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# UNIMPOUNDMENT: POLITICS AND THE COURTS IN THE RELEASE OF IMPOUNDED FUNDS\*

by Jon L. Mills\*\* and William G. Munselle\*\*\*

*During the administration of President Nixon, the impoundment of funds appropriated by the Congress became not merely a means of executive economy but a tool of presidential politics. Non-judicial methods of unimpoundment lost their efficacy, and the courts became involved in the conflict between the President and the Congress in resolving the question of whether impoundment was either constitutionally or legislatively proscribed. Mr. Mills and Professor Munselle examine the process of unimpoundment both as a political phenomenon and as a legal issue. They survey the extra-judicial means of unimpoundment and then consider the resolution of that issue in the courts, particularly as affected by the recent decision of the Supreme Court in Train v. New York. Finally, they discuss the implications of the recently enacted Budget and Impoundment Control Act of 1974, particularly as it affects the judicial process of unimpoundment. Their conclusions suggest that the Act has formalized both methods of unimpoundment and that the resolution of budgetary conflicts between the President and the Congress will continue in both political and judicial arenas.*

## INTRODUCTION

In 1965 Professor Arthur Miller stated that the power of presidential impoundment could be exercised "to the extent that the political milieu in which he [the President] operates permits him to do so."<sup>1</sup> Although federal courts were a part of that milieu in 1965, they had not yet become actively involved in the impoundment controversy. At that time disputes concerning impoundment were resolved by, or at least were limited to, the executive branch and Congress without the intervention of courts.<sup>2</sup> Apparently, the severity of impoundments and the degree of animosity they engendered had not

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<sup>1</sup> Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision Making*, 43 N.C.L. Rev. 502 (1965) [hereinafter cited as Miller].

<sup>2</sup> See notes 12-33 *infra* and accompanying text.

reached a stage at which any party found litigation either necessary or desirable. In the 1970's, however, courts were drawn into the conflict. Legal philosophers had long acknowledged the political role of the courts, and judicial involvement in impoundment provided further evidence of this fact.<sup>3</sup> But the current role of the courts in the budget is unique.<sup>4</sup> Previously, the budget process had been solely a matter between Congress and the Executive;<sup>5</sup> the impoundment controversy has revealed, however, that agreement between the Executive and Congress cannot always be achieved.<sup>6</sup> When there is an impasse, the role of the courts becomes crucial.

Impoundment, when taken to court, raises most difficult questions of judicial review and judicial restraint,<sup>7</sup> for it requires the courts to define the relative scope of executive and congressional authority in an area lacking explicit constitutional guidelines. In this ambiguous and unfamiliar setting the courts have become active participants in the impoundment controversy. Without dispute impoundment in its broadest sense occurred for many years before the Nixon Administration,<sup>8</sup> yet political institutions other than the courts previously acted as the forum in which the release of funds was sought. Courts became involved only after continued failure of other institutions to settle the dispute.

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<sup>3</sup> See Miller, *supra* note 1, at 515-16, 537.

<sup>4</sup> Never before have courts become involved as directly in determining the expenditure of appropriated funds. The unimpoundment phase of the budget is the only stage in which the courts have thus far become involved; however, the new budget act may compel courts to become involved with requiring reporting of deferrals, etc. See notes 106-07 *infra*.

<sup>5</sup> See notes 12-33 *infra*. In the early days of the republic, long before the existence of a budget, Congress appropriated separately to various branches of Government. L. FISHER, *PRESIDENT AND CONGRESS 85-90* (1972). Yet even at an early date tension existed between the executive branch and Congress over spending. Witness the continuing conflict between Secretary of the Treasury Alexander Hamilton and the Congress.

<sup>6</sup> The President has charged the Congress with being "spendthrifts." *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., 239-40 (1973) [hereinafter cited as *1973 Hearings*]. They have in turn charged the President with unconstitutionally attempting to usurp their "power of the purse." *Id.* at 4-6. The result was an impasse.

<sup>7</sup> See notes 42-77 *infra*.

<sup>8</sup> See Williams, *The Impounding of Funds by the Bureau of the Budget*, reprinted in *Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 378 (1971) [hereinafter cited as *1971 Hearings*]; Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 198-99 (1974) [hereinafter cited as *Impoundment: Legal Principles*].

Finally, in 1974 the impoundment controversy in *Train v. New York* reached the Supreme Court.<sup>9</sup> The Court's acceptance of certiorari in *Train v. New York* and its decision overturning the impoundment are the ultimate recognitions of the courts' role in the budget process. If the expenditure of funds is an implementation of law and, therefore, a reflection of national policy, the courts apparently now feel a responsibility to interpret and define that policy. Courts are being asked to enforce government expenditures, and the trend has been to uphold the claims of those seeking unimpoundment.<sup>10</sup>

New legislation has recently been enacted which formalizes the procedures for impounding and unimpounding—the Congressional Budget and Impoundment Control Act of 1974.<sup>11</sup> These procedures will be examined as will some of the major circumstances which led to their passage. Finally, the likely future of such methods under the new Act will be assessed.

#### UNIMPOUNDING PRIOR TO COURT INVOLVEMENT

In the first two years of the Nixon Presidency and in previous administrations, efforts to unimpound funds were channeled through non-judicial political processes; these can be defined as efforts by an individual or by groups to obtain the expenditure of congressionally authorized funds in the face of executive branch refusal to expend such funds.<sup>12</sup> "Frozen funds" have been released on numerous occasions when adverse political or economic reaction to impoundments has become excessive in the opinion of executive branch officials.

For example, in January, 1972, the Rural Electric Cooperative Association and its supporters were successful in obtaining the release of \$109 million in frozen funds intended for rural electrification

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<sup>9</sup> *Train v. New York*, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975).

<sup>10</sup> See L. FISHER, COURT CASES ON IMPOUNDMENT OF FUNDS: A PUBLIC POLICY ANALYSIS (Congressional Research Service, Library of Congress, multilith, Mar. 15, 1974).

<sup>11</sup> Congressional Budget and Impoundment Control Act, Pub. L. No. 93-344 (July 12, 1974), 88 Stat. 297.

<sup>12</sup> The definition for "impoundment" itself has been elusive. We adopt the definition that an impoundment results when any type of executive action or inaction precludes or delays the obligation or expenditure of any part of authorized budget authority. See *Impoundment: Legal Principles*, *supra* note 8, at 192, 193.

loans.<sup>13</sup> In the same year, the National Limestone Institute and other concerned associations were able, through the help of Secretary of Agriculture Earl Butz, to obtain the release of \$55 million for the Rural Environmental Assistance Program.<sup>14</sup> This practice of releasing impounded funds because of political pressure is not a recent development. As early as 1942, the Bureau of the Budget released \$513,000 for an Oklahoma flood control project after pressure was applied by Senators Lee and Thomas of Oklahoma and Senator McKellar of Tennessee.<sup>15</sup> In 1943, the Bureau released \$800,000 for Nevada airports because of political pressure from Senator McCarran.<sup>16</sup> Dr. Louis Fisher reports similar events during the Johnson Administration:

Political pressures have sometimes been enough to pry loose impounded funds. After the November 1966 elections, President Johnson announced a \$5.3 billion reduction in Federal programs. Economic and legal justifications presented by the Administration failed to placate the localities affected by the cutbacks. Sensitive to criticism from the states, President Johnson released some of the money in February 1967, and on the eve of a conference the next month with governors he released additional amounts.<sup>17</sup>

These unimpoundments were accomplished through political pressure exerted by both ad hoc and existing groups, some of which will subsequently be discussed.<sup>18</sup> The process of getting impounded funds released exemplifies the political bargaining process. According to one Nixon Administration official, some leeway was allowed for programs in which cuts generated political costs that were too great or where the parties successfully bargained. In such cases, funds were released in a process termed "fine tuning."<sup>19</sup> Those seek-

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<sup>13</sup> Interview conducted by one of the authors with the staff of the Rural Electric Cooperative Association. This interview was one of several conducted with various interest groups June 12-14, 1973, in Washington, D.C.

<sup>14</sup> Interview conducted by one of the authors with the staff of the National Limestone Institute in Washington, D.C., June 12-14, 1973. This interview was one of several conducted with various interest groups.

<sup>15</sup> Williams, *supra* note 8, at 384-86.

<sup>16</sup> *Id.* at 386-87.

<sup>17</sup> L. FISHER, *PRESIDENT AND CONGRESS* 126 (1973).

<sup>18</sup> Confidential interview conducted by one of the authors in Washington, D.C., June 12-14, 1973.

<sup>19</sup> Confidential interview conducted by one of the authors in Washington, D.C., June 14, 1973.

ing release of funds vary from congressional leaders to organized interest groups, individual Congressmen, citizens, governors, mayors, or even an agency itself which wants more money from the Office of Management and Budget (OMB).<sup>20</sup> Since unimpoundment is political, the relative political bargaining power of the party seeking the release is the central factor in predicting success. Several techniques utilized by those seeking unimpoundment will now be considered.

### *Methods of Unimpounding*

Organized interest group representatives or individual citizens have often telephoned or visited an agency which administered the program affected by an impoundment in an effort to get the funds restored.<sup>21</sup> While some lobbyists have expressed the view that such action is of little help since the power to restore cuts lies in the OMB rather than in the agencies, others feel it is valuable to contact the agency first to gain information before approaching the OMB. Officials of one local New York City agency supported by federal funds reported taking busloads of community people to the office of the Secretary of Health, Education & Welfare to stage a "sit-in" protesting the impoundment of funds.<sup>22</sup> These officials noted that such actions were not as successful in the Nixon Administration as in previous administrations in light of the possibility of very strong, direct police reaction. The possibility that people may get hurt was, according to these officials, a change from the 1968-69 period.

Attempts to unimpound funds have sometimes focused on the OMB. Visits and phone calls have been made to explain the consequences of the cutbacks and to explore the possibility of restoration of funds. Some lobbyists have complained of difficulty in gaining access to OMB officials,<sup>23</sup> however, and others claim that even when OMB officials have been contacted, few results have been gained.

Additionally, according to one Nixon Administration official,

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<sup>20</sup> Confidential interviews conducted by the authors in Washington, D.C., June 12-14, 1973 and in New York City, April 23-25, 1973.

<sup>21</sup> *Id.*

<sup>22</sup> Confidential interview conducted by one of the authors in New York City, April 23, 1973.

<sup>23</sup> Confidential interview conducted by one of the authors in Washington, D.C., June 13, 1973.

Domestic Council members have been importuned to release funds by interest groups and by Washington lawyers.<sup>24</sup> Interviewed lobbyists also indicated that unimpounding efforts were sometimes directed to Domestic Council personnel, such as former director John Ehrlichman.<sup>25</sup> Such appeals have sometimes been partly or completely successful.

Members of Congress have often been requested to assist in efforts to get funds released.<sup>26</sup> Constituents and interest groups have asked Representatives and Senators to call or visit agency officials, OMB personnel, or Domestic Council members. Further, interested parties have lobbied Congressmen for legislation which will free specific funds or curtail executive impoundment powers in general.<sup>27</sup> Some interest groups have made use of legislative rallies in their efforts to unimpound funds.<sup>28</sup> Members of such associations have been brought in from around the country to talk with their Congressmen.

The National Rural Electric Cooperative Association has used the tactic of the legislative rally in a particularly sophisticated manner. The Washington headquarters staff of the Association visited Democratic members of Congress before the rally to solicit their support in obtaining the release of loan funds for rural electrification. Then, the national headquarters relied on the state associations to bring members of the rural electric cooperatives to Washington to see their Republican Senators and Representatives. The state associations were careful to include among the constituents Republican state and congressional district chairmen who contacted Republican congressional leaders such as Senators Robert Dole, Hugh Scott, and Roman Hruska, and then-Representative Gerald Ford. After the rally, these Republican leaders applied pressure on the White

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<sup>24</sup> Confidential interview conducted by one of the authors in Washington, D.C., June 14, 1973.

<sup>25</sup> Confidential interviews conducted by one of the authors in Washington, D.C., June 13-14, 1973.

<sup>26</sup> Confidential interviews conducted by one of the authors in Washington, D.C., June 12-14, 1973.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* A legislative rally is a gathering of association members in one place for the purpose of contacting legislators and thereby affecting public policy. Association members meet with each other to discuss strategies and purposes and then contact legislators. A legislative rally may be held at the state level to influence state legislators or in Washington to influence members of Congress.

House to get the funds released; as a result, \$109 million of an impounded \$216 million was unfrozen.<sup>29</sup>

Congress itself has occasionally obtained the release of impounded funds by holding other funds desired by the President. For example, a congressional committee or sub-committee may delay an appropriation bill until impounded funds are unfrozen. The Foreign Assistance Act of 1971 is an example of congressional efforts to release frozen funds through the legislative process; the Act makes the obligation or expenditure of funds available under the Foreign Assistance Act and the Foreign Military Sales Act of 1971 explicitly contingent upon release of certain impounded funds.<sup>30</sup>

Interest groups have often cooperated with each other in attempts to unfreeze impounded funds by the formation of clearing houses and coalitions. One example is the Rural Impoundment Clearing House, an ad hoc subcommittee associated with the National Farm Coalition. Members of this organization include the National Farmers Organization, the National Rural Electric Cooperatives Association, the National Limestone Institute, the National Grange, the National Farmers Union, and the National Association of Wheat Growers. Members of such anti-impoundment alliances have met to discuss and disseminate news concerning impoundments, including advance leaks of forthcoming freezes.<sup>31</sup> They have also planned strategies for getting funds unfrozen and, in a cooperative, organized manner, have lobbied the executive and legislative branches for solutions to their common problems. For example, the National Ad Hoc Housing Coalition has lobbied for congressionally mandated

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<sup>29</sup> Interview conducted by one of the authors in Washington, D.C., June 12-14, 1973. The National Rural Electric Cooperative Association was one of several interest groups whose staffs were interviewed by one of the authors.

<sup>30</sup> Pub. L. No. 92-226 (Feb. 7, 1972), § 658(a), 86 Stat. 20, reprinted in 1972 U.S. CODE CONG. & ADM. NEWS 37.

Sec. 658(a). Except as otherwise provided in this section, none of the funds appropriated to carry out the provisions of this Act or the Foreign Military Sales Act shall be obligated or expended until the Comptroller General of the United States certifies to the Congress that all funds previously appropriated and thereafter impounded during the fiscal year 1971 for programs and activities administered by or under the direction of the Department of Agriculture, the Department of Housing and Urban Development, and the Department of Health, Education, and Welfare have been released for obligation and expenditure.

<sup>31</sup> Confidential interviews conducted by one of the authors in Washington, D.C., June 12-14, 1973.



spending measures, supported the Ervin anti-impoundment bill, lobbied the OMB, talked with White House staff members, and met with departmental secretaries.<sup>32</sup> These formal coalitions have not included all of the groups that have actually worked for the release of frozen funds. Other groups, although not formal members, have often cooperated with the coalitions in unimpounding attempts.<sup>33</sup>

In some states, the governor has been the focal point for political unimpoundment efforts. New York State is an example. According to one New York City government official, attempts to unfreeze impounded funds from the national government had to be channeled through then-Governor Nelson Rockefeller.<sup>34</sup> This official said he knew of several specific projects that were taken off a moratorium on spending, because, he had been told, "someone got to the Governor." Another city official claimed that New York State, under Governor Rockefeller, had much more luck in getting federal funds unfrozen than did New York City under Mayor Lindsay.

#### *Influence of Elections and Political Friendships in Unimpoundment*

The political nature of the unimpoundment process is especially clear when consideration is given to the role of elections and political friendships in the process. An officer of a national interest group which has been successful in obtaining the release of impounded funds was asked whether unimpoundments are related to political elections. He replied:

Yes, they are connected. The election in 1972 was related to the release of the \$109 million we got unfrozen. The funds were released in January [of 1972]. [Secretary of Agriculture] Butz left the door open for further releases at our national convention [where Butz spoke].<sup>35</sup>

An official of another national interest group association attributed

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<sup>32</sup> Interview conducted with the staff of a member organization of this Coalition by one of the authors in Washington, D.C., June 12-14, 1973. This organization was one of several whose staffs were interviewed.

<sup>33</sup> Confidential interview conducted by one of the authors in Washington, D.C., June 12, 1973.

<sup>34</sup> Confidential interview conducted by one of the authors in New York City, April 25, 1973.

<sup>35</sup> Confidential interview conducted by one of the authors in Washington, D.C., June 12, 1973.

the success of some unimpoundment efforts in 1971 to the fact that there was to be a presidential election in the following year.<sup>36</sup>

Both of these lobbyists seemed to feel that the release of impounded funds was viewed by the Nixon Administration as an effective campaign device. Louis Fisher has also pointed out that unimpounding is at times related to elections:

In the fall of 1970 it was learned that the Nixon Administration planned to withhold some education funds. Criticism began to build up in Congress and in the school districts. Two weeks before the November elections the Administration announced that the money would be released. When the Secretary of Health, Education and Welfare was asked whether the pending elections had prompted the Administration to reverse its position and release the funds, he replied, smiling, that there was "no connection whatsoever."<sup>37</sup>

The release of impounded funds has been used to reward political allies. One Washington lobbyist, pointing to Philadelphia's success in obtaining the release of \$10 million in urban funds, suggested that the sole motivation for such a release was the close political relationship between President Nixon and Mayor Rizzo.<sup>38</sup> The New York City official who claimed that it was necessary to channel unimpoundment efforts in the state through former Governor Rockefeller stated that Rockefeller's influence in this area was based on his help to President Nixon during the 1972 presidential election. Attempts to unimpound had to go through the governor "because he delivered New York."

This official also discussed the increasing politicization of the unimpoundment process:

Before the recent [housing] moratorium, only a few cases of unimpounding were highly political in nature. [By "highly political" he meant that White House involvement was encountered.] Unimpoundment was an administrative, substantive matter. Now there is little substantive discussion. Politici-

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<sup>36</sup> Confidential interview conducted by one of the authors in Washington, D.C., June 14, 1973.

<sup>37</sup> FISHER, *PRESIDENT AND CONGRESS* 126 (1972).

<sup>38</sup> Confidential interview conducted by the staff of the McIntosh Foundation Executive Impoundment Project on June 22, 1973.

zation is the rule rather than the exception. Politics was only part of the process of unfreezing the funds before the moratorium; politics is nearly the whole thing now.<sup>39</sup>

There has been considerable variation in the success of unimpounding efforts. Some groups have been highly successful while others have met with partial or total failure. Circumstances at the time of such efforts also affect success; the difficulty of unimpounding funds may vary with the particular administration or by time phases within each administration.<sup>40</sup> In sum, the success of a group or individual in non-judicial unimpounding efforts depends upon various factors including the particular lobbying techniques, the general political influence of the group, and the timing of the attempt.

#### *1971: A Change of Strategy and Forums*

In 1971, a major strategic change occurred in efforts to obtain release of impounded funds. The arena of the controversy was expanded to include the federal courts; litigation became a new unimpoundment weapon. Why was there resort to the courts in 1971 when there had been none previously? The answer is two-fold. The first reason is that non-judicial unimpoundment efforts were frequently proving to be unsuccessful or only partly successful; the courts were used in frustration. The second reason is that the total impact of Nixon Administration impoundments was different from the impact of impoundments of previous administrations. The crucial distinction between the impoundment policies of the Nixon Administration and previous administrations was not to be found in any single factor but rather in the impact of a combination of factors. The Nixon Administration openly and aggressively used impoundment as a policy tool on an extensive scale in the domestic area for purposes unrelated to war-making capability.<sup>41</sup> Nixon Administration impoundments were often permanent and frequently terminated or severely restricted entire projects rather than merely reducing their levels.

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<sup>39</sup> Confidential interview conducted by one of the authors in New York City, April 25, 1973.

<sup>40</sup> *Id.*

<sup>41</sup> See OMB Report Under Federal Impoundment & Information Act, 39 Fed. Reg. 7707 (1974). The preponderance of impoundments occurred in the domestic arena.

The severe consequences of such policies in part resulted in resort to the courts. This aggressive stand on impounding occurred at a time when Congress and the executive branch were in conflict over the extent of executive power in other areas. This conflict was aggravated because many of the impounded programs had been popular ones with great political support. These characteristics taken collectively distinguished the Nixon Administration's impoundment policies from those of previous administrations. The greater impact of the Nixon Administration impoundments and the frequent lack of success in getting these funds released by the usual political methods led to efforts to involve the courts.

### RESORT TO THE COURTS

In the face of a long history of resolution of budget controversies through non-judicial political pressure and bargaining, the first steps seeking judicial alternatives were tentative. Those seeking redress through the courts must have realized that they were embarking on an expensive, time-consuming course. The first major cases were filed in 1971 before the issue of impoundment had reached the scale of a national controversy, one by Missouri,<sup>42</sup> and another by the San Francisco Housing Authority.<sup>43</sup> The San Francisco action proved unsuccessful and was dismissed on the basis of sovereign immunity.<sup>44</sup> While the San Francisco Housing Authority case failed, the Missouri suit against the Secretary of Transportation, *State Highway Commission v. Volpe*,<sup>45</sup> was to become both the first appellate court decision on impoundment and the first to overrule an impoundment. The *Volpe* court avoided any constitutional interpretation and emphasized that the decision was based on a

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<sup>42</sup> *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1124 (8th Cir. 1973).

<sup>43</sup> *Housing Authority v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972). *See also* *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971). These were the first decisions treating impoundment, as such, in detail.

<sup>44</sup> One case decided in California in 1971 related to impoundment but was dismissed on sovereign immunity grounds without thorough treatment of the spending issue. *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971). Other cases are cited as bearing on the issue of spending authority but were not truly cases involving the issue of presidential impoundment but merely the payment of prior governmental obligations. *See* *United States v. Price*, 116 U.S. 43 (1885); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838). *See also Impoundment: Legal Principles*, *supra* note 8, at 215-16.

<sup>45</sup> *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

statutory direction of Congress rather than a renunciation of presidential constitutional prerogatives.<sup>46</sup>

The *Volpe* case was argued and decided just as the political controversy over impoundment was quickening and it was becoming apparent that traditional means of unimpoundment would not be successful.<sup>47</sup> The series of impoundments announced at the beginning of January 1973 made it apparent that cooperation was not forthcoming.<sup>48</sup> Indicative of the increasing breakdown in political rapport, twenty-three Senators and Representatives joined as amici curiae in the *Volpe* appeal to the Eighth Circuit.<sup>49</sup> Shortly following the impoundment hearings conducted by the two Senate committees in February—which provided further evidence that the Administration did not intend to cease impounding,<sup>50</sup> the *Volpe* decision was issued.<sup>51</sup> It was then firmly established that the impoundment conflict would involve the courts.

### *The Barriers to Court Intervention*

Prior to the initial impoundment cases, speculation on whether courts would decide the impoundment issue centered around the doctrines of political question and sovereign immunity. Professor Arthur Miller discussed the political question barrier to judicial resolution of impoundment in 1965<sup>52</sup>—long before impoundment became a national controversy. He viewed the doctrine as one of judicial self-restraint and concluded that an impoundment case was not a proper instance for the exercise of restraint since “it is a conflict among those very political branches of government that would answer the question otherwise.”<sup>53</sup> The Supreme Court has enumerated six specific criteria which may preclude a court from hearing a case because it involves a political question.<sup>54</sup> More recent

<sup>46</sup> *Id.* at 1106.

<sup>47</sup> See testimony of Roy Ash and Joseph T. Sneed, 1973 *Hearings*, *supra* note 6, at 269, 481, 344, 358.

<sup>48</sup> These extensive impoundments were reported in February. OMB Report Under Federal Impoundment & Information Act, 38 Fed. Reg. 3473-96 (1973).

<sup>49</sup> Brief of Appellee, *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

<sup>50</sup> See 1973 *Hearings*, *supra* note 6, at 269-73 (testimony of Roy Ash), 358-62 (testimony of Joseph T. Sneed).

<sup>51</sup> *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

<sup>52</sup> See Miller, *supra* note 1, at 517.

<sup>53</sup> *Id.*

<sup>54</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962). The six standards were: (1) textually de-

Court opinions indicate that the principal considerations will be whether the issue is committed to a coordinate branch or whether there are judicially manageable standards.<sup>55</sup> Political question was strenuously argued by the government in the early days of the impoundment controversy.<sup>56</sup>

### Political Question

The political question argument appears, however, to be basically unavailable in impoundment cases.<sup>57</sup> The courts have uniformly rejected the arguments of the Executive in this regard. First, the determination of executive-congressional disputes regarding statutory meaning is not an issue committed to either of these branches but rather to the judiciary.<sup>58</sup> In fact, the judiciary is the only branch which can resolve such an impasse.<sup>59</sup> The determination that the political question doctrine did not obtain is key to the overall impoundment controversy since it signifies the formal entry of the courts into the dispute. While the courts have always been available for unimpoundment attempts, in previous administrations the issue

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monstrable constitutional commitment to a coordinate political department, (2) lack of judicially discoverable or manageable standards for resolving the issue, (3) the impossibility of deciding the issue without an initial policy determination of a kind clearly for non-judicial discretion, (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government, (5) an unusual need for unquestioning adherence to a political decision already made, and (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.*

<sup>55</sup> *Powell v. McCormack*, 395 U.S. 486 (1969); *DaCosta v. Laird*, 471 F.2d 1146, 1152-54 (2d Cir. 1973); *Massachusetts v. Laird*, 451 F.2d 26, 30-34 (1st Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039, 1041-43 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

<sup>56</sup> See Brief of Appellant at 46-52, *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); 1973 *Hearings, supra* note 6, at 358-65 (testimony of Deputy Atty. Gen. Joseph T. Sneed).

<sup>57</sup> The argument has been almost unanimously rejected. See, e.g., *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1124 (8th Cir. 1973); *New York v. Train*, 494 F.2d 1033 (D.C. Cir. 1974), *aff'd*, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975); *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 900-01 (D.D.C. 1973).

<sup>58</sup> "[I]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "The judicial branch of the federal government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch." *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974); "An agency may not finally decide the limits of its statutory powers. That is a judicial function." *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1124 (8th Cir. 1973). Cf. *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>59</sup> See note 58 *supra*.

was resolvable through political exchange between Congress and the President. When the Executive is extremely reluctant to release funds in the bargaining process, "[t]o say that the Constitution forecloses judicial scrutiny in these circumstances is to urge that the Executive alone can decide what is best and what the law requires."<sup>60</sup> Thus, the courts have recognized that raw power to accomplish an impoundment by the Executive was obviously not per se a "commitment to a coordinate branch" and that refusal of the courts to intervene on that basis would reflect *power*, not *authority*.

Courts have likewise rejected the argument of a lack of judicially manageable standards in impoundment cases.<sup>61</sup> The argument of the Executive in this portion of the political question doctrine can be framed as follows: there are no manageable standards for the courts since impoundment is within the discretion accorded by the statute at issue.<sup>62</sup> It may be possible for Congress to confer total discretion upon the Executive in spending, in effect allowing expenditures of any amount. Such statutory drafting would be a proper basis for a claim that a political question was involved since the impact would be conferral of total discretion controllable only by political pressure. If there is no limit to discretion, then the Executive obviously cannot exceed its discretion.<sup>63</sup> If there is a limit to agency discretion, then, according to the Administrative Procedure Act, courts can review that agency action.<sup>64</sup> Thus, courts do have the

<sup>60</sup> National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 900 (D.D.C. 1973).

<sup>61</sup> See New York v. Train, 494 F.2d 1033 (D.C. Cir. 1973), *aff'd*, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975); Guadamuz v. Ash, 368 F. Supp. 1233, 1238 (D.D.C. 1973).

<sup>62</sup> Brief of Petitioner at 41-48, Train v. New York, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975).

<sup>63</sup> See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). The Supreme Court in *Volpe* considered the statutory exception under section 701 of the Administrative Procedure Act to judicial review of agency actions "committed to agency discretion," and concluded:

This is a very narrow exception. . . . The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

401 U.S. at 410, *interpreting* 5 U.S.C. § 701 (Supp. V, 1964).

<sup>64</sup> 401 U.S. at 413. Such review falls under section 706 of the Administrative Procedure Act, which provides specific standards for review, including in all cases the right to set aside agency action which is "'arbitrary, capricious, or otherwise not in accordance with the law'

power to review agency actions which exceed or abuse statutory discretion.<sup>65</sup> Only once thus far in impoundment cases has the government argument that a statute was totally discretionary and should bar judicial review been accepted in the courts.<sup>66</sup> On the basis of statutory interpretation, most courts have overturned impoundment actions taken by the Executive as an abuse of discretion.<sup>67</sup>

The courts' determination regarding existence of statutory discretion will be determinative of the political question issue. Statutes found to accord total discretion probably fall within the realm of political question since there are in effect no standards for review.<sup>68</sup> Enactments with no discretion will not be political questions because standards are explicit.<sup>69</sup> Statutes with some discretion present the greatest problem because the courts must determine, through statutory interpretation, if they have the ability to establish limits on the exercise of discretion and, if so, whether that discretion has been abused.<sup>70</sup> This problem was apparent in *Campaign Clean Water Inc. v. Ruckelshaus*,<sup>71</sup> when the district court found there was discretion but that it had been exceeded by impounding 55% of available funds. The court found that 45% was not an acceptable commitment of funds (and therefore was an abuse of discretion) but did not define standards for adequate compliance.<sup>72</sup> The finding of abuse implicitly reflects a judicial determination that adequate standards existed for such a finding.

Courts have consistently not accepted the argument that im-

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or if the action failed to meet statutory, procedural or constitutional requirements." 5 U.S.C. §§ 706 (s) (A), (B), (C), (D) (Supp. V, 1964).

<sup>65</sup> See note 64 *supra*.

<sup>66</sup> *Housing Authority v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972).

<sup>67</sup> See, e.g., *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); *New York v. Train*, 494 F.2d 1033 (D.C. Cir. 1974).

<sup>68</sup> See note 63 *supra*.

<sup>69</sup> See *Train v. New York*, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975).

<sup>70</sup> *Campaign Clean Water v. Train*, 489 F.2d 494 (4th Cir. 1973), *rev'd*, 43 U.S.L.W. 4214 (U.S. Feb. 18, 1975) (per curiam).

<sup>71</sup> 361 F. Supp. 689 (E.D. Va.), *modified*, 489 F.2d 492 (4th Cir. 1973), *rev'd*, 43 U.S.L.W. 4214 (U.S. Feb. 18, 1975).

<sup>72</sup> The Supreme Court in fact granted certiorari in both *New York v. Train* and *Campaign Clean Water*, "[b]ecause of the differing views with respect to the proper construction of the Act" in those two decisions, regarding the existence of discretion in the Administrator to withhold funds.



poundment is a non-reviewable political question. Thus, the courts have basically supported Professor Miller's reasoning that failure of courts to intervene would leave the executive and legislative branches in irreconcilable conflict over impoundment.<sup>73</sup> Failure of the court to act defers to raw power. As was stated by the court in *National Council of Community Mental Health Centers, Inc. v. Weinberger*, "[w]hen Congress directs that money be spent and the President, as Chief Executive, declines to permit the spending, the resulting conflict is not political."<sup>74</sup> As the Supreme Court also succinctly put it in rejecting the argument that total discretion had been conferred on the Administration in *Train*,

We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation. Yet such was the Government's position in the lower court—combined with the argument that the discretion conferred is unreviewable.<sup>75</sup>

The Court rejected both contentions, based on the legislative history of the statute under consideration.

### Sovereign Immunity

The other barrier to court involvement in impoundment controversies was the fact that the party to be sued was the federal government, suggesting the defense of sovereign immunity.<sup>76</sup> Application of that doctrine has been increasingly reduced by the courts in the recent past,<sup>77</sup> and many statutes specifically waive sovereign immunity.<sup>78</sup> Further, sovereign immunity is no bar to what are com-

<sup>73</sup> See note 52 *supra*.

<sup>74</sup> 361 F. Supp. 897, 900 (D.D.C. 1973).

<sup>75</sup> 43 U.S.L.W. at 4212-13.

<sup>76</sup> The Justice Department routinely raises the defense. See *Hearings on "Sovereign Immunity" Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 28-30, 64-75 (1970).

<sup>77</sup> See *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Land v. Dollar*, 330 U.S. 731 (1947); *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); *Scanwell Laboratories, Inc. v. Schaffer*, 434 F.2d 859 (D.C. Cir. 1970). *But cf.* *Hawaii v. Gordon*, 373 U.S. 57 (1963).

<sup>78</sup> See, e.g., *Housing Act of 1937*, 42 U.S.C. §§ 1401-35 (1970). In addition, several courts of appeals have read an implied waiver of sovereign immunity by Congress in any action to which the Administrative Procedure Act applies. See *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); *Scanwell Laboratories, Inc. v. Schaffer*, 424 F.2d 859 (D.C. Cir. 1970); *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961).

monly termed officer suits in which judicial review has been held available when an officer of the government acts in excess of statutory authority or in an unconstitutional manner.<sup>79</sup> The rationale is that there is no officer of the federal government who “does not hold office under the law.”<sup>80</sup>

The officer suit has, consequently, become the basic vehicle for impoundment litigation. Only once has sovereign immunity been found to bar suit and then because the action of the officer was interpreted to be within the broad discretion of the statute.<sup>81</sup> Thus, the same type of judicial interpretation of statutory language which

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*But see Warner v. Cox*, 487 F.2d 1301 (5th Cir. 1974). Other circuit courts of appeals have completely rejected such an implied waiver, requiring that the defense of sovereign immunity be met on traditional grounds. *See Bramblett v. Desobry*, 490 F.2d 405 (6th Cir. 1974), *cert. denied*, \_\_\_ U.S. \_\_\_ (1975); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967); *Chournos v. United States*, 335 F.2d 919 (10th Cir. 1964); *Cyrus v. United States*, 226 F.2d 416 (1st Cir. 1955). There is also a third view in which the policies behind sovereign immunity may be of sufficient weight to require dismissal of a suit, even though the Administrative Procedure Act appears to grant review. *See Littell v. Morton*, 446 F.2d 1207 (4th Cir. 1971); *Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969). The Supreme Court, even when presented with the opportunity to resolve this conflict, has failed to do so. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

One court of appeals has found a waiver of sovereign immunity where the relevant statute expressly incorporated the provisions of the Administrative Procedure Act. *Schlafly v. Volpe*, 495 F.2d 273 (7th Cir. 1974).

<sup>79</sup> *See Dugan v. Rank*, 372 U.S. 609 (1963); *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Larson v. Domestic and Foreign Commerce Corp.*, 331 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947); *Ex Parte Young*, 209 U.S. 123 (1908); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 676 (1868).

The Supreme Court in *Larson* set forth two explicit exceptions to the general rule of sovereign immunity which otherwise applies where “the relief sought in a suit nominally addressed to the officer in relief against the sovereign.” 337 U.S. at 687. These rules are:

(1) [W]here the officer’s powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. 337 U.S. at 689.

(2) [A Case] in which the statute or order conferring power upon the officer to take action in the sovereign’s name is claimed to be unconstitutional. . . is beyond the officer’s power and is, therefore, not the conduct of the sovereign. 337 U.S. at 690.

There is also an exception to both these exceptions where the relief requested may require the sovereign to dispose of unquestionably sovereign property. 337 U.S. at 692 n.11. This has been criticized but has resulted in denial of relief. *See, e.g., Gardner v. Harris*, 391 F.2d 885 (5th Cir. 1968); *cf. Saine v. Hospital Authority*, 502 F.2d 1033 (5th Cir. 1974) (remand to district court to consider whether relief would intolerably burden governmental function).

<sup>80</sup> *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 676-77 (1868).

<sup>81</sup> *Housing Authority v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972).

determines whether there are "manageable standards" in the political question area also determines the availability of officer suits.<sup>82</sup>

It appears that the courts' involvement with the preliminary issues of whether they can consider the case (political question) and whether suit can be brought against the government (sovereign immunity) is determined primarily by the interpretation of statutory language authorizing a particular program. When Congress and the President disagree on the meaning of the program, those branches can no longer satisfactorily cope with the issue. In other words, when the intent of Congress as manifested by a statute is challenged by the Executive and when the Congress is powerless to enforce that statute either through persuasion or pressure, then the resulting impasse is a matter for the courts. When there is total disagreement on the meaning of a law between those who wrote it and those who execute it, the ultimate solution is arbitration by the judiciary.

#### *Substantive Determination by the Courts to Unimpound*

Since the courts are entering a new arena in dealing with the budget, they have sought to deal with the issues through basic legal doctrines.<sup>83</sup> District courts, courts of appeals, and even the Supreme Court have avoided determinations on the basis of the Constitution or economics and instead have based most decisions on well-established canons of statutory interpretation with which they are comfortable.<sup>84</sup> Consequently, not only has the interpretation of statutes determined the threshold issues of political question and sovereign immunity, but statutory analysis has been the basis of the final decision of the case. Courts have endeavored to analyze authorization and appropriation statutes through standard methods of interpretation: legislative history, plain meaning, and other

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<sup>82</sup> The Supreme Court did not consider the issue of sovereign immunity in *Train v. New York*, but the Court of Appeals for the District of Columbia had applied its rule of implied waiver of sovereign immunity under the Administrative Procedure Act. *New York v. Train*, 494 F.2d 1033, 1038 (D.C. Cir. 1974). The government did not appeal this issue to the Supreme Court, but the Court noted that the government conceded that, if there were no discretion in the Administrator, the district court had jurisdiction to order allotment as a ministerial act, another exception to the rule of sovereign immunity. 43 U.S.L.W. at 4211 n.7.

<sup>83</sup> Cf. R. POUND, *LEGAL REASONING*, ch. 2 (1921).

<sup>84</sup> See, e.g., *Train v. New York*, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

doctrines.<sup>85</sup> The ultimate goal is to evaluate whether the agency action is within whatever discretion is conferred by the particular statute. The courts continually cite statements by congressional sponsors and from committee reports and other indications of legislative intent.<sup>86</sup> An example is the *Train* case decided by the Supreme Court,<sup>87</sup> which dealt with the refusal of the Administrator of the Environmental Protection Agency to allot six billion dollars during fiscal years 1973 and 1974 under the Water Pollution Control Act.<sup>88</sup> The cases have centered on the meaning of the budgetary phase of the Act termed allotment. The administration has argued that the provision was permissive to allow the refusal while plaintiffs seeking the funds have alleged that the provision was mandatory.<sup>89</sup> Each side has cited history and logic as supporting its advocated result.<sup>90</sup>

The Supreme Court in *Train* extensively cited the legislative history of the Water Pollution Control Act and weighed opposing interpretations of that history. The Administrator alleged that statements by Congressman William Harsha emphasizing "the President's flexibility to control the date of spending"<sup>91</sup> indicated the statute was discretionary, while opponents cited a statement by Senator Edmund Muskie that "funds must be allocated."<sup>92</sup> Other

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<sup>85</sup> See *New York v. Train*, 494 F.2d 1033 (D.C. Cir. 1974). For an enumeration of various canons of interpretation in impounding cases see Brief for Amicus Curiae Center for Governmental Responsibility, 1-32. *Train v. New York*, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975). Some examples are plain meaning, legislative history, statements of sponsors of bills, favoring of interpretation which allows operation of all provisions, internal logic of all provisions of a bill. The more complex statutory arguments, that is, operation of all provisions, and internal logic require technical analysis of budgetary consequences of various portions of the Act. Other arguments such as plain meaning and legislative history are based more on statutory wording and analysis of numerous statements by legislators interpreting the Act and its various sections. See, e.g. *Train v. New York*, 43 U.S.L.W. 4209, 4212-13 (U.S. Feb. 18, 1975).

<sup>86</sup> See, e.g., *New York v. Train*, 494 F.2d 1033, 1042 (D.C. Cir. 1974).

<sup>87</sup> 43 U.S.L.W. 4209 (Feb. 18, 1975).

<sup>88</sup> This refusal has generated a number of lawsuits challenging the legality of such an impoundment. See, e.g., *Campaign Clean Water v. Train*, 489 F.2d 492 (4th Cir. 1973); *New York v. Train*, 494 F.2d 1033 (D.C. Cir. 1974). See also *Train v. New York*, 43 U.S.L.W. 4209, 4213 n.15 (U.S. Feb. 18, 1975) (list of Federal cases challenging such impoundments).

<sup>89</sup> Except *Campaign Clean Water*, which alleges that the provision is discretionary but that the Administrator has abused his discretion. Brief for Respondent, *Campaign Clean Water* at 27-41, *Train v. New York*, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975).

<sup>90</sup> Brief for Petitioner at 14-30, *Train v. New York*, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975).

<sup>91</sup> 118 CONG. REC. H9122 (daily ed. Oct. 4, 1972).

<sup>92</sup> 118 CONG. REC. S18546 (daily ed. Oct. 17, 1972).

impoundment decisions have also treated legislative history in depth.<sup>93</sup> The Court in *Train* determined that the allotment provision was mandatory, stating “[t]he Court of Appeals carefully examined the legislative history in this respect and arrived at the same conclusion, as have most of the other courts that have dealt with the issue.”<sup>94</sup> By emphasizing the importance of legislative history and statutory interpretation the Court both continued the trend of lower court decisions and legitimized statutory analysis as the basis for future holdings in impoundment cases.

### *The Constitution in Court Decisions*

Determinations by the courts thus far have been made primarily on the basis of statutory interpretations. The Constitution has not been the sole basis for any holding although courts have in dicta stated there was an absence of executive authority to refuse unilaterally to spend.<sup>95</sup> The very fact that courts have entered into the impoundment controversy is, aside from the political importance of an additional actor in the impoundment conflict, an event of constitutional significance. Rarely has an issue developed that has such major constitutional import for each of the three branches. Impoundment litigation results in a judicial interpretation of presidential execution of congressional enactments and consequently is a determination of the constitutional boundary between the Executive and Congress with regard to spending power.

The courts are being cast as the final referees in the constitutional confrontation on impoundment. Congress asserts that it has the supreme authority in regard to spending, while executive spokesmen urge that spending or the decision to spend is an executive function—exclusively under the control of the President.<sup>96</sup> The latter interpretation is constitutionally invalid, however, in that the President can control spending only to the extent that his actions comport with congressional desires as expressed in enacted statutes. Thus, legislative intent as interpreted by the courts defines the parameters of executive power. In other words, executive impound-

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<sup>93</sup> See, e.g., *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); *Local 2677, AFGE v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

<sup>94</sup> 43 U.S.L.W. at 4212.

<sup>95</sup> See *Impoundment: Legal Principles*, *supra* note 8, at 193-202.

<sup>96</sup> See *1973 Hearings*, *supra* note 6, at 358-62 (testimony of Joseph T. Sneed).

ment accomplished consistent with congressional intent is constitutional while impoundment which contravenes legislative intent is a usurpation of the congressional power to legislate.

Lower courts have usually avoided mentioning the Constitution, and the Supreme Court in *Train v. New York* continued such a trend; therefore, the questions of the President's inherent authority to impound has not been directly addressed by the courts. Informally, the Executive has urged a constitutional authority to impound even in the absence of statutory authority,<sup>87</sup> but no such direct claims of authority were argued to the Supreme Court. Rather, the Court limited itself in *Train* to statutory construction of the Act. In rejecting the authority of the administration to impound, however, the Court implicitly rejected a constitutional authority to impound. A constitutional decision would have been a difficult matter for the Court. Too stringent or clear a delineation of authority could impair the delicate checks and balances between Congress and the President. Further, little constitutional precedent exists to aid the Court's interpretation. Only decisions such as *Youngstown Sheet and Tube Co. v. Sawyer*<sup>88</sup> or *United States v. Curtiss-Wright Exporting Corp.*<sup>89</sup> provide much guidance. While *Youngstown* dealt with seizure of the steel mills by President Truman and *Curtiss-Wright* with presidential powers in foreign trade, each considered the doctrine of inherent authority. Because of these difficulties, the Court and lower courts are likely to avoid constitutionally based decisions as did the Court in *Train*.

Only if executive assertions of inherent power are directly advanced in impoundment cases will the courts be likely to engage in extensive constitutional analysis. First, of course, the courts would have to find an absence of authority to impound in the statute in question. After finding such an absence, courts would then be confronted with a clear-cut assertion of constitutional power, with no other available source of authority to impound. If this situation

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<sup>87</sup> President Nixon asserted that the "constitutional right for the President of the United States to impound funds . . . not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people . . . is absolutely clear." 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 11 (1973). See also 1973 Hearings, *supra* note 6, at 270, 369.

<sup>88</sup> 343 U.S. 579 (1952).

<sup>89</sup> 229 U.S. 304 (1936).

eventuates, analysis would focus on the nature of impoundment as a usurpation of congressional prerogatives to legislate. Impoundment is not supported by inherent constitutional authority because the power to legislate spending policy is in the Congress unless a veto is sustained. Therefore, where impoundment contravenes congressional policy, that is, when no discretion has been delegated to impound in the statute in question, the Executive is acting unconstitutionally. This matter of constitutionality has been discussed at length in the journals, and there is no need to recount in detail that analysis here.<sup>100</sup> Uniformly, commentators have reached the conclusion that impoundment in contravention of congressional intent is analogous to an unconstitutional absolute or item veto and not within inherent authority of the President. The courts in the future can be expected to reach a similar conclusion.

#### *Judicial v. Non-Judicial Unimpoundment*

To understand the comparative consequences of judicial and non-judicial unimpoundment, court interpretations must be compared with the bases considered in non-judicial unimpoundment actions. In non-judicial unimpounding the results depend upon who reaches whom or who can offer or deny enough to compel the release of funds.<sup>101</sup> In the courts the considerations are somewhat more objective. Therefore, the party with the most power at a particular time, which in the recent past has clearly been the Executive, would normally try to keep the unimpoundment process out of the courts since raw power is not determinative in the judicial process.<sup>102</sup>

The active presence of the courts in the impoundment controversy changes the political milieu. The need for political bargaining power

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<sup>100</sup> Abascal and Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1566-76 (1974); Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFFALO L. REV. 141, 143-70 (1973); Levinson and Mills, *Impoundment: A Source for Legal Principles*, 26 U. FLA. L. REV. 190, 193-202 (1974); Stanton, *The Presidency and the Purse: Impoundment 1803-1973*, 45 U. COLO. L. REV. 25, 48-50 (1973); Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1513-16 (1973); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636, 1638-42 (1972).

<sup>101</sup> See notes 11-39 *supra* and accompanying text.

<sup>102</sup> As a manifestation of the desire to keep the matter out of the court, the Executive proposed to the Senate Appropriations Committee that the 1973 Labor-HEW appropriation contain a provision which would preclude suit on funds impounded during FY 1974. See Washington Post: Nov. 24, 1973, at A1.

is dramatically reduced, and individuals without such power may ask for the release of funds with the threat of suing. The fact that an individual has sued and may sue again may in itself have an effect on the way he is treated in funding.<sup>103</sup>

Litigation does, however, present problems to those seeking release of impounded funds. For example, while a non-judicial unimpoundment can result in a release of funds almost immediately, litigation takes time, sometimes years.<sup>104</sup> Further, the courts are limited in their consideration of an impoundment to legal factors which have not yet included possible economic effects, actual political effects, and the subjective evaluations of the success of a program.<sup>105</sup> In fact, the courts have said that neither they nor the Executive can consider the success or failure of a program when making decisions on termination;<sup>106</sup> consequently, the only way to stop a program solely on the basis of its failure is through congressional acquiescence.

It therefore appears that litigation is a more viable alternative to parties with less political influence while powerful lobbying groups could sometimes obtain release of funds more expeditiously and with less expense through exerting political pressure outside the courts. New legislation may modify tactics slightly, but the same basic alternatives will be under consideration.

#### UNIMPOUNDMENT UNDER THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974

In July 1974, the President signed the Congressional Budget and Impoundment Control Act of 1974,<sup>107</sup> a measure passed in large part

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<sup>103</sup> It is reported that Congressman Fred Rooney (D. Pa.), who was plaintiff in a suit for impounded funds, had few impoundments occur subsequently in his district, at least during the Nixon Administration. Interview, William Kovacs, Legislative Assistant to Congressman Rooney.

<sup>104</sup> Clean Water Act funds were impounded in January, 1973, and were not released while the case was pending before the Supreme Court, until the decision in February, 1975.

<sup>105</sup> See *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1114 (8th Cir. 1973). The court stated that factors such as inflation were irrelevant considerations in cutting a program. *But see, Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974). In *Lynn*, the court held that failure of a program to accomplish its purpose was cause for termination.

<sup>106</sup> *E.g., Local 2677, AFGE v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

<sup>107</sup> Pub. L. 93-344, 88 Stat. 297 (hereinafter referred to as Impoundment Control Act § 1001 *et seq.*).



to establish congressional control over impoundments and to provide institutionalized mechanisms for unimpoundment. The Act will affect unimpoundment in two significant ways: it will perpetuate the role of the courts,<sup>108</sup> and it will provide Congress with direct authority to unimpound.<sup>109</sup>

Seeking a broad definition of impoundment to insure wide application, the authors of the new budget bill invented the term "deferral." Deferrals as defined in the Act include:

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including the authority to obligate by contract in advance of appropriations as specifically authorized by law.<sup>110</sup>

This definition is designed to include all possible impoundment actions taken by the Executive. The reason for the broad definition is that impoundment reports currently submitted to Congress by the OMB list only reserves, thus failing to include many withholdings accomplished by techniques other than reserving which still result in funds not being expended.<sup>111</sup> A primary example is the failure to report six billion dollars which the President ordered the Environmental Protection Agency not to allot.<sup>112</sup>

Under the new law, the President is required to transmit a message to Congress on each proposed deferral (which can be proposed for no longer than one fiscal year).<sup>113</sup> Either house may pass an "impoundment resolution" disapproving such deferral at any time, and the President is thereupon required to make the budget author-

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<sup>108</sup> The Impoundment Control Act expressly provides that it will not affect the claims or defenses of any litigants, and it also expressly authorizes the Solicitor-General to bring suit to "require . . . budget authority to be made available for obligation." Impoundment Control Act §§ 1001(3), 1016.

<sup>109</sup> Congress may, by a resolution of either house, overrule a "deferral" (*i.e.*, an impoundment) made by the President. Impoundment Control Act § 1013.

<sup>110</sup> Impoundment Control Act § 1011(1)(A), (B).

<sup>111</sup> H. Rep. No. 93-658, 93d Cong., 1st Sess. 42 (1973).

<sup>112</sup> See OMB Report under Federal Impoundment & Information Act, 39 Fed. Reg. 7707 (1974).

<sup>113</sup> Impoundment Control Act § 1013(a).

ity available for obligation.<sup>114</sup> The override provision is subject to criticism in that it permits either house to override a deferral although the other house may take a contrary view. Thus, one house can by itself prevail over the wishes of the President and the other house.

Another questionable result of the delegation of override power is that either house may override any deferral even if the deferral is authorized by the Anti-Deficiency Act.<sup>115</sup> The Anti-Deficiency Act authorizes the Executive to reserve for savings and to prevent waste as long as reserves do not substantively affect the purpose of an appropriation.<sup>116</sup> The Act stated:

. . . reserves may be established 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.<sup>117</sup>

Obviously, the "other developments" provision was rather loose language which might conceivably justify reserving for varied purposes. For example, Roy Ash, former OMB Director, stated in testimony before a Senate Committee in 1973 that "other developments" could include inflation.<sup>118</sup> To prevent further confusion as to the meaning of the Anti-Deficiency Act, the new Budget Act amends the reserving provisions by deleting the phrase "other developments," thus closing one of the major loopholes in a statute which allowed impoundment.<sup>119</sup> Therefore, reserves are authorized only in limited instances to effect savings or provide contingencies. Yet under the new Act, one house can prevent such savings by overruling any deferral.

The creation of "deferral" and its definition are obvious attempts

<sup>114</sup> Impoundment Control Act § 1013(b).

<sup>115</sup> 31 U.S.C. § 665(c), *as amended* (Supp. 1975). The Impoundment Control Act expressly requires deferrals under the Anti-Deficiency Act to be reported as deferrals under the new Act. Impoundment Control Act § 1002.

<sup>116</sup> 31 U.S.C. § 665(c)(2), *as amended* (Supp. 1975); *See Impoundment: Legal Principles*, *supra* note 8, at 203-04.

<sup>117</sup> 31 U.S.C. § 665(c), *as amended* (Supp. 1974) (emphasis added).

<sup>118</sup> 1973 *Hearings*, *supra* note 6, at 528, 529 (testimony of Roy Ash).

<sup>119</sup> Impoundment Control Act § 1002, *amending* 31 U.S.C. § 665 (1954), *as amended* (Supp. 1975).

to close a loophole in reporting procedures under which many impoundments went unreported because of the absence of a functional definition of impoundment. All non-spending actions, except "rescissions," will be reviewed under the deferral procedures because of the broad definition of deferrals.<sup>120</sup> Rescissions, which had been provided for in the Anti-Deficiency Act<sup>121</sup> prior to the recent Act, will allow the Executive to propose permanent termination of expenditures on a given program.<sup>122</sup> The procedure is distinct from deferrals in that the rescission does not go into effect prior to congressional approval and that Congress must approve the proposed rescission in forty-five days or it will be deemed rejected.<sup>123</sup>

The new deferral procedure may also have created problems in program management. In the first place, Congress has by the Budget Reform Act delegated authority to the President to impound for an unspecified period of time less than one year.<sup>124</sup> During congressional consideration of impoundment resolutions, the President can in fact accomplish an impoundment by temporarily stopping or scaling down programs. Even if such programs are started up again or restored to the original level of activity, there can be negative effects. The uncertainty of funding increases the difficulty of maintaining competent personnel to operate programs. Agency employees may be let go because of lack of funds or may leave on their own for positions with greater funding security. If they cannot be convinced to return to an agency which has had impounded funds restored, their training and experience have been lost to that agency.

There are also costs in the sense that many clients of an agency may be discouraged and disillusioned by the temporary loss of services (such as health services, for example) and will not quickly return to the agency for those services. The usefulness of services that were previously rendered may thus be undermined. Time may be required before an agency returns to an efficient level of operation characterized by an adequate, experienced staff and a clientele that makes full use of an agency's services. A "stop and start" approach

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<sup>120</sup> Impoundment Control Act § 1013.

<sup>121</sup> 31 U.S.C. § 665(e)(2) (1954).

<sup>122</sup> Impoundment Control Act § 1012(a).

<sup>123</sup> Impoundment Control Act § 1012(b).

<sup>124</sup> Impoundment Control Act § 1013.

to funding will not be costless. Programs will be disrupted even if Congress overrides presidential deferrals.

*Unimpoundment in the Courts Under the New Budget Act*

In the new Budget Act Congress, for the first time, has granted a direct power to litigate the impoundment issue although the grant extends only to the Comptroller General.<sup>125</sup> The provision allows the Comptroller General to sue to enforce impoundment provisions of the Act with counsel of his own choosing. Prior to suit the Comptroller General must give Congress twenty-five days notice of intent to sue.<sup>126</sup>

During the impoundment controversy the most common litigants have been states and specific recipients of benefits, but in the new Budget Act no specific provision is made for suits by these parties. Section 1001 of the Act does, however, state: "Nothing contained in this Act or in the amendments made by this Act shall be construed as . . . affecting in any way the claims or defenses of any party to litigation concerning any impoundment."<sup>127</sup> Nowhere in the legislative history is there further explanation of this provision. However, Senator Ervin stated:

The Comptroller General will be granted authority to sue in the Federal [*sic*] District Court for the District of Columbia to enforce the provisions of the title . . . . This authority is not intended to infringe upon the right of any other party to initiate litigation . . . .<sup>128</sup>

Further, the Act contains a provision which states that the Act will have no effect on required budgetary actions<sup>129</sup> and, therefore, pre-

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<sup>125</sup> Impoundment Control Act § 1016.

<sup>126</sup> *Id.* The Comptroller General is also required to advise Congress regarding the legality and policy aspects of each proposed deferral. Impoundment Control Act § 1011. Further, if the Comptroller finds that an action or inaction constitutes a reserve or a deferral that has not been reported to Congress, he shall himself make the report which will enable Congress to follow through the appropriate procedures. Impoundment Control Act § 1017(a).

<sup>127</sup> Impoundment Control Act § 1001(3).

<sup>128</sup> 120 Cong. Rec. S11222 (daily ed. June 21, 1974).

<sup>129</sup> Pub. L. No. 93-344 § 1001.

Sec. 1001. Nothing contained in this act, or in any amendments made by this Act, shall be construed as — . . . .

(4) Superseding any provision of law which requires the obligation of budget

sumably would allow enforcement by the courts of those mandatory provisions. Consequently, the courts in their statutory interpretation of these provisions will probably utilize the same standards for decisions developed in recent impoundment cases discussed above.<sup>130</sup> Thus, the precedents of the last two years will continue to be relevant to cases arising under the new Act.

A question likely to be raised regarding litigation by private parties and states is whether, because of the new Act, the case is barred from judicial review by the political question doctrine. The issue would be whether the Budget Act, by establishing a procedure for impoundment and unimpoundment,<sup>131</sup> has constitutionally committed resolution of the impoundment issue to a coordinate branch.<sup>132</sup> Support for this conclusion can be found in the constitutional power of Congress to designate court jurisdiction. Congress has broad power to determine what the courts can review. Here, Congress has directly spoken to the effect that no provision shall preclude suit.<sup>133</sup> Hypothetically, the President could propose a deferral of a program which is mandatory, making such a deferral illegal under the Budget Act.<sup>134</sup> A state could then sue for funds under the Act. During the potential one-year pendency of the deferral before Congress, can a court overrule the impoundment as illegal or is determination of that issue committed to Congress? The answer is unclear although it can be logically argued that, since the Act directly states that nothing in the Act shall be construed as

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authority or the making of outlays thereunder.

Executive officials have, because of this provision, interpreted the Budget Act as not granting authority to countermand mandatory programs. STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, SEMINAR ON THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974 CONDUCTED BY THE CENTER FOR GOVERNMENTAL RESPONSIBILITY, 93d Cong., 1st Sess. 16, 57 (Comm. Print 1974).

<sup>130</sup> It is significant that the Supreme Court noted the passage of the Impoundment Control Act but did not consider that the Act mooted the case before it. *Train v. New York*, 43 U.S.L.W. 4209, 4211 n.8 (U.S. Feb. 18, 1975).

<sup>131</sup> See note 101 *supra*.

<sup>132</sup> See notes 47-60 *supra* for discussion of this aspect of the political question doctrine.

<sup>133</sup> See note 109 *supra*.

<sup>134</sup> See note 110 *supra*. As previously stated, impoundments of programs found to be mandatory have consistently been held to be illegal. See notes 42-94 *supra* and accompanying text. The provision in the new Budget Act which states that the Act has no effect on required budget actions apparently means the Act in no way adds to executive authority regarding statutes found to be mandatory and consequently a deferral of a mandatory program would be illegal.

affecting the claims of any party, the Act directly precludes the interpretation of any of its sections to bar claims.<sup>135</sup> Therefore, provisions which provide for congressional review of deferrals cannot be construed to bar action as a "political question" and preclude the claimant's action.

Another area in which litigation would seem to remain available to recipients would be unreported or improperly reported impoundments. For example, if a deferral were accomplished without reporting it as such it could be said to be illegal; or, if a rescission were reported as a deferral, the action could be considered an illegal deferral.<sup>136</sup> The Comptroller General would, of course, also have the opportunity to sue in either of the above instances.<sup>137</sup>

#### *Unimpoundment in the Congress Under the New Budget Act*

Another potential problem area involves the degree of difficulty in Congress' overriding presidential deferrals. At one extreme, it may be much more difficult to override a particular impoundment limited to a narrow constituency than it would be to override a veto of an appropriations or authorization bill which deals with broad categories. The specificity of the deferral may make difficult the building of coalitions sufficiently large to override these impoundments. If this situation were to develop, deferrals could thus be utilized as an item veto—a power continually rejected by Congress.<sup>138</sup> At the other extreme, a norm of reciprocity could develop concerning congressional overriding of deferrals. Congressmen, pushed by constituents and interest groups who know that Congress now has the formal power to get funds released, might engage in logrolling on these votes to such an extent that even reasonable delays of expenditures may prove difficult to sustain. For example, a federal agency may refuse to begin a project because all submitted construction bids are considered excessive. The disappointed construction firms could convince their Representative or Senator to push for a congressional override of the executive branch deferral. The Congressman might obtain support for this override by promising his colleagues his support in similar situations.

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<sup>135</sup> See notes 108-10 *supra* and accompanying text.

<sup>136</sup> *Cf.* Impoundment Control Act § 1015(a).

<sup>137</sup> Impoundment Control Act § 1016. *But cf.* § 1015(b).

<sup>138</sup> See Statement by Elmer Staats, Comptroller General of the United States, 1973 *Hearings, supra* note 6, at 101, 110-14.

Another potential problem is that an impoundment resolution could be bottled up in committee in spite of the new budget act's provisions for discharging reluctant committees from further consideration of bills. Committee specialization is an important congressional norm, and in the past discharge procedures have not been successfully used with any frequency. The discharge provision may prove to be an ineffective check to committee inaction.

The new role of Congress may make the use of impoundment for partisan electoral purposes much more difficult. If either chamber were controlled by the party in opposition to the President, impoundments made for partisan purposes might be overridden. If the President unimpounded funds for some districts or projects for partisan purposes,<sup>139</sup> the opposition-controlled chamber (or even Congress) might proceed to vote the release of other funds which would favor its party's electoral chances. The executive branch and the party in control of that branch no longer have a monopoly on the use of impoundment.

The new congressional role will also constrain executive impoundments in a different manner: the executive branch will want to choose impoundments that will not be easily overridden in Congress.<sup>140</sup> Frequent defeats on impoundments could damage an administration's prestige and legislative program. Impoundment decisions will have to be made cautiously, with careful consideration of congressional reactions.

### CONCLUSION

In sum, the new budget act will perpetuate the system of impoundment on a basis which will involve political pressures on the Executive, probably not unlike those discussed as unimpounding procedures in the past; political pressures on the Congress (probably similar to pressures brought on the Executive); and ultimately resort to the courts, which now have an institutionalized role in the

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<sup>139</sup> See *Executive Session Hearings Before the Select Comm. on Presidential Campaign Activities of the Senate, Use of Incumbency-Responsiveness*, Program Book 18, 93d Cong., 2d Sess. (1974). These hearings describe the use of the budget and grant programs to advance the cause of reelection of President Nixon.

<sup>140</sup> Confidential interview conducted by one of the authors in Washington, D.C. on June 20, 1973.

process if pressure fails or a party lacks sufficient influence to pressure either the Executive or Congress.

Regardless of President or party, the process of impoundment and unimpoundment must now be considered as an integral part of the budget process. Its existence will ensure its use. While Congress as a body (or as individual chambers) has obtained authority to unimpound, those most tangibly affected, prospective recipients, must still seek to obtain the release of funds either by influencing the Executive (and now the Congress) or by bringing legal action to secure funds authorized by Congress. Thus, the result of the new Act is increased congressional control over the process of impoundment. The controls will apparently be exercised in both the Congress and the courts. The ultimate effect will be to formalize two methods in the process of releasing funds: one method, similar to the pre-1971 situation, relying on political resolution outside of the courts, and the second method, used during the 1971-73 period, relying on the courts for resolution of the controversy.



## APPENDIX

Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93-344, 88 Stat. 297 (1974)

## TITLE X—IMPOUNDMENT CONTROL

## PART A—GENERAL PROVISIONS

## DISCLAIMER

Sec. 1001. 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;
- (2) ratifying or approving any impoundment heretofore or hereinafter executed or approved by the President or any other Federal officer or employee, except insofar as pursuant to statutory authorization then in effect;
- (3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment; or
- (4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.

## AMENDMENT TO ANTIDEFICIENCY ACT

Sec. 1002. Section 3679(c)(2) of the Revised Statutes, as amended (31 U.S.C. 665),<sup>59</sup> is amended to read as follows:

“(2) In apportioning any appropriation, reserves may be established solely to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations. Whenever it is determined by an officer designated in subsection (d) of this section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the full objectives and scope of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations. Except as specifically provided by particular appropriations Acts or other laws, no reserves shall be established other than as authorized by this subsection. Reserves established pursuant to this subsection shall be reported to the Congress in accordance with the Impoundment Control Act of 1974.”

## REPEAL OF EXISTING IMPOUNDMENT REPORTING PROVISION

Sec. 1003. Section 203 of the Budget and Accounting Procedures Act of 1950 is repealed.<sup>59,1</sup>

PART B—CONGRESSIONAL CONSIDERATION OF PROPOSED  
RESCISSIONS, RESERVATIONS, AND DEFERRALS OF BUDGET  
AUTHORITY

## DEFINITIONS

Sec. 1011. For purposes of this part—

(1) “deferral of budget authority” includes—

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or

(B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law;

(2) “Comptroller General” means the Comptroller General of the United States;

(3) “rescission bill” means a bill or joint resolution which only rescinds, in whole or in part, budget authority proposed to be rescinded in a special message transmitted by the President under section 1012, and upon which the Congress completes action before the end of the first period of 45 calendar days of continuous session of the Congress after the date on which the President’s message is received by the Congress;

(4) “impoundment resolution” means a resolution of the House of Representatives or the Senate which only expresses its disapproval of a proposed deferral of budget authority set forth in a special message transmitted by the President under section 1013; and

(5) continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain shall be excluded in the computation of the 45-day period referred to in paragraph (3) of this section and in section 1012, and the 25-day periods referred to in sections 1016 and 1017(b)(1). If a special message is transmitted under section 1012 during any Congress and the last session of such Congress adjourns sine die before the expiration of 45 calendar days of continuous session (or a special message is so transmitted after the last session of the Congress adjourns sine die), the message shall

be deemed to have been retransmitted on the first day of the succeeding Congress and the 45-day period referred to in paragraph (3) of this section and in section 1012 (with respect to such message) shall commence on the day after such first day.

#### RESCISSION OF BUDGET AUTHORITY

Sec. 1012. (a) Transmittal of Special Message.—Whenever the President determines 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 or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of authorized projects or activities for which budget authority has been provided), or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year, the President shall transmit to both Houses of Congress a special message specifying—

(1) the amount of budget authority which he proposes to be rescinded or which is to be so reserved;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific project or governmental functions involved;

(3) the reasons why the budget authority should be rescinded or is to be so reserved;

(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed rescission or of the reservation; and

(5) all facts, circumstances, and considerations relating to or bearing upon the proposed rescission or the reservation and the decision to effect the proposed rescission or the reservation, and to the maximum extent practicable, the estimated effect of the proposed rescission or the reservation upon the objects, purposes, and programs for which the budget authority is provided.

(b) Requirement to Make Available for Obligation.—Any amount of budget authority proposed to be rescinded or that is to be reserved 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.

#### DISAPPROVAL OF PROPOSED DEFERRALS OF BUDGET AUTHORITY

Sec. 1013. (a) Transmittal of Special Message.—Whenever the President, the Director of the Office of Management and Budget, the head of

any department or agency of the United States, or any officer or employee of the United States proposes to defer any budget authority provided for a specific purpose or project, the President shall transmit to the House of Representatives and the Senate a special message specifying—

- (1) the amount of the budget authority proposed to be deferred;
- (2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific projects or governmental functions involved;
- (3) the period of time during which the budget authority is proposed to be deferred;
- (4) the reasons for the proposed deferral, including any legal authority invoked by him to justify the proposed deferral;
- (5) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed deferral; and
- (6) all facts, circumstances, and considerations relating to or bearing upon the proposed deferral and the decision to effect the proposed deferral, including an analysis of such facts, circumstances, and considerations in terms of their application to any legal authority and specific elements of legal authority invoked by him to justify such proposed deferral, and to the maximum extent practicable, the estimated effect of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

A special message may include one or more proposed deferrals of budget authority. A deferral may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral is transmitted to the House and the Senate.

(b) Requirement to Make Available for Obligation.—Any amount of budget authority proposed to be deferred, as set forth in a special message transmitted under subsection (a), shall be made available for obligation if either House of Congress passes an impoundment resolution disapproving such proposed deferral.

(c) Exception.—The provisions of this section do not apply to any budget authority proposed to be rescinded or that is to be reserved as set forth in a special message required to be transmitted under section 1012.

#### TRANSMISSION OF MESSAGES; PUBLICATION

Sec. 1014. (a) Delivery to House and Senate.—Each special message transmitted under section 1012 or 1013 shall be transmitted to the House of Representatives and the Senate on the same day, and shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in session. Each

special message so transmitted shall be referred to the appropriate committee of the House of Representatives and the Senate. Each such message shall be printed as a document of each House.

(b) **Delivery to Comptroller General.**—A copy of each special message transmitted under section 1012 or 1013 shall be transmitted to the Comptroller General on the same day it is transmitted to the House of Representatives and the Senate. In order to assist the Congress in the exercise of its functions under sections 1012 and 1013, the Comptroller General shall review each such message and inform the House of Representatives and the Senate as promptly as practicable with respect to—

(1) in the case of a special message transmitted under section 1012, the facts surrounding the proposed rescission or the reservation of budget authority (including the probable effects thereof); and

(2) in the case of a special message transmitted under section 1013, (A) the facts surrounding each proposed deferral of budget authority (including the probable effects thereof) and (B) whether or not (or to what extent), in his judgment, such proposed deferral is in accordance with existing statutory authority.

(c) **Transmission of supplementary messages.**—If any information contained in a special message transmitted under section 1012 or 1013 is subsequently revised, the President shall transmit to both Houses of Congress and the Comptroller General a supplementary message stating and explaining such revision. Any such supplementary message shall be delivered, referred, and printed as provided in subsection (a). The Comptroller General shall promptly notify the House of Representatives and the Senate of any changes in the information submitted by him under subsection (b) which may be necessitated by such revision.

(d) **Printing in Federal Register.**—Any special message transmitted under section 1012 or 1013, and any supplementary message transmitted under subsection (c), shall be printed in the first issue of the Federal Register published after such transmittal.

(e) **Cumulative Reports of Proposed Rescissions, Reservations, and Deferrals of Budget Authority.**—

(1) The President shall submit a report to the House of Representatives and the Senate, not later than the 10th day of each month during a fiscal year, listing all budget authority for that fiscal year with respect to which, as of the first day of such month—

(A) he has transmitted a special message under section 1012 with respect to a proposed rescission or a reservation; and

(B) he has transmitted a special message under section 1013 proposing a deferral.

Such report shall also contain, with respect to each such proposed

rescission or deferral, or each such reservation, the information required to be submitted in the special message with respect thereto under section 1012 or 1013.

(2) Each report submitted under paragraph (1) shall be printed in the first issue of the Federal Register published after its submission.

#### REPORTS BY COMPTROLLER GENERAL

Sec. 1015. (a) Failure to Transmit Special Message.—If the Comptroller General finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any other officer or employee of the United States—

(1) is to establish a reserve or proposes to defer budget authority with respect to which the President is required to transmit a special message under section 1012 or 1013; or

(2) has ordered, permitted, or approved the establishment of such a reserve or a deferral of budget authority;

and that the President has failed to transmit a special message with respect to such reserve or deferral, the Comptroller General shall make a report on such reserve or deferral and any available information concerning it to both Houses of Congress. The provisions of this part shall apply with respect to such reserve or deferral in the same manner and with the same effect as if such report of the Comptroller General were a special message transmitted by the President under section 1012 or 1013, and, for purposes of this part, such report shall be considered a special message transmitted under section 1012 or 1013.

(b) Incorrect classification of special message.—If the President has transmitted a special message to both Houses of Congress in accordance with section 1012 or 1013, and the Comptroller General believes that the President so transmitted the special message in accordance with one of those sections when the special message should have been transmitted in accordance with the other of those sections, the Comptroller General shall make a report to both Houses of the Congress setting forth his reasons.

#### SUITS BY COMPTROLLER GENERAL

Sec. 1016. If, under section 1012(b) or 1013(b), budget authority is required to be made available for obligation and such budget authority is not made available for obligation, the Comptroller General is hereby expressly empowered, through attorneys of his own selection, to bring a civil action in the United States District Court for the District of Columbia to require such budget authority to be made available for obligation, and

such court is hereby expressly empowered to enter in such civil action, against any department, agency, officer, or employee of the United States, any decree, judgment, or order which may be necessary or appropriate to make such budget authority available for obligation. The courts shall give precedence to civil actions brought under this section, and to appeals and writs from decisions in such actions, over all other civil actions, appeals, and writs. No civil action shall be brought by the Comptroller General under this section until the expiration of 25 calendar days of continuous session of the Congress following the date on which an explanatory statement by the Comptroller General of the circumstances giving rise to the action contemplated has been filed with the Speaker of the House of Representatives and the President of the Senate.

#### PROCEDURE IN HOUSE AND SENATE

Sec. 1017. (a) Referral.—Any rescission bill introduced with respect to a special message or impoundment resolution introduced with respect to a proposed deferral of budget authority shall be referred to the appropriate committee of the House of Representatives or the Senate, as the case may be.

(b) Discharge of Committee.—

(1) If the committee to which a rescission bill or impoundment resolution has been referred has not reported it at the end of 25 calendar days of continuous session of the Congress after its introduction, it is in order to move either to discharge the committee from further consideration of the bill or resolution or to discharge the committee from further consideration of any other rescission bill with respect to the same special message or impoundment resolution with respect to the same proposed deferral, as the case may be, which has been referred to the committee.

(2) A motion to discharge may be made only by an individual favoring the bill or resolution, may be made only if supported by one-fifth of the Members of the House involved (a quorum being present), and is highly privileged in the House and privileged in the Senate (except that it may not be made after the committee has reported a bill or resolution with respect to the same special message or the same proposed deferral, as the case may be); and debate thereon shall be limited to not more than 1 hour, the time to be divided in the House equally between those favoring and those opposing the bill or resolution, and to be divided in the Senate equally between, and controlled

by, the majority leader and the minority leader or their designees. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(c) Floor Consideration in the House.—

(1) When the committee of the House of Representatives has reported, or has been discharged from further consideration of, a rescission bill or impoundment resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the bill or resolution. The motion shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on a rescission bill or impoundment resolution shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the bill or resolution. A motion further to limit debate shall not be debatable. In the case of an impoundment resolution, no amendment to, or motion to recommit, the resolution shall be in order. It shall not be in order to move to reconsider the vote by which a rescission (*sic*) bill or impoundment resolution is agreed to or disagreed to.

(3) Motions to postpone, made with respect to the consideration of a rescission bill or impoundment resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to any rescission bill or impoundment resolution shall be decided without debate.

(5) Except to the extent specifically provided in the preceding provisions of this subsection, consideration of any rescission bill or impoundment resolution and amendments thereto (or any conference report thereon) shall be governed by the Rules of the House of Representatives applicable to other bills and resolutions, amendments, and conference reports in similar circumstances.

(d) Floor Consideration in the Senate.—

(1) Debate in the Senate on any rescission bill or impoundment resolution, and all amendments thereto (in the case



of a rescission bill) and debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours. The time shall be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(2) Debate in the Senate on any amendment to a rescission bill shall be limited to 2 hours, to be equally divided between, and controlled by, the mover and the manager of the bill. Debate on any amendment to an amendment, to such a bill, and debate on any debatable motion or appeal in connection with such a bill or an impoundment resolution shall be limited to 1 hour, to be equally divided between, and controlled by, the mover and the manager of the bill or resolution, except that in the event the manager of the bill or resolution is in favor of any such amendment, motion, or appeal, the time in opposition thereto, shall be controlled by the minority leader or his designee. No amendment that is not germane to the provisions of a rescission bill shall be received. Such leaders, or either of them, may, from the time under their control on the passage of a rescission bill or impoundment resolution, allot additional time to any Senator during the consideration of any amendment, debatable motion, or appeal.

(3) A motion to further limit debate is not debatable. In the case of a rescission bill, a motion to recommit (except a motion to recommit with instructions to report back within a specified number of days, not to exceed 3, not counting any day on which the Senate is not in session) is not in order. Debate on any such motion to recommit shall be limited to one hour, to be equally divided between, and controlled by, the mover and the manager of the concurrent resolution. In the case of an impoundment resolution, no amendment or motion to recommit is in order.

(4) The conference report on any rescission bill shall be in order in the Senate at any time after the third day (excluding Saturdays, Sundays, and legal holidays) following the day on which such a conference report is reported and is available to Members of the Senate. A motion to proceed to the consideration of the conference report may be made even though a previous motion to the same effect has been disagreed to.

(5) During the consideration in the Senate of the conference report on any rescission bill, debate shall be limited to 2 hours, to be equally divided between, and controlled by, the

majority leader and minority leader or their designees. Debate on any debatable motion or appeal related to the conference report shall be limited to 30 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report.

(6) Should the conference report be defeated, debate on any request for a new conference and the appointment of conferees shall be limited to one hour, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee, and should any motion be made to instruct the conferees before the conferees are named, debate on such motion shall be limited to 30 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report. Debate on any amendment to any such instructions shall be limited to 20 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report. In all cases when the manager of the conference report is in favor of any motion, appeal, or amendment, the time in opposition shall be under the control of the minority leader or his designee.

(7) In any case in which there are amendments in disagreement, time on each amendment shall be limited to 30 minutes, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee. No amendment that is not germane to the provisions of such amendments shall be received.

Approved July 12, 1974.

