

10-1-1973

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### Recommended Citation

Louis Fisher, *Impoundment of Funds: Uses and Abuses*, 23 Buff. L. Rev. 141 (1973).  
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol23/iss1/7>

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## IMPOUNDMENT OF FUNDS: USES AND ABUSES

LOUIS FISHER\*

In his news conference of January 31, 1973, President Nixon raised a number of academic and congressional eyebrows by asserting 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."<sup>1</sup> Far from laying the issue to rest, this sweeping declaration triggered a strong countermovement within Congress.

The debate on impoundment, spirited and fervent though it may be, has a tendency to generate more heat than light. A rich lode of precedents is available to comfort either side. Despite the volume of commentary on the subject, no one can say precisely what "impoundment" is.<sup>2</sup> This has resulted in a confusion of terms and misleading statistical claims. The first part of this article attempts to clear away some of the conceptual underbrush by offering a typology of impoundment, suggesting which are controversial and which are not. Then, three case studies are offered to demonstrate that apart from the broad issue of constitutionality is the practical need for good-faith efforts on the part of administrative officials. Without such efforts, administrators cannot expect to receive from Congress the customary broad grants of discretionary power. The system of delegation would then be profoundly altered, with many of the informal and nonstatutory controls frozen into law.

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The views expressed in this article are those of the author, not the Congressional Research Service.

1. 9 WEEKLY COMP. PRES. DOC. 110 (1973).

2. For an exploration of the definitional problem, see Note, *Presidential Impoundment: Constitutional Theories and Political Realities*, 61 GEO. L.J. 1295, 1295-97 (1973).

PART I

TYPES OF IMPOUNDMENT

Discussion of impoundment requires distinguishing among various types of action. Some actions are legitimate exercises of executive power, while others trespass directly on the legislative domain. To say that "impoundment has been used in the past" is to say nothing at all. The proper inquiry must be "What *kind* of impoundment?" It comes in many shapes and colors, legitimate in one case and highly suspect in another. As an omnibus term, "impoundment" tells us very little. To state the definition in a manner analogous to Mr. Justice Jackson's description of security, impoundment is like liberty in that many are the crimes committed in its name.<sup>3</sup>

The first of four categories, efficient management, covers instances in which funds are withheld either (1) to effect savings, (2) to accommodate changing events which make an expenditure unnecessary, or (3) to satisfy basic managerial responsibilities. Impoundments of this type are of a commonsense variety, evoking few protests, if any, from members of Congress.

A second category includes impoundment actions based upon statutory authority. Some statutes provide a routine delegation of power, calling upon the expertise and managerial talents of the executive branch. Other statutes represent a surrender of power that could have been exercised at the legislative level, had there been the desire to do so. In both cases, impoundment authority is derived from statute.

A third category concerns the general constitutional powers of the President, particularly his duties as Commander in Chief. Impoundments in this area are highly controversial, placing the President's power directly in conflict with Congress's responsibility to provide for the common defense.

The last category covers executive policy making. In pursuing such goals as curbing inflation or reordering budget priorities, the President uses impoundment to further his objectives at the expense of legislative preferences. In such cases it is not sufficient to agree with

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3. In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), Mr. Justice Jackson said that "security is like liberty in that many are the crimes committed in its name." *Id.* at 551.

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administrative goals, for that easily degenerates into a philosophy wherein "the end justifies the means."

These four categories are not mutually exclusive. For example, efficient management has been partially enacted into statute (the Anti-deficiency Act) and may even be regarded as part of the President's constitutional responsibility to faithfully execute the laws. The value of categorizing impoundments is to separate their various underlying sources of authority.

### I. EFFICIENT MANAGEMENT

It has long been the practice of the executive branch to regard appropriations as permissive rather than mandatory. Impoundment has thus existed since the days of George Washington, at least to the extent that expenditures occasionally fall short of appropriations.

#### A. *To Effect Savings*

Attorney General Judson Harmon declared in 1896 that an appropriation is not mandatory "to the extent that you are bound to expend the full amount if the work can be done for less . . . ." <sup>4</sup> This same point was made in 1942 by President Roosevelt. The setting aside of budgetary reserves for the purpose of preventing deficiencies or for effecting savings was defended as sound fiscal practice. Roosevelt wrote that to mandate that all funds be fully expended "would take from the Chief Executive every incentive for good management and the practice of commonsense economy." <sup>5</sup>

In 1950 the House Committee on Appropriations emphasized that economy "neither begins nor ends in the Halls of Congress." <sup>6</sup> According to the Committee, an appropriation of a given amount for a particular activity constituted

only a ceiling upon the amount which should be expended for that activity. The administrative officials responsible for administration of an activity for which appropriation is made bear the final burden for

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4. 21 OP. ATT'Y GEN. 415 (1896); similar statements appear *id.* at 392, 422.

5. *Hearings on First Supplemental National Defense Appropriation Bill for 1944 Before the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 739 (1943) (letter from President Franklin D. Roosevelt to Senator Richard Russell, Aug. 18, 1942).

6. H.R. REP. No. 1797, 81st Cong., 2d Sess. 9 (1950).

rendering all necessary service with the smallest amount possible within the ceiling figure fixed by the Congress.<sup>7</sup>

These are *limited* powers of impoundment. President Roosevelt expressly recognized the constraints on this type of action by saying that the use of budgetary reserves to prevent deficiencies or to effect savings was not "a substitute for item or blanket veto power, and should not be used to set aside or nullify the expressed will of Congress . . . ."<sup>8</sup> The 1950 statement by the House Committee on Appropriations warned that "there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds."<sup>9</sup>

### B. *Changing Events*

If Congress provides funds for a purpose, and later events make the expenditure unnecessary, administrators are expected to withhold the funds and return them to the Treasury. Jefferson, for example, found it unnecessary on a number of occasions to use all of the money provided in a contingent fund. He regularly returned the unexpended balances to the Treasury.<sup>10</sup>

A more publicized impoundment by Jefferson concerned the withholding of \$50,000 in 1803. When Jefferson notified Congress that the funds appropriated for gunboats would remain unexpended, he explained: "The favorable and peaceable turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary . . . ."<sup>11</sup> Since the emergency contemplated by Congress failed to materialize, because of the Louisiana Purchase, Jefferson saw no reason to spend the money. Neither did Congress. A year later, having taken the time to study the most recent models of gunboats, Jefferson informed Congress that he was proceeding with the program.<sup>12</sup>

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7. *Id.*

8. See *Hearings, supra* note 5.

9. See H.R. REP. NO. 1797, *supra* note 6, at 311.

10. 1 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 325 (J. Richardson ed. 1925). See also *id.* at 354, 366, 382-83, 405, 421, 447.

11. *Id.* at 348.

12. *Id.* at 360. For a discussion of the historical background for this by Professor Joseph Cooper, see *Hearings on Impoundment of Appropriated Funds by the President 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. 676-77 (1973) [hereinafter cited as *1973 Ervin Hearings*].

The Nixon administration attempted to use the routine impoundment by Jefferson

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### C. Managerial Responsibilities

An administration may have a number of other valid reasons for suspending a program or payment. In 1840, the Supreme Court upheld a decision of the Secretary of the Navy to withhold payment from a widow whose claim was based on a resolution passed by Congress.<sup>13</sup> Had the Secretary mechanically followed the direction of Congress, without exercising judgment or discretion, the widow would have received two pensions: one from the specific resolution adopted on her behalf, and a second from a general pension bill. The Secretary properly concluded that Congress could not have intended double benefits.

After World War II, President Truman temporarily withheld funds from a program to build hospitals for veterans. The administration had thought it better to wait until the returning servicemen had settled in order to achieve the most effective placement of medical facilities.<sup>14</sup>

In January 1971, the Department of Housing and Urban Development interrupted a mortgage-subsidy program designed to help poor families buy their own homes. HUD Secretary Romney suspended part of the program when it became apparent that abuses by real estate speculators were "more prevalent and widespread than had previously been evident."<sup>15</sup> After the potential for abuse had been corrected, the program was reinstated.

Several months later HUD suspended a low-income housing program in New Jersey because of inadequate administration by the Newark Housing Authority. The money was released when the Authority complied with HUD's request for organizational changes.<sup>16</sup>

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to justify much more serious actions. See *Hearings on Department of Housing and Urban Development; Space, Science, Veterans and Certain Other Independent Agencies Appropriations for Fiscal 1973 Before the Senate Comm. on Appropriations*, 92d Cong., 2d Sess. 565 (1972) (statement by George Romney, Secretary of Housing and Urban Development); *Hearings on Caspar W. Weinberger To Be Secretary of Health, Education, and Welfare (Part 1) Before the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 29 (1973).

13. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840). For other early cases distinguishing between ministerial and executive duties, see Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124, 126-28 (1969).

14. *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. 85 (1971) [hereinafter cited as *1971 Ervin Hearings*].

15. *Washington Post*, Jan. 15, 1971, at A2, col. 1. Section 235 of the Omnibus Housing Act of 1968, 12 U.S.C. § 1715z(c)(2) (1971), authorizes payment by the government of up to all but one percentage point of the interest rate on a mortgage loan for a low income buyer.

16. *N.Y. Times*, Apr. 23, 1971, at 36, col. 2.

A final example involved HEW's 1971 withholding of federal funds from black nationalist Col. Hassan Jeru-Ahmed's drug rehabilitation program. Inadequate bookkeeping was cited as the reason. A report by the General Accounting Office disclosed that at least \$171,533 in federal drug treatment funds were paid to a relative and friends of Hassan, were spent for automobiles and real estate, or were unable to be counted for.<sup>17</sup>

## II. STATUTORY AUTHORITY

The President is not only permitted limited powers of impoundment to be exercised at his discretion; in some cases he is required or directed by law to withhold funds under conditions and circumstances prescribed by Congress.

### A. *Economy and Reorganization Acts*

Economic collapse in 1929 led to broad presidential authority for reducing expenditures. In 1932 President Hoover received authority to make partial layoffs, reduce compensation for public officials, and consolidate executive agencies in order to effect savings. Funds impounded by this Economy were to be returned to the Treasury.<sup>18</sup> The House of Representatives disapproved the initiatives offered by Hoover, preferring to leave reorganization changes to the incoming President, Franklin D. Roosevelt.<sup>19</sup> Before leaving office, Hoover signed two more economy measures authorizing his successor to effect further reorganization and to reduce military spending in accordance with an economy survey to be ordered by the President.<sup>20</sup>

Once in office, Roosevelt requested authority to reduce veterans' benefits and the salaries of federal employees.<sup>21</sup> The Economy Act of

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17. Washington Post, June 26, 1971, at B1, col. 6; *id.*, May 31, 1972, at A1, col. 3.

18. Act of June 30, 1932, ch. 314, pt. II, tit. I, IV, 47 Stat. 382.

19. 76 CONG. REC. 233, 2103-26 (1932). On June 30, 1932, President Hoover signed the legislative appropriation bill, section 2 of which, the economy act, contained a provision for the reorganization of the executive departments, and in which the President was given certain limited authority to group, coordinate, and consolidate Government activities. Acting under that authority, the President submitted on Dec. 9 a very thorough and exhaustive message containing recommendations for the consolidation of some 58 governmental activities. *Id.* at 2103.

20. Act of Mar. 4, 1933, ch. 281, tit. II, § 4, 47 Stat. 1602; Act of March 3, 1933, ch. 212, § 16, 47 Stat. 1519.

21. 2 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 50 (1938).

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March 20, 1933, authorized him to reduce veterans' payments by several hundred million dollars.<sup>22</sup> The Reorganization Act of 1939,<sup>23</sup> which declared that continuing deficits made cutbacks desirable, directed the President to effect savings by consolidating or abolishing agencies for more efficient operation. Of the five purposes identified in the act, spending reduction was listed first.<sup>24</sup>

Another general grant of impoundment power appeared in the single-package ("omnibus") appropriation bill of 1950, directing the President to cut the budget by not less than \$550 million without impairing national defense.<sup>25</sup> President Truman fulfilled the statutory directive by placing \$572 million in reserve, including \$343 million in appropriations, \$119 million in contract authority, and \$110 million in authorizations to borrow from the Treasury.<sup>26</sup>

### B. Spending Ceilings

In 1967 Congress directed a spending cut of \$4.3 billion. Legislative action reduced spending by \$1.8 billion, leaving \$2.5 billion to be trimmed by the President. The budget-cutting formula required each civilian agency to reduce its budgeted obligations by an amount equal to 2 percent of payroll, plus 10 percent of other controllable obligations. Defense Department obligations were to be reduced by an amount equal to 10 percent of non-Vietnam programs.<sup>27</sup>

In 1968, 1969, and 1970, Congress enacted ceilings on expenditures, and thereby gave the Nixon administration additional statutory authority to impound funds.<sup>28</sup> Policy making inevitably resulted, since the administration unilaterally selected the programs to be sacrificed.<sup>29</sup>

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22. Act of Mar. 20, 1933, ch. 3, 48 Stat. 8. See 2 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 21, at 28, 51, 69.

23. Act of Apr. 3, 1939, ch. 36, 53 Stat. 561.

24. For additional background on this and other impoundment disputes, see Fisher, *The Politics of Impounded Funds*, 15 AD. SCI. Q. 361 (1970).

25. Act of Sept. 6, 1950, ch. 896, § 1214, 64 Stat. 768.

26. H.R. Doc. No. 182, 82d Cong., 1st Sess. (1951).

27. Act of Dec. 18, 1967, Pub. L. No. 90-218, 81 Stat. 662. See 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1967, at 1174.

28. Act of July 6, 1970, Pub. L. No. 91-305, § 501, 84 Stat. 406; Act of July 22, 1969, Pub. L. No. 91-47, § 401, 83 Stat. 82; Act of June 28, 1968, Pub. L. No. 90-364, § 202, 82 Stat. 271. See L. FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* 106-10 (1972).

29. For a discussion of the policy-making issue, see notes 132-63 *infra* & accompanying text.

In retaliation, Congress refused to adopt a spending ceiling in 1971. Representative Joe L. Evins explained that Congress did not want to give the Nixon administration "a flexible ceiling which could [be] use[d] as a tool to freeze and impound funds as [they] did in the past."<sup>30</sup> The subject of a spending ceiling reappeared in the fall of 1972, but the two Houses of Congress were unable to agree on a formula which would restrict executive discretion.<sup>31</sup>

The Ervin impoundment bill, reported out on April 17, 1973, included a spending ceiling of \$268 billion for fiscal 1974. If withholding were necessary to protect the ceiling, the bill provided that it be done on a roughly proportional basis. The Ervin bill passed the Senate three times: as an amendment to the Par Value Modification Bill,<sup>32</sup> as an amendment to the Debt Limit Bill,<sup>33</sup> and as a separate bill.<sup>34</sup> On July 25, 1973, the House adopted a spending ceiling with a proportional cutback formula.<sup>35</sup>

### C. Antideficiency Act

The Antideficiency Act, as amended in 1950, authorizes the President to establish budgetary reserves

to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available.<sup>36</sup>

To comprehend the purpose and scope of this provision, it must be viewed in the context of an earlier Post Office dispute.

In the spring of 1947, the Post Office Department announced that it would exhaust its funds long before the end of the fiscal year. Instead of apportioning its funds to avoid a deficiency situation (*e.g.*, in roughly equal amounts by quarters), the Post Office allotted \$370

30. *Hearings on Public Works for Water and Power Development and Atomic Energy Commission Appropriations (Part 6) Before the House Comm. on Appropriations*, 92d Cong., 1st Sess. 13. (1971).

31. *See* 118 CONG. REC. S18,633 (daily ed. Oct. 18, 1972); *id.* at S18,506-29 (daily ed. Oct. 17, 1972).

32. 119 CONG. REC. S6696 (daily ed. Apr. 4, 1973).

33. *Id.* at S12,169 (daily ed. June 27, 1973). Rejected by conferees, *id.*, at H5721 (daily ed. June 29, 1973); *id.* at S12,710-11 (daily ed. June 30, 1973).

34. *Id.* at S8871 (daily ed. May 10, 1973).

35. 119 CONG. REC. H6626 (daily ed. July 25, 1973).

36. Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765 (codified at 31 U.S.C. § 665(c)(2) (1970)).

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million for the first quarter, \$409 million for the second, \$364 million for the third, and only \$9.5 million for the final quarter. Congress found itself in a predicament: If it did not provide extra money in a deficiency bill, the Post Office would have to suspend operations.<sup>37</sup>

The difficulties of the Post Office caused the Senate Appropriations Committee to request that the Bureau of the Budget (hereinafter referred to as "BOB") and the General Accounting Office (hereinafter referred to as "GAO") recommend ways to improve the Anti-deficiency Act.<sup>38</sup> The resulting joint BOB-GAO report began with the assumption that it was impossible to completely eliminate deficiencies; changing conditions, unforeseen at appropriation time, would always breed new expenses. The report noted, however, that changing conditions should also produce *surpluses* by way of overfunding. Unless some action was taken to conserve these excess funds, they might be obligated by the end of the fiscal year "even though there may be no essential need thereof."<sup>39</sup>

The obvious means for avoiding deficiency bills in the future was to encourage the setting aside of surpluses. A draft bill prepared by the BOB and the GAO recommended this language:

In apportioning any appropriation, reserves may be established to provide for contingencies or to effect savings whenever savings are made possible by or through changes in quantitative or personnel requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available.<sup>40</sup>

Section 1211 of the 1950 omnibus appropriation act closely followed the BOB-GAO language:

In apportioning any appropriation, 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>41</sup>

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37. *Hearings on Second Deficiency Appropriation Bill for 1947 Before the Senate Comm. on Appropriations*, 80th Cong., 1st Sess. 125, 137 (1947).

38. *Id.* at 142-43.

39. Director of the Bureau of the Budget & Comptroller General of the United States, Report and Recommendations with Respect to the Antideficiency Act and Related Legislation and Procedures 7 (mimeographed report with appendices submitted to Senator Styles Bridges, chairman of the Committee on Appropriations, June 5, 1947).

40. *Id.* (§ (c)(2) of draft bill).

41. See Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765.

The legislative history of this provision clearly demonstrates that its purpose was to build up surpluses in some accounts as a means of balancing deficiencies elsewhere. Nowhere was there an implied authority to set aside reserves to cancel or curtail a program. On the contrary, immediately after the above cited passage the Act provides that

[w]henver it is determined by an officer designated in subsection (d) of this section to make apportionments and reappropriations that any amount so reserved will not be required to carry out the purposes 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.<sup>42</sup>

In short, if an administrator could execute a program by spending fewer dollars than appropriated, all well and good. But the purpose of the appropriation itself was not to be denied.

This was a well established policy. The BOB-GAO report had cautioned that the authority to set aside reserves "must be exercised with considerable care in order to avoid usurping the powers of Congress."<sup>43</sup> The same position was taken two years later by the Hoover Commission when it recommended that the President "should have authority to reduce expenditures under appropriations, if the purposes intended by the Congress are still carried out."<sup>44</sup> In reporting out the antideficiency language in 1950, the House Appropriations Committee explained that this grant of authority to set aside reserves was not to be taken as "justification for the thwarting of a major policy of Congress by the impounding of funds."<sup>45</sup> The intent of the 1950 language was amplified by the BOB in its Examiners Handbook for 1952: "Reserves must not be used to nullify the intent of Congress with respect to specific projects or level of programs."<sup>46</sup>

Roy L. Ash, Director of the Office of Management and Budget (hereinafter referred to as "OMB"), during the Nixon administration, argued that inflationary pressures can be considered "other de-

42. *Id.* (emphasis added).

43. BOB-GAO Report at 21.

44. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH, BUDGETING AND ACCOUNTING, A REPORT TO THE CONGRESS 17 (1949).

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

46. Williams, *The Impounding of Funds by the Bureau of the Budget* 32, *Inter-University Case Program* #28 (1955), reprinted in 1973 *Ervin Hearings*, *supra* note 12, at 859.

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velopments" within the meaning of the Antideficiency Act and thus an authority for withholding funds.<sup>47</sup> However, there is nothing in either the language or the history of the Antideficiency Act to support that proposition.

### D. *Employment Act of 1946*

Caspar W. Weinberger told a Senate committee on January 17, 1973, that the Employment Act of 1946<sup>48</sup> "requires the President to maintain policies that guard against inflation."<sup>49</sup> That is inaccurate. The Act merely requires the President to present an economic report to Congress.<sup>50</sup> It did not confer upon the President any special powers. The Act's goals of maximum employment, production, and purchasing power were to be the responsibility of the entire federal government.

Furthermore, the Act did not confer any discretionary spending power upon the President. Significantly, Section 6 of the Employment Bill of 1945 *did* contain discretionary spending authority, allowing the President to vary expenditure levels in whatever manner he determined to be necessary for the purpose of "assisting in assuring" full employment, but that section was conspicuously absent from the Employment Act of 1946.<sup>51</sup>

As a final point, the Employment Act of 1946 was enacted as an instrument for countering a possible postwar depression. Maximizing purchasing power, a primary goal, was to be attained by promoting employment and production. Impoundment has precisely the opposite effect.

### E. *Economic Stabilization Act*

Deputy Attorney General Joseph T. Sneed told a Senate committee on February 6, 1973, that President Nixon had

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47. 1973 *Ervin Hearings* at 286. The author discusses the history of the Antideficiency Act more thoroughly in *id.* at 395-99.

48. Act of Feb. 20, 1946, ch. 33, 60 Stat. 24 (codified at 15 U.S.C. §§ 1021-25 (1970)).

49. *Hearings on Caspar W. Weinberger To Be Secretary of Health, Education, and Welfare (Part 1) Before the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 30 (1973).

50. Act of Feb. 20, 1946, ch. 33, § 3, 60 Stat. 24 (codified at 15 U.S.C. § 1022 (1970)).

51. S. BAILEY, CONGRESS MAKES A LAW 248 (1950); S. 380, 79th Cong., 1st Sess. (1945), as introduced on Jan. 22, 1945 and referred to the Committee on Banking and Currency.

substantial latitude to refuse to spend or to defer spending for general fiscal reasons, such as control of inflation. This view is supported by the Congressional intent revealed by the Employment Act of 1946, the Economic Stabilization Act Amendments of 1971, and the debt limit imposed by Public Law 92-599.<sup>52</sup>

A report by OMB also cited the Economic Stabilization Act as authority and reason for withholding funds from a number of projects: the Appalachian regional development programs, rural electrification loans, FHA rural water and waste disposal grants, federal aid to highways, payment to the Tennessee Valley Authority Fund, and several housing and urban development programs.<sup>53</sup>

On February 19, 1973, Senator Eagleton introduced an amendment to provide that nothing in the Economic Stabilization Act "may be construed to authorize or require the withholding or reservation of any obligational authority provided by law, or of any funds appropriated under such authority."<sup>54</sup> The Eagleton amendment was incorporated into a bill to extend and amend the Economic Stabilization Act<sup>55</sup> and was enacted into law on April 30, 1973.<sup>56</sup>

#### F. Public Debt Limit

Several administrations have relied on the debt ceiling as authority for withholding funds. In 1957, in order to keep within the statutory debt limit imposed by Congress, the Eisenhower administration issued a series of orders and announcements for cutbacks and stretchouts in defense programs.<sup>57</sup> When Congress later raised the debt limit, the money was released.<sup>58</sup> The "debt ceiling" argument has also been invoked frequently by the Nixon administration.<sup>59</sup>

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52. 1973 *Ervin Hearings* at 366.

53. 38 Fed. Reg. 3475 [Code 6c], 3476-93 (1973).

54. 119 CONG. REC. S2682 (daily ed. Feb. 19, 1973).

55. S. REP. NO. 63, 93d Cong., 1st Sess. 6-7 (1973).

56. Act of Apr. 30, 1973, Pub. L. No. 93-28, § 4, 87 Stat. 28.

57. Rep. Mahon explained the stretchout policy at 103 CONG. REC. A7337 (1957). In brief, the stretchout policy involves slowing down the rate of expenditures during a given fiscal year, and spending the balance in subsequent years.

58. Budget Director Stans said that funds were released after the debt ceiling was raised. *Hearings on the Budget for 1960 Before the House Comm. on Appropriations*, 86th Cong., 1st Sess. 40 (1959).

59. See 1973 *Ervin Hearings* at 270, 366-77; 1971 *Ervin Hearings* at 96; *Hearings on Withholding of Funds for Housing and Urban Development Programs, Fiscal Year 1971, Before the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 1st Sess. 94 (1971).

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In adhering to a debt limit established by Congress, an administration is nevertheless able to give preference to its own programs and priorities. Thus, the Nixon administration extended revenue sharing to the states without feeling constrained by the debt limit, while at the same time it withheld funds from a number of other programs ostensibly on the ground that the debt limit could not accommodate them.

### G. Discretionary Language

Statutes frequently provide for discretionary spending authority, which is sometimes explicit in the statute itself, sometimes implicit in the statute's legislative history.

Explicit authority is illustrated by the Labor-HEW appropriation bill for fiscal 1970. President Nixon vetoed the bill on January 26, 1970, because it provided \$1.3 billion more than he had requested.<sup>60</sup> After sustaining<sup>61</sup> the President's veto, Congress reduced the appropriation from \$19.7 billion to \$19.3 billion—still \$900 million more than Nixon had desired. But in order to avert the possibility of a second veto, the bill included a provision that limited expenditures to 98 percent of appropriations, provided that no amount specified in the appropriation could be cut by more than 15 percent. The 2-percent cutback allowed for a further spending reduction of \$347 million. President Nixon signed the amended bill.<sup>62</sup>

A similar situation arose three years later. President Nixon vetoed the fiscal 1973 Labor-HEW appropriation bill, which was \$1.8 billion higher than he had requested.<sup>63</sup> Congress passed the bill again, this time including presidential authority to withhold from obligation and expenditure as much as \$1.2 billion, provided that no activity would be reduced by more than 13 percent.<sup>64</sup> In contrast with his action three years earlier, the President pocket vetoed the amended bill.<sup>65</sup>

The Labor-HEW appropriation bill for fiscal 1974, enacted into law,<sup>66</sup> authorizes the President to withhold up to \$400 million, with

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60. 116 CONG. REC. 1365-67 (1970).

61. *Id.* at 1552.

62. Act of Mar. 5, 1970, Pub. L. No. 91-204, § 410, 84 Stat. 48. *See* discussion at 116 CONG. REC. 5926-27 (1970).

63. 8 WEEKLY COMP. PRES. DOC. 1240 (1972).

64. *See* H.R. REP. NO. 1591, 92d Cong., 2d Sess. 2-3 (1972).

65. 8 WEEKLY COMP. PRES. DOC. 1578 (1972).

66. Act of Dec. 18, 1973, Pub. L. No. 93-192.

the restriction that none of the appropriations, activities, programs and projects may be reduced by more than 5 percent. If the discretion is used to its fullest, the statute will exceed the President's budget request by approximately \$978 million.<sup>67</sup>

A more difficult area, concerning the degree of spending discretion implicit in an act, is illustrated by the Federal Water Pollution Control Act Amendments of 1972.<sup>68</sup>

#### H. *Other Miscellaneous Statutory Provisions*

The President has been granted discretionary spending powers in a variety of other legislative formulations. For example, he has been directed to withhold economic assistance in an amount equivalent to that spent by an underdeveloped country for the purchase of sophisticated weapons systems, unless he informs Congress that the withholding of such assistance would be detrimental to national security.<sup>69</sup> Economic assistance is not to be furnished to any nation "whose government is based upon that theory of government known as communism," unless the President determines that the withholding of such assistance would be contrary to the national interest.<sup>70</sup> An overthrow of a regime by "communist" forces might therefore be a basis for cutting off assistance. Furthermore, according to the "Hickenlooper amendment," if a foreign government seizes any property from U.S. corporations and fails to compensate them within a reasonable amount of time, the President is required to suspend assistance.<sup>71</sup>

The 1964 Civil Rights Act empowers the President to withhold funds from federally financed programs in which there is discrimination by race, color, or national origin.<sup>72</sup> On the basis of that provision, special desegregation grants may be terminated when school districts violate civil rights requirements.

States that fail to enact billboard control legislation, as required

67. H.R. REP. NO. 682, 93d Cong. 1st Sess. 7 (1973).

68. See notes 206-35 *infra* & accompanying text.

69. Act of Feb. 9, 1970, Pub. L. No. 91-194, § 119, 84 Stat. 10; 22 U.S.C. § 2370(s) (1970).

70. Act of Feb. 9, 1970, Pub. L. No. 91-194, § 109(b), 84 Stat. 9; 22 U.S.C. § 2370(f) (1970).

71. 22 U.S.C. § 2370(e) (1970). That provision has been applied only once, against Ceylon in 1963. *Hearings on Foreign Assistance and Related Agencies Appropriations for 1973 (Part 2) Before the House Comm. on Appropriations*, 92d Cong., 2d Sess. 142 (1972).

72. 42 U.S.C. § 2000(d)(1) (1970).

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by the Federal Highway Beautification Act of 1965, have been threatened with a loss of federal aid for highway improvement.<sup>73</sup> A 1968 act requires states to update their welfare payments standards in order to reflect cost-of-living increases.<sup>74</sup> Failure to comply with this act can lead to a cutoff of federal welfare assistance.<sup>75</sup>

### III. CONSTITUTIONAL POWERS

#### A. Executive Power

Legislative efforts to control impoundment have been resisted by the Nixon administration as a "serious infringement" upon the President's constitutional responsibility to execute the laws enacted by Congress. The establishment and release of budgetary reserves was regarded as an action of "an administrative nature, fully consistent with the President's constitutional duty to 'take care that the laws be faithfully executed.'" <sup>76</sup> A more general proposition by the Nixon administration rested on the belief that the President's authority to establish reserves "is derived basically from the constitutional provisions which vest the executive power of the President."<sup>77</sup>

This latter proposition opens the door to the shadowy area of

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73. Washington Evening Star, Feb. 27, 1971, at A2, col. 6; Washington Post, Feb. 12, 1972, at A4, col. 1.

74. Act of Jan. 2, 1968, Pub. L. No. 90-248, 81 Stat. 898, § 213(b) (codified at 42 U.S.C. § 602(a)(23) (1970)).

75. HEW threatened during 1971 to cut off relief funds from California, Indiana, Nebraska, and Arizona. See National Journal, Feb. 20, 1971, at 401-09; N.Y. Times, Apr. 1, 1971, at 24, col. 3; *id.*, Mar. 29, 1971, at 19, col. 1; *id.*, Jan. 20, 1971, at 15, col. 1; Washington Post, Jan. 28, 1971, at A18, col. 1; *id.*, Jan. 9, 1971, at A2, col. 1; *id.*, Jan. 8, 1971, at A5, col. 6.

76. *Hearings on the Budget of the United States, Fiscal Year 1973, Before the Senate Comm. on Appropriations*, 92d Cong., 2d Sess. 126 (1972) (statement by the Office of Management and Budget). Repeated, Feb. 1, 1973, by OMB Director Roy L. Ash, in *1973 Ervin Hearings*, *supra* note 12, at 272.

77. *1971 Ervin Hearings*, *supra* note 14, at 95. In his statement of Feb. 1, 1973, OMB Director Ash said that the

detailed administration of projects, the negotiating and letting of contracts, the identification of payees and determination of their eligibility for payment, and the essential exercise of judgment in the normal conduct of Government operations—all of these, by their very nature, are clearly executive functions.

These functions are undeniably within the executive authority. Indeed, he has an absolute responsibility to carry out these functions.

*1973 Ervin Hearings*, *supra* note 12, at 270. At the latter hearings, Deputy Attorney General Sneed doubted whether Congress can legislate against impoundment, even in the domestic area: "To admit the existence of such power deprives the President of a substantial portion of the 'executive power' vested in him by the Constitution . . ." *Id.*, at 369.

implied powers. And yet, to deny the President any discretion and judgment over the expenditure of funds, other than what Congress specifically delegates to him, would convert his office from that of Chief Executive to Chief Clerk.<sup>78</sup> It would prevent the executive branch from making the kinds of decisions previously described as "efficient management."<sup>79</sup> Finally, it would carry to extremes the Brandeis dictum that the doctrine of separated powers was adopted "not to promote efficiency but to preclude the exercise of arbitrary power."<sup>80</sup> The period from 1774 to 1787 furnishes ample proof that the framers indeed intended to create a separate executive branch for the purpose of imparting efficiency and accountability to government.<sup>81</sup>

The issue is thus not *whether* a degree of discretion and judgment is implied in Article II of the Constitution.<sup>82</sup> Rather, inquiry must be made as to the boundaries of that discretion.

### B. Foreign Affairs

Officials of the Nixon administration have argued that the President's discretion to withhold funds is especially broad in the area of foreign affairs. In a statement before the Ervin-Chiles impoundment hearings on February 6, 1973, Assistant Attorney General Sneed offered these remarks:

The President has substantial authority to control spending in the areas of national defense and foreign relations. Such authority flows from the President's constitutional role as Commander-in-Chief of the Armed Forces and from his relatively broad constitutional authority in the field of foreign affairs.<sup>83</sup>

. . . . .  
In [the areas of national defense and foreign relations] Congressional directives to spend may intrude impermissibly into matters re-

78. *Id.* (statement by Deputy Attorney General Sneed).

79. See notes 4-17 *supra* & accompanying text.

80. *Myers v. United States*, 272 U.S. 52, 293 (1926) (dissenting opinion).

81. L. FISHER, *PRESIDENT AND CONGRESS 1-27, 241-70* (1972); Fisher, *The Efficiency Side of Separated Powers*, 5 J. AMERICAN STUDIES 113 (1971); Fisher, *Presidential Tax Discretion and Eighteenth Century Theory*, 23 WESTERN POL. Q. 151 (1970).

82. L. FISHER, *supra* note 81, at 29-42.

83. *1973 Ervin Hearings*, *supra* note 12, at 368, citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). The sweeping assertions by Mr. Justice Sutherland in the *Curtiss-Wright* case rest on an overly simplistic dichotomy between foreign affairs and domestic affairs. Executive commitments abroad have sharply reduced the availability of funds for domestic programs. See L. FISHER, *supra* note 81, at 64-65, 117-18, 127-31.

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served by the Constitution to the President. It is noteworthy that Congress has never successfully challenged an impounding action in the foreign relations and national defense fields.<sup>84</sup>

Of course, ample statutory authority exists for withholding foreign assistance funds.<sup>85</sup> If the President were to withhold funds he would be acting in support of congressional policy, not in defiance of it. Moreover, the administrative patterns in foreign assistance is not to impound funds but to spend every available dollar. In 1971, when it was learned that a series of domestic programs had been affected by impoundment, congressional hearings revealed that not one dime had been withheld from projects overseas.<sup>86</sup> This led to a provision in the Foreign Assistance Act of 1971, prohibiting the obligation or expenditure of funds available under the Foreign Assistance Act and the Foreign Military Sales Act unless certain funds withheld from the Departments of Agriculture, HEW, and HUD were released.<sup>87</sup> A similar effort was made in 1973 to make the expenditure of foreign assistance funds contingent upon the release of domestic funds.<sup>88</sup>

### C. Commander in Chief

Assistant Attorney General Sneed's contention that there exists executive authority for impoundment of funds in national defense and foreign relations matters relies upon the President's constitutional role as Commander in Chief.<sup>89</sup> The scope of that constitutional provi-

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84. 1973 *Ervin Hearings*, *supra* note 12, at 368.

85. See notes 69-71 *supra* & accompanying text.

86. *Hearings on Foreign Assistance and Related Agencies Appropriations for 1972 Before the House Comm. on Appropriations*, 92d Cong., 1st Sess. 275-77 (Part 1), 70, 181-91, 351-55 (Part 2) (1971).

87. Act of Feb. 7, 1972, Pub. L. No. 92-226, § 658, 86 Stat. 32. The Senate Committee on Foreign Relations explained that the purpose of the impoundment provision was to tell the American taxpayers: "You will be assured of getting the funds appropriated by Congress for domestic programs and projects before additional foreign aid funds can be obligated for similar programs and projects in Rio de Janiero, Nairobi or New Delhi." S. REP. NO. 432, 92d Cong., 1st Sess. 15 (1971). The General Accounting Office subsequently reported that the domestic funds in question had been released. 118 CONG. REC. H4098 (daily ed. May 3, 1972).

88. *Id.* at H4583-85 (daily ed. June 11, 1973); 119 CONG. REC. S2431-33 (daily ed. Feb. 8, 1973). The Nixon administration's first impoundment report, in response to P.L. 92-599, included various types of withholdings, including Code 8: "The President's constitutional authority and responsibility for the conduct of foreign affairs (U.S. Constitution, Article II, section 2)." No funds were withheld for that reason, 38 Fed. Reg. 3475 (1973).

89. See note 83 *supra* & accompanying text.

sion remains a source of continuing dispute. As Mr. Justice Jackson once said of the Commander in Chief clause:

These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends.<sup>90</sup>

1. *During Wartime.* Impoundment pursuant to this authority was used before, during, and after World War II, sparking objections from some members of Congress but without creating a major crisis. With war imminent in January 1941, President Roosevelt told Congress that it seemed appropriate to "defer construction projects that interfere with the defense program by diverting manpower and materials."<sup>91</sup> Despite some opposition, the Roosevelt administration was generally able to withhold funds from domestic projects in order to promote the war effort.<sup>92</sup> When Congress authorized public works projects in December 1944 and in March 1945, it did so in the "interest of the national security" and for the purpose of providing a reservoir of useful projects during the postwar period. Projects were to be initiated "as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements."<sup>93</sup> No project was to be funded or constructed until six months after the end of the war, unless recommended by an authorized defense agency and approved by the President as being "necessary or desirable in the interest of the national defense and security, and the President had notified the Congress to that effect."<sup>94</sup>

Surrender of the Axis powers left the federal government with tens of billions of dollars in excess of military needs. That balance was brought under control by Congress (rescinding appropriations) and by the President (impounding funds). In June 1944, Congress directed the President to undertake a continuous study of war appropriations and contract authorizations so that he would be able to

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90. *Youngstown v. Sawyer*, 343 U.S. 579, 641 (1952).

91. 9 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 656 (1941).

92. See Williams, *supra* note 46.

93. See Act of Mar. 2, 1945, ch. 19, § 2, 59 Stat. 11; Act of Dec. 22, 1944, ch. 665, § 10, 58 Stat. 891.

94. Act of Mar. 2, 1945, ch. 19, § 2, 59 Stat. 12.

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recommend the rescission of appropriations no longer needed.<sup>95</sup> The following year it called upon the administration to reduce the number of federal employees and to bring about the reduction of administrative costs by way of reorganization. Savings were to be placed in reserve and returned to the Treasury.<sup>96</sup> Also in 1945, Congress passed the first rescission bill, cancelling a number of funds previously appropriated.<sup>97</sup>

In September 1945, President Truman submitted to Congress a series of proposed reductions in the civilian war agencies and in the naval and military establishments. The proposed rescissions of appropriations and contract authorizations came to approximately \$49 billion.<sup>98</sup> But when Congress passed the rescission bill, it included a rider to require decentralization of public employment offices. Truman opposed this latter provision both in substance and procedure, insisting that such issues "should not be dealt with as riders to appropriation bills." He refused to sign the bill into law, yet he told Congress that he would heed those sections which dealt with rescissions. He then directed the BOB to designate those amounts as non-expendable.<sup>99</sup>

Congress responded by passing a number of statutes to rescind appropriations and contract authority.<sup>100</sup> Spending reductions for the budget year ending June 30, 1946, eventually came to \$55 billion.<sup>101</sup> Thus, under appropriate conditions, Congress as well as the President can "impound" appropriations previously made.

2. *Peacetime Military Procurement.* Prior to the Nixon administration, most of the controversial impoundment actions involved weapons systems. The complicated political setting of this type of action may be illustrated by providing details of two major examples: one involving Air Force funds withheld by Truman and the other

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95. Act of June 28, 1944, ch. 304, § 303, 58 Stat. 623.

96. Act of Dec. 20, 1945, ch. 582, §§ 3, 10, 59 Stat. 617; Act of June 30, 1945, ch. 212, § 607, 59 Stat. 304.

97. Act of July 3, 1945, ch. 266, 59 Stat. 407.

98. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1945, at 259, 320, 343.

99. *Id.* at 579.

100. Act of July 30, 1947, ch. 357, 61 Stat. 572; Act of July 23, 1946, ch. 591, 60 Stat. 600; Act of May 27, 1946, ch. 271, 60 Stat. 221; Act of Feb. 18, 1946, ch. 30, 60 Stat. 6.

101. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1947, at 385. *See id.* 1946, at 17, 288; *id.* 1947, at 100.

concerning funds for B-70 bombers during the Kennedy administration.

In 1949 Congress voted to increase President Truman's Air Force request from 48 to 58 groups. Truman countered by placing the unwanted funds, totaling \$735 million, in reserve. Several factors produced this collision between the two branches.

First, Louis Johnson, who replaced James Forrestal in March 1949 as the new Defense Secretary, subjected the military budget to fresh scrutiny. Even though the Berlin airlift was in operation and the Korean War little more than a year away, Johnson was optimistic about the chances for peace.<sup>102</sup> This period was also dominated by the theory that it was the intention of Soviet Russia to force the United States to spend so much on defense that this would bankrupt the American economy. Instead of aiming for a military victory, it was widely believed that Russia planned to undermine the American economy—to “bleed the economy to death.”<sup>103</sup>

Retrenchment in defense spending became even more likely when the Eberstadt task force of the Hoover Commission released its findings on the Pentagon. In December 1948 the task force criticized the military services for hampering defense policy with their fierce rivalries. More directly to the point, the services lacked a “sense of cost consciousness” and were “far too prodigal” with government funds.<sup>104</sup> The following April former President Hoover advised Congress that \$1.5 billion could be cut from the military budget without impairing national security.<sup>105</sup> In June, Franz Schneider, who had headed the Eberstadt study of the fiscal 1950 budget, told a Senate committee that defense savings could run as high as \$2 billion.<sup>106</sup>

Secretary Johnson, who considered the defense budget too small when he presented it in 1949, nevertheless concluded that larger appropriations—because of waste within the Pentagon—would be throwing money “down a rat hole.”<sup>107</sup>

Still another factor was Truman's fiscal policy of relying on bud-

102. *Hearings on Military Situation in the Far East (Part 4) Before the Senate Comms. on Armed Services and Foreign Relations*, 82d Cong., 1st Sess. 2607 (1951).

103. W. SCHILLING, P. HAMMOND & G. SNYDER, *STRATEGY, POLITICS AND DEFENSE BUDGETS 103-07* (1962) [hereinafter cited as W. SCHILLING].

104. N.Y. Times, Dec. 17, 1948, at 18, col. 3.

105. *Id.*, Apr. 12, 1949, at 1, col. 5.

106. W. SCHILLING, *supra* note 103, at 110.

107. *See Hearings, supra* note 102, at 2607.

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get surpluses and debt retirement to restrain inflation. Twice in 1947 he vetoed tax-reduction bills.<sup>108</sup> In 1948, when he again vetoed a tax-reduction bill, Democrats joined with Republicans to override him.<sup>109</sup> With revenues lost to tax relief, and tax receipts down because of the 1948-49 recession, Truman had to redouble his efforts to control expenditures.<sup>110</sup>

The Senate joined with the President in opposing Air Force funds added by the House. But as the matter lay deadlocked in conference committee, the House rejected a Senate motion to vote continuing appropriations.<sup>111</sup> With adjournment close at hand and the military services in need of payroll funds, the Senate reluctantly agreed to the 58 groups. It did so, however, on the understanding that the money might not be spent. Senator Elmer Thomas, a ranking Democrat on the Appropriations Committee, left the impression that "if the money is appropriated it may not be used."<sup>112</sup>

Truman signed the bill, announcing that he was directing his Secretary of Defense to place the extra funds in reserve: \$577 million in contract authority for aircraft construction, \$130 million for maintenance and operations, and lesser amounts for contingencies, special procurement, and research and development—a total of \$735 million.<sup>113</sup> He justified impoundment on the need to maintain a balance between national security and a sound economy, the importance of preserving the elements of a unified strategic concept among the military services, and the President's authority as Commander in Chief.<sup>114</sup>

Neither Senator McKellar nor Representative Cannon—Chairmen of the Appropriations Committees—questioned Truman's au-

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108. 93 CONG. REC. 7073-74, 9303 (1947).

109. 94 CONG. REC. 4018-19, 4026, 4051-53 (1948).

110. A. HOLMANS, UNITED STATES FISCAL POLICY: 1945-1959, at 56-84 (1961).

111. 95 CONG. REC. 14,591-92 (1949).

112. *Id.* at 14,355. See also Exchange between Senators Ferguson and Saltonstall, *id.* at 14,855. For pointed critiques on the failure of Congress to analyze the defense budget so as to rationally justify an expanded Air Force, see E. KOLODZIEJ, THE UNCOMMON DEFENSE AND CONGRESS 79-81, 87-107 (1966); W. SCHILLING, *supra* note 103, at 71-87.

113. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1949, at 538-39; *Hearings on Department of Defense Appropriations for 1951; Additional Supplemental Hearing Before the House Comm. on Appropriations*, 81st Cong., 2d Sess. 27 (1950).

114. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1949, at 538-39. See also Letter from Harry S. Truman to Defense Secretary Johnson, Nov. 8, 1949, in 1971 *Ervin Hearings*, *supra* note 14, at 525.

thority to withhold the money.<sup>115</sup> Defense Secretary Johnson regarded Truman's action as inherent in the President's responsibilities as Chief Executive and Commander in Chief.<sup>116</sup> When Truman was later asked if he saw any conflict between his constitutional duty to enforce the law and his impoundment of Air Force funds, he replied:

That is the discretionary power of the President. If he doesn't feel like the money should be spent, I don't think he can be forced to spend it. How would you go about making him spend it . . . ?<sup>117</sup>

Another hotly contested impoundment action involved the B-70 bomber (later the RS-70), a long-range aircraft billed as successor to the B-52. President Eisenhower had restricted the B-70 program to production of prototype aircraft, to be made available in 1963 for flight testing. Although U.S. strategy in the postwar period depended on manned bombers, Eisenhower felt that an increasing part of the strategic force would be composed of fixed-base and mobile ballistic missiles. Hence, he doubted the need for B-70s in an age of ICBMs and Polaris submarines.<sup>118</sup>

In 1961 Congress added \$180 million to the \$200 million requested by the Kennedy administration for development of the B-70. Defense Secretary McNamara, stressing our advantage over the Soviets in bombers and the deterrent capability of American missile strength, refused to release the unwanted funds.<sup>119</sup>

In March 1962 the House Armed Services Committee, under the leadership of Carl Vinson, voted to direct the Secretary of the Air Force to spend not less than \$491 million during fiscal 1963 toward production of the aircraft (then redesignated RS-70). The committee figure was \$320 million above the administration's request. To remove any doubts about its intentions, the committee said that the Secretary was "directed, ordered, mandated, and required" to spend the full \$491 million. In casting down the gauntlet, the committee declared:

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115. N.Y. Times, Oct. 30, 1949, at 3, col. 3; *id.* at 40, col. 5.

116. *Hearings on Department of Defense Appropriations for 1951 (Part 1) Before the House Comm. on Appropriations*, 81st Cong., 2d Sess. 61 (1950).

117. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1950, at 661. For more background on the Air Force impoundment dispute, see E. HUZAR, *THE PURSE AND THE SWORD* 177-92 (1950).

118. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER, 1960-61, at 52, 951 (1961).

119. N.Y. Times, Oct. 28, 1961, at 1, col. 5.

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"If this language constitutes a test as to whether Congress has the power to so mandate, let the test be made . . ."<sup>120</sup>

President Kennedy, in a letter to Vinson, urged that the word "authorized" be used in place of "directed." The President contended that the change in language would be more suitable for an authorization bill, since funds would still have to be appropriated in a separate bill. He also thought the wording would be "more clearly in line with the spirit of the Constitution" and its separation of powers. Kennedy insisted on "the full powers and discretions essential to the faithful execution of [his] responsibilities as President and Commander in Chief, under article II, sections 2 and 3, of the Constitution."<sup>121</sup>

Other than the backing of his own committee, Vinson was isolated from other congressional power centers. Among the military, he was supported only by the Air Force. The rest of the Joint Chiefs supported McNamara.<sup>122</sup>

Vinson also encountered stiff opposition from the House Appropriations Committee. Committee Chairman George H. Mahon said that it was improper and impractical to direct the President to spend money before it was appropriated. He was opposed to the Armed Services Committee's directing his committee to appropriate money.<sup>123</sup> Gerald Ford, ranking minority member on House Appropriations, was "unalterably opposed" to the use of the word "directed." According to Ford, the "directed" language invaded the responsibilities of the President, usurped the authority of the Appropriations Committee, and created inflexibility in the program.<sup>124</sup> Opposition to the mandatory language came from Charles Halleck, House Minority Leader, John McCormack, Speaker of the House, and Carl Albert, House Majority Leader.<sup>125</sup>

To assuage Vinson's embarrassment, Kennedy announced that McNamara would initiate a "new study" of the aircraft.<sup>126</sup> Vinson took the floor to claim that Congress "has made its point and . . .

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120. H.R. REP. NO. 1406, 87th Cong., 2d Sess. 1, 9 (1962).

121. 108 CONG. REC. 4694 (1962). Kennedy's reasons for holding up on the RS-70 were given at a news conference on March 7, 1962, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY, 1962, at 202.

122. BUSINESS WEEK, Mar. 17, 1962, at 34.

123. *Id.* See also 108 CONG. REC. 4720 (1962) (remarks of Rep. Mahon).

124. 108 CONG. REC. 4714 (1962).

125. E. KOŁODZIEJ, *supra* note 112, at 415-17 (1966).

126. 108 CONG. REC. 4694 (1962).

caused the Department of Defense to see the error of their ways."<sup>127</sup> Interpretations from other Members were less flattering. Representative Leslie Arends called it a "paper victory." He said he would "await the translation of the assurances we now have into affirmative action."<sup>128</sup> Representative Frank Becker claimed that McNamara's offer was "an old legislative trick—that when you want to get rid of something, agree to a study. This is the surest way to brush something under the rug that you want to get rid of."<sup>129</sup> Representative H. R. Gross regretted that the fight had ever started, "for it is apparent now that it has been lost. This is not a compromise; it is a defeat for the entire House of Representatives."<sup>130</sup>

The administration proceeded with its original plan to build two prototypes of the RS-70 before considering full-scale production. One prototype crashed in June 1966; the second ended up in the Air Force Museum at Dayton, Ohio.<sup>131</sup>

#### IV. ADMINISTRATIVE POLICY MAKING

Any impoundment action by an executive official represents at least some degree of policy making, even when in compliance with statutory language. Policy is part of every budget and fiscal decision.<sup>132</sup> A few cases of impoundment, however, illustrate policy making in such pure form that they are included here as a separate section.

##### A. Unwanted Projects

Prior to the 1960's, several Presidents practiced a form of "item veto" on public works legislation—obeying certain portions of a bill while ignoring others. Senator Stephen Douglas of Illinois recalled that an appropriation act of 1857 had failed to benefit his state. The

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127. *Id.*

128. *Id.* at 4699.

129. *Id.* at 4707.

130. *Id.* at 4714.

131. For studies on the RS-70 and other impoundments of weapons systems, see Davis, *Congressional Power to Require Defense Expenditures*, 33 *FORDHAM L. REV.* 39 (1964); Moore, *To . . . Provide for the Common Defense*, in *PUBLIC ADMINISTRATION* 371-400 (2d ed., R. Golembiewski, F. Gibson, G. Carnag eds. 1972); Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations*, 57 *GEO. L.J.* 1159 (1969).

132. See statement by Caspar W. Weinberger, in 1971 *Ervin Hearings*, *supra* note 14, at 98.

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President had quarreled with Representatives from Illinois and penalized them by withholding funds:

To this hour [in 1861], you could not get the law executed. Other custom-houses could be built; other post offices could be made; but not a dollar could be expended at Springfield or at Cairo, in Illinois, although the law required it.<sup>133</sup>

In 1876, in signing a river and harbor bill, President Grant expressed his objections to particular projects:

If it was obligatory upon the Executive to expend all the money appropriated by Congress, I should return the river and harbor bill with my objections, notwithstanding the great inconvenience to the public interests resulting therefrom and the loss of expenditures from previous Congresses upon completed works. Without enumerating, many appropriations are made for works of purely private or local interest, in no sense national. I can not give my sanction to these, and will take care that during my term of office no public money shall be expended upon them.<sup>134</sup>

This selective execution of the laws occasionally received support from influential legislators. In 1896, Senator John Sherman—second-ranking Republican on the Finance Committee—regarded President Cleveland's veto of a river and harbor bill as unnecessary. The appropriation bill was permissive:

If the President of the United States should see proper to say, "That object of appropriation is not a wise one; I do not concur that the money ought to be expended," that is the end of it. There is no occasion for the veto power in a case of that kind.<sup>135</sup>

In 1923, President Harding threatened to use his impoundment power to curb river and harbor spending. Whether he could have won this confrontation with Congress is academic; within a matter of months he was dead, and there is no evidence to suggest that his successor was inclined to impound the funds.<sup>136</sup>

With regard to a dispute in the early 1940's concerning the Kings

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133. CONG. GLOBE, 36th Cong., 2d Sess. 1177 (1861).

134. 9 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 4331 (J. Richardson ed. 1925).

135. 28 CONG. REC. 6031 (1896).

136. N.Y. Times, Feb. 8, 1923, at 4, col. 6; *id.*, Jan. 23, 1923, at 20, col. 2. See 64 CONG. REC. 3507 (1923).

River Project in California's Central Valley Basin, President Roosevelt instructed his Secretary of War not to allocate any funds or submit any estimates for appropriations without review by the BOB and by the President.<sup>137</sup> When Congress funded the project in the spring of 1946, President Truman announced that he would submit his own plan for developing water resources in that area. He then impounded the funds pending a determination of the prospective costs. In February 1947, after he submitted his report to Congress, Truman released the money.<sup>138</sup>

In 1965 a dispute over legislative procedures led to impoundment of funds for small watershed projects. Instead of vetoing a river and harbor bill, President Johnson noted his opposition to a committee-veto provision and asked that it be repealed in the next session. Congress refused and the funds for small watershed projects remained impounded.<sup>139</sup> On March 27, 1969, President Nixon advised his Secretary of Agriculture that he would not object to the committee-veto procedure.<sup>140</sup> A list of 18 projects was submitted to Congress on June 30 for committee approval.<sup>141</sup>

In a fiscal 1966 appropriation, Congress provided \$9.2 million for construction of a national aquarium.<sup>142</sup> The Johnson and Nixon administrations impounded practically the entire amount.<sup>143</sup> On January 19, 1971, President Nixon halted construction of the \$180 million Cross Florida Barge Canal, a project that was years in the making and more than one-third complete. The project was halted, the President said, "to prevent serious environmental damages."<sup>144</sup>

Lastly, during December 1972 and January 1973, the Nixon ad-

137. A. MAASS, *MUDDY WATERS: THE ARMY ENGINEERS AND THE NATION'S RIVERS* 237 (1951). The dispute involved a contest between the Corps of Engineers and the Bureau of Reclamation. *Id.* at 215.

138. H.R. Doc. No. 136, 80th Cong., 1st Sess. (1947); *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1946*, at 229-30.

139. 2 *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1965*, at 1083.

140. Department of Agriculture Release No. 1015-69 (1969).

141. Forwarded to the author by Senator Talmadge, Chairman, Subcommittee on Watershed Projects of the Senate Committee on Agriculture and Forestry. For entire list of 96 projects affected by the Johnson impoundment, see 115 CONG. REC. 5923 (1969).

142. 1971 *Ervin Hearings*, *supra* note 14, at 217.

143. *Id.* at 139-42, 211-17.

144. 7 WEEKLY COMP. PRES. DOC. 81 (1971). See 117 CONG. REC. E2195 (daily ed. Mar. 25, 1971) (statements by Rep. Bennett); 118 CONG. REC. H4668 (daily ed. May 17, 1972) (statement by Rep. Sikes).

ministration announced the termination or postponement of numerous agricultural, environmental and housing programs.<sup>145</sup>

B. *Anti-inflation Policy*

In signing an agricultural appropriation bill in 1966, President Johnson was displeased that Congress had added \$312.5 million to his budget request. "During a period," he said, "when we are making every effort to moderate inflationary pressures, this degree of increase is . . . most unwise." Instead of vetoing the bill, and losing funds he wanted, he reduced expenditures for certain items "in an attempt to avert expending more in the coming year than provided in the budget."<sup>146</sup>

President Johnson's economic message to Congress, on September 8, 1966, estimated that spending had to be cut by \$3 billion to protect the nation's economy. Whenever possible, appropriations surpassing the President's recommendations would be withheld.<sup>147</sup> After the November elections, Johnson announced a \$5.3 billion reduction in federal programs, requiring more than a \$3 billion reduction for the remaining seven months of the fiscal year.<sup>148</sup>

The Nixon administration's anti-inflation policy was buttressed by congressionally-enacted spending ceilings for fiscal years 1969, 1970, and 1971.<sup>149</sup> Apart from those statutory limitations, however, the President relied upon general executive authority to restrain inflationary pressures.

For example, the spending ceiling established in July 1969 ranged from \$191.9 billion to \$193.9 billion (to allow for uncontrollables), plus whatever Congress wanted to add to the budget. But the President announced his intention to follow his *own* ceiling of \$192.9 billion.<sup>150</sup>

During the fall of 1970, while signing an authorization bill for sewer and water lines, President Nixon warned that appropriations in excess of his budget would have a "disastrous fiscal effect." Nixon

145. See Part II *infra*.

146. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1966, at 980. See also notes 108-10, 114 *supra* & accompanying text (anti-inflationary efforts by President Truman).

147. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1966, at 987-88.

148. 2 *id.* at 1406-10.

149. See note 28 *supra*.

150. 5 WEEKLY COMP. PRESS. DOC. 1142, 1759 (1969).

said that in the event that Congress refused to exercise restraint, "I must and will act to avoid the harmful fiscal consequences of this legislation. I will be compelled to withhold any overfunding."<sup>151</sup> The following day he signed a public works appropriation bill, stating his intention to consider all means possible "to minimize the impact of these inflationary and unnecessary appropriations, including the deferment of the proposed starts and the withholding of funds."<sup>152</sup>

The Nixon administration went ahead with the public works projects that it had recommended. It also deferred, without exception, all of the additional projects that Congress had added. Caspar Weinberger offered this explanation to a House subcommittee: "Given the necessity for retrenchment in some areas, I think it is inevitable that the President would feel that the items he included were items that should be released first."<sup>153</sup>

Why only the President's items? Did the executive branch enjoy some special technical or professional advantage in selecting top-priority projects? The administration made no effort to justify its choices in terms of project merit, such as cost-benefit ratios or any other criteria.

Weinberger even acknowledged that congressional committees explored in "much greater depth" than OMB the technical merits of public works projects:

The point I made is that the discretion we exercise is done on a single basis, the idea that the President's budget should stand and that all of the congressional add-ons be deferred, when a deferral is necessary in this amount, rather than exercising a cavalier or an independent judgment on individual projects. We don't feel qualified to do that.<sup>154</sup>

OMB depended on advice from the Corps of Engineers or the Bureau of Reclamation as to which projects had lower priority—"by definition those projects that are not included in the budget . . ."<sup>155</sup> In short,

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151. 6 *id.* at 1343 (1970).

152. *Id.* at 1349.

153. *Hearings on Public Works for Water and Power Development and Atomic Energy Commission Appropriations (Part 6) Before the House Comm. on Appropriations*, 92d Cong., 1st Sess. 22 (1971).

154. *Id.* at 19.

155. *Id.* at 17. Still another explanation for impounding all of the new congressional projects was that it seemed more "impartial" to do it that way. It was argued that a more selective list, impounding projects in some congressional districts while allow-

## IMPOUNDMENT OF FUNDS

instead of treating the budget as a set of recommendations, to be acted on at the discretion of Congress, OMB decided that "the President's budget should stand and that all of the congressional add-ons be deferred . . . ." <sup>156</sup>

In the fall of 1972, after Congress had refused to establish a spending ceiling, President Nixon announced that he intended to "use every weapon at [his] command" to hold spending in fiscal 1973 as close as possible to \$250 billion.<sup>157</sup> Having asked for a statutory ceiling of \$250 billion, and having been rejected, the President proceeded to adopt that figure as an administration target, impounding whatever funds were necessary to stay within that limit. Speaker Albert commented that this action made "a monkey out of the legislative process."<sup>158</sup>

### C. *Shifting Priorities*

After inheriting the "Great Society" programs of the Johnson years, President Nixon relied on impoundment to move toward his own priorities. During the latter part of 1969 and into 1970, the Nixon administration announced plans to reduce research health grants, Model Cities funds, and grants for urban renewal to help check inflation.<sup>159</sup> The President's critics noted that these cutbacks were made at the same time the administration was sponsoring such costly projects as the supersonic transport, a manned landing on Mars, revenue sharing; a larger merchant marine fleet, and the Safeguard ABM system.

In the spring of 1971, the Nixon administration reported that it was withholding more than \$12 billion, most of which consisted of highway money and funds for various urban programs.<sup>160</sup> It became

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ing other add-ons to go forward, might have invited charges of discrimination and political favoritism. *Id.* at 10-11.

156. *Id.* at 19.

157. 8 WEEKLY COMP. PRES. DOC. 1553 (1972). The fiscal 1974 budget reduced and terminated a number of programs in order to adhere to the President's \$250 billion target. UNITED STATES BUREAU OF THE BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974, at 47-57 (1973). For two recent decisions striking down the Nixon administration's argument that it could withhold highway funds to combat inflation, see *State Highway Comm'n v. Volpe*, 347 F. Supp. 950 (W.D. Mo. 1972), *aff'd*, 479 F.2d 1099 (8th Cir. 1973).

158. Washington Post, Mar. 7, 1973, at A4, col. 1.

159. N.Y. Times, Jan. 9, 1970, at 1, col. 8; *id.*, Oct. 2, 1969, at 28, col. 1; *id.*, Sept. 16, 1969, at 16, col. 1; *id.*, Sept. 13, 1969, at 1, col. 4; *id.*, Sept. 11, 1969, at 1, col. 1.

160. 1973 *Ervin Hearings*, *supra* note 12, at 877-79; 1971 *Ervin Hearings*, *supra* note 14, at 164-65.

evident that part of the withholding was tied to the administration's desire to drop the system of categorical grant-in-aid programs in favor of bloc grants and general revenue sharing. When Congressman Zablocki complained about the impoundment of water and sewer funds, he was told by Weinberger that the administration

shares your concern over the public facility needs of cities. . . . However, the President firmly believes that revenue sharing represents a much more effective way of helping local governments provide for local needs than the narrowly-focused categorical grant programs which now exist.<sup>161</sup>

This was the administration's way of saying that it intended to implement a program which was not yet law, but would not implement a program already authorized and funded.

The withholding of water and sewer grants was defended in 1972 by OMB Director George Shultz:

I might say that this is one area where there are some funds in reserve that are restrictive in nature. I think it reflects our feelings that while other funds will be released by the end of the fiscal year, we can appropriately drag our feet just a little bit while the Congress examines the extent to which it wants to transfer to the Federal Government what has historically been a function of local government, usually financed by the people who benefit directly.<sup>162</sup>

This is essentially a states' rights argument, perhaps compatible with the political philosophy of John Calhoun and John Taylor, but not even remotely supported by statutory authority, by constitutional grants of power, or by the present distribution of power between the federal government and the states.<sup>163</sup> The argument is not consistent with the reality of federal financing of health, education, and welfare—responsibilities which also at one time were “a function of local government.” Consistency in this position would require the Nixon administration to withhold from local governments still other funds for

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161. 1971 *Ervin Hearings*, *supra* note 14, at 310.

162. *Hearings on the Budget of the United States, Fiscal Year, 1973, Before the Senate Comm. on Appropriations*, 92d Cong., 2d Sess. 129-30 (1972).

163. In his budget message for the fiscal 1974 budget, President Nixon quoted the tenth amendment and said that the “philosophy of the Founding Fathers embodied in this amendment is also my philosophy.” UNITED STATES BUREAU OF THE BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974, at 11 (1973). For comments on the tenth amendment, see L. FISHER, PRESIDENT AND CONGRESS 37-39 (1972).

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programs which the President strongly supports, such as law-enforcement grants.

### PART II

#### THE NIXON ADMINISTRATION'S "GOOD FAITH" EFFORTS:

##### THREE CASE HISTORIES

The examples offered in the first part of this article are illustrative of the broad areas of spending flexibility available to the executive branch. Discretion and judgment are essential qualities of executive power. And yet the fact that spending flexibility exists does not indicate that an administration may operate without limits. A lack of mandatory language cannot be taken to mean that an administration is at liberty to ignore a program in its entirety. In such cases an unwritten code of custom and interbranch comity obliges executive officials to operate on a good faith basis, preserving a foundation of trust with Congress and its committees.

This nonstatutory system of controls, constructed over a period of decades, has collapsed in recent years. The Nixon administration has ignored its "good faith" obligations and stretched discretionary authority beyond its customary limits. In self-defense, Congress has begun to delete from legislation various forms of executive spending discretion. The three case histories offered here provide concrete evidence of congressional disapproval.

#### I. AGRICULTURE

During December 1972, the Nixon administration made wholesale reductions in farm programs. The first two casualties were the \$225.5 million Rural Environmental Assistance Program (REAP) and the \$10 million Water Bank Program. Subsequently, the administration also terminated the emergency disaster loan program (of the Farmers Home Administration), the rural electrification program and the water and sewer grant programs.

##### A. *REAP and Water Bank*

The Rural Environmental Assistance Program operated to relieve the problem of water pollution caused by sediment; the Water Bank

Program was established to preserve wetlands for waterfowl. Both programs were terminated on December 26, 1972. A legal memorandum from the Department of Agriculture argued that the action was "consistent with provisions of the legislation authorizing the REAP and Water Bank Programs since that legislation authorizes but does not require that the programs be carried out by the Secretary."<sup>164</sup> "Since it is clear," the memorandum continued, "that neither the substantive legislation nor the appropriation act compels the obligation and expenditure of the full amount authorized but merely authorizes a program to be carried out, it is our opinion that the program may be legally terminated."<sup>165</sup> That is a wholly remarkable interpretation since Congress authorized and funded a program after holding hearings, writing committee reports, and enacting a bill into law.

The response from Congress was predictable. In place of discretionary language, Congress inserted mandatory clauses. The House Committee on Agriculture said that while it normally sought to give the Secretary "maximum discretion in administering the programs assigned him by the Congress as a contribution toward sound administration, the REAP termination signals an abuse of that discretion."<sup>166</sup> Instead of providing that the Secretary "shall have power" to carry out REAP, the committee proposed that he "shall" carry it out. Instead of allowing the Secretary to make payments "in amounts determined by the Secretary to be fair and reasonable," he was directed to make payments "in an aggregate amount equal to the sums appropriated therefor . . ."<sup>167</sup>

The Senate Committee on Agriculture and Forestry added the requirement that the Water Bank Program "shall" be carried out.<sup>168</sup> The bill was amended on the Senate floor by deleting from the Water Bank Act the words "shall have authority to" and replacing

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164. Memorandum from Edward M. Shulman, General Counsel, to Kenneth E. Frick, Administrator of the Agricultural Stabilization and Conservation Service, in H.R. REP. NO. 6, 93d Cong., 1st Sess. 2 (1973).

165. *Id.* at 4. A letter from Elmer B. Staats, Comptroller General of the United States, to Senator Sam J. Ervin, Jr., July 26, 1973, B-135564, at 25, stated: "[W]e do not believe it follows that by employing permissive language the Congress envisions the bulk of appropriations acts as carrying with them the seeds of their own destruction in the form of an unrestricted license to impound."

166. H.R. REP. NO. 6, 93d Cong., 1st Sess. 8 (1973).

167. *Id.* at 11.

168. S. REP. NO. 49, 93d Cong., 1st Sess. (1973).

them with language directing that the Secretary "shall, to the full extent permitted by available appropriations therefor."<sup>169</sup> Because of differences between the two houses,<sup>170</sup> and because of some doubts as to whether either house had the two-thirds majority needed to override a veto, the bill was not presented to the President.

Another effort was made to reinstate REAP by amending, on the Senate floor, the Agriculture and Consumer Protection Act.<sup>171</sup> Five days later the House Committee on Appropriations directed that the REAP and Water Bank Programs be reinstated for fiscal 1974. In the event that Department of Agriculture studies indicated that the same work could be carried out with less personnel, the committee stated that it would consider such proposals "with the understanding that no reductions be made until prior Committee approval has been obtained."<sup>172</sup> An amendment by Representative Robert H. Michel to limit the scope of the REAP program was later rejected on the House floor by a vote of 23 to 69.<sup>173</sup>

The Agriculture and Consumer Protection Act of 1973, as enacted, contained a modified REAP program entitled "Rural Environmental Conservation Program." The Act directed that the Secretary of Agriculture "shall carry out the purposes" of specified clauses in the Soil Conservation and Domestic Allotment Act and in the Water Bank Act.<sup>174</sup> The conference report on the agriculture appropriation bill included funds both for the modified REAP program and for the Water Bank Act.<sup>175</sup>

### B. *FHA Disaster Loans*

The emergency loan program of the Farmers Home Administration was established to provide a source of loan funds for farmers and ranchers in areas designated to be disaster areas. In a press release dated December 27, 1972, the Department of Agriculture announced that funds were being cut off to counteract inflationary pressures and

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169. 119 CONG. REC. S3811-12 (daily ed. Mar. 1, 1973).

170. See H.R. REP. NO. 101, 93d Cong., 1st Sess. (1973).

171. 119 CONG. REC. S10,742-44 (daily ed. June 8, 1973).

172. H.R. REP. NO. 275, 93d Cong., 1st Sess. 34 (1973). See *id.* at 78-80. Concurred in by the Senate Committee on Appropriations, S. REP. NO. 253, 93d Cong., 1st Sess. 22-23 (1973).

173. 119 CONG. REC. H4808-10 (daily ed. June 15, 1973).

174. Act of Aug. 10, 1973, Pub. L. No. 93-86, 87 Stat. 241.

175. H.R. REP. NO. 520, 93d Cong., 1st Sess. 22-23 (1973).

to enable adherence to the President's \$250 billion spending limit.<sup>176</sup>

As a result of judicial and legislative efforts, the program was partially restored. A Minnesota district court decision ordered Secretary Butz to reinstate the program for natural disaster victims in 15 Minnesota counties.<sup>177</sup>

Secretary Butz had designated 14 of the counties eligible for emergency loans on June 26, 1972.<sup>178</sup> On September 20, 1972, he added another county to the list.<sup>179</sup> Farmers in those areas were advised that applications would be accepted and processed through June 30, 1973. They were also advised that it would be preferable to file after the harvest (late November or early December) to ensure that all eligible losses were included in the applications. Because of the large number of applications after the harvest, many farmers were told that appointments for review could not be made until early 1973. Then, on December 27, Secretary Butz directed the Minnesota State FHA office not to accept any applications for the 15 Minnesota counties.<sup>180</sup>

The Minnesota court distinguished between two types of secretarial actions: discretionary (declaring which areas were entitled to disaster assistance) and ministerial (processing applications after a designation is made). The court held that while an individual does not have a "right to receive a loan under the disaster loan program, he does have the right to file an application and to have his application reviewed."<sup>181</sup> It was determined by the court that Secretary Butz' refusal was "in excess of the Secretary's authority and [was] unlawful."<sup>182</sup>

Moreover, the court concluded that Secretary Butz had ignored several departmental regulations, including a requirement to give prior notice in the *Federal Register* for proposed rules, and a requirement to provide an opportunity for interested parties to participate in rulemaking. Also ignored was a requirement to publish an adopted rule in the *Federal Register* not less than 30 days before its effective date. The court noted that the Department "did not comply with even one of these mandatory requirements . . . ."<sup>183</sup>

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176. H.R. REP. NO. 15, 93d Cong., 1st Sess. 2 (1973).

177. *Berends v. Butz*, 357 F. Supp. 143 (D. Minn. 1973).

178. *See* 37 Fed. Reg. 12,854 (1972).

179. *Id.* at 20,122.

180. *Berends v. Butz*, 357 F. Supp. 143, 148 (D. Minn. 1973).

181. *Id.* at 151, *citing* *Dubrow v. SBA*, 345 F. Supp. 4 (C.D. Cal. 1972).

182. *Id.*

183. *Id.* at 154. For a similar situation where the Nixon administration tried to

## IMPOUNDMENT OF FUNDS

Congress rewrote the FHA emergency loan program to eliminate a \$5,000 forgiveness feature and to raise the interest rate on loans from 1 percent to 5 percent.<sup>184</sup> The new law also eliminates what was previously discretionary authority for the Secretary of Agriculture. Instead of "authorizing" him to make loans, the law states that he "shall" make them.<sup>185</sup> And whereas previous law provided that the Secretary "may" designate any area as an emergency area when he finds that a need exists, it now provides that he "shall."<sup>186</sup> Finally, the law included an 18-day grace period for eligible applicants in areas designated by the Secretary of Agriculture after January 1, 1972 and prior to December 27, 1972.<sup>187</sup>

### C. REA Loan Program

On December 28, 1972, without advance warning and without prior consultation with the leadership of Congress, the Department of Agriculture terminated the program of direct loans to rural electric and telephone borrowers of the Rural Electrification Administration. Instead of offering federal loans at a fixed 2-percent interest rate, the Government planned to insure or guarantee private loans at 5 percent.

In his news conference of January 31, 1973, President Nixon resorted to ridicule in an effort to justify the administration's decision:

[W]hat I have found is that when I first voted for REA, 80 percent of the loans went for the purpose of rural development and getting electricity to farms. Now 80 percent of this 2 percent money goes for country clubs and dilettantes, for example, and others who can afford living in the country. I am not for 2 percent money for people who can afford 5 percent or 7.<sup>188</sup>

Several days later, at hearings before the Senate Agriculture and Forestry Committee, Secretary Butz was asked whether he agreed with

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close down the Office of Economic Opportunity, acting in violation of OEO procedures, see *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

184. Act of Apr. 20, 1973, Pub. L. No. 93-24, 87 Stat. 24. The first section is directed against the forgiveness and low-interest features. See S. REP. NO. 85, 93d Cong., 1st Sess. 4 (1973).

185. Act of Apr. 20, 1973, Pub. L. No. 93-24, § 3, 87 Stat. 24. See H. REP. NO. 15, 93d Cong., 1st Sess. 10 (1973).

186. Act of Apr. 20, 1973, Pub. Law No. 93-24, § 6, 87 Stat. 25.

187. *Id.* at § 8.

188. 9 WEEKLY COMP. PRES. DOC. 107 (1973).

the President's statement that most REA loans were going to dilettantes and country clubs. Butz replied:

No, not most of them. There are some going like that, of course, in rural areas. I think the choice of the word "most" was probably unfortunate and not premeditated on his part. There are some going like that, Mr. Chairman, but surely not most of them.<sup>189</sup>

Legislation was introduced in each house to reactivate the program. The Senate report concluded that the association between REA and "2-percent money" was an exaggeration. Most loans were a combination of 2-percent REA loans and supplemental assistance from the Rural Utilities Cooperative Finance Corporation (CFC), a private credit cooperative. Fewer than 10 percent of the borrowers were eligible for 2-percent loans. The remainder relied on blended loans, with about 54 percent eligible for 70 percent REA/30 percent supplemental funds, about 20 percent for 80/20 loans, and about 17-18 percent for 90/10 loans.<sup>190</sup>

The Senate bill replaced discretionary language with mandatory provisions. Instead of providing that the Administrator is "authorized and empowered" to make loans, with discretion as to the amount, the bill "authorized and directed" loans to be made "in the full amount determined to be necessary by the Congress or appropriated by the Congress . . ."<sup>191</sup> The House version, which also contained mandatory clauses, proposed a compromise measure designed to meet some of the objections of the administration. For example, the House incorporated a new revolving fund for two types of insured loans, one at a "special rate" of 2 percent and the other at a "standard rate" of 5 percent.<sup>192</sup>

Secretary Butz pledged to carry out the REA program on the condition that the mandatory language be stricken from section 305, which "authorized and directed" the Administrator to make insured loans. The conference committee complied with his request.<sup>193</sup> The enacted statute reflects that change and retains the concept of a revolving fund.<sup>194</sup>

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189. *Hearings on Impoundment of Funds for Farm and Rural Programs Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 1st Sess. 22 (1973).

190. S. REP. No. 20, 93d Cong., 1st Sess. 7-8 (1973).

191. *Id.* at 25-26.

192. H.R. REP. No. 91, 93d Cong., 1st Sess. 12-13, 19-20, 38 (1973).

193. H.R. REP. No. 169, 93d Cong., 1st Sess. 5, 10 (1973).

194. Act of May 11, 1973, Pub. L. No. 93-32, 87 Stat. 65.

## IMPOUNDMENT OF FUNDS

When the administration failed to implement the REA program, Congress threatened to prevent payment of certain salaries and expenses for persons responsible for the delay. The threat was withdrawn after Congress received assurances from the OMB Director that he would recommend and support implementation of the program.<sup>195</sup>

### D. Rural Water and Sewer Grants

On January 10, 1973, the Department of Agriculture announced that it was "terminating" planning and development grants in the water and waste disposal programs of Farmers Home Administration. The effect was to impound \$120 million for fiscal 1973. An opinion from the General Counsel of the Department justified the action on the ground that the statute "authorizes but does not require that the programs be carried out by the Secretary."<sup>196</sup>

The House Committee on Agriculture, in reporting out a bill to restore the program, said that the grant of discretion by Congress, and the subsequent abuse of that discretion, made the remedy apparent: "The Committee has little choice but to act to remove the discretionary features of the original Poage-Aiken Act, and reinstate the program as originally established by law."<sup>197</sup> The House bill, substituting the word "shall" for the words "is authorized to" and "may," passed by a vote of 297 to 54.<sup>198</sup> The Senate passed the bill 66 to 22.<sup>199</sup>

Despite the generous margins of those votes, Congress was unable to override the President's veto. The House could muster only a vote of 225 to 189 on the override attempt.<sup>200</sup> Nevertheless, the conference report on the agriculture appropriation bill contained \$30 million in new funds for FHA water and sewer grants, supplemented by \$120 million in carryover funds.<sup>201</sup>

As a general approach to the impoundment of agriculture funds,

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195. H.R. REP. No. 520, 93d Cong., 1st Sess. 15-16 (1973).

196. H.R. REP. No. 21, 93d Cong., 1st Sess. 1 (1973).

197. *Id.* at 3.

198. 119 CONG. REC. H1284-85 (daily ed. Mar. 1, 1973).

199. *Id.* at S5598 (daily ed. Mar. 22, 1973).

200. *Id.* at H2551-52 (daily ed. Apr. 10, 1973). For veto message, *see id.* at H2454 (daily ed. Apr. 5, 1973). For fiscal 1974 funding, *see* H.R. REP. No. 275, 93d Cong., 1st Sess. 46 (1973). An amendment by Rep. Michel to delete the funds was rejected. 119 CONG. REC. H4800-01 (daily ed. June 15, 1973).

201. H.R. REP. No. 520, 93d Cong., 1st Sess. 21 (1973).

the Senate adopted an amendment to the agriculture appropriation bill requiring that all money appropriated by the bill "shall be made available for expenditure except as specifically provided by law."<sup>202</sup> The exception was intended to cover such statutes as the Antideficiency Act.<sup>203</sup> Senator Bayh elaborated on the purpose of this provision:

This amendment will send the administration a message about what Congress means when it passes an appropriations bill. It will tear asunder the administration's argument—which I think specious in any event—that the amount granted in an appropriations bill is only the maximum which can be spent on the program in question, and that the administration has discretion to spend less—down to nothing if it feels like it.<sup>204</sup>

The amendment was deleted in conference without prejudice as an unnecessary restatement of existing provisions of law.<sup>205</sup>

## II. ENVIRONMENT

The Federal Water Pollution Control Act Amendments of 1972<sup>206</sup> were enacted into law when both houses overrode a presidential veto, the Senate 52-12 and the House 247-23.<sup>207</sup> A month later the President instructed the head of the Environmental Protection Agency (hereinafter referred to as "EPA") to withhold from the states more than half of the waste treatment allotments. Instead of following the statutory ceilings of \$5 billion for fiscal 1973 and \$6 billion for fiscal 1974, the President established the maximum allotments for those years at \$2 billion and \$3 billion.<sup>208</sup>

### A. Statutory Coverage

The administration had potential spending control in (1) the initial allotments of contract authority to the states and (2) the obli-

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202. 119 CONG. REC. S12,375 (daily ed. June 28, 1973).

203. S. REP. NO. 253, 93d Cong., 1st Sess. 6 (1973).

204. 119 CONG. REC. S12,403 (daily ed. June 28, 1973).

205. H.R. REP. NO. 520, 93d Cong., 1st Sess. 6 (1973).

206. Act of Oct. 18, 1972, Pub. L. No. 92-500, 86 Stat. 816.

207. 118 CONG. REC. H10,266-73 (daily ed. Oct. 18, 1972) (House override); *id.* at S18,546-54 (daily ed. Oct. 17, 1972) (Senate override).

208. Letter to William Ruckelshaus, EPA Administrator, from President Richard M. Nixon, Nov. 22, 1972, in *Hearings on the Federal Budget for 1974 Before the House Comm. on Appropriations*, 93d Cong., 1st Sess. 194-95 (1973).

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gation and expenditure of funds at a later date. The statute appeared to make the first step mandatory, in the sense that section 205 of the Act directed that sums "shall" be allotted. However, the original language in the House bill had been even stronger, directing that "all" sums shall be allotted.<sup>209</sup>

Representative William H. Harsha, ranking Republican on the conference committee handling the bill, explained that elimination of the word "all" was intended "to emphasize the President's flexibility to control the rate of spending."<sup>210</sup> Flexibility was enhanced by inserting the phrase "not to exceed" in section 207 of the Act, which described the amounts authorized to be appropriated for fiscal years 1973, 1974, and 1975. The EPA Administrator could also pace the expenditure of funds by virtue of his authority to approve plans, specifications, and estimates.<sup>211</sup>

Representative Harsha concluded by saying that he did not see how "reasonable minds could come to any other conclusion than that the language [of section 207] means we can obligate or expend up to that sum—anything up to that sum but not to exceed that amount."<sup>212</sup> Representative Robert Jones, chairman of the House conferees, agreed: "there is no doubt in anybody's mind of the intent of the language."<sup>213</sup> Minority Leader Gerald Ford summed up the situation:

[T]his clarifies and certainly ought to wipe away any doubts anyone has. The language is not a mandatory requirement for full obligation and expenditure up to the authorization figure in each of the 3 fiscal years.<sup>214</sup>

Edmund Muskie, leading Senate sponsor of the bill, remarked that the President knew "that all the money authorized in the bill would not have to be obligated."<sup>215</sup> According to Muskie, the "not to exceed" language, coupled with the deletion of "all," was to be taken "to give the administration some flexibility concerning the obligation

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209. H.R. 11,896, 92d Cong., 2d Sess. (1972) (reported out of House Comm. on Public Works).

210. 118 CONG. REC. H9122 (daily ed. Oct. 4, 1972).

211. *Id.*

212. *Id.* at H9123.

213. *Id.*

214. *Id.*

215. *Id.* at S18,549 (daily ed. Oct. 17, 1972).

of construction grant funds."<sup>216</sup> Hence, these speakers were in agreement that the President could exercise some discretion in obligating and expending funds.

A separate question presented was whether the President also enjoyed flexibility in allotting the contract authority to the states. In a decision handed down on May 8, 1973, the U.S. District Court for the District of Columbia held that the Act required the administration to allot the full sums authorized to be appropriated by section 207.<sup>217</sup> Instead of allotting \$5 billion for the first two years, the administration should have allotted the full \$11 billion. In reaching that decision, however, Judge Gasch did not try to determine "whether the Administrator should *spend* any given amount of money for sewage treatment works."<sup>218</sup> He stated that the question whether "the entire amount should be *obligated* is, of course, not before this Court."<sup>219</sup>

The question of obligation and spending was at issue in *Campaign Clean Water v. Ruckelshaus*.<sup>220</sup> Judge Merhige found that the Nixon administration's failure to allot \$6 billion in clean-water money constituted an abuse of discretion.<sup>221</sup>

Unlike Judge Gasch, Judge Merhige warned that excessive withholding at the obligation and expenditure stages would contravene the letter and spirit of the Act.<sup>222</sup> But whereas Judge Gasch decided that the Act required allotment of all funds, Judge Merhige drew from the legislative history—particularly the omission of the word "all" from section 205—a willingness on the part of Congress to allow *some* discretion at the allotment stage. However, the degree of impoundment—55 percent (\$6 billion out of \$11 billion for fiscal years 1973 and 1974)—represented "a violation of the spirit, intent and letter of the Act and a flagrant abuse of executive discretion."<sup>223</sup>

216. *Id.* at S18,546.

217. *City of New York v. Ruckelshaus*, 358 F. Supp. 669 (D.D.C. 1973).

218. *Id.* at 675 (emphasis in original).

219. *Id.* at 679 (emphasis in original). Similar decisions were handed down in *Minnesota v. EPA*, Civil No. 4-73 (D. Minn., June 25, 1973); *Martin-Trigona v. Ruckelshaus*, Civil No. 72 C 3044 (N.D. Ill., June 29, 1973). In *dicta*, Judge Hauk of the U.S. District Court for the Central District of California concluded that the administration did have discretion in allotting funds. *Brown v. Ruckelshaus*, Civil Nos. 73-154-AAH and 73-736-AAH (D. Cal., Oct. 7, 1973).

220. 361 F. Supp. 689 (D. Va. 1973).

221. *Id.* at 700.

222. *Id.*

223. *Id.*

## IMPOUNDMENT OF FUNDS

### B. Legislative Commitment

The Merhige decision reconciled two central features of the clean-water legislation: (1) the grant of discretionary authority to the executive and (2) the commitment on the part of the Government to combat water pollution within a scheduled period of time. The administration used its discretion to undermine its commitment.

The concept of an overriding legislative commitment is described most clearly in a decision by Judge Roberts of the Western District of Texas.<sup>224</sup> He emphasized Congress's concern with the ability of state and local governments to effect long-range plans in combating pollution: "Indeed the planning problem was the reason for the implementation of the allotment procedure rather than the normal appropriation procedure in the Act."<sup>225</sup> Without unequivocal federal financial assistance, state and local governments would have difficulty entering into long-term contracts and financing long-term bonds. "It is illogical," wrote Judge Roberts, "to think that Congress would inject the same uncertainty back into the system it had sought to avoid with the allotment procedure by giving the Administrator discretion to choose the amount to be made available to the state and local governments."<sup>226</sup>

Administrative spokesmen claimed that it was impossible to use the full amount of contract authority provided by Congress. John D. Ehrlichman, in his capacity as Director of the Domestic Council, said that there are

only so many contractors who can build sewer plants. There is only a certain amount of sewer equipment that can be purchased. It becomes obvious that there is no point in going out and tacking dollar bills to the trees. That isn't going to get the water clean.<sup>227</sup>

Why assume that the environmental industry would be unable to increase its capacity? It would be more reasonable to expect that if the Government committed itself financially and established target dates for the goal of clean water, industry would gear up to meet that commitment. That is what happened with the 1950's highway program, and with the goal set in 1961 of putting a man on the moon by the

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224. *Texas v. Fri*, Civil No. A-73-CA-38 (D. Tex., June 25, 1973).

225. *Id.* at 2.

226. *Id.* at 5.

227. *Washington Post*, Feb. 5, 1973, at A4, col. 5.

end of the decade. No one argued that those commitments could not be met because of a lack of contractor capability. The commitment came first; the capability followed.

After the President's veto, Mr. Ruckelshaus argued that it was economically unwise to allot the full amounts authorized by Congress: "the fastest way to increase inflation is to pour more money into the community than the construction industry can absorb."<sup>228</sup> That conflicts with his own letter to the Office of Management and Budget, *prior* to the veto, in which he strongly recommended that the President sign the bill:

The total value of construction initiated in the near-term under the enrolled bill is expected to correspond closely to the total value of construction that would have been initiated under the Administration bill . . . . With the projected close correspondence in total near-term value of construction starts, the potential inflationary impact upon the entire construction sector would be minimized.

The total amount of contract grant authority contained in the enrolled bill is formulated from the Administration's estimate of construction needs as submitted to the Congress in February of this year. The total estimate amounted to \$18.1 billion. The Federal share at 75% would amount to \$13.6 billion. This needs estimate did not include any allowance for inflation, nor did it include funds for combined, storm and collection sewers, or for recycled water supplies. These are project eligibilities newly specified by the enrolled bill.<sup>229</sup>

In this same letter, Mr. Ruckelshaus pointed out that the needs estimate provided to Congress was constructed

to support the commitment of the President in his State of the Union message of January 22, 1970, to "put modern municipal waste treatment plants in every place in America where they are needed to make our waters clean again, and to do it now.

This Presidential commitment was repeated in the environmental messages in 1970 and 1971.<sup>230</sup> Mr. Ruckelshaus further noted that the additional spending authority provided by Congress was "largely the

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228. 1973 *Ervin Hearings*, *supra* note 12, at 417.

229. Letter from William D. Ruckelshaus to OMB, Oct. 11, 1972, in STAFF OF THE SENATE COMM. ON PUBLIC WORKS, 93D CONG., 1ST SESS., 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 155 (Comm. Print 1973).

230. *Id.*

## IMPOUNDMENT OF FUNDS

result of the Congress adopting a later EPA needs survey than the one that provided the basis for the Administration's request."<sup>231</sup>

Notwithstanding the discretion included in the bill, the thrust of the legislation was to establish a clear commitment and to provide the necessary budget authority. "To say we can't afford this sum of money," said Representative Harsha, "is to say we can't afford to support life on earth."<sup>232</sup> Senator Muskie stressed that the "whole intent of this bill is to make a national commitment."<sup>233</sup> The discretionary language in the bill was not to be used, Senator Muskie warned, "as an excuse in not making the commitments necessary to achieve the goals set forth in the act."<sup>234</sup>

When the administration used that discretion to cut in half a legislative commitment, the lesson for some legislators was to be less generous with discretionary authority in the future. It was a temptation to Congress to be more inflexible when drafting legislation. Senator Muskie directed these remarks to Mr. Ruckelshaus:

. . . I could now write better language and believe me, I will. Believe me, I will.

The clear language and debate was what we were giving you, is what we understood to be legitimate administrative discretion to spend the money, not defeat the purposes. Then to have you twist it as you have, is a temptation to this Senator to really handcuff you the next time.<sup>235</sup>

### III. HOUSING AND URBAN DEVELOPMENT

#### A. *Housing Moratorium*

On January 5, 1973, the Nixon administration placed an 18-month moratorium on subsidized housing programs: low-rent public housing, rent supplements, homeownership assistance, and rental housing assistance. In a speech three days later, HUD Secretary Romney offered the following justification:

It became crystal clear by 1970 that the patchwork, year-by-year, piecemeal addition of programs over a period of more than three decades, had created a statutory and administrative monstros-

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231. *Id.* at 152.

232. 118 CONG. REC. H10,268 (daily ed. Oct. 18, 1972).

233. *Id.* at S18,547 (daily ed. Oct. 17, 1972).

234. *Id.* at S16,871 (daily ed. Oct. 4, 1972).

235. 1973 *Ervin Hearings*, *supra* note 12, at 411.

ity that could not possibly yield effective results even with the wisest and most professional management systems.<sup>236</sup>

That position was repeated a week later by the Director of Domestic Council, Kenneth R. Cole, Jr., who argued that

the program structure we have now cannot possibly yield effective results even with the most professional management. There is mounting evidence that the present programs, for the most part, have proven inequitable, wasteful, and ineffective in meeting housing needs.<sup>237</sup>

Members of Congress pressed the administration for analyses and studies which justified the moratorium. Senator Proxmire, for example, wanted to know if the Cole statement was true and "what documentation he has for it and how you can establish that. . . . Where is the evidence?"<sup>238</sup> It appears that the moratorium was imposed *before* such documentation was available. William Lilley, III, HUD's Deputy Assistant Secretary for Policy Development, was "distressed" to find that "no sophisticated analytical work" had been done prior to the moratorium. After the subsidized housing program was suspended, HUD devoted a day and a half to an initial rationalization, which Lilley called "paper thin, highly subjective and totally unsupported by any back-up data."<sup>239</sup>

Did the housing program "fail to work" because of defects in the law or because of mismanagement and administrative disinterest? Dr. Anthony Downs, in a study dated October 1972, described the homeownership and rental housing programs as "effective instruments for meeting the key objectives of housing subsidies." The basic designs were considered sound, while the

major inadequacies so far encountered in the execution of these programs have stemmed mainly from either poor administration by HUD or the inherently higher risks of investing capital in housing for relatively low-income households in relatively deteriorated areas.

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236. Speech by Secretary Romney, National Association of Home Builders, Houston, Texas, Jan. 8, 1973, at 7 (on file at the *Buffalo Law Review*).

237. Letter from Kenneth R. Cole, Jr., to Senator John Sparkman, Jan. 15, 1973, in 119 CONG. REC. S1723 (daily ed. Jan. 31, 1973).

238. *Hearings on Oversight on Housing and Urban Development Programs: Washington, D.C. (Part I) Before the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. 256 (1973).

239. *Washington Post*, Dec. 3, 1973, at A1, col. 5.

## IMPOUNDMENT OF FUNDS

Such higher risks are inescapable in any meaningful attempts to achieve the basic objectives of housing subsidies.<sup>240</sup>

Regarding public housing leasing and rent supplements, Dr. Downs said that the programs had "major advantages that indicate they should be significantly expanded."<sup>241</sup> After identifying and analyzing the major criticisms of housing subsidies, the Downs study stated that "the widely expressed conclusion that current housing subsidy programs 'have failed' or are generally ineffective is false."<sup>242</sup>

The Joint Economic Committee reported in March 1973 that most of the scandals and abuses were due to

faulty administration by the Department of Housing and Urban Development rather than to any inherent defects in the legislation. Shoddy construction, poor inspection procedures, almost no tenant counseling, no careful analysis of the cause of high default rates, excessive land costs, and excessive legal and organizational fees are examples the Subcommittee found where HUD simply did not do its job. While some legislative improvements are needed, our present housing programs are *not* inherently unworkable as some White House spokesmen have charged.<sup>243</sup>

On June 30, 1973, the Senate adopted an amendment to prohibit the use of any HUD funds unless the Secretary of HUD, during fiscal 1974, made funds available for obligation contract authority for rent supplements, homeownership, rental housing assistance and public housing.<sup>244</sup> The amendment was deleted in conference.<sup>245</sup>

In a decision of July 23, 1973, Judge Charles R. Richey of the U. S. District Court for the District of Columbia called the housing moratorium unlawful. He ordered Secretary Lynn to accept applications for subsidies, to process existing and new applications in accordance with HUD regulations, and to approve and complete the processing of projects found to be qualified under HUD regulations.<sup>246</sup> It

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240. A. DOWNS, *FEDERAL HOUSING SUBSIDIES: THEIR NATURE AND EFFECTIVENESS, AND WHAT WE SHOULD DO ABOUT THEM* 17 (1972).

241. *Id.* at 19.

242. *Id.* at 21.

243. SUBCOMMITTEE ON PRIORITIES AND ECONOMY OF THE JOINT ECONOMIC COMMITTEE, 93D CONG., 1ST SESS., *HOUSING SUBSIDIES AND HOUSING POLICY* 6 (Comm. Print 1973) (emphasis in original).

244. 119 CONG. REC. S12, 625-27 (daily ed. June 30, 1973).

245. *Id.* at H6815 [Amendment No. 42] (daily ed. July 28, 1973).

246. *Pennsylvania v. Lynn*, 362 F. Supp. 1363 (D.D.C. 1973).

was not within the discretion of the Executive "to refuse to execute laws passed by Congress but with which the Executive presently disagrees."<sup>247</sup>

The Nixon administration had four years to study housing programs and to propose remedies. Each budget presentation could have identified for Congress the inadequacies and what should be done to correct them. Nothing was proposed except for a consolidation and simplification bill. To wait four years and then impose a moratorium, without adequate evidence that the program was structurally unsound or administratively unworkable, was in act of administrative bad faith.

### B. Community Development

In a March 1971 appearance before a Senate committee, Secretary of HUD Romney explained that funds were being held back from various urban programs in anticipation of the President's revenue sharing proposal.<sup>248</sup> He remarked that there was no point in accelerating programs that were "scheduled for termination."<sup>249</sup> The fact that Congress had yet to register an opinion about the "termination" of urban grants was apparently immaterial to Mr. Romney.

Two years later, during Senate hearings on February 1, 1973, Senator Ervin challenged the right of the administration to use impoundment in this manner. He was assured by OMB Director Ash that the Romney example "dealt not with this year but earlier activities. This year the reasons are very compelling ones and different ones."<sup>250</sup>

Contrary to the Ash reassurance, impoundment was still very much a part of the administration's strategy to enact urban revenue sharing. Secretary Romney, in his speech of January 8, 1973, announced that "we have ordered a temporary holding action on new commitments for water and sewer grants, open space grants, and public facility loans until these activities are folded into the Special

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247. *Id.* at 1372 (footnote omitted). On July 31, 1973, Judge Richey ruled that the administration's refusal to further process, improve and implement applications for Farmers Home Administration interest credit loans was unlawful. *Pealo v. Farmers Home Adm'n*, Civ. No. 1028-73 (D.D.C. Aug. 3, 1973), *appeal docketed*, No. 73-1870 (D.C. Cir., Aug. 10, 1973).

248. *Hearings on Withholding of Funds for Housing and Urban Development Programs, Fiscal Year 1971 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 1st Sess. 159 (1971).

249. *Id.* at 163, 165.

250. 1973 *Ervin Hearings*, *supra* note 12, at 278. *But see id.* at 277.

## IMPOUNDMENT OF FUNDS

Revenue Sharing program.”<sup>251</sup> That was underscored a week later by Kenneth R. Cole, Jr., Director of the Domestic Council.<sup>252</sup>

To impound funds in this prospective sense—holding on to money in anticipation that Congress will enact an administration proposal—was a new departure for the impoundment technique. Money was not being withheld to avoid deficiencies, to effect savings, or even to fight inflation, but rather merely to shift budget priorities from one administration to the next, all before any congressional action.

In its report of June 19, 1973, the House Committee on Appropriations expressed “great concern” that termination of categorical grant programs for community development

by impoundment of funds or executive fiat is of questionable legality. Until modified or repealed by the Congress, the Committee directs that the programs be continued.<sup>253</sup>

In that same report, Representative Robert O. Tiernan pointed out that the omission of mandatory language in the bill created uncertainty as to the future of community development programs.<sup>254</sup> On April 6, 1972, the District Court for the Northern District of California had concluded that non-mandatory language in federal housing legislation made it impossible for the court to order the release of \$150 million in urban renewal funds.<sup>255</sup> The court had held that Congress appeared “to have created much of the executive’s discretion to withhold funds and would also appear to be able to limit that discretion if it so desired.”<sup>256</sup>

When the housing appropriation bill reached the floor, Representative Tiernan offered an amendment to mandate spending for three community development programs: Model Cities, urban renewal, and open space. His amendment was rejected on a point of

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251. Speech by Secretary Romney, National Association of Home Builders, Houston, Texas, Jan. 8, 1973, at 5 (on file at the *Buffalo Law Review*).

252. Letter from Kenneth R. Cole, Jr. to Senator John Sparkman, Jan. 15, 1973, in 119 CONG. REC. S1723 (daily ed. Jan. 31, 1973).

253. H.R. REP. No. 296, 93d Cong., 1st Sess. 6 (1973). For 1974 funding of HUD water and sewer grants, see H.R. REP. No. 275, 93d Cong., 1st Sess. 73 (1973); S. REP. No. 253, 93d Cong., 1st Sess. 50-51 (1973).

254. H.R. REP. No. 296, 93d Cong., 1st Sess. 31 (1973).

255. *Housing Authority v. United States Dep't. of Housing and Urban Dev.*, 340 F. Supp. 654, 656 (N.D. Cal. 1972).

256. An earlier decision on housing impoundment ruled that there was no precedent to suggest that a U.S. district court may compel the President “to take any action whatsoever.” *San Francisco Redev. Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971).

order.<sup>257</sup> Senator Cranston successfully proposed an amendment to the housing appropriation bill to prohibit the Secretary of HUD from using any funds for administrative expenses unless the full amount appropriated for community development assistance programs was released during fiscal 1974. That amount included funds to be available in the fiscal 1974 bill as well as those impounded from prior appropriations.<sup>258</sup> The Senate also adopted an amendment that made air conditioning for the Office of Management and Budget contingent upon the release of \$10.1 million for air conditioning of Veterans Administration hospitals.<sup>259</sup> As passed by the Senate, the fiscal 1974 appropriation bill contained a general provision to induce the administration to spend the funds; the bill specified that all funds "shall be made available for expenditure except as specifically provided by law . . ."<sup>260</sup> These amendments to the HUD bill were rejected in conference.<sup>261</sup>

A general directive to spend funds for all federal programs was included, however, in the continuing appropriations bill passed by the Senate on June 29, 1973. The provision stated that funds "shall be made available for expenditure except as specifically provided by Law."<sup>262</sup> The Senate Appropriations Committee intended that

all funds [would] be available for obligation except those for which a specific reservation ha[d] been provided in this bill or those which may legally be withheld under the Anti-Deficiency Act or other specific statutory authority.<sup>263</sup>

The provision was deleted in conference because it was considered an unnecessary restatement of existing provisions of law.<sup>264</sup> The continuing appropriations bill also provided that "[a]ny provision of law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall not be held to affect the status of any lawsuit or right of action involving the right to those funds."<sup>265</sup>

257. 119 CONG. REC. H5217-19 (daily ed. June 22, 1973).

258. *Id.* at S12,624 (daily ed. June 30, 1973).

259. *Id.* at S12,633.

260. *Id.* at S12,616. *See* S. REP. NO. 272, 93d Cong., 1st Sess. 4 (1973).

261. 119 CONG. REC. H6814-15 (daily ed. July 28, 1973) (Amendment Nos. 1, 9 & 36).

262. 119 CONG. REC. S12,536 (daily ed. June 29, 1973).

263. S. REP. NO. 277, 93d Cong., 1st Sess. 4 (1973).

264. H.R. REP. NO. 364, 93d Cong., 1st Sess. 3 (1973).

265. Act of July 1, 1973, Pub. L. No. 93-52, § 111, 87 Stat. 134.

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### IV. CONCLUSION

Impoundment of funds by the Nixon administration provoked not only ad hoc efforts to restore specific programs but also more general remedies. Even members of Congress who at one time were sympathetic to impoundment now joined the ranks of those insisting on greater congressional control.

A good example of the change in congressional thinking is George H. Mahon, chairman of the House Committee on Appropriations. In 1969 he stated that

the weight of experience and practice bears out the general proposition that an appropriation does not constitute a mandate to spend every dollar appropriated . . . . I believe it is fundamentally desirable that the Executive have limited powers of impoundment in the interests of good management and constructive economy in public expenditures . . . .<sup>266</sup>

Four years later, no longer confident that the Executive could be trusted to exercise "limited powers of impoundment," Mahon sponsored a bill to prohibit impoundment if both Houses of Congress, within 60 days, adopted a resolution of disapproval.<sup>267</sup> To President Nixon's claim that it was "absolutely clear" that he had the constitutional right to impound funds to prevent an increase in prices or taxes,<sup>268</sup> Mahon insisted that Congress could not concede such broad authority: "To concede that would mean that we were practically out of business as a legislative branch."<sup>269</sup> According to Mahon a failure to check the administration's use of impoundment "would destroy the coequal status of Congress . . . . [and] would be demeaning the Congress."<sup>270</sup>

The Mahon impoundment bill, after extensive modification by the House Committee on Rules, was reintroduced by Representative Ray J. Madden.<sup>271</sup> The new House bill provided for disapproval by

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266. Letter from Rep. George H. Mahon to Senator Sam J. Ervin, Jr., Feb. 25, 1969, in *1971 Ervin Hearings*, *supra* note 14, at 501-02. Mr. Mahon had noted in 1949, in reference to impoundment, that "economy is one thing, and the abandonment of a policy and program of the Congress another thing." 95 CONG. REC. 15,126 (1949).

267. H.R. 5193, 93d Cong., 1st Sess. (1973).

268. See note 1 *supra* & accompanying text.

269. *Hearings on Impoundment Reporting and Review (Part 1) Before the House Comm. on Rules*, 93d Cong., 1st Sess. 7 (1973).

270. *Id.* at 9.

271. H.R. 8480, 93d Cong., 1st Sess. (1973).

only one House instead of two, reliance on the expertise of the General Accounting Office, a provision to discharge from the Appropriations Committees any impoundment actions referred there, and a spending ceiling of \$267.1 billion for fiscal 1974.<sup>272</sup> The bill passed the House on June 25, 1973.<sup>273</sup>

The Ervin impoundment bill, which had already passed the Senate,<sup>274</sup> prohibited an impoundment after 60 days unless both Houses ratified it. Whereas the Madden bill placed upon either the House or the Senate the burden of disapproving an impoundment action, the Ervin bill placed upon the administration the burden of gaining the support of both Houses. Furthermore, the Ervin bill relied to an even greater extent on the GAO for assistance, brought impoundment actions directly to the floor rather than referring them first to Appropriations Committees, and established a spending ceiling of \$268.0 billion for fiscal 1974.<sup>275</sup>

Both Houses moved forward with these bills somewhat reluctantly; they were concerned about the effect of anti-impoundment legislation on government economy and efficiency. But the extraordinary and unprecedented use of impoundment by the Nixon administration left Congress with no other choice. Congress could not allow the President to justify impoundment on the grounds of fighting inflation and higher taxes. Those policy objectives, attractive though they may be, do not stand alone. Constitutional government depends on more than the pursuit of desirable goals. More fundamental than goals are the means employed. Who is to set the goals? What standards and procedures are to be devised to ensure that public policy is built upon the law rather than administrative convenience?

For all its trappings of conservatism and "strict constructionism," the Nixon administration has never demonstrated an understanding of what lies at the heart of our political system: a respect for procedure, a sense of comity and trust between the branches, an appreciation of limits and boundaries. Used with restraint and circumspection, impoundment is a viable instrument, capable of being used without precipitating a crisis. But restraint was replaced by abandon,

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

273. 119 CONG. REC. H6626 (daily ed. June 25, 1973).

274. See notes 30-34 *supra* & accompanying text.

275. See S. REP. NO. 121, 93d Cong., 1st Sess. (1973).

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precedent stretched past the breaking-point, and statutory authority pushed beyond legislative intent. Basic courtesies were neglected, and OMB's reputation for objectivity and professionalism damaged.

Without good-faith efforts and integrity on the part of executive officials, the system of delegation, discretion, and nonstatutory controls will not last. Under such conditions Congress is forced to act.

### APPENDIX

#### STATISTICAL CLAIMS

##### A. *Impoundment Reports*

A debt limit bill, enacted October 27, 1972, required the President to transmit an impoundment report to Congress.<sup>276</sup> Although the language of the law called for "prompt" reporting, the President still had not complied by January 6, 1973. On that day the Senate considered an amendment by majority whip Robert C. Byrd to establish a specific deadline for the information.<sup>277</sup> As finally enacted, the date was set for February 10.<sup>278</sup>

The resulting report from the Office of Management and Budget stated that "budgetary reserves," as of January 29, 1973, amounted to \$8.7 billion.<sup>279</sup> Administration spokesmen relied on this report to announce that Presidents Kennedy and Johnson had both impounded a higher percentage of funds than President Nixon. Secretary Weinberger wrote:

Here are the facts: as of Jan. 29 of this year, 3.5 per cent of the total unified budget was being impounded. That compares with 7.8 per cent on June 30, 1961, under President Kennedy, 6.1 per cent in 1962, 4 per cent in 1963; 3.5 per cent in 1964 under President

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276. Act of Oct. 27, 1972, Pub. L. No. 92-599, § 402, 86 Stat. 1325.

277. 119 CONG. REC. S275 (daily ed. Jan. 6, 1973). See *id.* at H237 (daily ed. Jan. 16, 1973); *id.* at S696 (daily ed. Jan. 15, 1973).

278. Act of Jan. 19, 1973, Pub. L. No. 93-1, § 2, 87 Stat. 3. A continuing appropriation bill, enacted March 8, 1973, provided for four impoundment reports a year. The first report shall be transmitted on or before October 15, covering the period through September 30. The second and third reports shall be submitted on or before the 15th and 90th days after submission of the budget, and shall cover the periods through the date of submission and 75 days after that date (*i.e.*, around the end of January and mid-April). The fourth report shall be submitted on or before July 15 following the end of the fiscal year. Act of Mar. 8, 1973, Pub. L. No. 93-9, § 3, 87 Stat. 7.

279. 38 Fed. Reg. 3474 (1973) (reprinted as S. Doc. No. 4, 93d Cong., 1st Sess. (1973)).

Johnson's first budget, 4.7 per cent in 1965, 6.5 per cent in 1966, 6.7 per cent in 1967, and 5.5 per cent in 1968.<sup>280</sup>

The "facts" of the matter are a little more complicated. As will be demonstrated herein, the OMB report omitted approximately \$9 billion in impounded funds. Moreover, percentages and dollar amounts fail to capture the nature and character of impoundment actions. Not until they are analyzed on a case-by-case basis—separating the routine from the controversial, the deferred from the cancelled—is it possible to comprehend the full impact on programs and activities.

1. *Amounts.* Five instances of impoundment were omitted from the OMB report. The largest of such items was \$6 billion in contract authority withheld from water pollution control programs: \$3 billion each year for fiscal 1973 and fiscal 1974. However, since the President acted in fiscal 1973 to withhold the amounts for both years,<sup>281</sup> the entire \$6 billion should have been included in his report.

The justification for omitting the \$6 billion may be found in the definition of contract authority—budget authority "which permits obligations, but requires an appropriation or receipts 'to liquidate' (pay) these obligations."<sup>282</sup> Since states could not enter into obligations until the President allotted the authority, the unallotted portion (\$6 billion) never satisfied the technical definition of either contract authority or budget authority. By this reasoning, nothing existed to impound or place in reserve. Caspar W. Weinberger noted that "the authority to obligate the United States comes into existence on the date the allotments to the states are made and the amount of the total obligational authority thus provided is determined by the total amount allotted."<sup>283</sup> Still, it is clear that Congress regarded the failure to allot the \$6 billion as an act of impoundment. Moreover, the act of October 27, 1972, called for reports on *impoundment*, not

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280. Weinberger, *Congress as the Crisis*, N.Y. Times, Mar. 27, 1973, at 45, col. 5.

281. See notes 208-23 & accompanying text.

282. UNITED STATES BUREAU OF THE BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974, at 315 (1973).

283. *Hearing on Nominations of Caspar W. Weinberger, of California, to be Secretary of Health, Education, and Welfare, and Frank C. Carlucci, of Pennsylvania, to be Under Secretary of Health, Education, and Welfare, Before the Senate Comm. on Finance*, 93d Cong., 1st Sess. 48 (1973).

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“budgetary reserves” or some other category more convenient to the administration.

The OMB report also failed to include \$441 million in contract authority withheld because of the housing moratorium.<sup>284</sup> This amount included \$38,584,000 for rent supplements, \$220,983,000 for homeownership, \$171,473,000 for rental assistance, and \$10,209,000 for college housing. HUD explained that those amounts were not reported because contract authority is not apportioned by HUD and therefore cannot be placed in “budgetary reserve.”<sup>285</sup>

A third item omitted from the OMB list was \$382.8 million in proposed rescissions (requests to cancel budget authority). This was comprised of \$283.8 million for manpower training services; \$17.3 million for the Food and Drug Administration; \$4.7 million for Indian health services; and four programs in the Office of Education: \$18 million for Indian education; \$44.3 million for higher education; \$2.9 million for library resources; and \$11.9 million for educational renewal.<sup>286</sup> Those amounts were apportioned to their respective agencies, pending congressional action. Since they were actually apportioned, and thus not placed in “budgetary reserve,” they were omitted from the OMB list.<sup>287</sup>

Whether apportioned or not, the proposed rescissions were functionally identical to impoundment. The agencies were instructed not to obligate the funds until Congress acted. Even if Congress rejected the proposed rescissions there was no guarantee that the money would be used. Weinberger explained:

Our determination of what steps to take if the funds are not rescinded will be dependent upon a number of factors which are currently unknown, such as the status of Congressional action on other fiscal year 1973 appropriations and where we stand with respect to our firm target of maintaining outlays below \$250 billion in fiscal year 1973.<sup>288</sup>

Part of the proposed rescissions were released as a result of court action. Of the \$44.3 million withheld from higher education, \$25 million was for veterans' cost-of-education grants to colleges and uni-

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284. See notes 236-47 *supra* & accompanying text.

285. Statistics and argument obtained from HUD budget office.

286. UNITED STATES BUREAU OF THE BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974, APPENDIX 1074 (1973).

287. 38 Fed. Reg. 3474 (1973).

288. Letter from Caspar W. Weinberger to Senator Jacob K. Javits, Feb. 22, 1973, in 1973 *Ervin Hearings*, *supra* note 12, at 732.

versities. Judge Gesell of the U.S. District Court for the District of Columbia ordered the Office of Education to issue regulations so that colleges and universities could apply for grant assistance.<sup>289</sup> The Office later agreed to fund the program in its entirety.<sup>290</sup>

The \$18 million for Indian education was also released because of pressure from litigation.<sup>291</sup> When the fiscal 1974 budget proposed to rescind \$10 million for land-grant colleges (the Bankhead-Jones Act),<sup>292</sup> the National Association of State Universities and Land Grant Colleges brought suit against HEW Secretary Weinberger in the U.S. District Court for the District of Columbia.<sup>293</sup> The Department of Justice informed the court that, in view of Congress's failure to approve the rescission requests, HEW was now implementing the program. The case was dismissed as moot.<sup>294</sup>

In rejecting the rescission requests,<sup>295</sup> both houses were

highly critical of the Department's actions with respect to items proposed for rescission. Little was done in the way of anticipating Congressional action on these items. As a result, those who wish to apply for funding are required to do so on extremely short notice. The conferees are aware that to date the Department has acted with less than alacrity, and expects that all possible considerations be given to applicants.<sup>296</sup>

A fourth category omitted by OMB was \$1.9 billion withheld from the Departments of Labor and Health, Education, and Welfare.

289. *National Ass'n of Collegiate Veterans v. Ottina*, Civ. No. 349-73 (D.D.C., May 24, 1973). See *Washington Post*, Mar. 28, 1973, at A2, col. 7.

290. *Washington Evening Star and Daily News*, May 23, 1973, at B4, col. 1; *Washington Post*, May 23, 1973, at A7, col. 1.

291. *Minnesota Chippewa Tribe v. Carlucci*, Civ. No. 628-73 (D.D.C., May 8, 1973). See *Education Daily*, May 10, 1973, at 2; *id.*, Apr. 30, 1973, at 4; *N.Y. Times*, June 25, 1973, at 14, col. 1.

292. UNITED STATES BUREAU OF THE BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974, APPENDIX 1074 (1973).

293. *National Assoc. of State Univ. & Land Grant Colleges v. Weinberger*, Civ. No. 1014-73 (D.D.C., dismissed June 29, 1973).

294. U.S. Dep't of Justice, *Impoundment Cases*, at 5, Aug. 10, 1973 (memorandum).

295. H.R. REP. No. 164, 93d Cong., 1st Sess. 3-4 (1973); S. REP. No. 160, 93d Cong., 1st Sess. 3 (1973).

296. H.R. REP. No. 295, 93d Cong., 1st Sess. 11 (1973). The veto of this supplemental appropriation bill by President Nixon on June 27, 1973, does not alter the fact that his requests for rescission were rejected by the Appropriations Committees of both houses. As enacted, the Second Supplemental Appropriation Act, 1973, extended by three months the availability of certain higher education funds affected by the rescission requests. Act of July 1, 1973, Pub. L. No. 93-50, 87 Stat. 106-07.

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The appropriation bill for those departments had been vetoed once by the President and pocket-vetoed a second time.<sup>297</sup> During this period the Labor-HEW programs were financed by means of a continuing resolution, under which departments and agencies were generally funded at the level approved by the House or the Senate, whichever was lower. Instead, the administration decided to fund the programs at an even lower level—the President's revised 1973 budget requests.<sup>298</sup> The difference of \$1.9 billion was not technically "budgetary reserves," since the apportionment process was waived for continuing appropriations.<sup>299</sup> Yet the effect was identical to impoundment.

Because of the administration's action in withholding Labor-HEW funds, House Appropriations prepared a continuing appropriations bill to establish spending authority for the Departments of Labor and Health, Education, and Welfare, and related agencies "as now or hereafter passed by the House and Senate." The "current rate" for projects and activities in the Labor-HEW bill was defined to be those established by Congress in the continuing resolution for fiscal 1973—a level higher than the actual ongoing administrative rate.<sup>300</sup>

The fifth, and final, item omitted from the OMB impoundment report was approximately \$300 million withheld from the FHA disaster loan program. That is the estimated saving that would have been realized had the program been cancelled.<sup>301</sup> Adding the five omissions to the OMB list of \$8.7 billion brings the impoundment total up to \$17.7 billion. Instead of only 3.5 percent of the Nixon budget being impounded, the actual percent was at least twice that amount.

2. *Program Impact.* Although it is not very helpful to compare administrations with aggregate figures, either by dollar amounts impounded or by percentages, such comparisons are instructive in showing the impact of impoundment *within* an administration.

The OMB report listed \$1.899 billion withheld from the Depart-

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297. 8 WEEKLY COMP. PRES. DOC. 1240, 1578 (1973).

298. 119 CONG. REC. H4694-95 (daily ed. June 13, 1973) (statement by Rep. Bell); *id.* at S3351 (daily ed. Feb. 26, 1973) (statement by Sen. Cotton).

299. *See e.g.*, Act of July 1, 1972, Pub. L. No. 92-344, § 103, 86 Stat. 404.

300. Act of July 1, 1973, Pub. L. No. 93-52, § 101(a)(4), 87 Stat. 131. *See* 119 CONG. REC. H5358-59, S12,537-38 (daily ed. June 26, 1973). *See* H.R. REP. NO. 328, 93d Cong., 1st Sess. 2-3 (1973); S. REP. NO. 277, 93d Cong., 1st Sess. 2 (1973).

301. Obtained from the Agriculture budget office. Some of this will be spent because of court and congressional actions taken after the OMB impoundment report. For details on the FHA disaster loan program, see notes 176-87 *supra* & accompanying text.

ment of Defense (military functions), \$1.497 billion from the Department of Agriculture and \$529 million from HUD. As percentages of total available budget authority for fiscal 1973 that translates to 2.4 percent for Defense, 13.0 percent for Agriculture, and 10.5 percent for HUD.<sup>302</sup> As Defense is underrepresented, the main burden of impoundment obviously falls on the domestic sector.

Those percentages actually understate the full extent of that burden. Two other calculations are needed. The first involves the OMB report's omission of \$300 million in FHA disaster loan funds and \$441 million in HUD contract authority.<sup>303</sup> Thus, a more accurate comparison would be: 2.4 percent for Defense, 15.6 percent for Agriculture, and 19.2 percent for HUD.

A second focuses on the amount of unobligated funds which lapse at the end of the fiscal year. Deferral of spending is less serious to an agency than outright loss of funds. Of the Defense impoundments, all unobligated funds will be available beyond fiscal 1973 except for \$7.5 million in annual accounts; \$5.1 million in Reserve Personnel, Marine Corps, and \$2.4 million in the Special Foreign Currency Program.<sup>304</sup> Thus, less than one-half of 1.0 percent of Defense impoundments was scheduled to lapse.

That stands in stark contrast with the \$207 million of Agriculture money not available beyond fiscal 1973.<sup>305</sup> Moreover, there are additional funds which are technically or legally "available" after fiscal 1973, of which the administration had no intention of spending: \$300 million for the FHA disaster loan program, \$210 million for REAP, \$11 million for the Water Bank Program, \$456 million for REA loans, and \$120 million for rural water and waste disposal grants. In a practical sense, then, 72.6 percent of Agriculture impoundments would have been lost after fiscal 1973 without legal and legislative efforts to restrain the administration.<sup>306</sup>

All of the \$970 million withheld from HUD was technically avail-

302. Based on the following fiscal 1973 estimates for budget authority: Agriculture, \$11.532 billion; Defense-Military, \$77.804 billion; and HUD, \$5.048 billion. UNITED STATES BUREAU OF THE BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974, at 329 (1973).

303. Information obtained from Agriculture and HUD budget offices.

304. The OMB report, *supra* note 279, included a column "Available beyond fiscal year 1973?"

305. *Id.*

306. For details on these agriculture impoundments, see notes 164-205 *supra* & accompanying text.

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able after fiscal 1973. But with the single exception of \$6.6 million in housing production and mortgage credit, the administration had no plans to spend the money.<sup>307</sup> In the area of Defense, none of the funds that extended beyond fiscal 1973 faced political impoundment.

Thus, a comparison of the three Departments in terms of the percent of impoundments that would lapse—either legally or politically—reveals: 0.4 percent, Defense; 72.6 percent, Agriculture; and 99.3 percent, HUD.

### B. *The \$11-Billion Saving*

During the fall election months of 1972, when President Nixon asked Congress for a \$250 billion ceiling for fiscal 1973, administration spokesmen argued that congressional action threatened to drive federal spending to an irresponsible and inflationary level. The President declared his intention to “fight every attempt by the Congress to bust that budget, because a big spending spree by the Congress will have only one result, a hangover of higher taxes or higher prices for every working family in America.”<sup>308</sup> After Congress refused to grant him a spending ceiling, the President announced his determination to “use every weapon at my command to hold spending in this fiscal year as close as possible to \$250 billion . . . .”<sup>309</sup>

In an article for *The New York Times*, Secretary Weinberger claimed that “only Presidential intervention” prevented an additional \$11-billion increase in the fiscal 1973 budget. Weinberger maintained that the President ordered the “most exhaustive evaluation of Federal programs ever undertaken” in order to ferret out waste and inefficiency.<sup>310</sup> The alleged saving came from two sources: \$6.5 billion in program reductions and terminations, and \$4.7 billion attributed to the following items (in billions):<sup>311</sup>

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307. Information obtained from HUD budget office. Some of this budget authority could be made available for the Administration's special revenue sharing proposal or for the suspended housing programs, but that will require legislative action.

308. 8 WEEKLY COMP. PRES. DOC. 1497 (1972).

309. *Id.* at 1553.

310. Weinberger, *Congress as the Crisis*, N.Y. Times, March 27, 1973, at 45, col. 5.

311. UNITED STATES BUREAU OF THE BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1973, at 49 (1972).

Additional stockpile disposals	-0.4
Additional non-federal financing for federal credit programs	-1.1
Deferral of various payments:	
General revenue sharing	-1.5
Other	-0.5
Additional offshore oil receipts	-1.0
Increase in user charges and other actions	-0.2

Starting with this list of \$4.7 billion, most of the action consists of bookkeeping processes and deferrals rather than actual savings. To sell \$1.5 billion in stockpile assets and federal credit is not a saving in the sense that a program is eliminated or reduced. Nor is it a saving to push certain costs into the early months of the next fiscal year, such as the \$2.0 billion in general revenue sharing and other deferrals. Furthermore, the \$1.0 billion in offshore oil receipts is more properly considered as additional revenue rather than "outlay savings."

Turning now to the \$6.5 billion, a significant percentage of the program reductions and terminations resulted from factors over which the administration had no control. For example, \$2.343 billion represented monies which might have been spent had Congress not established a ceiling of \$2.5 billion for the social services grant program.<sup>312</sup> To designate that as part of the President's \$11 billion savings is a strange use of statistics.

Several other large savings resulted from congressional action or inaction. Highway spending was reduced by \$100 million because Congress failed to pass the Highway Act of 1972.<sup>313</sup> Similarly, the defeat of the appropriation bill for the Corporation for Public Broadcasting resulted in an outlay saving of \$10 million.<sup>314</sup> Also significant was legislation enhancing the marketability of bonds for the Washington Metropolitan Area Transit Authority, permitting earlier use of bond

312. *Id.* at 49, 53.

313. Much of the information in footnotes 314-24 can be found in *id.* at 50-57, but a more detailed examination by OMB was forwarded to the Joint Economic Committee and reprinted in *Hearings on The 1973 Economic Report of the President (Part I) Before the Joint Economic Committee*, 93d Cong., 1st Sess. 124-86 (1973) [hereinafter referred to as *1973 Economic Report*]. For information on Highway Act of 1972, see *1973 Economic Report* at 171.

314. *1973 Economic Report* at 184.

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revenues and \$80 million in outlay savings.<sup>315</sup> Still another factor external to administrative action was the termination of the European Monetary Agreement by the Organization for Economic Cooperation and Development, producing an outlay saving of \$242 million.<sup>316</sup>

Projects were delayed in some cases because of environmental considerations, especially projects that had been authorized prior to the National Environmental Policy Act of 1969. Those delays affected projects by the Corps of Engineers and the Bureau of Reclamation, airport grants, the Federal Law Enforcement Training Center, AEC's Plowshare program, and TVA construction activity—a total of \$155 million related to environmental factors.<sup>317</sup> The motivating force here was not administrative initiative but compliance with legislative standards.

Other large savings resulted from normal administrative responsibilities: eliminating unnecessary advance payments in the Medicare program, and eliminating overpayments or payments to ineligible recipients in the Medicaid and public assistance programs. Those items amounted to \$572 million.<sup>318</sup> Surely it cannot be argued that the Congress would want the administration to pay for unnecessary advancements, overpayments, or ineligible recipients.

Nor could Congress have expected the administration to spend funds for FAA equipment subject to procurement delays;<sup>319</sup> for Urban Mass Transportation research and development experiencing problems with new technology;<sup>320</sup> for intermodal research and development in the Transportation Department affected by administrative delays;<sup>321</sup> for termination payments on the supersonic transport delayed by negotiations to settle claims;<sup>322</sup> or for maritime subsidies delayed by late shipments of grain.<sup>323</sup> Outlay savings for those items came to \$90 million.

In short, more than half of the \$6.5 billion in reductions and terminations can be accounted for by the following four categories:

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315. *Id.* at 186.

316. *Id.* at 130.

317. *Id.* at 144-45, 165, 172, 175-76, 186.

318. *Id.* at 145, 157.

319. *Id.* at 172.

320. *Id.* at 173.

321. *Id.* at 173-74.

322. *Id.* at 174-75.

323. *Id.* at 141-42.

\$2.775 billion related to congressional action or inaction; \$155 million related to environmental factors; \$572 million in normal administrative responsibilities; and \$90 million produced by administrative delays or late shipments—a total of \$3.592 billion.<sup>324</sup>

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324. For other critiques of the "\$11-billion saving," see 119 CONG. REC. S7863-65 (daily ed. Apr. 18, 1973) (statement by Elmer B. Staats, Comptroller General of the United States); *id.* at S7391-94 (daily ed. Apr. 13, 1973) (staff study of Joint Economic Committee).