS. 593, 593 n.1 (1976) for a listing of pre-*Chadha* commentary on the legislative veto.

4. See DeConcini & Faucher, *The Legislative Veto: A Constitutional Amendment*, 21 HARV. J. ON LEGIS. 29 (1984) (a discussion supporting the legislative veto amendment, and Senator DeConcini's resolution S.J. Res. 135 to that effect).

5. For a thorough discussion of the various legislative devices the Congress now employs to effect oversight of the agencies and to keep within the constitutional boundaries of *Chadha*, see Fisher, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 PUB. ADMIN. REV. 705 (Nov. 1985) [hereinafter *Judicial Misjudgments*]. See also Kaiser, *Congressional Control of Executive Actions in the Aftermath of the Chadha Decision*, 36 ADMIN. L. REV. 239 (1984).

6. Impoundment Control Act, Pub. L. No. 93-344, Title X §§ 1001-1017, 88 Stat. 297, 332-339, 2 U.S.C. §§ 681-688 (1982) [hereinafter ICA].

7. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297-339 (codified as amended in scattered sections of 2 U.S.C. (1982 and Supp. IV 1986)) [hereinafter Budget Act].

8. President Nixon signed the bill into public law on July 12, 1974, although this embodied the very constraint on executive powers his administration had protested. In the wake

tion, the Impoundment Control Act reserved to the Congress the right to review and negate or approve these executive recommendations.⁹

The effect of *Chadha* was to upset this political accommodation by voiding the one-House legislative veto for disapproval of proposed delays in spending—the deferral provision of the Impoundment Control Act.¹⁰ In 1986 the Reagan Administration pushed for judicial resolution of the deferral provision's constitutionality, and argued for excising only the legislative veto provision.¹¹ The House responded to this by passing legislation to delete the deferral provision entirely from the Impoundment Control Act, only to have the proposal dropped by the Republican-controlled Senate.¹² Early in 1987, the President announced his intention to recommend reforms in the congressional budget process, including revision of impoundment control.¹³ By summer, the reform discussions between Congress and the White House had stalled. In light of the background of strained relations over spending delays, the change to a Democratically-controlled Senate and the government's defeat in the courts, the prospects for any further change in impoundment procedures during the Reagan Administration are not bright.¹⁴

of court decisions against the government on impoundment, President Nixon ultimately conceded the issue.

9. See *infra* notes 42-63 and accompanying text.

10. See *infra* notes 64-84 and accompanying text.

11. See *City of New Haven v. United States*, 634 F. Supp. 1449 (D.D.C. 1986). A three-judge panel for the District Court of the District of Columbia ruled that the entire deferral provision, section 1013, and the legislative veto provision were severable. On January 20, 1987, this decision was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit, 809 F.2d 900 (D.C. Cir. 1987). See *infra* notes 96-116 and accompanying text.

12. The House proposal was attached as a rider to the Urgent Supplemental Appropriations Bill, Pub. L. No. 99-349, 100 Stat. 710 (1986). For a closer examination of the deferral debate see 44 CONG. Q. WEEKLY REP. 678 (Mar. 22, 1986); 792 (Apr. 12, 1986); 1066 (May 10, 1986); 1133 (May 17, 1986); 1249 (May 23, 1986); 1364 (June 14, 1986); 1422 (June 21, 1986).

13. With the departure of Donald Regan as President Reagan's Chief of Staff in early March 1987, the early executive impetus for budget reform proposals disappeared. See *The Cleveland Plain Dealer*, Mar. 7, 1987, at 4-A, col. 1.

During July 1987 Congress and the administration joined in budget conferences concerned with the entire budget and appropriations process. President Reagan publicly called for support for budget reform, including "enhanced rescission authority" contained in a budget reform bill introduced by Senator Pete V. Domenici (R-N.M.). See *The Cleveland Plain Dealer*, Mar. 22, 1987, at 8-A, col. 1. Domenici's proposal, which looks much like a line-item veto authority, allows the President to rescind funds from appropriations unless the Congress objects within a specific period. See S. 832, 100th Cong., 1st Sess., Title II (1987). It is not likely to be adopted.

14. See 44 CONG. Q. WEEKLY REP. 3139 (Dec. 27, 1986) for analysis. With these political changes and the revelations from the congressional hearings on the Iran-Contra-gate

This Note will argue that the President has no inherent constitutional power to not spend appropriated funds. To the extent to which the President has had discretion to withhold funds, that discretion has historically been a matter of political accommodation between the Congress and the President. It is not properly an issue for the courts.

The constitutional power to authorize programs and to appropriate funds to carry out those programs rests with Congress.¹⁵ The essence of the legislative process is making policy: balancing competing interests, seeking a consensus and enacting programs to carry out those policies. The President's constitutional role in the legislative process is strictly limited to proposing legislation and using the veto as a check on Congress' power. The executive's primary role is to carry out legislative programs and policies, that is, to faithfully execute the laws.¹⁶ In reality today, the President's power and influence in the legislative process is considerably broader, in part due to the singularly powerful position of the President as a national political leader and also in part due to the gradual accrual of power in the executive both by design and by default.¹⁷ Thus the combination of constitutional power and historically accumulated power has contributed to the President's major policy-making role.

Yet this breadth of power is not limitless. Policy-making as a purely legislative function requires that funds to implement policy may not be spent except in consequence of enacted legislation. Likewise, not spending appropriated money for policy reasons is policy-making and not a presidential prerogative. The institutional tensions which are by design an important feature of our constitutional system were conceived by the Framers as a check on abuse of power by any one branch of government.¹⁸ The system was not designed for efficiency or speed but rather to insure fundamental freedoms through a government of laws. Although these institu-

arms scandal, the President, with less than one year remaining in his term, has little leverage to negotiate with the Congress on this issue. The deferral issue is only part of a whole range of major budget disputes focused on the deficit, Gramm-Rudman reform, the debt ceiling, and all the appropriations bills for fiscal year 1988. *See* 45 CONG. Q. WEEKLY REP. 1369-73 (June 27, 1987).

15. *See* U.S. CONST. art. I, § 8, cl. 18; § 9, cl. 7.

16. *See* U.S. CONST. art. II, § 3.

17. *See infra* notes 124-62 and accompanying text.

18. THE FEDERALIST NO. 47, at 301 (J. Madison)(C. Rossiter ed. 1961). Madison wrote that:

[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

tional tensions are always present, the executive and legislative branches act most in harmony when the two share the same political and philosophical objectives. When there is a split government, as with a Republican President and a Democratically-controlled Congress, the differing policy objectives of the two branches will result in a high level of tension and disharmony. This strain exposes the weaknesses of the political process, which happened during the Nixon presidency over impoundments,¹⁹ as the more efficient political branch enhances its control over the process. The reaction by Congress to the shift in political power becomes more cohesive as an institutional reaction when the taking of control is too great or is an abuse of power.

The personalities in office define the dynamics of the system. No political structure can effectively contain this institutional tension. Periods of greatest policy conflict will foster more creative ways to circumvent the system in order to achieve certain policy objectives. In 1974 Congress reacted to Nixon's impoundment policies with legislation designed to severely curtail presidential impoundments.²⁰ Then increasing use of the legislative veto device to control executive agencies led in 1983 to the *Chadha* decision declaring the legislative veto unconstitutional.²¹ Taking advantage of a crippled deferral process, the Reagan Administration sought ways to expand its impoundment authority, ultimately seeking unsuccessfully to gut the basic purpose of the 1974 ICA.²² Left with a greatly restricted deferral authority, the administration has tried to negotiate with Congress for new impoundment authority.²³

This Note will examine the inherent power theory of impoundment and the historical political relationship between the President and Congress relating to the appropriations power and process in order to better address the problems with the current impoundment control process. Part I of this Note will survey the history behind enactment of the Impoundment Control Act and examine the

19. See *Congress Given New Budget Controls*, CONGRESS AND THE NATION 1973-76, Vol. IV, 71-73 (1977).

20. See *infra* notes 42-63 and accompanying text.

21. 462 U.S. at 959.

22. See *President's Deferral Authority*, XLII CONG. Q. ALMANAC 576-78 (1986); *Budget Process: Reconciling Spending, Taxes*, CONGRESS AND THE NATION, 1981-84, Vol. VI, 34 (1985).

23. In his fiscal year 1988 Budget Message, President Reagan called for reform of the budget process, to include presidential line-item veto authority. 45 CONG. Q. WEEKLY REP. 81 (Jan. 10, 1987). The line-item veto was featured in Reagan's "Economic Bill of Rights" speech, see *id.* at 1532 (July 11, 1987), and again in his 1988 State of the Union message, 46 CONG. Q. WEEKLY REP. 190 (Jan. 30, 1988).

mechanisms established to control impoundment. Part II will address the impact of the *Chadha* decision on the Impoundment Control Act and the current situation after *City of New Haven v. United States*.²⁴ Part III will evaluate competing claims to spending power by both the Congress and the President. It will also explore historical political accommodations through which the President and the Congress have established a shared power in the budget process. Part IV will examine the constitutional issue of whether the executive has inherent power to impound, building on *The Steel Seizure Case*²⁵ and enactment of the Impoundment Control Act. Part V will conclude with an evaluation of the current impoundment control process and the defects which have been exposed and examine proposals for reform.

I. HISTORY BEHIND IMPOUNDMENT

Impoundment in its modern fiscal context refers to the unlawful withholding of monies already appropriated.²⁶ "Impoundment in its broadest sense includes any type of Executive action which effectively precludes the obligation or expenditure of any part of budget authority. It does not include presidential action which is in strict compliance with discretion vested in the executive branch by the Congress."²⁷ Money can alternatively be withheld through reprogramming of funds within a budget account,²⁸ or by transfer

24. 809 F.2d 900 (D.C. Cir. 1987).

25. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

26. For extensive historical background, see Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549 (1974) [hereinafter Abascal & Kramer I].

27. Mikva & Hertz, *Impoundment of Funds — The Courts, the Congress and the President: A Constitutional Triangle*, 69 NW. U.L. REV. 335, 337 (1974) (footnote omitted) [hereinafter Mikva & Hertz]. "Rescissions" and "deferrals" are statutorily permissible methods for the President to propose withholding and are technically not impoundments. However, the term "impoundments" will be used in this discussion to describe withholding of funds, whether deferrals or rescissions.

The term "budget authority" is used as defined in the Budget Act, 2 U.S.C. § 622(2): "The term 'budget authority' means authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds or to collect offsetting receipts, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government."

28. Reprogramming is not impoundment. It is a procedure whereby executive officials can shift funds *within* a budget account from one program to another. It can result from wage-rate adjustments, unforeseen developments, inaccurate pricing, etc. Reprogramming is an informal, nonbinding process between the agency and its congressional appropriations committees to resolve any disputes about shifting funds. For further discussion on reprogramming activities, see L. FISHER, *PRESIDENTIAL SPENDING POWER* 75-98 (1975) [hereinafter L. FISHER].

of funds from one account to another due to program reevaluations, revisions, cancellation or by subsequent enactment of legislation.²⁹ Impoundment actions can either delay spending or simply propose not to spend at all, thereby suspending or even cancelling all or part of a program.³⁰ The use of regulations or paperwork can slow the process of expending funds and effect an overall decrease in the spending level for the fiscal year. Some impoundments can be classified as routine managerial actions, for instance, savings due to lower costs than projected. However, many impoundments encroach on Congress' constitutional authority to determine policy and budget priorities³¹ — as in the refusal to implement a program or protracted delays in spending for a program with which the President disagrees.

A. *The Historical Framework*

Impoundment has been a part of our political process ever since President Jefferson refused to spend \$50,000 appropriated to build a warship, claiming it was no longer needed.³² Although successor presidents withheld spending appropriated funds for policy reasons,³³ the practice was not extensive. The modern impoundment era began with President Franklin Roosevelt, who impounded funds from certain domestic programs to ensure adequate emergency funding for the Second World War and national defense.³⁴ Although there was a struggle between Congress and the President over deferring domestic expenditures, "Congress statutorily authorized many of the deferrals and expressly recognized the higher priority of military mobilization."³⁵ Presidents until the early 1970s have withheld appropriated monies in varying amounts, principally for military spending proposals.³⁶ A kind of gentlemen's agreement

29. Transfer authority applies to shifting of funds from one budget account to another. The authority to transfer is provided explicitly in the legislation. *See also* L. FISHER, *supra* note 28, at 99-122.

30. Fisher identifies four basic types of impoundment actions: 1) routine management decisions for efficiency reasons; 2) statutory authority; 3) constitutional power; and 4) administrative policy-making. *See id.* at 148-74 (for a full discussion).

31. *Id.* at 148.

32. Mikva & Hertz, *supra* note 27, at 341. The money was later spent when changed international conditions required an increase in naval forces.

33. *Id.* at 341, n.27.

34. *Id.* at 341.

35. Abascal & Kramer I, *supra* note 26, at 1604 (footnote omitted).

36. *See id.* at 1611-12 for a discussion of President Truman's refusal to comply with Congress' approval of a larger Air Force than the President wanted. *See also* Mikva & Hertz, *supra* note 27, at 342-43 (Presidents Eisenhower and Kennedy withheld money targeted for

between the two branches assured limited executive discretion to expend public monies wisely and economically while not thwarting the basic budget policies enacted by Congress.³⁷

However, under President Nixon, this agreement was breached as impoundments reached unprecedented levels and directly targeted domestic programs the President wanted to cut.³⁸ Nixon's actions spawned a series of lawsuits—most of which held the President's actions illegal³⁹—and ultimately led to enactment of the Congressional Budget and Impoundment Control Act of 1974.⁴⁰ The Impoundment Control Act of the Budget Act, Title X, worked well until President Reagan began to assert broad control powers over federal spending, particularly in 1986.⁴¹

B. *The Impoundment Control Act of 1974*

In the wake of public outcries and substantial litigation, the Congress moved in the early 1970s to enact a comprehensive budget reform measure and to reassert its central role of policy-making in

certain weapons programs, while President Johnson, like Roosevelt, reduced spending in certain domestic programs). See also Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 695-96, nn. 12-14 (1985).

37. *Impoundment of Appropriated Funds by the President: 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. 2 (1973) (statement of Senator Ervin) [hereinafter *1973 Hearings*]; Mikva & Hertz, *supra* note 27, at 363-64 n.134. Senator Ervin recognized the need for limited impoundments which "when undertaken pursuant to congressional dictate . . . may be quite useful in effecting economy." *1973 Hearings, supra*, at 2. See L. FISHER, *THE POLITICS OF SHARED POWER* 85-86 (1981).

38. See L. FISHER, *supra* note 28, at 171-74 for a discussion of the Nixon impoundments. See also Mikva & Hertz, *supra* note 27, at 343-44.

For testimony and questioning of Deputy Attorney General Joseph Sneed, see *1973 Hearing, supra* note 37, at 358-402.

39. Of the more than 50 cases litigated during this period, only four decisions sustained the President's position. For a list of the Nixon impoundment cases, see *Court Challenges to Executive Branch Impoundments of Appropriated Funds: Special Report of the Joint Comm. on Congressional Operations*, 93d Cong., 2d Sess. (1974) and *Presidential Impoundment of Congressionally Appropriated Funds: An Analysis of Recent Federal Court Decisions*, House Comm. on Government Operations, 93d Cong., 2d Sess. (1974).

40. L. FISHER, *COURT CASES ON IMPOUNDMENT OF FUNDS: A PUBLIC POLICY ANALYSIS* (1974) [hereinafter *COURT CASES*]. The Nixon impoundment cases were decided on the basis of statutory construction: whether the statutory language was mandatory or discretionary as regards the executive spending authority. Those federal courts which considered the issue dismissed the government's inherent power argument, but the decision did not rest on this finding. See also Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 GEO. L.J. 149 (1974) [hereinafter *Abascal & Kramer II*]; Mikva & Hertz, *supra* note 27, at 346-62.

41. See 44 CONG. Q. WEEKLY REP. 737-38 (Apr. 5, 1986); 2915 (Nov. 15, 1986).

fiscal matters.⁴² The Budget Act declared as Congress' central purpose:

- (1) to assure effective congressional control over the budgetary process;
- (2) to provide for the congressional determination each year of the appropriate level of Federal revenues and expenditures;
- (3) to provide a system of impoundment control;
- (4) to establish national budget priorities; and
- (5) to provide for the furnishing of information by the executive branch in a manner that will assist the Congress in discharging its duties.⁴³

Title X is the Impoundment Control Act.⁴⁴ It contains a disclaimer that "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as —

- (1) asserting or conceding the constitutional powers or limitations of either the Congress or the President."⁴⁵

The procedures established by the Impoundment Control Act make clear that Congress is reasserting its control in the appropriations and spending arena. The Impoundment Control Act amended the 1950 Anti-Deficiency Act by deleting the "other developments" language to narrowly circumscribe executive authority to establish reserves only for contingencies, to effect savings through efficiencies, or as provided by law.⁴⁶

The Impoundment Control Act identifies two categories of impoundment: deferrals and rescissions. Deferrals are generally temporary delays in spending money within the current fiscal year and are presumed to be routine managerial decisions rather than policy decisions.⁴⁷ Rescissions are proposals not to spend for all or part of a program. Deferral of budget authority includes in its definition,

- (A) withholding or delaying the obligation or expenditure or budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or
- (B) *any other type of Executive action or inaction which ef-*

42. See generally CONGRESS AND THE NATION, 1973-76, *supra* note 19.

43. 2 U.S.C. § 621 (Congressional Declaration of Purpose).

44. ICA, *supra* note 6.

45. *Id.* § 1001.

46. *Id.* § 1002. See *infra* notes 146-48 and accompanying text. This section deleted the "other developments" language which President Nixon relied on to impound funds and requires that reserves established under authority of the Anti-Deficiency Act be reported as provided for in the Impoundment Control Act.

47. Following the *New Haven* decision the deferral provision of the ICA, section 1013, is invalid. The ICA has not been amended since *New Haven*. See *City of New Haven v. United States*, 634 F. Supp. 1449 (D.D.C. 1986) *aff'd.*, 809 F.2d 900 (D.C. Cir. 1987).

*fectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law.*⁴⁸

Funds deferred beyond the end of a fiscal year, or budget authority that expires if funds are deferred, are not classified as deferrals. This category is presumed to include temporary delays made for managerial reasons rather than for strictly policy reasons, although the provision clearly allows the President to report policy deferrals. The funds are immediately withheld when the deferral message is sent to Congress. The burden is placed on Congress to disapprove the deferral and reinstate the obligation to spend. There is no time limit within which the Congress must act.

The other category of impoundment is a rescission,⁴⁹ which includes all other proposals to not spend in whole or in part for any program as provided in the budget authority. A deferral in spending for the final year of a multi-year appropriation is included in the rescission category. Also included are determinations by the President that "all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided."⁵⁰ A rescission includes withheld funds that are necessary to fulfill the objectives of the appropriation—and generally includes "policy" impoundments.⁵¹ The President bears the burden to gain congressional approval.

For any rescission, the President is required to transmit a special message to both the General Accounting Office ("GAO") and the Congress, detailing the amount to be rescinded, the reasons why, the estimated fiscal, economic and budgetary effect of the rescission, and additional facts or considerations bearing on the decision.⁵² The Congress has 45 legislative days from receipt of the rescission in which to approve the proposed rescission or it does not take effect.⁵³ The funds proposed for rescission are *not* available for obligation during this 45-legislative day period.⁵⁴

48. ICA, § 1011(1) (emphasis added).

49. *Id.* § 1012. See discussion in Abascal & Kramer II, *supra* note 40, at 181-82.

50. ICA, § 1012(a).

51. Policy impoundments may be described as a legislative act: a decision not to fund a program in whole or in part because the President has a political agenda different from that of Congress. The D.C. Circuit in *New Haven* described a policy deferral as one "ordinarily intended to negate the will of Congress by substituting the fiscal policies of the Executive Branch for those established by the enactment of budget legislation." 809 F.2d at 901.

52. ICA, § 1012, § 1014(a)-(b).

53. *Id.* § 1011(3).

54. Section 1012(b) states:

Any amount of budget authority proposed to be rescinded or that is to be reserved

Proposed deferrals similarly require transmittal of a special message from the President including the detailed explanatory statements listed above.⁵⁵ However, deferrals cannot be proposed beyond the end of the current fiscal year.⁵⁶ The deferred funds must be made available for obligation or a new deferral message sent. The deferral takes effect automatically unless *either* the House or the Senate disapproves of the proposed deferral.⁵⁷ The procedure for disapproving deferrals is the so-called legislative veto which *Chadha* has found unconstitutional in any form.⁵⁸

The General Accounting Office plays several roles in this process. First, it must evaluate the proposed deferral (or rescission) to determine that it is accurately categorized.⁵⁹ If a deferral is incorrectly labeled, the GAO then reports the proper designation (a rescission) to the House and the Senate, and the 45-legislative day period begins at that *later* reporting date.⁶⁰ The GAO also has au-

as set forth in such special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved.

However, the GAO has determined that the President may withhold spending pending action on the rescission or until the expiration of the 45-day limit. See *The Economy and Fiscal Policy 1974: Hearings Before the Senate Comm. on the Budget*, 93d Cong., 2d Sess. 376 (1974) (letter of Elmer B. Staats, Comptroller General of the United States, to Senator Edmund S. Muskie, Chairman, Senate Comm. on the Budget dated Dec. 18, 1974). See also *Oversight on the Impoundment Control Process, Hearing Before the Task Force on Enforcement, Credit and Multiyear Budgeting of the House Comm. on the Budget*, 97th Cong., 2d Sess. 103 (1982) [hereinafter *Impoundment Oversight Hearing*]. See also Appellant's Brief at 6, *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1986).

55. ICA, § 1013.

56. *Id.* § 1013(a).

57. *Id.* § 1013(b). The GAO has held that a reimposition of funds after disapproval of the initial deferral by the Congress is not legal. This redeferral technique was used to continue withholding funds for the Strategic Petroleum Reserve in 1985-86. See *Defects in the Deferral Mechanism in the Impoundment Control Act, Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 2d Sess. 108-09 (1986) (statement of Milton J. Socolar, Special Assistant to Comptroller General, GAO) [hereinafter *Deferral Defects Hearing*]. See also *Legislative Branch Appropriations for 1987, Hearings Before a Subcomm. of the House Comm. on Appropriations*, Part 2, 99th Cong., 2d Sess. 520-23, 532-33 (1986) (report and statements from GAO). OMB Director James Miller does not accept this position. See *The Deferral Process After Chadha, Hearings Before the House Comm. on Rules*, 99th Cong., 2d Sess. 22 (1986) [hereinafter *Deferral Process Hearings*].

58. ICA, § 1011(4). Disapproval by either the House or Senate is recorded in an "impoundment resolution." Since it is an act by the legislature acting unilaterally and without presentment to the President, the deferral provision lies within the category determined unconstitutional under *Chadha*. See *infra* notes 64-84 and accompanying text.

59. ICA, § 1015(b).

60. There is no stipulation in the statute as to the procedure for misclassification. The GAO position is that it informs Congress of its reclassification and that the 45-day clock begins running with the reclassification date. If at the end of that period the funds are not

thority to additionally report any deferrals or rescissions it independently determines are in effect, and these messages from the GAO are treated as though they have been received from the President.⁶¹ Any special message transmitted as either a deferral or rescission is printed in the Federal Register for public notice.⁶² In addition, the GAO's Comptroller General is "expressly empowered . . . to bring a civil action" in the Federal District Court for the District of Columbia should a required budget authority continue to be withheld by the appropriate executive department or agency.⁶³

II. THE EFFECTS OF *Chadha* ON THE IMPOUNDMENT CONTROL ACT

A. *The Chadha Decision*

On June 23, 1983, the Supreme Court decided that the legislative veto was unconstitutional.⁶⁴ The one-House veto power over executive acts breached the "carefully crafted restraints"⁶⁵ imposed by the constitutional separation of powers. The majority opinion by Chief Justice Warren Burger focused on the purposes and policies under the bicameralism⁶⁶ and presentment⁶⁷ clauses to argue his theory.

The bicameralism requirement emphasizes that "legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."⁶⁸ The presentment clause gives the President a role in the legislative process by providing him a power to veto proposed legislation as a way of circumscribing Congress' law-making powers and negating any oppressive or

released, then GAO can bring suit. The administration has disputed this position, asserting GAO can only notify Congress of its finding. See *Deferral Defects Hearing*, *supra* note 57, at 134 (statement of Milton J. Socolar, Special Assistant to the Comptroller General, GAO).

61. ICA, § 1015(a).

62. *Id.* § 1014(d).

63. *Id.* § 1016. The suit can be brought 25 calendar days after an explanation has been filed with the Speaker of the House and the President of the Senate. See *Abascal & Kramer II*, *supra* note 40, at 182-84 for an explanation of the judicial procedure.

The authority of the Comptroller General to sue the government was challenged in *Staats v. Lynn*, Civ. No. 75-0551 (D.D.C. 1976), but was dropped when release of the disputed funds mooted the case. With section 1013 invalidated, the Comptroller General now lacks authority to bring suit if the "required budget authority" which should be obligated is a deferral.

64. *INS v. Chadha*, 462 U.S. 919 (1983).

65. *Id.* at 959.

66. U.S. CONST. art. I, § 1; § 7, cl. 2.

67. U.S. CONST. art. I, § 7, cls. 2, 3.

68. *Chadha*, 462 U.S. at 949.

poorly drafted legislation.⁶⁹ The intention of the Framers was to give the President a limited legislative role through the veto.⁷⁰ Throughout the elaborate tripartite scheme of governmental control was the keen desire of the Framers to "divide and disperse power in order to protect liberty."⁷¹ Not persuaded by the efficiency⁷² or "political invention"⁷³ arguments, Burger adhered strictly to the theory of separable functions and duties for each of the three branches of government.⁷⁴ In this regard, Burger's separation theory closely parallels the arguments used by Justice Black in *The Steel Seizure Case*.⁷⁵

Powell's concurrence in *Chadha* also raised the abuse of power concerns of the Framers,⁷⁶ but he expressed deep concern with the broad impact of the majority's ruling.⁷⁷ Citing Justice Jackson in *Youngstown Sheet and Tube Co. v. Sawyer*,⁷⁸ Powell's theory of separation is less stark than Burger's, urging "separateness but interdependence, autonomy but reciprocity."⁷⁹ Violation of the separation of powers doctrine can be determined in one of two ways: impermissible interference with the constitutional functions of a coordinate branch; or assumption of a function which properly belongs to another branch.⁸⁰ On the facts of *Chadha*, Powell con-

69. *Id.* at 947-48.

70. *Id.* There are four constitutional provisions which permit a single House to act with no presidential veto power: 1) art. I, § 2, cl. 5, (House initiated impeachment proceedings); 2) art. I, § 3, cl. 6, (Senate impeachment trial); 3) art. II, § 2, cl. 2, (Senate confirmation of presidential appointments); and 4) art. II, § 2, cl. 2, (Senate ratification of treaties). *Id.* at 955.

71. *Id.* at 950.

72. "Convenience and efficiency are not the primary objectives—or hallmarks—of democratic government . . ." *Id.* at 944.

73. "But policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution . . ." *Id.* at 945. *See also id.* at 958-59.

74. Burger's standard for a legislative act is action with the "purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch." *Id.* at 952. Since this definition can apply to *any* government act—legislative, judicial, or executive—the standard is at best unclear. Burger's standard can also be read as imposing formal requirements on any act of the legislature simply because it has acted. *See also* Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 8-10 (1984).

75. *See infra* notes 174-77 and accompanying text.

76. 462 U.S. 919, 960-62. Justice Powell concurred in the judgment only.

77. "The breadth of this holding gives one pause. Congress has included the veto in literally hundreds of statutes. . . . [T]he respect due its [Congress'] judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide these cases." *Id.* at 959-60.

78. 343 U.S. 579 (1952).

79. *Chadha*, 462 U.S. 919, 962 (quoting Justice Jackson, 343 U.S. at 635).

80. *Id.* at 963.

cluded that Congress' act was adjudicatory and not legislative⁸¹—thus “exceed[ing] the scope of its constitutionally prescribed authority.”⁸²

In a lengthy dissent, Justice White reiterated Powell's concern with the reach of the decision. He cited a number of instances where the legislative veto was instrumental in resolving executive-legislative policy-making disputes, including the Impoundment Control Act.⁸³ The veto had allowed Congress to retain control and enhance accountability over an increasingly complex and sprawling executive bureaucracy.⁸⁴

B. *Impact on Congress*

At the time of the decision it was variously estimated that some 200 statutory provisions were affected, and in the months following *Chadha*, Congress passed 53 additional laws with legislative veto provisions attached.⁸⁵ There was mixed reaction to the *Chadha* decision on Capitol Hill, and hearings were initiated to explore alternative devices of control.⁸⁶ These ranged from a constitutional amendment to establish the legality of the legislative veto, to “report and wait” provisions which delay implementation of an executive decision for a definite period after Congress is notified so it can act,⁸⁷ to prior notification or consultation with the appropriate

81. *Id.* at 964-65. In *Chadha*, a Kenyan student sought to avoid deportation when his visa expired by applying for permanent resident status under section 244(a)(1) of the Immigration and Nationality Act. The immigration judge, acting under the provisions of the INA, determined that Chadha met the requirements of the INA (good moral character and deportation would cause extreme hardship) and granted his request. A year and a half later, the House Judiciary subcommittee with jurisdiction over INA introduced a resolution which reversed the immigration judge's finding. The House adopted the resolution, and the immigration judge was bound to order Chadha deported. The distinction raised by Justice Powell was that the INS judge was performing a judicial function statutorily delegated by the Congress and outside the competence of the Congress. *See also* Tribe, *supra* note 74, at 15-17.

82. *Chada*, 462 U.S. at 967.

83. The Court “sounds the death knell for nearly 200 other statutory provisions . . .” *Id.* “Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history.” *Id.* at 1002.

84. Justice White characterized the veto as “a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation's lawmaker.” *Id.* at 974.

85. *Judicial Misjudgments*, *supra* note 5, at 706.

86. CONGRESS AND THE NATION 1981-84, *supra* note 22, at 837-38.

87. This is similar to the rescission process; the burden may lie with either the President or the Congress. The HUD regulations are reported in this manner. Proposed regulations are submitted semiannually to congressional committees for review and are automatically published for comment 15 legislative days after notification unless Congress acts. Once a regulation is published as final, it is not effective for 20 legislative days during which the

oversight committee before executive action,⁸⁸ or a joint resolution of approval of an agency action.⁸⁹ Statutes with the disabling provision were either modified statutorily by Congress or have been gradually litigated on a case-by-case basis to determine how much of the law could survive if the offending provision was removed.⁹⁰

C. City of New Haven v. United States

After *Chadha*, the deferral mechanism of the Impoundment Control Act was not altered. Instead, a political accommodation between the administration and Congress permitted Congress to consider deferrals as though the statute was intact. Deferral resolutions were attached to appropriations bills.⁹¹ The administration agreed not to veto legislation solely because it included a deferral disapproval.⁹² However, after David Stockman left as the Office of Management and Budget ("OMB") Director and was replaced by James Miller, the agreement broke down. On February 5, 1986, President Reagan sent deferral messages to Congress to suspend \$5.3 billion from housing programs for the poor and elderly.⁹³

committees review and may legislatively disapprove. 42 U.S.C. § 3535(o) (1982). The "report and wait" procedure was approved in *Sibbach v. Wilson*, 312 U.S. 1, 15 (1941).

88. This is the procedure used in the reprogramming of funds. The informal exchange alerts each side to proposed actions in order to head off later policy disputes.

89. A joint resolution meets both the bicameralism and presentment requirements and is a law. In 1984 it was used to approve the administration's reorganization plan. See CONGRESS AND THE NATION 1981-84, *supra* note 22, at 838-39; *Judicial Misjudgments*, *supra* note 5, at 709.

90. See *supra* note 2.

91. See *Deferral Defects Hearing*, *supra* note 57, at 5-6; *Deferral Process Hearing*, *supra* note 57, at 4 (statements of Hon. Jamie L. Whitten, Chairman of House Appropriations Committee). Since the House rules do not permit legislative language to be included in appropriations bills, Congressman Whitten had to request a waiver of the rules to include the deferral disapprovals. See also L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 238 (1985) [hereinafter CONSTITUTIONAL CONFLICTS].

92. 44 CONG. Q. WEEKLY REP. 2915 (Nov. 15, 1986).

93. The President's budget for fiscal year 1987 submitted on February 5, 1986, included \$22.3 billion in deferrals for the then-current fiscal year 1986. This total was later revised downward to \$13.3 billion because of release of some funds and reclassification of other deferrals as rescissions. See 44 CONG. Q. WEEKLY REP. 737 (Apr. 5, 1986); 792 (Apr. 12, 1986); *Deferral Defects Hearing*, *supra* note 57, at 6. The \$5.3 billion in impounded housing funds became the focus for litigation challenging the President's authority to defer for policy reasons. See *City of New Haven v. United States*, 634 F. Supp. 1449 (D.D.C. 1986), *aff'd*, 809 F.2d 900 (D.C. Cir. 1987). Funds were impounded for four programs:

- 1) Section 8 Housing Assistance Payments Program (direct housing subsidy for low income families): fiscal year 1986 \$2.4 billion appropriated, all but \$184 million deferred;
- 2) Section 202 (housing assistance for elderly and handicapped with direct loans to private non-profit corporations, certain public agencies for construction, and rent subsidies): fiscal year 1986 \$631 million appropriated for loans for construction, \$600 million deferred; \$1.6 billion appropriated for rent subsidies, all but \$12.8 million deferred;

Congress had rejected the administration's proposed cuts in these same programs the year before.⁹⁴ Controversy between Congress and the President had been growing as legislators sensed an attempt by the President to now use deferral powers in the same way Nixon had—to kill programs with which he did not agree.⁹⁵

Four House Democrats,⁹⁶ the National League of Cities, six individual cities,⁹⁷ and the Public Citizen Litigation Group filed suit on February 20, 1986, to challenge the deferral authority of the President and to seek an injunction for immediate release of the funds.⁹⁸ Oral arguments were heard March 24 on an expedited basis in the U.S. District Court for the District of Columbia. Both sides conceded the unconstitutionality of the one-House legislative veto provision.⁹⁹ The argument focused on whether or not the entire deferral provision, section 1013, should also fall with the veto.

Judge Thomas Penfield Jackson, writing for a three-judge panel, granted the plaintiffs' motion for summary judgment.¹⁰⁰ An injunction was ordered to release the impounded funds for the four housing programs, which was stayed until the appeals process was completed.¹⁰¹ The case was argued November 12, 1986, before a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit.¹⁰² The unanimous decision, handed down on January 20, 1987, strongly affirmed the district court's findings.

3) Community Development Block Grant: fiscal year 1986 \$3.1 billion appropriated, \$500 million deferred;

4) Section 312 (rehabilitation loans for low income neighborhoods): fiscal year 1986 Congress directed that \$166 million remaining in the program be available, \$135 million deferred. 634 F. Supp. at 1451-52. *See also* 44 CONG. Q. WEEKLY REP. 737-38 (Apr. 5, 1986) (description of the local impact of the program cuts).

94. 44 CONG. Q. WEEKLY REP. 2915 (Nov. 15, 1986); 45 CONG. Q. WEEKLY REP. 145 (Jan. 24, 1987).

95. 44 CONG. Q. WEEKLY REP. 678 (Mar. 22, 1986); 2915 (Nov. 15, 1986).

96. Barbara Boxer - California; Mike Lowry - Washington; Bruce A. Morrison - Connecticut; Charles E. Schumer - New York.

97. Seattle, Washington; San Francisco, California; Charlotte, North Carolina; Kansas City, Missouri; New York, New York; Los Angeles, California. Separate suits were filed by Chicago, Illinois and New Haven, Connecticut and consolidated with the National League of Cities suit.

98. *City of New Haven v. United States*, 634 F. Supp. 1449 (D.D.C. 1986). *See also* 44 CONG. Q. WEEKLY REP. 565 (Mar. 8, 1986); 737-38 (Apr. 5, 1986).

99. 634 F. Supp. at 1451, 1453. The National League of Cities' objective was to obtain release of the money quickly. Conceding the unconstitutionality of the legislative veto assured the NLC a strong case.

100. 634 F. Supp. at 1451, 1460.

101. *Id.* at 1460.

102. *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987). The government had 90 days in which to file an appeal. Since it failed to do so, the decision stands and section 1013 is invalid. It is interesting to note that one of the three judges was Robert

One month following the district court's findings, the Section 202 housing funds were released by OMB in the spring of 1986.¹⁰³ Subsequently, Congress voted in June to disapprove the three disputed deferrals. The disapproval was included in the 1986 Urgent Supplemental Appropriations bill which President Reagan signed into law on July 2.¹⁰⁴ Because the President had threatened to veto the supplemental appropriations bill since it also contained a House provision to delete the deferral power from the Impoundment Control Act, the House conferees agreed to drop this language in return for a written promise from OMB Director Miller that the administration would not make any more policy deferrals for the balance of 1986.¹⁰⁵

In the initial *New Haven* litigation, the government presented three arguments.¹⁰⁶ First, the government argued that the power to defer should remain intact with severance of the legislative veto since the intent of the Congress in adopting the Impoundment Control Act was solely to provide Congress with notice of the deferrals. Retaining the deferral power while discarding only the legislative veto would still meet the notice requirement. Since the severability standard is based in part on a determination of whether the remaining statute is workable, the government cited as proof the fact that deferrals had operated without difficulty since the 1983 decision.¹⁰⁷

Second, since neither the authorization nor appropriations bills specified the timing of the expenditures, the government maintained that the President has independent discretion, from his authority to execute the laws, to determine and revise an appropriate spending schedule. This discretion exists separate from any authority

Bork—a Reagan Supreme Court nominee recently denied Senate confirmation—who, as a Justice Department official, defended the Nixon impoundment policy.

103. Appellee's Brief, *United States of America*, at 9, *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).

104. Urgent Supplemental Appropriations Bill, *supra* note 12; 44 CONG. Q. WEEKLY REP. 1550-53 (July 5, 1986); 2915 (Nov. 15, 1986).

105. 44 CONG. Q. WEEKLY REP. 1422 (June 21, 1986). *See also id.* at 1249 (May 31, 1986); 1364 (June 14, 1986); 1513 (June 28, 1986).

106. *City of New Haven*, 809 F.2d at 900. *See* Appellant's Brief at 13-18 for a summary of these arguments.

107. Appellant's Brief at 27-29. The government also argued that Congress' dispute with President Nixon focused on the President's refusal to spend money (i.e. rescissions) rather than delays in spending. Deferrals, appellants argued, are "presumptively valid." The mechanism for disapproval is of less importance than notice that the President is exercising authority to delay spending. *Id.* at 38-39. For further analysis of how the deferral process has worked after *Chadha* see *infra* notes 198-216 and accompanying text.

granted by the Impoundment Control Act.¹⁰⁸ The district court declined to rule on this issue, since the President acted on authority of section 1013 of the Impoundment Control Act and did not assert an independent basis for his deferral action.¹⁰⁹

Third, the government argued that even if the court should strike the entire deferral provision, it should also strike the 1974 amendment to the Anti-Deficiency Act which deleted the "other developments" language. The government argued that since the Budget Act represented a political accommodation between the two branches, any changes by judicial decree should restore the status quo ante.¹¹⁰ The district court rejected this argument and applied the standard to save as much of the statute as was consistent with legislative intent.¹¹¹

The cities' response was that the government's view of the legislative history behind impoundment was completely unfounded.¹¹² Severing the veto provision from the deferral process ignored obvious legislative intent to *control* the impoundment process, not simply to be notified of executive deferral actions. In addition, the critical point is that severing only the veto power of Congress would give the President a line-item veto power¹¹³—a power which President Reagan has continually urged be granted him. Congress has steadfastly refused to grant such a powerful *legislative* tool to the President, since such a power would make congressional deliberations and enactments superfluous. Although the President had signed an appropriations bill into law, he could under this theory, selectively withhold spending for any program which was not part of his agenda. Should the Congress pass new appropriations for the targeted programs, the President could then veto the legislation and take steps to circumvent a successful two-thirds vote override.

The government argued that a deferral is not a true veto, since the funds must be made available before the end of the fiscal year. Judge Jackson responded that this "ignores the practical realities of

108. Appellant's Brief at 44-45, *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).

109. *City of New Haven*, 634 F. Supp. at 1460. Thus, the assertion that the President has inherent constitutional authority to not spend remains unaddressed by the courts.

110. Appellant's Brief at 58-60, *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987); *City of New Haven*, 634 F. Supp. at 1459.

111. The D.C. Circuit Court of Appeals similarly rejected this argument. "The amendment to the Anti-Deficiency Act . . . is fully consistent with the expressed intent of Congress to control presidential impoundments. Thus, there is absolutely no basis for overturning Congress' amendment to the Anti-Deficiency Act." *City of New Haven*, 809 F.2d at 909.

112. Appellee's Brief at 42-51, *City of New Haven*, 809 F.2d 900 (D.C. Cir. 1987).

113. Appellee's Brief at 40-41.

the budget process, however, for when the expenditure of funds is deferred for one year, those funds remain available and may be used to offset budgetary requirements for the following fiscal year."¹¹⁴ The net result would be a cut in the program.

In his May 16 opinion, Judge Jackson carefully traced the legislative history of the Impoundment Control Act and observed that "[i]t is apparent from historical circumstances alone that the legislation to which Congress was building would be designed and expected to mark the limits of Congressional and Presidential power in the matter of impoundments" beyond the then-current dispute with President Nixon.¹¹⁵ The notice provision of the Impoundment Control Act was important, but "merely incidental" in comparison with the veto as an instrument for control. In his analysis of the integral nature of the veto to the enacted law, Judge Jackson concluded:

It can be said with conviction that Congress would have preferred no statute to one without the one-House veto provision, for with no statute at all, the President would be remitted to such pre-ICA authority as he might have had for particular deferrals which, in Congress' view (and that of most of the courts having passed upon it) was not much.¹¹⁶

III. COMPETING CLAIMS TO SPENDING AUTHORITY

The power to appropriate public monies is explicitly given to Congress in the Constitution.¹¹⁷ However, the power to control the expenditure of those funds is not stated. It is through the power of the purse and the authority to make the laws that Congress has asserted its prerogative to see that its mandate is carried out by the executive. This view of separation of powers assumes an oversight function to assure that legislative powers or policies are not diminished or thwarted. The executive views separation of powers in a different manner—that Congress' powers end when the law has been enacted and that the legislature should not interfere with or oversee in the implementation of those laws. From this perspective, implementation is an explicitly executive function.

In the give and take of the political process, the functional powers of the two branches overlap. Congress has available to it several

114. *City of New Haven*, 634 F. Supp. at 1458.

115. *Id.* at 1455.

116. *Id.* at 1459.

117. U.S. CONST. art. I, § 9, cl. 7: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"

constitutionally permissible methods for oversight of the executive.¹¹⁸ The President through a primary leadership role for the country and political party has enormous influence over the legislative process. The President is given legislative power to propose legislation to the Congress. Executive officials have ready access both formally and informally to the relevant congressional committees to present the administration's position and supporting documentation. The administration proposal is often the starting point for the discussion.¹¹⁹ This is certainly true in the case of the budget, since the President is statutorily required to present his budget proposal, including projected revenue receipts and outlays, to the Budget and Appropriations Committees of both Houses.¹²⁰ The President can also veto bills. A supermajoritarian response from both Houses of Congress is required to defeat the President.¹²¹ When there is a strong and popular President, a national emergency, or a politically controversial issue, Congress is often hesitant to go against the President's wishes.

Claims to discretionary authority over spending derive from two principal sources: statutory authority specifically given to the President¹²² and inherent constitutional authority.¹²³ Particularly in times of emergency or general national crisis or when strong presidential leadership acts in harmony with congressional priorities, Congress has vested discretionary authority over spending programs in the President. When the crisis has passed or there are executive-legislative tensions over policy as in a split government,

118. *See supra* notes 87-89 and accompanying text.

119. The 1974 Budget Act made some major changes to strengthen the Congress' negotiating position. The Budget Act now requires, in addition to the annual budget proposal from the President, submission of a current services budget which projects what would happen if there were no changes in existing law. This base-line budget now gives Congress additional leverage in its negotiations. In addition, the Budget Act established the Congressional Budget Office (CBO), an independent, professional, nonpartisan staff which assists the House and the Senate in its budget work. As an analogue to OMB, it has helped restore some balance to the congressional side of the ledger.

120. The reporting requirement originated in the Budget and Accounting Act of 1921 and is now codified at 31 U.S.C. § 1105 (1982 and Supp. III 1985). *See infra* notes 138-43 and accompanying text.

121. U.S. CONST. art. I, § 7, cl. 2.

122. Statutory authorization is the discretionary authority most commonly relied on, either from an explicit statement in the law or implied through omission of mandatory language. President Nixon argued that the lack of explicit, mandatory language gave him authority to withhold funds. *See 1973 Hearings, supra* note 37, at 841.

123. Inherent authority is derived from the vesting of executive power in the President and a duty to see that the laws are faithfully executed. *See* U.S. CONST. art. II, § 1, cl. 3.

the Congress will reassert its control through mandatory spending language in its appropriations or authorization bills.

A. *Evolution of Shared Power*

As Hamilton observed in Federalist 30: "Money is, with propriety, considered as the vital principle of the body politic."¹²⁴ Control over the purse strings is clearly one of the most potent tools a government possesses. The Congress derives its power of the purse explicitly from the Constitution: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."¹²⁵ Congress as the law-making body also exercises the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹²⁶ The President is directed to "take Care that the Laws be faithfully executed."¹²⁷ The power to appropriate is thus separated from the implementation of spending programs as a check on abuse of power. Placing both decision and execution powers in the same branch would concentrate enormous power with no built-in restraint. Such concentration of power would surely raise legitimate concerns about abuse of power of the sort with which the Framers were so deeply concerned.

Historical developments in the appropriations and budget process are important factors to consider in analyzing the extent and source of executive discretion in withholding appropriated funds. Although the constitutional powers appear to be allocated separately to the Congress to appropriate and the President to faithfully execute, in fact the legislative-executive relationship in the appropriations process has become interwoven as the complexity of the governmental functions has increased.

1. *The Early Appropriations Process*

The first congressional appropriation in 1789 was a brief lump sum measure setting out four general classes of expenditures for the new government.¹²⁸ In contrast, the 1793 appropriation bill was a very detailed line-item appropriation greatly limiting any discre-

124. THE FEDERALIST NO. 30, at 188 (A. Hamilton) (C. Rossiter ed. 1961).

125. U.S. CONST. art. I, § 9, cl. 7.

126. U.S. CONST. art. I, § 8, cl. 18.

127. U.S. CONST. art. II, § 3.

128. L. FISHER, *supra* note 28, at 60. The accounts appropriated were: "\$216,000 for the

tionary spending authority to the President.¹²⁹ Appropriations in lump sum amounts as opposed to highly specific line-item budgets offered greater spending discretion to the executive. Swings between lump sum and line-item budget authority would alternately expand or restrict the discretionary authority of the President to control the level of spending. Generally, the discretion granted has been broader during periods of national emergency—war or depression.¹³⁰ When the crisis passed, the delegation narrowed.

The codification in 1809 of the itemized appropriation led to two administrative practices¹³¹ which circumvented the rigidity of the line-item system. One was the transfer of excess funds from one budget account to take up the deficiency which had occurred in another. Congress limited, then broadened and ultimately repealed administrative transfer authority in 1868.¹³²

The other was the so-called “coercive deficiency.”¹³³ Annual appropriations bills provided agencies with lump sum amounts which were to be roughly apportioned in quarterly installments over the fiscal year. With no central control over the spending rate, agencies would routinely spend until their authority was exhausted and then request a deficiency appropriation to carry them through the balance of the fiscal year. If Congress refused additional appropriations, agency operations would be shut down and the blame would be attributed to congressional stinginess.¹³⁴

2. *Modern Statutory Underpinnings*

In the early years, Congress appropriated funds with varying degrees of specificity and the President executed the agreed-to poli-

civil list, \$137,000 for the War Department, \$190,000 to discharge warrants issued by the previous Board of Treasury, and \$96,000 for pensions to disabled veterans.”

129. *Id.* “By 1793, appropriations were descending to such minutiae as \$450 for firewood, stationery, printing, and other contingencies for the Treasurer’s office.”

130. *Id.* at 61-63.

131. *Abascal & Kramer I, supra* note 26, at 1580. These practices were sanctioned by the Act of May 3, 1809, which gave the President limited authority to shift funds from one account to another.

132. *Id.* at 1581-82.

133. *See id.* at 1580-81.

134. *See id.* at 1582. After Congress prohibited the use of transfers, it also tried to eliminate deficiency appropriations by requiring agencies to spend within the appropriated budgets. However, the Postmaster General in 1879 got around the language of this law by entering into contract obligations of \$1.7 million for future services. In requesting deficiency appropriations to meet the future obligation, he argued that the Congress could, if it wished to preserve the law, annul the contracts with a month’s severance and halt the mails. Congress, of course, was forced to appropriate the additional funds. But an administrative ability to circumvent statutory language was gradually unfolding.

cies and programs. By the turn of this century, however, spending abuse by the agencies and a failure to coordinate expenditures over the full fiscal year led to enactment of the Anti-Deficiency Act in 1905.¹³⁵ Congress asserted its control over appropriations by requiring the agencies to apportion their spending on a monthly or other basis to prevent deficiency appropriation requests. Waivers or modifications were, however, permitted on written orders of the agency heads.¹³⁶ Due to widespread abuse of the waiver provision, the following year Congress amended the waiver provision, permitting its use only in the event of some unforeseen " 'extraordinary emergency or unusual circumstance.' " ¹³⁷

In 1921 Congress passed the Budget and Accounting Act.¹³⁸ The debates during this period reflected the tension between providing the executive with control over agency spending levels and retaining the principal appropriations powers within the control of the Congress. The President not only wanted budget-making staff, but also recognition of an executive budget, which would limit Congress' power to increase spending levels or add new programs.¹³⁹ Congress specifically rejected the concept of an executive budget which would have required Congress to act within the budget limits set by the President. The Budget Bureau was to act as a filter for the President's budget requests, which were viewed by Congress as simply a reflection of the administration's wishes. Congress refused to give up its constitutional powers, and the leadership emphasized "that the Act would leave unaltered the existing distribution of powers between the President and Congress." ¹⁴⁰

135. Act of Mar. 3, 1905, Pub. L. No. 58-217, § 4, 33 Stat. 1214, 1257-1258 (codified as amended at 31 U.S.C. §§ 1341, 1349-1351, 1511-1519 (1982 and Supp. III 1985)). The restrictive language was added to this deficiency appropriations bill to forbid expenditures in excess of appropriations, to require apportionment except on waiver, and to impose a personal criminal penalty of removal from office, a fine of not less than \$100 and imprisonment for not less than one month. See also L. FISHER, *supra* note 28, at 233-34.

136. See L. FISHER, *supra* note 28, at 233. For a thorough historical background on the factors leading to enactment of the Anti-Deficiency Act, see also Abascal & Kramer *I*, *supra* note 26, at 1583-87.

137. Act of Feb. 27, 1906, Pub. L. No. 59-28, § 3, 34 Stat. 27, 48 (codified as amended at 31 U.S.C. §§ 1511-1519 (1982)). These restrictive provisions were added to an urgent deficiency appropriations bill. See also L. FISHER, *supra* note 28, at 234.

138. Act of June 10, 1921, Pub. L. No. 67-13, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C. §§ 701-778, and §§ 1101-1114 (1982 and Supp. III 1985)).

139. Abascal & Kramer *I*, *supra* note 26, at 1591.

140. *Id.* Abascal & Kramer argue that Congress' firm resistance to transfer of its power to the President is critical to understanding the impoundment issue. There was tremendous economic pressure brought on by wartime debts and political pressures flowing from enactment of a federal income tax which argued that Congress was ill-equipped institutionally to

The Budget and Accounting Act created the Bureau of the Budget within the Treasury Department to coordinate presentation of an annual comprehensive budget with estimated expenditures and revenues and requested appropriations.¹⁴¹ The Budget and Accounting Act retained in Congress the power to revise the appropriation estimates up or down in light of national policy prerogatives it established.¹⁴² Congress in turn reformed its splintered appropriations committee structure and established single appropriations committees in each House with an intent to report out a single money bill.¹⁴³

The first Budget Director, Charles G. Dawes, treated appropriations as spending ceilings and instituted an administrative regulation to effect savings through establishment of a General Reserve.¹⁴⁴

deal effectively with the budget. For a thorough background of events leading up to enactment of the Budget and Accounting Act, see *id.* at 1595-99.

141. *Id.* at 1598-99. See also L. FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* (1972). Unlike establishment of the Departments of State and War which Congress considered purely executive departments, the Treasury Department was viewed as serving the Congress as well as the President. Congress jealously guarded its constitutional control over revenues. It specifically placed the Bureau of the Budget in the Treasury and *not* in the White House, on the theory that Congress could then retain control over revenue matters. See *id.* at 86-89.

142. L. FISHER, *THE POLITICS OF SHARED POWER*, *supra* note 37, at 39. Although Congress asserted the primacy of the legislative budget, its splintered appropriations process worked against development of a legislative budget. Until the Budget and Impoundment Control Act of 1974, the only comprehensive budget proposal the Congress worked with was the President's. Congressional deliberations on appropriations could only effectively work changes on the edges of the administration's proposals. See *Issue Presentations Before the House Rules Comm. Task Force on the Budget Process*, 98th Cong., 2d Sess. 147, 161-62 (Oct. 1984) (statement of Shirley Ruhe, House Budget Committee). See also Abascal & Kramer *I*, *supra* note 26, at 1566.

143. L. FISHER, *supra* note 28, at 36-37. This reform was short-lived. Instead of waiting for each of the subcommittees of the Appropriations Committee to report out its bill and then combine them into one, the Appropriations Committee presented each bill separately. *Id.* at 37. The only other time a single appropriations bill was attempted was in 1950. Fear that the President could veto an entire budget in one stroke soon eliminated this reform. Today, the appropriations committees each have 13 subcommittees. Appropriations bills are then acted on in the subcommittees and reported out separately for consideration by the House and Senate. However, the authorizing committees must act first to authorize a program before the appropriations committees can appropriate funds to enact programs. Authorization bills are ceilings — "It is authorized to be appropriated . . ." — beyond which an appropriation may not go. Money cannot be released from the Treasury until an appropriation has been enacted into law.

144. Abascal & Kramer *I*, *supra* note 26, at 1600-03. Reserves from appropriated funds were made available only to meet unforeseen emergencies and to effect savings and only with the authorization of the Budget Bureau. In addition, this procedure eliminated the "June rush" by which agencies felt obligated to spend all of the appropriated funds before the end of the fiscal year. The individual agency heads were no longer allowed to set apportionment schedules; that decision was given to the Budget Bureau.

By 1933, the Budget Bureau had established control over the coordination of legislative requests from the executive agencies to Congress. In 1939, a revised Reorganization Act directed the President to consolidate and abolish governmental agencies for efficiency and economy reasons.¹⁴⁵ President Roosevelt used this authority to transfer the Budget Bureau to the new Executive Office of the President, thus centralizing budget control and bringing it within the White House.

In 1950, the Anti-Deficiency Act was again amended to encourage agencies to set aside surplus funds for unanticipated emergencies.¹⁴⁶ The amended act authorized the establishment of budgetary reserves "to provide for contingencies, or 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."¹⁴⁷ President Nixon relied principally on this statutory authority and its critical "other developments" language to justify the impoundments early in his first term.¹⁴⁸ One noted authority has observed that the legislative purpose behind the language "was to build up surpluses in some accounts in order to balance deficiencies that developed elsewhere. Nowhere was there an implied au-

145. L. FISHER, *CONSTITUTIONAL CONFLICTS*, *supra* note 91, at 164-66. Congress gave this authority only on the condition that the reorganization proposal be submitted to Congress for review. The reorganization was effective 60 days after submission unless disapproved by concurrent resolution of both Houses. *Id.* at 166.

146. Act of Sept. 6, 1950, Pub. L. No. 81-759, § 1211, 64 Stat. 595, 765 (codified as amended at 31 U.S.C. §§ 1511-1519 (1982)).

147. 31 U.S.C. § 1512(c)(1) (emphasis added), *cited in* L. FISHER, *supra* note 28, at 154. The 1950 language grew out of another Post Office dispute. In 1947 the Post Office apportioned its funds so that there was a short-fall in the final quarter. The Post Office threatened to limit services unless additional funds were appropriated. The legislative purpose of the amendment was to build up reserves to pay for any unanticipated deficiencies without resorting to additional appropriations. L. FISHER, *supra* note 28, at 155.

148. *See* 1973 *Hearings*, *supra* note 37, at 366 (statement of Deputy Attorney General Joseph Sneed). *Id.* at 529 for the OMB interpretation of 1950 Anti-Deficiency Act:

In light of the fact that spending under conventional appropriations is not mandatory, the authority to establish reserves because of "other developments subsequent to the day on which such appropriation was made available" should be construed broadly. Thus "other developments" would encompass any circumstances which arise after an appropriation becomes available for use, which would reasonably justify the establishment of a reserve.

President Nixon used impoundment as an executive tool to severely cut back or cancel programs without any notice to Congress. This marked a major departure from past executive impoundment actions. *See* L. FISHER, *supra* note 28, at 176-77. "In other words, the mere existence of discretionary authority, which had been granted by Congress to enable executive officials to administer the programs more effectively, was used as an excuse to deny the programs in their entirety." *Id.* at 177.

thority to set aside reserves to cancel or curtail a program. At no time was the Antideficiency Act conceived of as a tool for stabilizing the economy."¹⁴⁹

President Nixon also instituted another important structural change when he reorganized the Budget Bureau into the Office of Management and Budget ("OMB") in 1970. He asserted that the priority of the new OMB would be to evaluate "the extent to which programs are actually achieving their intended results, and delivering the intended services to the intended recipients."¹⁵⁰ Growing confrontation between Nixon and the Congress over impoundment led only to a modest modification of the OMB reorganization proposal in 1974. The powers and duties which Congress had statutorily vested in the Budget Bureau became vested in the President under Nixon's reorganization and could be delegated by him and not by the Congress.¹⁵¹ Since Congress had established the Budget Bureau to be responsive to Congress' reporting requests, this move greatly enhanced the President's control over the budget process. However, nominations for the Director and Deputy Director of OMB now required Senate approval.¹⁵²

B. *Statutory Authority*

There are a variety of ways in which the President can withhold spending under the law. Under the Anti-Deficiency Act, the President is directed to establish reserves to provide for contingencies or from savings in program efficiencies.¹⁵³ Using the authority of the Anti-Deficiency Act, as amended in 1950, President Nixon argued that the reserve language permitted him to adjust spending levels downward in the face of spiraling inflation. Since the Congress had refused to take responsible action in this area and the economic situation had reached emergency proportions, Nixon claimed both statutory and inherent power to act.¹⁵⁴ However, Nixon's priorities

149. L. FISHER, *supra* note 28, at 156.

150. Executive Order 11541, 31 U.S.C. § 501 (1982), *cited in* L. FISHER, *supra* note 28, at 47.

151. *Id.* at 49-51. "All budget functions transferred to the President were delegated to the OMB Director, such functions to be carried out by the Director 'under the direction of the President and pursuant to such further instructions as the President from time to time may issue.'" *Id.* at 51 (quoting from Executive Order 11541).

152. *Id.* at 51-54.

153. *See supra* notes 146-49 and accompanying text.

154. *See 1973 Hearings, supra* note 37, at 358-402 (testimony of Deputy Attorney General Joseph Sneed). *See also* The Washington Post, February 1, 1973, *reprinted in 1973 Hearings, supra* note 37, at 1019.

were very different from those of the Congress, and for the first time, substantial cutbacks were made in domestic programs, particularly those with which the President philosophically disagreed. As amended in 1974, the Anti-Deficiency Act now provides only limited executive discretion to refuse to spend appropriated funds.¹⁵⁵

Congress has also used governmental reorganization acts to direct the President to eliminate inefficiency and waste and to reduce government spending. To assure control over the process, Congress has attached language to the law stipulating that the reorganization plan be submitted to Congress for review before becoming effective.¹⁵⁶

Some programs are funded as "no-year" appropriations, to be spent over an unspecified time until expended. Purchases of military equipment and construction of public buildings are examples of such programs.¹⁵⁷ In addition, federal funds can be withheld from recipient organizations which discriminate in violation of Title VI of the Civil Rights Act of 1964.¹⁵⁸

The public debt limit has been used as a justification for withholding funds. As one scholar observed, this was merely a pretext for the administration to selectively excise programs which it did not want and fully fund those programs it supported.¹⁵⁹ Spending ceilings have occasionally been enacted with a percentage reduction formula for agency budgets. These may directly conflict with appropriations already enacted and can become a source of executive abuse.¹⁶⁰

Lastly, the language of the statute itself has caused interpretation problems.¹⁶¹ President Nixon argued that appropriations bills

155. ICA, § 1002.

156. See, e.g., *supra* note 145 and accompanying text.

157. See Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124, 125 (1969).

158. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VI, § 602, 42 U.S.C. § 2000d-1 (1982).

159. L. FISHER, *supra* note 28, at 153. See also Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 206 (1974).

160. L. FISHER, *supra* note 28, at 152-153. President Nixon used the ceiling as a tool for cutting unwanted domestic programs. The Congress refused to enact another such spending ceiling since it could not limit executive discretion. The automatic spending cut mechanism in the Gramm-Rudman law is an updated version of the spending ceiling. This "automatic" mechanism, declared unconstitutional in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), was designed to minimize the President's discretion to make cuts selectively. The Gramm-Rudman law has been amended to correct its constitutional infirmity. Currently in force, its automatic sequestering provisions are now forcing the Reagan Administration to negotiate with the Congress on budget policy.

161. All the litigation on impoundment of funds and currently on severability has focused

were simply authorizations or "ceilings" for spending, and, absent mandatory language, he as the chief executive had discretion to spend less than the full allocation. Yet this rationale completely ignores the fact that an appropriations bill, passed by both Houses of Congress and signed by the President, is a law. The appropriation reflects a consensus on policy as to the allocation of resources. Fiscal restraints on programs which severely limit their scope and inhibit performance are in fact policy determinations—legislative acts—made unilaterally by the executive in disregard of Congress' determination. Enactment of the Impoundment Control Act narrowed and focused the scope of executive discretion.¹⁶² When Congress passed the law, it recognized the need to retain the executive's capability to manage the federal bureaucracy while eliminating the need for Congress to reaffirm its past legislative judgments in the face of impoundments.

IV. CONSTITUTIONAL AUTHORITY

The remaining constitutional issue which the Supreme Court has not yet decided is whether the President has inherent power to withhold the spending of appropriated funds. Few of the impoundment cases have addressed the inherent power of the President to withhold spending.¹⁶³ This constitutional issue has only been raised as an alternative theory to statutory powers.

The constitutional basis for the inherent powers argument is found in Article II, the vesting of executive power in the President¹⁶⁴ and the requirement to faithfully execute the laws.¹⁶⁵ During the Nixon presidency, this constitutional claim appeared to be an unlimited discretion: "The President's obligation to faithfully

on congressional intent and statutory construction. The courts in the 1970s overwhelmingly rejected the government's interpretation of the statutory language. See *supra* note 39. Since the initial litigation, Congress has inserted explicitly mandatory language in the authorization and appropriations bills.

162. See *supra* notes 42-63 and accompanying text.

163. Those courts which did, soundly rejected any finding of inherent power. See *Campaign Clean Water, Inc. v. Train*, 489 F.2d 492, 498 (1973) ("When the executive exercises its responsibility under appropriation 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 of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion . . ."); *State of Louisiana ex rel. Guste v. Brinegar*, 388 F. Supp. 1319, 1324-25 (1975) (citing Justice Black's argument in *The Steel Seizure Case* with approval and noting that the executive power and faithful execution clauses "are hardly grants of legislative power"). See also L. FISHER, COURT CASES, *supra* note 40, at 76-82.

164. U.S. CONST. art. II, § 1.

165. U.S. CONST. art. II, § 3.

execute the laws plainly includes an obligation to prevent waste."¹⁶⁶ Given the Congress' demonstrated inability to responsibly manage the economic problems of inflation and a swollen budget, Deputy Attorney General Joseph Sneed further argued:

Our Nation needs the impounding authority vested in the President to check this otherwise ruinous tendency of Congress. The exercise of this authority by the President to promote fiscal stability is not usurpation; rather it is in the great tradition of checks and balances upon which our Constitution is based.¹⁶⁷

Clearly the definition of "waste" in fiscal policy can and did differ dramatically between the Republican President and Democratic Congress. Similarly, promoting "fiscal stability" meant making choices between alternative programs—a legislative act—which Congress had already performed through its appropriations process.

There are few Supreme Court decisions which bear on this discussion. One of the earliest is *Kendall v. United States ex rel. Stokes*.¹⁶⁸ During President Jackson's administration the Postmaster General refused to pay an individual for contracted mail delivery services although Congress had specifically appropriated funds to do so. In holding that the Postmaster General must pay, the Court stated: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies the power to forbid their execution is a novel construction of the Constitution, and entirely inadmissible."¹⁶⁹ Although the Court's language may be used to deny the President discretionary authority to withhold spending, *Kendall* can be distinguished on its facts from the current impoundment dispute in that it involved an individual claim for services under a contractual obligation with the government.¹⁷⁰ The impoundments at issue during the Nixon and Reagan administrations involved funding for federal programs.

166. 1973 *Hearings*, *supra* note 37, at 360 (testimony of Deputy Attorney General Joseph Sneed).

167. *Id.* at 363. Although this argument is similar to the dissent in *The Steel Seizure Case*, Justice Vinson stressed inherent *emergency* powers, those necessarily involved to assure survival of the nation. See *infra* note 190 and accompanying text.

168. 37 U.S. (12 Pet.) 524 (1838).

169. *Id.* at 613.

170. The Court further distinguished between ministerial (nondiscretionary statutory duty) and executive (discretionary) acts, *id.* at 613-14, a distinction that was further developed in *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840). This attempt by the Court to allocate authority to both branches does not really resolve the fundamental issue, since neither word clarifies the distinction. One still must resort to statutory construction and congressional intent to determine whether discretion was granted to the President.

A. The Steel Seizure Case

The major Supreme Court decision on inherent executive powers¹⁷¹ is *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁷² In *Youngstown*, President Truman ordered the seizure of the steel mills on April 8, 1952, after failure to settle a labor dispute threatened a nation-wide steel strike. The President immediately notified Congress and justified his action on the basis of his executive powers and as Commander in Chief.¹⁷³ In separate opinions, the Court held 6-3 that President Truman did not have the constitutional authority in this situation to take over steel production. The six majority opinions did not completely reject the theory of inherent executive power although Justices Black and Douglas clearly did and Frankfurter and Jackson came close. However, the opinion left any such inherent constitutional power which might exist severely limited and insufficient to support a President's attempt to impound funds.

Writing for the Court (and joined in a concurrence by Douglas),¹⁷⁴ Justice Black found no specific constitutional or statutory authority to justify President Truman's act.¹⁷⁵ Addressing specifically the President's executive power, Justice Black argued that: "The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad,"¹⁷⁶ and all other law-making powers are specifically vested in the Congress. Structurally, Black and Douglas saw the divisions among the three branches regarding their respective powers as fairly clearly drawn. This strict view of separation of powers was later echoed by Chief Justice Burger in the *Chadha* decision.¹⁷⁷

The four concurring Justices—Frankfurter, Jackson, Burton and Clark—did not view the jurisdictional lines so clearly. To Frankfurter, the three governmental branches "are partly interact-

171. The term "inherent powers" is used in the all-inclusive manner suggested by Justice Jackson: "Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers, 'ple-nary' powers, 'war' powers and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646-47 (1952) (Jackson, J., concurring).

172. 343 U.S. 579 (1952).

173. At the time of the strike, the United States was still engaged in a police action in Korea. The President was concerned that the strike might cripple the war effort. *Id.* at 583.

174. *Id.* at 629 (Douglas, J., concurring).

175. "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. . . . It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution." *Id.* at 585-87.

176. *Id.* at 587.

177. See *supra* notes 66-75 and accompanying text.

ing, not wholly disjointed."¹⁷⁸ Nor do they operate in a vacuum. Historical experiences have a way of shaping governments as well as people, which become a "gloss" on vested executive powers.¹⁷⁹ Frankfurter did caution however that the President's powers are not undefined.¹⁸⁰ Quoting Justice Holmes, Frankfurter argued that the duty to faithfully execute the laws "is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."¹⁸¹ Frankfurter did not find historical justification sufficient to support President Truman's exercise of presidential power.¹⁸²

Justice Jackson similarly described an interwoven governmental system but with fluctuating presidential powers "depending upon their disjunction or conjunction with those of Congress."¹⁸³ Jackson outlined three conditions against which to test the legality of a President's assertion of authority.¹⁸⁴ In the first, the President acting with Congress has maximum power to act.¹⁸⁵ Second, the President acting without any congressional grant or denial of authority, is in the "twilight zone" of uncertain power and must rely on his own independent powers for authority to act.¹⁸⁶ Third, the President acting contrary to express or implied congressional will is acting with least power, and his act is subject to strict scrutiny.¹⁸⁷

Both Justices Clark and Burton focused on the Commander in Chief powers and the right to act in a national emergency. Only the case of an extreme emergency—"imminent invasion or threatened attack"¹⁸⁸—Burton argued, might justify inherent executive power. Clark, however, found such a grant of power in a "grave and imper-

178. *Youngstown Sheet & Tube*, 343 U.S. at 610 (Frankfurter, J., concurring).

179. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissably narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.

Id. In asserting inherent executive power, Nixon also argued that the practice of impoundment had been used and not objected to since the early days of the Republic. While asserting the "gloss" of long historical use, Nixon overlooked the fact that his use of impoundments was unprecedented in scope and nature, amounting to a major redesign of government policy.

180. 343 U.S. at 610.

181. *Id.*, quoting *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting).

182. *Id.* at 611-13.

183. *Id.* at 635 (Jackson, J., concurring).

184. *Id.* at 635-38.

185. *Id.* at 635-37.

186. *Id.* at 637.

187. *Id.* at 637-38.

188. *Id.* at 659 (Burton, J., concurring).

ative national emergency,"¹⁸⁹ a lesser standard.

The three dissenters, Vinson, Reed, and Minton, argued that as a requisite for faithful execution of the laws, the President has inherent emergency powers which here encompassed continued steel production and stable prices critical to the ongoing war effort. They rejected the idea that a President is an "automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake."¹⁹⁰ And they cited instances where Presidents have acted first in an emergency and then informed Congress who usually approved. The Court concluded that the President may have very limited inherent emergency powers but the threat to the war effort of an imminent steel strike was not sufficiently proved or threatening to justify seizure.¹⁹¹

B. *The Youngstown Principles and the Impoundment Control Act*

Applying the principles laid out in *Youngstown* to impoundment, the conclusion reached is that the President does not have inherent power to withhold spending appropriated funds. Short of a wartime emergency when the nation's production and economy would have to be instantly diverted to the defense effort, any other fiscal emergency would probably be insufficient to meet the *Youngstown* emergency standard.¹⁹² The President has both the time and the legislative tools to request a change in the policy. The design of the 1974 Impoundment Control Act was to formalize that process.

When we apply Justice Jackson's analysis of executive actions to the current conflict, there is today far less historical ambiguity about congressional intent than President Nixon could argue existed.¹⁹³ First, a series of legal challenges to the Nixon Administra-

189. *Id.* at 662 (Clark, J., concurring).

190. *Id.* at 682 (Vinson, J., dissenting).

191. The crucial factor in the Court's decision was that Congress had denied such seizure authority in the past. President Truman was not acting in a legislative void. *Youngstown Sheet & Tube*, 343 U.S. at 586.

192. The anti-inflation justification for impoundment used by Nixon was rejected by the courts. See L. FISHER, COURT CASES, *supra* note 40, at 83-84; *Presidential Impoundment of Appropriated Funds*, House Comm. on Government Operations, *supra* note 39, at 63.

193. See Levinson & Mills, *supra* note 159, at 199. In 1969, then-Assistant Attorney General William Rehnquist wrote that:

existence of such a broad power is supported by neither reason nor precedent. There is, of course, no question that an appropriation act permits but does not require the executive branch to spend funds. . . . 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. It may be argued that the spending of money is inherently an executive function, and it seems an anomalous proposition

tion's decision to withhold spending on housing, environmental, and other domestic programs was successfully challenged in the courts. By 1974, the Impoundment Control Act was enacted with Nixon's approval. Presidents Ford and Carter adhered to the reporting and approval mechanisms of the Impoundment Control Act. Reagan initially accepted the terms of the Impoundment Control Act,¹⁹⁴ although as President, he has continued to request line-item veto authority from the Congress.¹⁹⁵ Applying Jackson's third category—when the President is acting contrary to the express or implied will of Congress, he has the least power to act—the Impoundment Control Act is a particularly clear statement of Congress' intent that the President has no authority to redesign congressional policy through withholding.¹⁹⁶ The President cannot choose another course because it is preferable. Otherwise impoundment becomes in effect the unilateral rewriting of a law after enactment—absent any check on presidential power—and the Constitution did not invest so great a veto power in the President.¹⁹⁷

When Congress receives a proposed budget from the President, each House evaluates the programs and policies in light of its own agenda. Hearings are held for administration officials as well as public representatives. Bills are approved by each body, and the differences are compromised in a conference bill which is resubmitted to each House for approval. The bill then goes to the President for signature (approval) or veto (disapproval). Once enacted into law the funds are available for expenditure by the executive. By substituting his own policy agenda and denying or significantly delaying funds already appropriated, the President is selectively vetoing those sections of the appropriations law with which he disagrees—and for which he has no constitutional or statutory

that because the executive branch is bound to execute the laws, it is free to decline to execute them.

1973 *Hearings*, *supra* note 37, at 393-94.

194. Candidate Reagan had also implied that the Congress should have some veto authority over agency actions. See CONGRESS AND THE NATION 1981-84, *supra* note 22, at 833.

195. In his State of the Union address, (January 27, 1987), President Reagan again requested line-item veto authority from the Congress. The rescission mechanism that remains valid is essentially a negotiated line-item veto.

196. This finding has been clearly affirmed by both the federal district and circuit appellate courts in the *New Haven* case. 634 F. Supp. 1449 (D.D.C. 1986), *aff'd* 809 F.2d 900 (D.C. Cir. 1987).

197. See Mikva & Hertz, *supra* note 27, at 380-81: "When the Congress has considered an expenditure and approved it, any withholding of funds will conflict with the congressional consideration."

power. In addition, Congress has no mechanism to force compliance with the law it has enacted. It could enact a new appropriations bill mandating that those withheld funds be spent. This is not, however, a sufficient check as the President could always exercise his veto, and should the bill then pass on an override, the President could again ignore it. The only remedy left to Congress would then be through the courts—an often ineffective, time-consuming, patchwork process. This is not the proper role for the courts. The judiciary was not designed to arbitrate budget policy disputes between the executive and legislative branches. Protracted litigation could also accomplish the executive's objective of defeating or crippling the targeted program. Litigation does not resolve the need for a prospective enforcement mechanism.

V. THE CURRENT IMPASSE

The effects of both *Chadha* and *New Haven* on the Impoundment Control Act have left the President with very limited discretion in spending authority. The Anti-Deficiency Act is now the general statutory authority which permits non-policy deferrals—to provide for contingencies or effect savings. The deferral provision of the Impoundment Control Act is no longer operative. This was the only general statutory provision authorizing policy deferrals.

Although the history is clear that spending power rests principally with the Congress, the executive-legislative relationship traced in Part III demonstrates that the spending power is not exclusive. The executive has acquired dominant control over the budget with the enormous accrual of power within OMB and the executive agencies as compared to the congressional committee structure. Aided by judicial decisions on impoundment and adoption of the Budget and Impoundment Control Act, Congress began to restore some balance to the process starting in 1974. Fiscal conflicts between the Reagan Administration and Congress have revealed the weaknesses in the legislative oversight process. The *New Haven* result should force the Congress to address the serious problems remaining, if that branch is to effectively reassert its constitutional prerogative over spending. The critical feature of this discussion is that the allocation of discretionary power properly remains a *political* question. It needs to be resolved between the legislative and executive branches within the new constraints imposed by the Court.

In a series of congressional hearings in 1982 and again in 1986,

many observers, including legislators, public officials, scholars, and lawyers, raised concerns about the defects in assuring compliance with Impoundment Control Act procedures.¹⁹⁸ Much of the criticism was directed toward the enforcement ability of the GAO as well as GAO's interpretation of certain critical provisions of the Impoundment Control Act. Some of it focused on the nature of the political compromise which shaped the final form of the ICA.¹⁹⁹ Since *Chadha*, attention has shifted to the administration's abuse of the crippled deferral process.

Congress' intent in enacting the Impoundment Control Act was to assert review authority over all spending delays or terminations made for policy reasons as distinct from managerial reasons. Yet there is great difficulty in distinguishing between policy and non-policy motives for not spending. The broad definitions used in the Impoundment Control Act should have captured most of the spending changes with which Congress was concerned.²⁰⁰ Under its Impoundment Control Act review authority, however, GAO has used definitional guidelines which give broader discretion to executive deferrals than Congress may have intended. Thus in interpreting the rescission language of section 1012(a), GAO has concluded that it

does not establish that termination of a program or activity is necessarily a rescission of the funds. . . . A rescission occurs when budget authority will be unused: if a cancellation will have that result, then a rescission should be reported and, if the President did not do so, we would. But if a cancellation merely results in budget authority being used for another authorized purpose, then no rescission occurs.²⁰¹

This same analysis has also been applied to the increased use of deferrals pending transfer requests. A program is deferred on the basis that a request to transfer the funds to another account has been submitted for congressional action. Again, the fact that the

198. See *Impoundment Oversight Hearing*, *supra* note 54; *Deferral Defects Hearing*, *supra* note 57; *Deferral Process Hearing*, *supra* note 57.

199. The Senate version of impoundment control placed the burden of gaining congressional approval on the President. The House version gave the President authority to impound while the burden of disapproval lay with either House of Congress. The law that emerged incorporated both themes—the Senate version in rescissions and the House version in deferrals.

200. There have been suggestions that the terms are so imprecise as to be unworkable and thus capture too many routine spending deferrals. See Note, *supra* note 36, at 693 n.2. Yet if the statutory language is too narrowly drawn, it becomes far easier to circumvent the terms of the law.

201. *Legislative Branch Appropriations for 1987: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 99th Cong., 2d Sess. pt.2 525-26 (1986).

administration intends to rescind the program should Congress agree is not held per se to be a rescission.²⁰² As a result of this interpretation, GAO has reclassified very few deferral messages.²⁰³ When a deferral is reclassified or an improper impoundment is reported by GAO as a rescission, GAO has determined that the 45-day clock begins running at that later date, rather than from the point at which the funds were first impounded.

In 1975, GAO ruled that the President can withhold funds proposed in a rescission message, although the clear language of section 1012(b) states the funds "shall be made available for obligation."²⁰⁴ Thus the President has been able to withhold funds immediately upon submitting either a deferral or a rescission. The key difference between these alternative methods was the time limit imposed on the rescission. Once *Chadha* was decided, the appropriations committees decided not to use one-House resolutions to disapprove deferrals. Attaching disapprovals to the appropriations or supplemental bills not only required a waiver of the House rules,²⁰⁵ but also meant long delays in overturning impoundment actions.²⁰⁶

Additionally, Impoundment Control Act reporting requirements are premised on good faith compliance by the executive. Yet OMB has terminated funds in anticipation of later reporting an impoundment message.²⁰⁷ This is in clear violation of the Impoundment Control Act, but the GAO lacks any comprehensive monitoring procedure other than through reports from public officials or program recipients.

With the limited discretionary authority available now to the President, the Reagan Administration is more aggressively exploiting these weaknesses in the process. Although OMB is still reporting deferrals, transfer requests are increasingly used as a basis for deferrals. The National League of Cities turned again to the court

202. See *Deferral Defects Hearing*, *supra* note 57, at 108-11 (testimony of Milton J. Socolar, Special Assistant to the Comptroller General, GAO).

203. Deferrals reclassified by GAO numbered 7 in 1975 and none until 1986, when one deferral was reclassified as of March 20, 1986. *Deferral Process Hearing*, *supra* note 57, at 146. It should be noted that the administration has also reclassified deferrals. See *supra* note 93.

204. See *supra* note 54.

205. See *supra* note 91.

206. Before *Chadha*, an impoundment resolution (deferral disapproval) could be acted on in 2-3 weeks. Using the appropriations bills after *Chadha* increased the time needed to halt an impoundment to 6-8 months. See *Deferral Defects Hearing*, *supra* note 57, at 14 (statement of Hon. Jamie L. Whitten, Chairman of the House Appropriations Committee).

207. See *Impoundment Oversight Hearing*, *supra* note 54, at 4-20 (statement of Rep. Peter A. Peyser (N.Y.) on OMB impoundment of funds for library services).

seeking distribution of Revenue Sharing funds which were sequestered under Gramm-Rudman and transferred from the trust fund into the general treasury.²⁰⁸

Early in 1987, while the administration stated that it had essentially abandoned requests for policy deferrals, the President on January 28 submitted a report for 25 policy deferrals totaling \$300 million pending transfer requests.²⁰⁹ The cited authority for deferral included section 1013 of the Impoundment Control Act and a provision in the 1987 Continuing Resolution relating to the federal pay increase.²¹⁰ In February the Public Citizen Litigation Group instituted a suit on behalf of the Mid-Ohio Food Bank and others challenging the deferral of funds which supported emergency food organizations.²¹¹ Although the deferral was ultimately overruled by Congress and funding restored, the plaintiffs in *Mid-Ohio* requested a declaratory judgment on the issue of the President's statutory authority to make policy deferrals. The district court declined to decide this issue.²¹² An April 1 GAO report to Congress concluded that the deferrals were not permitted under either provision since (1) section 1013, the exclusive statutory provision for policy deferrals was invalid, and (2) neither congressional intent nor statutory construction supported the argument that the pay raise provision gave deferral authority to the President.²¹³ The report also noted that GAO no longer had authority to sue on behalf of

208. *NLC Suit to Challenge Treasury on GRS*, Nation's Cities Weekly, Feb. 16, 1987, (vol. 10, no. 7) at 1, col. 1. Gramm-Rudman specifies that trust funds shall remain sequestered in the trust accounts. The present administration has justified the transfer to the general treasury as facilitating the closing down of the Revenue Sharing program. Judge Joyce Hens Green ruled that the revenue sharing funds should be released to the cities. *National Ass'n of Counties v. Baker*, 669 F. Supp. 518 (D.D.C. 1987). See also 45 CONG. Q. WEEKLY REP. 1766 (Aug. 1, 1987).

209. 45 CONG. Q. WEEKLY REP. 145 (Jan. 24, 1987).

210. Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-591, § 144(a)(3)(A), 100 Stat. 3341-353 (1986). The language stated that appropriations for federal pay increases "shall be made based on the assumption that the various departments and agencies of the Government will, in the aggregate, absorb 50 percent of the increase in total pay for fiscal year 1987." *Id.* The administration's interpretation of this language gives the President separate impoundment authority to selectively withhold program funds regardless of any administrative cost savings, employee attrition or supplemental appropriation. *Memo-randum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 15-17*, *Mid-Ohio Food Bank v. Lyng*, 670 F. Supp. 403 (D.D.C. 1987). See also Comptroller General Report to Congress at 6-8 (B-224882 of Apr. 1, 1987) (discussing legality of executive spending deferrals and rejecting the administration's argument).

211. *Mid-Ohio Food Bank*, 670 F. Supp. 403.

212. *Id.* at 408. See also *Notice of Withdrawal of Plaintiffs' Motion for Preliminary Injunction, Mid-Ohio Food Bank*.

213. Comptroller General Report to Congress, *supra* note 210.

Congress for release of the funds once section 1013 of the Impoundment Control Act had been invalidated.²¹⁴

The deletion of section 1013 which followed from the *New Haven* decision has not fully resolved the deferral issue. A gap in the statute may now leave in doubt whether deferrals pursuant to statutory authority other than the Impoundment Control Act should continue to be reported to Congress.²¹⁵ The Impoundment Control Act created statutory authority to impound funds while also providing a reporting and approval mechanism. Although statutory authority other than the Impoundment Control Act is quite limited, the lack of review could give rise to abuse of that impoundment authority.

Congressman Bruce Morrison²¹⁶ and forty-nine co-sponsors have introduced H.R. 1181 amending the Impoundment Control Act to provide for deferral authority on the same basis as rescissions. Thus proposed deferrals will not be effective unless Congress acts within 45 legislative days to approve the deferral. It is important that Congress consider adopting a proposal along these lines.

Treating deferrals in the same manner as rescissions and placing the burden for approval on the President no longer requires distinguishing between the two. It should easily simplify the review process and remove from the discussion whether a message is properly classified to instead decide whether the withholding is justified. Reporting of impoundments still rests on a good faith compliance with the process, but the resources of both the GAO and the several budget and appropriations committees would be better focused on the substantive policy issues.

The evident weakness of the GAO as an enforcement agency compels more assertive action by Congress. Although the GAO was created by Congress to serve as its investigative arm, its Impoundment Control Act-role in executive-legislative impoundment disputes also placed GAO in a difficult adjudicatory position be-

214. Section 1016 of the ICA states: "If, under section 1012(b) [rescissions] or 1013(b) [deferrals], budget authority is required to be made available for obligation and such budget authority is not made available" the Comptroller General may bring a civil suit.

215. Section 1013(a) states: "Whenever the President [or other government officials] . . . proposes to defer any budget authority provided for a specific purpose or project" the Congress should be notified. Since this notice provision applies to deferral of *any* budget authority, it may now mean that Congress is not required to be notified of deferrals under the Anti-Deficiency Act. Not having to report deferral actions makes Congress' oversight of the impoundment process more difficult.

216. Rep. Bruce Morrison (Conn.) was one of the congressional plaintiffs in the successful *New Haven* litigation. He introduced this same bill in 1986.

tween the branches. GAO's reluctance to precipitate a crisis with the executive may explain its predominant support of the administration's interpretation of the statute. Treating deferrals as rescissions and restoring the Comptroller General's authority to sue for any unauthorized withholding strengthens the review and enforcement provision of the Impoundment Control Act. Using the same timetable and approval mechanism should also eliminate the need for such creative devices as a "deferral pending transfer request" as well as assure continued funding should Congress disapprove the deferral request.

The Impoundment Control Act should also be amended to state clearly that it is the exclusive statutory authority for policy impoundments, whether a deferral or rescission. The *New Haven* court and GAO have adopted this position; the statute should be explicit on this point. The notice provision for all deferrals should be clearly incorporated in the bill so that all proposed deferrals and rescissions are reported to Congress.

Given the constraints of *Chadha*, there is no other legislative mechanism which will serve the congressional interest in retaining control over executive spending. Whether the Congress chooses to act is a political question. If it does, then a strong consensus is required, probably a supermajority to override an expected presidential veto. There is a growing crisis on this issue, although it has not yet reached the pitch of the Nixon period which precipitated the Budget and Impoundment Control Act. The administration is talking compromise while it is also taking steps to circumvent congressional authority. The *Chadha* Court took away a creative legislative tool which allowed for flexibility in sharing power. *New Haven* has reasserted congressional prerogatives in spending power. It is now up to Congress to act to preserve that power.

LORETTA HAGOPIAN GARRISON