THE CASE AGAINST IMPOUNDMENT*

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The 1970's have witnessed a major expansion in the number and scope of impoundments of congressionally appropriated funds by the federal executive.[1] During the Nixon administration funds were no longer frozen merely to effect marginal savings, control the rate of fund allotment, or restrict the achievement of particular projects, as in earlier practice,[2] but rather to alter the actual purpose of congressional programs. Policy impoundment, as Senator Humphrey noted, "is a method of substituting Executive will for Congressional purpose."[3]

Recent exercises of executive power have thus tended to "relegate distinctions and limits accepted by past decades to oblivion. . . ."[4] The effects have been substantial, particularly as a result of actions by the Office of Management and Budget (OMB), the clearinghouse for executive budgetary decisionmaking. As part of President Nixon's Reorganization Plan No. 2 (1970), OMB was established as the successor to the Bureau of the Budget (BOB)[5] and was charged with budgetary responsibilities substantially broader than those discharged by BOB. OMB's powers have grown to the point where one member of Congress has remarked, "[t]he OMB has become the 'invisible government' of the United States."[6] Long-term as well as short-term projects which

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* This note is expanded from an essay awarded the Harold E. Goettler Political Institutions Prize, University of Chicago, 1974.

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1. The impoundments discussed herein are those exercised with respect to funds appropriated for domestic purposes. Whether the impoundment of funds appropriated for national defense is authorized by the commander-in-chief clause of the Constitution is a subject best dealt with separately.

2. *See generally* the incremental development scheme for impoundment set forth by Professor Cooper in *Hearings on Executive Impoundment of Appropriated Funds Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 92d Cong., 1st Sess. at 181-89 (1971) (hereinafter cited as *1971 Hearings*). (prepared statement of Professor Joseph Cooper, "Executive Impoundment of Appropriations").

3. 54 CONG. DIGEST (Apr., 1973) 119.

4. *1971 Hearings, supra* note 2, at 177. (testimony of Professor Cooper).

5. Exec. Order No. 11,541, 3 C.F.R. 939 (1966-70 Comp.).

6. 31 CONG. Q. WK. REPT. 215 (Feb. 3, 1973) (statement of Rep. J.J. Pickle of

never before encountered difficulty in funding were put in jeopardy. Entire programs were terminated or dismantled by the executive branch: the Rural Environmental Assistance Program,[7] the Farmers Home Administration's Water and Sewer Grant Programs,[8] Public Housing construction subsidies (for low rent projects),[9] and the Office of Economic Opportunity, including its various subprograms—the Community Action Agencies, Senior Citizen Services, and Emergency Food and Medical Programs.[10]

Gerald Ford, while still in the House of Representatives, supported many of these actions,[11] recognizing the need "to give some overall responsibility to a President" in the area of budgetary policy.[12] More recently, however, President Ford in a congressional message noted that it is the function of Congress to act as "a full patrner in the continuing struggle to keep Federal spending under control."[13]

Whatever the course of the future, the interrelation of authorities claimed by the executive branch for past impoundments is clear: the "executive power" and "laws be faithfully executed" clauses of the

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Texas). Among the functions of the Office of Management and Budget are:

"To assist the President in the preparation of the budget and the formulation of the fiscal program of the Government.

"To supervise and control the administration of the budget.

"To keep the President informed of the progress of activities by agencies of the Government with respect to work proposed, work actually initiated, and work completed. . . ."

7. *See Joint Hearings on S.373 Before the Ad Hoc Subcommittee on Impoundment of Funds of the Senate Committee on Government Operations and the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess. at 935 (1973) (hereinafter cited as *1973 Hearings*) (complaint for declaratory judgment and injunctive relief re: Termination of the Rural Environmental Assistance Program).

8. *See 1973 Hearings, supra* note 7, at 161 (letter from Maine Commissioner of Environmental Protection to Senator Muskie re: Termination of Water and Sewer Grant Programs).

9. *See 1973 Hearings, supra* note 7, at 302-07 (testimony of Lewis Cenker, Vice President of the National Association of Home Builders).

10. *See 1973 Hearings, supra* note 7, at 765-71 (memorandum by the Office of Economic Opportunity on Section 221 Funding).

11. Evidenced by Mr. Ford's support of rural electrification and environmental assistance program impoundments by the Nixon administration. *See Hearings on the Nomination of Gerald R. Ford of Michigan to be Vice President of the United States before the Senate Committee on Rules and Administration*, 93d Cong., 1st Sess. at 74-75 (1973). In addition, Congressman Ford in July, 1973, voted against a bill which would circumscribe the president's powers to impound funds appropriated by Congress. A revised version of this bill was later attached to the budget reform legislation and enacted into law. See note 47 *infra*.

12. *Id.* at 45.

13. *The President's Message to the Congress Transmitting Deferrals and Rescissions*, 10 WEEKLY COMP. OF PRES. DOC. at 1173 (Sept. 20, 1974).

Constitution; statutory grants of spending discretion to the executive; rigid spending ceilings and public debt limits; and finally, the generally permissive intent of appropriation bills.[14] This note will analyze these arguments.

I. Constitutional Arguments

The only constitutional references to the power to spend are in article I, which defines the duties of Congress. Article I, section 9 states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[15] According to Alexander Hamilton, the design of the Constitution in this clause secures these important ends: "that the purpose, limit, and the fund of every expenditure should be ascertained by a previous law. The public security is complete in this particular, if no money can be expended, but for an object, *to an extent*, and out of a fund *which the laws have prescribed.*"[16] Moreover, by adding section 8 of article I, which gives Congress the power to "provide for . . . general Welfare"[17] and "to make all Laws which shall be necessary and proper for carrying into

14. For the purpose of this discussion, an appropriation statute will be defined as general budgetary authority; the authorization act underlying the appropriation will be presupposed. Although in a strict sense, the obligational authority for a program is a separate step in the federal spending process from the allotment of funds, it has generally not been so regarded. For example, in the Antideficiency Act, the term "appropriation" is taken to mean: "appropriations, funds, and authorizations to create obligations by contract in advance of appropriations." 31 U.S.C. § 665(c)(1) (1970). Moreover, in the Federal Aid Highway Act of 1956, 23 U.S.C. §§ 101-36 (1970), Congress sought to eliminate year-by-year planning by setting specific authorizations for the life of the program. As Senator Ervin noted in his Brief as Amicus Curiae in State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973): "In so doing, Congress in effect transformed the authorization/obligation stage of the funding process into the equivalent of the normal appropriation stage . . . "*1973 Hearings, supra* note 7, at 979 (reprint of Brief of Senator Ervin as Amicus Curiae).

15. U.S. CONST. art. I, § 9.

16. H. LODGE, 7 ALEXANDER HAMILTON, WORKS 86-87 (1885) (emphasis added). Casper Weinberger, an administration spokesman for the existence of a broadly-conferred presidential impoundment power, testifying in March, 1971, before the Senate Subcommittee on Separation of Powers, took a view diametrically opposed to that of Hamilton—himself an advocate of broad presidential power. Citing the same provision in section 9 of article I, that "No money shall be drawn from the Treasury, but in consequence of appropriations made by law," Weinberger concluded: "It does not follow from this, however, that the expenditure of government funds involves an exclusively legislative function; in fact, the provision I have just quoted seems to assume that the *expenditure of funds*—as distinguished from the granting of authority to withdraw them from the Treasury—*is an executive function.* In any event, it has always been so regarded." *1971 Hearings, supra* note 2, at 94 (emphasis added) (testimony of C.W. Weinberger, Deputy Director, OMB).

17. U.S. CONST. art. I, § 8.

Execution the foregoing Powers",[18] a broad reading of the president's power over spending is thereby precluded.[19]

The executive branch, however, has interpreted the Constitution in a different light. It has asserted that article I, section 1, which vests the executive power in the president, encompasses the management of the national budget and the preservation of the nation's fiscal integrity. Therefore, the administration argues, the president has the authority to refuse to spend funds, if necessary, to protect that fiscal integrity and Congress may not mandate spending which jeopardizes it. One administration theory asserts that the president has inherent "latitude" to refuse to spend or to defer spending, regardless of congressional action.[20] Moreover, article II, section 3, which requires the president "take Care that the Laws be faithfully executed"[21] has been cited as a justification for impoundment. The rationale is that since the implementation of the laws, under the aforementioned clause, is an executive responsibility, the president may enforce or not enforce legislation as he sees fit.[22]

Both these interpretations ignore the traditional separation of

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18. *Id.*

19. The late Professor Alexander Bickel has noted that the president's power over spending is no greater than his power over laws generally. *1971 Hearings, supra* note 2, at 143-44 (statement made during testimony of C.W. Weinberger).

20. *See 1973 Hearings, supra* note 7, at 1090 (reprint of New York Times article by James Naughton, February 11, 1973, *Nixon's Challenge—Struggle Over The Power of The Purse*—(paraphrasing Deputy Attorney General Sneed).

The argument that there is an inherent constitutional right to impound is weakened even by administration spokesmen. The fact that Deputy Attorney General Sneed (currently circuit court judge for the Ninth Circuit) and former Deputy Director of OMB Weinberger (currently secretary of HEW) rely on congressional acquiescence as an important element in justifying administration policy is a tacit admission that contrary congressional action would be significant. If the administration truly believes that there is an indisputable inherent impoundment power, congressional acquiescence should be considered irrelevant to their argument. For the congressional acquiescence argument, *see 1973 Hearings, supra* note 7 at 833, 842 (Department of Justice answers to questions posed by Senator Ervin in his letter of February 14, 1973, to the deputy attorney general) (hereinafter cited as Dept. of Justice answers). Deputy Attorney General Sneed in his reply to Senator Ervin states, with respect to impoundment: "In my judgment the warrant of historic practice is perhaps the strongest support for my position." *Id.* at 842. *See also 1973 Hearings, supra* note 7, at 367 (prepared statement of Deputy Attorney General Sneed); *1971 Hearings, supra* note 2, at 162-63 (testimony of C.W. Weinberger).

21. U.S. CONST. art. II, § 3.

22. *See 1973 Hearings, supra* note 7, at 372-73 (testimony of Deputy Attorney General Sneed). The foundation of this argument rests on the contention that the president must harmonize inconsistent statutes. By claiming that the Antideficiency Act, the Economic Stabilization Act, *et al.*, represent statutes of overriding importance, the president thus defends his impoundment practice. Specific statutory authorizations are dealt with in another part of this article, see text accompanying notes 68-152 *infra.*

powers framework provided by the Constitution. Justice Brandeis observed in the 1920's that in a system of separated branches exercising limited powers, virtually every delegation of power to one is constrained by the grant of power to another.[23] Thus, the notion that the Constitution confers discretionary power upon the executive to refuse to execute a valid enactment by Congress "runs contrary to the entire scheme of the Constitution."[24]

The opinions of legal advisors to past presidents supports this view.[25] In 1899, for example, Attorney General Griggs advised the secretary of the treasury that he had no authority to refuse to pay a claim based on a private bill passed by Congress.[26] In an unpublished opinion letter of May 27, 1937, Attorney General Cummings advised President Roosevelt that he had no power to refuse to spend appropriated funds unless such power was found or implied in the legislation itself.[27] More recently, former Assistant Attorney General William H. Rehnquist, in a memorandum to President Nixon's deputy counsel, Edward Morgan, concluded that the president does not have a constitutional right to impound school-aid funds in the face of a congressional directive that they be spent. Mr. Rehnquist stated:

> It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. . . . [I]t seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them.[28]

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23. *See* Myers v. United States, 272 U.S. 52, 292-295 (1926) (Brandeis, J., dissenting).

24. 31 CONG. Q. WK. REPT. 215 (Feb. 3, 1973) (excerpt from Brief of Senator Ervin as Amicus Curiae in State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973).

25. Although Acting Attorney General Ramsey Clark in a 1967 letter to the secretary of transportation defended the president's authority to impound federal-aid highway funds, he was primarily concerned with statutory construction. As Assistant Attorney General Rehnquist pointed out in a 1969 memorandum, "[t]his opinion [of Acting Attorney General Clark] appears to us to have been based on the construction of the particular statute, rather than on the assertion of a broad constitution principle of Executive authority." *1971 Hearings, supra* note 2, at 279, 283 (reprint of 1969 memorandum by Assistant Attorney General William H. Rehnquist re: Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools) (hereinafter referred to as Rehnquist Memo).

26. 22 OP. ATT'Y GEN. 295 (1900).

27. *See 1971 Hearings, supra* note 7, at 283 (Rehnquist Memo).

28. *Id. See also* Berger, *Executive Privilege v. Congressional Inquiry,* 12 U.C.L.A. L. REV. 1043, 1111-1115. Berger states: "It is a feat of splendid illogic to wring from a duty faithfully to execute the laws a power to defy them." *Id.* at 1114. Moreover, judicial opinion exists supporting the notion of execution cannot be extended beyond the mere carrying out of enacted law. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952) (Black, J., majority opinion); *id.* at 602 (Frankfurter, J., con-

Indeed, once congressional policy becomes law, it is the president's duty to execute it whether he agrees with it or not. The Supreme Court has accepted this interpretation. In *Kendall v. United States ex rel. Stokes*,[29] the Supreme Court was asked to hold that it was within the constitutional authority of the postmaster general, as an official of the executive branch, to refuse to pay a contractor for service rendered, notwithstanding that Congress, by private legislation, had specifically provided for payment to the contractor. In refusing to so rule, this early decision clearly established that when Congress has expressly directed that sums be spent, the president has no constitutional power not to spend them:

> It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.
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> *To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.*[30]

In cases subsequent to *Kendall*, the Supreme Court has reiterated its position: When Congress appropriates money through a private bill to a particular person or group, no officer of the executive branch has the discretion to refuse to make the payment.[31]

The focus in *Kendall* and later cases is not on the nature of the claim or the fact that it is private, but rather the force of the making of a law. The situation in *Kendall* and the later cases is thereby analogous in certain respects to the problem of impoundment; both involve congressional enactments requiring a sum of money to be paid out and refusal by the executive branch to carry out the will of the legislature.

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curring); *id.* at 633 (Douglas, J., concurring); Myers v. United States, 272 U.S. 52, 117 (1926) (Holmes, J., dissenting); *id.* at 187 (McReynolds, J., dissenting); *id.* at 247, 292 (Brandeis, J., dissenting).

29. 37 U.S. (12 Pet.) 524 (1838).

30. *Id.* at 612-13 (emphasis added).

31. United States v. Louisville, 169 U.S. 249 (1898) (recovery of taxes by a city); United States v. Price, 116 U.S. 43 (1885) (reimbursement for supplies taken from an individual during war); United States v. Jordon, 113 U.S. 418 (1885) (refunding of excess taxes).

Both situations would allow an executive official some degree of discretion, but as the Supreme Court pointed out in the various cases the president does not have the power to forbid the law's execution.[32]

A differing thesis regarding the general power to impound has been found in *In re Neagle*.[33] There the president had ordered that a federal deputy act as bodyguard for a justice of the Supreme Court whose life had been threatened. In carrying out his duties he killed an attacker and was arrested and charged by local officials. The Supreme Court issued a writ of habeas corpus on the grounds that he had been performing a duty within the president's power and therefore was protected by the aegis of the federal government. As a source for this power, the Supreme Court credited the duty to take care that the laws be faithfully executed. Thus the high court, in affirming the circuit court's discharge of the defendant, implicitly noted that the president has some inherent powers to do certain acts upon his own initiative.

Advocates of the impoundment practice have built upon this interpretation to support their own cause.[34] *Neagle*, however, is distinguishable from the impoundment situation, for as the *Neagle* Court pointed out, in that case there was no action by Congress, and this void necessitated presidential power.[35] In the impoundment of appropriated funds, the entire conflict is focused upon the fact that there is a contrary congressional enactment.[36] Thus, although *Neagle* established that the president had powers beyond the enforcement of acts of Congress, it carries no weight in an area where Congress has acted.

Another case, *In re Debs*,[37] has been cited to support the inherent power of the chief executive to impound funds.[38] *Debs* involved the validity of an injunction sought by the executive to prevent obstruction of the mails by certain strike activities. In sustaining the injunction, the Court spoke of broad national powers over interstate commerce, of national competence "to remove all obstructions upon highways, nat-

32. As the late Professor Bickel stated, *Kendall, Jordon, Price* and *Louisville* established that under some circumstances, the congressional will prevails over the executive's simple refusal to execute. *1971 Hearings, supra* note 2, at 48-9 (remarks of Professor Bickel during testimony of Representative Charles Bennett of Florida).

33. 135 U.S. 1 (1890).

34. Generally, officials of the executive branch have taken this position. *See 1973 Hearings, supra* note 7, at 833, 839 (Dept. of Justice Answers). The viewpoint also discussed in Goostree, *The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-in-Aid to Segregated Activities*, 11 AM. U.L. REV. 32, 41-42 (1962).

35. *In re* Neagle, 135 U.S. 1, 63-67 (1890).

36. *See, e.g.*, recent anti-impoundment legislation, note 47 *infra*; mandated appropriations, note 48 *infra*.

37. 158 U.S. 564 (1895).

38. *See 1973 Hearings, supra* note 7, at 833, 839 (Dept. of Justice Answers).

ural, or artificial, to the passage of interstate commerce," and of the competency of the executive branch forcibly to remove such obstructions by appeal to the courts.[39] However, as in the case of *Neagle,* Congress had not made its will known on the contested issue, there being no direct congressional provision for securing such an injunction.[40]

United States v. Midwest Oil Co.[41] has also been alleged to support a broad view of inherent executive power.[42] The question raised was whether the president could transfer lands from the public domain to a naval oil reserve, thereby removing them from eligibility for homestead or lease.[43] In upholding the president's action, the Court said:

> [O]fficers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice.[44]

Considering that the Court's decision rests on the two-fold proposition of long-standing practice and congressional acquiescence, the *Midwest Oil* case is simply not authoritative on the matter of inherent presidential power—including impounding power.[45] Moreover, the argument

39. *In re* Debs, 158 U.S. 564, 599 (1895).

40. Oddly enough, although the executive does not cite a statute to sustain the injunction, the *Debs* Court, in the concluding paragraph of its opinion, reveals a congressional act which the Court believes would uphold its power to grant the injunction. Granting, arguendo, that there exists a pertinent congressional enactment, the bearing of the *Debs* case on inherent power is clearly thrown into doubt. Moreover, applying the standards established by Justice Jackson in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952), some fifty-seven years later, the issue in *Debs* would fall within that category of presidential action which is consistent with congressional will (see text accompanying note 61 *infra*).

If, however, one does not accept the proposition that there is a congressional provision to sustain the presidential action in *Debs,* one can still rely on the aforementioned theory promulgated in *Neagle, i.e.,* the absence of congressional intent necessitated presidential power. 135 U.S. at 63-67.

41. 236 U.S. 459 (1915).

42. *See 1973 Hearings, supra* note 7, at 833, 839 (Dept. of Justice Answers).

43. The president claimed that the lands were being bought up at such a rapid pace that the president felt he could not wait for Congress to act. He expressly issued his order "[i]n aid of proposed legislation." 236 U.S. at 467.

44. *Id.* at 472-73. The Court found 282 examples of similar unprotested withdrawals over the previous fifty years. However, Justice Day, dissenting, differed with the Court's opinion in finding that these 282 prior examples were indistinguishable categories and hence to precedent for the president's action. *Id.* at 492. *See also* The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 677 (1869):

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

45. See note 20 *supra* for the Nixon administration's argument regarding congressional acquiescence.

that presidential impoundment power is derived from an implied congressional grant, established by long, unbroken practice, falls short. When Congress has asked with specificity, the Court has upheld such legislation in the face of contrary presidential action.[46] In the case of impoundment Congress has implemented specific anti-impound legislation[47] to control domestic spending. In fact, Congress has utilized mandatory language in various statutes for the expressed purpose of depriving the executive branch of any discretionary power to withhold.[48]

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46. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Vital to the majority's position was the existence of statutes enunciating the procedure that the president was to follow in dealing with strikes which affected the national interest. *Id.* at 585-86, n.2. Justice Black, writing for the Court, maintained that in the face of such statutes, the president could not act in a manner contrary to that dictated by Congress. *Id.* at 586, 588-89.

47. In 1972, Congress enacted the Federal Impoundment and Information Act, PUB. L. No. 92-599, tit. IV, 86 Stat. 1325, *as amended*, PUB. L. No. 93-344, tit. X, 88 Stat. 332. It provided for the transmittal to the Congress and to the comptroller general of the amount of the funds impounded, the date on which they were impounded, and the reasons for impoundment.

More recently, Congress passed and the president signed into law the Impoundment Control Act of 1974, PUB. L. No. 93-344, tit. X, 88 Stat. 332. This legislation 1) amends the Antideficiency Act to limit executive discretion (deletes "other developments" clause), *id.* at § 1002; 2) requires that rescissions proposed by the president terminate within 45 days unless approved by both houses of Congress, *id.* at § 1012(b); 3) provides for deferrals requested by the president to cease if disapproved by either the House or Senate, *id.* at § 1013(b); and 4) establishes an enforcement mechanism by delegating authority to the comptroller general to file suits in the federal district court on behalf of Congress, *id.* at § 1016. As of this writing, these procedures have not been "tested"; however, it is worthy to note that on paper they represent a marked improvement over previous congressional efforts to curb the impoundment practice.

48. Three examples of mandated appropriations statutes: Act of Sept. 30, 1950, PUB. L. No. 81-874, ch. 1124, 64 Stat. 1100, (authorizing financial assistance for the maintenance and operation of local school districts); Federal-Aid Highway Act of 1956, 23 U.S.C. §§ 101-36 (1970), *as amended*, 23 U.S.C.A. §§ 101-44 (1974 Supp.); Federal Water Pollution Control Act Amendments of 1972, PUB. L. No. 92-500, § 205(a), 86 Stat. 837.

With respect to PUB. L. No. 81-874, former Assistant Attorney General Rehnquist interpreted the language of the statute:

"[i]mpounding the P.L. 874 funds would result . . . in permanent loss to the recipient school districts of the funds in question and defeat of the *Congressional intent* that the operations of these districts be funded at a particular level for the fiscal year.

"While there have been instances in the past in which the President has refused to spend funds appropriated by Congress for a particular purpose, we know of no such instance involving a statute which by its terms sought to require such expenditure." *1971 Hearings, supra* note 2, at 283 (emphasis added) (Rehnquist Memo).

The Federal-Aid Highway Act of 1956 is equally clear in its language. An amendment to the act, 23 U.S.C. 101(c) (1970), specifically addressed itself to the issue of impoundment:

"It is the sense of Congress that under existing law no part of any sums authorized

The case of *Myers v. United States*[49] has been further relied upon as support for a broad interpretation of the president's constitutional powers. *Myers* involved the executive removal of an Oregon postmaster. The Court, in upholding the president's action,[50] defined the executive removal power in expansive terms. However, the Court's decision was based upon a Hamiltonian construction of the "executive power" clause of the Constitution: "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed. . . ."[51] The Court in the later removal cases, namely *Humphrey's Executor v. United States*[52] and *Weiner v. United States*,[53] has not applied this standard to the adjudication of the issues. Indeed, it has significantly restricted the force of *Myers*. The *Humphrey's Executor* and *Weiner* Courts disapproved of a presidential hegemony over all manifestations of the law's administration, the view taken in *Myers*.[54] Instead, *Humphrey's Executor* and *Weiner* favored the principle of congressional authority independent of executive control—in the creation of quasi-legislative and quasi-judicial bodies.[55] In reaching its determination, the court in *Humphrey's Executor* made

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to be appropriated for expenditure upon any Federal-aid system which has been apportioned pursuant to the provisions of this title *shall be impounded or withheld. . . .*" (emphasis added).

Moreover, in *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), the court declared that Congress "provided for a coherent scheme of statutory duties relating to the Secretary of Transportation." *Id.* at 1112. In citing the Federal-Aid Highway Act, the court held that the discretion over the approval of grants to local highway authorities was closely circumscribed by "*specific* directions relating to efficiency, safety, and overall compliance with the Act itself." *Id.*

Finally, Section 205 of the Federal Water Pollution Control Act Amendments of 1972 contains mandatory language. It states relevant part: "(a) Sums authorized to be appropriated . . . shall be allotted by the Administrator [by a given date] . . . (b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation . . . on and after the date of such allotment." A federal district court recently held the impoundment of $6 billion in funds, provided by the act, unwarranted and ordered their release. *City of New York v. Ruckelshaus*, 358 F. Supp. 669 (D.D.C. 1973), *aff'd sub. nom.* 494 F.2d 1033 (D.C. Cir. 1974), *cert. granted*, 94 S. Ct. 1991 (1974) (No. 1377, 1973 term).

49. 272 U.S. 52 (1926).

50. The removal actually was by order of the postmaster general; however, he was acting under the direction of the president. *Id.* at 106.

51. *Id.* at 118. This passage is cited by Deputy Attorney General Sneed as authority for the president's impounding actions. *1973 Hearings*, *supra* note 7, at 833, 839. (Dept. of Justice Answers).

52. 295 U.S. 602 (1935).

53. 357 U.S. 349 (1958).

54. Myers v. United States, 272 U.S. 52, 135 (1926).

55. Humphrey's Executor v. United States, 295 U.S. at 629; Weiner v. United States, 357 U.S. at 352.

specific mention of the *Myers* opinion:

> To support its contention that the removal provision . . . as we have . . . construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers v. United States*. . . . In the course of the opinion of the [*Myers*] court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved.*[56]

Clearly, the administration's case for inherent presidential power, as set forth in *Myers*, must be reviewed in the light of the later Courts' rulings.

Finally, the nature and scope of presidential power was tested in *Youngstown Sheet & Tube Co. v. Sawyer*.[57] Faced with the threat of a steel strike damaging to the national defense, President Truman ordered that the steel mills be seized and operated by the secretary of commerce. The only basis of authority claimed for such action was the general constitutional powers of the president. The Supreme Court rejected this argument. It found that the steel seizure not only challenged the legislative realm, but violated the intent of Congress.[58]

Justice Black spoke for the Court: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[59] In concurring, Justice Frankfurter noted that "[w]hen Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement. . . ."[60]

The standards established by Justice Jackson, in his concurring opinion, cast further doubt on the presidential argument of inherent authority to impound funds. Justice Jackson lists three situations where "a President may doubt, or others may challenge, his powers":

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.
>
> 2. When the President acts in absence of either a congressional

56. Humphrey's Executor v. United States, 295 U.S. at 626 (emphasis added).

57. 343 U.S. 579 (1952).

58. *Id.* at 586-88. During consideration of the Taft-Hartley Act, Congress rejected an amendment which would have authorized government seizures in such cases of emergency. *Id.* at 586.

59. *Id.* at 587. Moreover, "[t]he Constitution does not subject this lawmaking power of Congress to presidential . . . supervision or control." *Id.* at 588.

60. *Id.* at 609-10 (Frankfurter, J., concurring).

> grant or denial of authority, he can only rely upon his own independent powers. . . .
>
> 3. *When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,* for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.[61]

Justice Jackson placed the steel seizure case in the third category, where presidential power is at its "lowest ebb." Impoundment, likewise, falls in that area where the president is most vulnerable to attack and in the least favorable of constitutional postures. Having taken a measure incompatible with the expressed will of Congress, his constitutional authority is limited.[62] The power to impound thereby "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[63]

The argument that the president possesses inherent authority to impound funds appropriated by Congress has an overriding difficulty—such authority would be unlimited. The power of Congress to establish policies and fix priorities (which includes the power to provide funds for programs) is of course subject to a limited overridable presidential veto.[64] But an absolute power to impound would be a severe incursion on this power to make law. It would convert the qualified veto into an absolute veto over funding programs[65] and thus would ren-

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61. *Id.* at 635-38 (Jackson, J., concurring) (emphasis added).

62. Recent impoundment cases have applied the doctrine of congressional intent in rejecting executive constitutional and statutory arguments to withhold. *See, e.g.*, City of New York v. Ruckelshaus, 358 F. Supp. 669 (D.D.C. 1973), *aff'd sub nom.* 494 F.2d 1033 (D.C. Cir. 1974), *cert. granted*, 94 S. Ct. 1991 (1974) (No. 1377, 1973 Term) (water pollution funds); Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689 (E.D. Va. 1973), *modified sub nom.*, 489 F.2d 492 (4th Cir. 1973), *cert. granted*, 94 S. Ct. 1991 (1974) (No. 1378, 1973 term) (water pollution funds); State Highway Comm'n v. Volpe, 347 F. Supp. 950 (W.D. Mo. 1972), *modified*, 479 F.2d 1099 (8th Cir. 1973) (impoundment of highway trust funds); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973) (termination of community action agencies); Berends v. Butz, 357 F. Supp. 143 (D. Minn. 1973) (emergency agricultural loans).

Housing Authority v. HUD, 340 F. Supp. 654 (N.D. Cal. 1972) has been cited in support of the impoundment practice. The court in reaching its determination utilized the congressional intent standard; it found the statutory language to be nonmandatory, thus granting discretion to the executive. *Id.* at 656. For a complete list of cases, see *Court Cases on Impoundment of Funds: A Public Policy Analysis*, LIBR. OF CONG., LEG. REFER. SERV. (1974).

63. 343 U.S. at 638.

64. U.S. CONST. art. I, § 7.

65. The absolute veto power would destroy a fundamental principle of American constitutional law, *i.e.*, that there is no officer, "from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and

der congressional action in the important area of spending policy determination merely advisory or prohibitory.[66]

The faithful execution clause, the veto provisions, the necessary and proper clause, and finally the attorney generals' opinions, are all supportive of a constitutional principle that the executive branch is continuously under an obligation of execution with respect to enacted law. That is, when Congress makes a law which the president later refuses to effectuate within the legislatively prescribed bounds, the president is setting himself against this constitutionally imposed duty. Moreover, little support can be gleaned from the cases cited by the administration—*Neagle, Debs, Midwest Oil* and *Myers*—to overcome this presumption. With regard to the theory that the chief executive has a con-

limited authority." The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 677 (1869). Nor is an item veto acceptable. It would grant the president the right to veto a portion of a bill, but sign the remainder. The Constitution, however, makes it clear that the president must agree to the entire bill or veto it entirely. U.S. CONST. art. I, § 7.

With respect to the history of the veto power, Professor Philip B. Kurland in the 1973 hearings noted, "the records of the Convention make it quite clear that the Founding Fathers were quite concerned about Executive power, that there was some concern as to whether they wanted to permit the veto at all, that they did permit the veto only on the specified conditions that are contained in article I, section 7." *1973 Hearings, supra* note 7, at 400 (remarks of Professor Kurland to the testimony of Deputy Attorney General Sneed). Kurland goes on to say, ". . . they [the founding fathers] anticipated a *limited authority* in the president to preclude the effectuation of national legislation." *Id.* at 400 (emphasis added).

66. Senator Ervin remarked on this point: "The impoundment practice . . . places Congress in the paradoxical and belittling position of having to lobby the Executive to carry out the laws it has passed." *1973 Hearings, supra* note 7, at 3 (introductory remarks of Senator Ervin).

Congress, in fact, was acutely aware of the repercussions of an absolute presidential veto: in 1972 President Nixon impounded $6 billion in water pollution funds, appropriated by Congress pursuant to the Federal Water Pollution Act Amendments of 1972, PUB. L. No. 92-500, 86 Stat. 837. In refusing to release the funds, the president ignored the congressional override of his veto to the aforementioned Water Pollution Act amendments; thereby, Congress was left with no means to implement the legislation it had passed.

This point was tellingly made in a dialogue between Senator Muskie and Deputy Attorney General Sneed:

> *Senator Muskie*: Now, let me ask you this question: We allotted $11 billion in 2 years, $5 billion the first year [in water pollution funds]. The President has cut that in half. Now, could the President or could the Administrator, in your judgment, change administration policy and now allow the sums that were not allotted prior to January 1?
> *Mr. Sneed*: Senator, I am not prepared to answer that. I would have to study the act to a greater extent to be able to give you a complete answer.
> I can see that there is a basis for, I think, the position you are pointing toward, and that is, I think it is not available.
> *Senator Muskie*: If that is the case, and I believe it to be, then what the President has done is not delayed the spending of these sums, nor delayed the allotment of these funds, but *rewritten a bill that the Congress enacted over his veto by cutting the authorized amounts in half.*
> *Now that is a legislative function, in my view.*

1973 Hearings, supra note 7, at 375-76 (emphasis added).

stitutional power to decline to spend funds appropriated by Congress, it must be concluded that "the existence of such a broad power is supported neither by reason nor precedent."[67]

II. Statutory Authorization

As previously mentioned, current impoundments have been rationalized by the assertion that it is the president's duty to "take Care that the Laws be faithfully executed."[68] Although this claim rests on a clause of the Constitution, the argument is fundamentally based on the construction of various statutes. The proponents of the administration theory maintain that despite the mandate that may appear from a particular appropriation act,[69] there exist conflicting statutes which confer discretion upon the president in this regard.[70] Citing the Antideficiency Act,[71] the Employment Act of 1946,[72] the Economic Stabilization Act of 1970,[73] the statutory spending ceiling,[74] and the public debt limit,[75] they argue that the president has the responsibility to execute all the laws. Since Congress has sent out contradictory signals, the president, in order to harmonize them, must have the freedom to withhold funds from federal programs.[76]

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67. *1971 Hearings, supra* note 2, at (Rehnquist Memo).

68. U.S. CONST. art. II, § 3. See text accompanying notes 21-22 *supra.*

69. While the administration has admitted that mandated appropriation acts exist, *see 1973 Hearings, supra* note 7, at 364, 368 (prepared statement of Deputy Attorney General Sneed), it has also contended that appropriation acts are generally permissive, *1971 Hearings, supra* note 2, at 94 (testimony of C.W. Weinberger): *1973 Hearings, supra* note 7, at 367-68 (prepared statement of Deputy Attorney General Sneed). For a more extensive commentary on the 'permissiveness' argument, see text accompanying notes 153-75 *infra.*

70. Former Assistant Attorney General Rehnquist noted with respect to conflicting statutory demands: "[T]he conflict must be real and imminent for this argument to have validity. . . ." *1971 Hearings, supra* note 2, at 284 (Rehnquist Memo).

71. Act of Mar. 3, 1905, PUB. L. No. 58-217 ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, PUB. L. No. 59-28 ch. 510, § 3, 34 Stat. 48; Act of Sept. 6, 1950, PUB. L. No. 81-759 ch. 896, § 1211, 64 Stat. 765; *codified* in 31 U.S.C. § 665(c) (1970), *as amended,* PUB. L. No. 93-344, tit. X, § 1002, 88 Stat. 332.

72. 15 U.S.C. §§ 1021-25 (1970), *as amended,* 15 U.S.C.A. § 1026 (Supp. 1974).

73. PUB. L. No. 91-379, tit. II, 84 Stat. 799, *as amended,* PUB. L. No. 92-210, 85 Stat. 743, *as amended,* PUB. L. No. 93-28, 87 Stat. 27.

74. Act of Dec. 18, 1967, PUB. L. No. 90-218, §§ 201-06, 81 Stat. 662; Revenue and Expenditure Control Act of 1968, PUB. L. No. 90-364, § 202, 82 Stat. 271; Second Supplemental Appropriation Act, 1969, PUB. L. No. 91-47, § 401, 83 Stat. 82; Second Supplemental Appropriation Act, 1970, PUB. L. No. 91-305, §§ 401, 501, 84 Stat. 405.

75. 31 U.S.C. § 757(b) (1970), *as temporarily amended,* PUB. L. No. 93-173, 87 Stat. 691.

76. *See 1971 Hearings, supra* note 2, at 94-97 (testimony of C.W. Weinberger); *1973 Hearings, supra* note 7, at 366, 372 (testimony and prepared statement of Deputy Attorney General Sneed).

A. Antideficiency Act

The Antideficiency Acts of 1905 and 1906[77] provided that the president should apportion monies to prevent over-expenditure.[78] Any waiver or modification of the apportionment plan was to be reported to Congress. The 1906 amended version stated specifically that the waiver or modification should only take place "upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time"[79] the appropriation was made. Although the act contemplated apportionment by the heads of executive agencies, the creation of the Bureau of the Budget in 1921 resulted in more centralized control of the apportionment process.[80] The budget bureau directed that reserve funds be established not only to prevent overexpenditure, but to effect savings. However, such savings were made without in any way hindering "the accomplishment of the objects of legislation."[81]

In 1950 the Antideficiency Act was amended by the General Appropriation Act,[82] after the budget bureau sought firmer statutory support for its policies.[83] This statute has been cited frequently by the

77. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48.

78. That is, an undue expenditure in one part of the year.

79. 34 Stat. 49.

80. Up until the 1930's, the Bureau of the Budget (BOB) had little decision making power over spending; it could pressure and exhort, but it could not direct or command the allotment of funds. Beginning in 1933, the bureau's responsibilities were broadened. In that year, President Roosevelt, by executive order, gave the BOB the function of "making, waiving, and modifying apportionments of appropriations." Exec. Order No. 6,166 (1933). By transferring significant authority from the department or agency hands to the bureau, steps were taken to centralize the apportionment process. In addition, a 1939 Roosevelt directive removed the bureau from the treasury, placing it in the newly-created Executive Office of the President. This general strengthening of the BOB in the pre-World War II period provided a key foundation for the later expansion of the withholding power (the role of the OMB in the seventies).

81. *1971 Hearings, supra* note 2, at 178 (statement of Professor Cooper, quoting Charles Dawes, first director of the BOB).

82. 64 Stat. 765.

83. During World War II, the Roosevelt administration reduced certain types of spending to offset increased military expenditures. For example, in 1942 President Roosevelt informed Congress that: "Federal aid for highways will be expended only for construction essential for strategic purposes. Other highway projects will be deferred until the post-war period." 88 CONG. REC. 38 (1942). The commander-in-chief clause of the Constitution was cited as justification for these actions.

When the war ended, however, the deferred funds were still not released. As time went on, it appeared that the budget bureau, now under the helmsmanship of President Truman, would continue the limited funding policy of the Roosevelt administration. With the war over, Truman found it difficult to rationalize his actions on the basis of Roosevelt's argument. The BOB thus sought to obtain statutory authorization to sustain executive actions.

Nixon administration to justify impoundment practices.[84] The 1950 act provides for the establishment of reserves to deal with "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."[85]

The language as well as the legislative history of the amended Antideficiency Act precludes the establishment of reserves simply because of policy disagreements between the executive and Congress.[86] The power to effect savings is limited to changes in requirements due to events occurring after the appropriation was made; thereby, the substitution of the executive's judgment on the same facts is prohibited.[87] Moreover, the provision contemplates only savings made possible by changes and developments intrinsic to the program itself. The specific wording of the statute, in defining the duties of the apportioning officer,[88] sets the bounds: "Whenever it is determined . . . that any amount will not be required *to carry out the purposes of the appropriation concerned,* he [the apportioning officer] shall recommend the rescission of such amount. . . ."[89] As Comptroller General Staats noted, testifying before the Senate Ad Hoc Committee on Impoundment of Funds in 1973: "[T]he act would *not* appear to authorize reservations based upon considerations of overall economy in government or other circumstances which do not relate directly to particular appropriations, and which would have the effect of reordering priorities

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It was in this light that the General Appropriation Act was passed in 1950. *See* Fisher, *The Politics of Impounded Funds,* 15 AD. SCI. Q. 361, 362-63 (1970) reprinted in *1971 Hearings, supra* note 2, at 103; J. Williams, *The Impounding of Funds by the Bureau of the Budget,* ICP Case Series No. 28, 1955, reprinted in *1971 Hearings, supra* note 2, at 378, 392-93.

84. *1971 Hearings, supra* note 2, at 95 (statement of C.W. Weinberger); *1973 Hearings, supra* note 7, at 366 (prepared statement of Deputy Attorney General Sneed).

85. 31 U.S.C. § 665(c)(2) (1970). The "other developments" clause was stricken in the recently passed budget reform/impoundment control legislation (see note 47 *supra*) because of the vast discretion it provided the executive branch.

86. *See* H.R. REP. No. 1797, 81st Cong., 2d Sess. 9 (1950); Ramsey, *Impoundment By The Executive Department of Funds Which Congress Has Authorized It To Spend Or Obligate,* LIBR. OF CONG. LEG. REF. SERV., 1968, at 11; *see also* 89 CONG. REC. 10362-63 (1943) (remarks of Senator Harry Truman).

87. 31 U.S.C. § 665(c)(2) (1970), referred to in *1973 Hearings, supra* note 7, at 105, 109-110 (attachment to the statement of Comptroller General Staats).

88. Formerly the director of the BOB served this function; however, since President Nixon's Reorganization Plan No. 2 (1970), which transferred the responsibilities of the BOB to the OMB, the director of the OMB performs the task of "apportioning officer."

89. 31 U.S.C. 665(c)(2) (1970), *as amended,* Pub. L. No. 93-344, tit. X, § 1002, 88 Stat. 332.

determined by the Congress."[90] The test of any impoundment under the act, therefore, is dependent upon the capacity of the executive to carry out the purposes of the appropriation.

The legislative history of the 1950 General Appropriation Act bolsters this narrow reading of the impoundment power therein granted. The Bureau of the Budget, in a 1947 report, which significantly influenced the construction of the general appropriation statute, pointed out that authority "must be exercised with considerable care in order to avoid usurping the powers of Congress."[91] The House Committee Report that accompanied the act reiterated this concern for the preservation of legislative policy: "The administration officials responsible for administration of an activity for which appropriation is made bear the final burden *for rendering all necessary service* with the smallest amount possible within the ceiling figure fixed by Congress."[92] The report went so far as to state that "there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds."[93]

Clearly, neither the language nor the legislative history of the amended Antideficiency Act supports the claim that the president has a broad discretionary power to impound.[94] While Congress, in the act, sought to give the executive branch managerial flexibility to provide

90. *1973 Hearings, supra* note 7, at 110 (attachment to statement of Comptroller General Staats) (emphasis added). Similarly, the BOB, in a 1961 memorandum to President Kennedy, applied a rigid interpretation to the statute:

"The language of the Act, when read in context, seems to indicate rather clearly that the provisions permitting the establishing of reserves are to be used only to the extent that they do not interefere with the execution of the purposes of which appropriations are provided." *Id.* at 338, 340 (memorandum to the president: Authority to Reduce Expenditures).

91. *1973 Hearings, supra* note 7, at 108 (attachment to statement of Comptroller General Staats). This position was adopted in the Bureau of the Budget Examiner's Handbook: "Reserves must not be used to nullify the intent of Congress with respect to specific projects or level of programs." *Id.* at 844, 859 (reprint of Williams, *The Impounding of Funds by the Bureau of the Budget*).

92. H.R. REP. No. 1797, 81st Cong., 2d Sess. 9 (1950) (emphasis added). Before passage of the General Appropriation Act, Congressman Mahon remarked: "I would not object, as I know other Members would not object, to any reasonable economies in Government. *But economy is one thing, and the abandonment of a policy and program* of the Congress another thing." 95 CONG. REC. 14,922 (1949) (emphasis added).

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

94. Indeed, Congress' purpose in passing the Antideficiency Act Amendments may, in fact, have been to limit the use of impoundment for purposes consistent with the goals of particular spending bills. *See* Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1518 n.69 (1973), wherein it is concluded that since the General Appropriation Act of 1950 was passed shortly after President Truman's impoundment of funds for increasing the size of the air force, it may have been initiated to limit the president's spending discretion.

for economies and contingencies, it did not comprehend reserves made with the intent to thwart, modify or reduce congressional purpose.

B. Employment Act of 1946

The Employment Act of 1946[95] is another law utilized to justify broad presidential impoundment authority.[96] The act gave official sanction to Keynesian economic policy, formerly only tacitly accepted.[97] It declared that the federal government would henceforth assume the burden of managing the national economy, in an effort to eliminate the "boom-bust" syndrome of the past.[98] The Nixon administration broadly interpreted this act to give it extensive powers to cut spending and thereby impound funds, to curb inflation.[99]

The portion of the employment act claimed as a foundation for the impoundment power reads:

> [I]t is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy . . . to promote maximum employment, production, and purchasing power.[100]

On reflection, the bearing this act has upon the matter of withholding funds seems at best tenuous. First, the act is addressed to the "federal government", not to the "executive". Nowhere in the statute is the president given plenary power to act unilaterally in the fight against inflation. Second, the administration argument of broad executive discretion is based upon the preamble to the employment act. The body of the act, however, clearly provides the Congress with a substantial role in promoting the economic policies of the country. Sections 1022

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95. 15 U.S.C. §§ 1021-25 (1970), *as amended*, 15 U.S.C.A. § 1026 (1974 Supp.).

96. *1971 Hearings, supra* note 2, at 96 (testimony of C.W. Weinberger); *1973 Hearings, supra* note 7, at 366 (prepared statement of Deputy Attorney General Sneed). The Nixon administration also contended that the Employment Act of 1946 is a source of conflicting congressional authority in the area of appropriations. *1971 Hearings, supra* note 2, at 96-7 (testimony of C.W. Weinberger).

97. R. HEILBRONER, THE MAKING OF ECONOMIC SOCIETY, 158-60 (1972).

98. *Id.* at 160.

99. The language of the Employment Act of 1946, "to promote maximum employment, production, and purchasing power," has also been interpreted to grant the president broad power to expand spending rather than to impound funds, on the theory that higher government spending will promote employment, production, and wages. *1971 Hearings, supra* note 2, at 594, 596 (memorandum by Louis Fisher to Senator Ervin, April, 1971) (hereinafter referred to as Fisher memo). In fact, this position was taken by the Nixon administration on the supersonic transport: increased government expenditure would provide more jobs. In response to this, Fisher asks: "But why are jobs associated with Model Cities, urban renewal, regional medical programs—and other programs affected by impoundment—of less importance? On what basis does the administration make such decisions?" *Id.* at 596.

100. 15 U.S.C. § 1021 (1970).

and 1023 of the Employment Act of 1946 direct the president, with the advice and assistance of the newly created Council of Economic Advisors, to prepare a yearly economic report, which is to be submitted to Congress. Section 1024 further established the Joint Economic Committee in Congress. Third, under these same operative sections of the act, the president is explicitly given limited control over policy: the making of such recommendations for legislation as he may deem necessary or desirable.[101]

Even assuming that the requisite congressional intent could be demonstrated, and that the employment act was accepted as a source of additional presidential discretion in appropriation measures, it is doubtful that it could be authority for specific program reservation.[102] Insofar as the control of inflation can be construed in a purpose of the employment act, it would seem that any reservations for such a purpose would have to be made across-the-board. Furthermore, allowing the executive branch to exercise its discretion as to inflation control by means of reducing or terminating funds for specific programs[103] would place the legislative function of policy determination largely in the hands of the chief executive.[104]

In sum, little, if any, evidence exists to uphold the administration's interpretation of the Employment Act of 1946. Congress, in this act, simply did not provide the executive branch with the authorization to control inflation through the impoundment of funds.[105]

C. The Economic Stabilization Act of 1970

The Economic Stabilization Act of 1970[106] granted the president

101. *Id.* § 1022(a)(4).

102. However, this apparently has been the view taken by administration spokesmen. *See, e.g., 1971 Hearings, supra* note 2, at 156-57 (testimony of C.W. Weinberger).

103. See text accompanying notes 7-10 *supra*, for examples of such action by the Nixon administration.

104. When Senator Ervin introduced anti-impoundment legislation in January, 1973, he noted: "[impoundment provides] merely a means whereby the White House can give effect to the social goals of its own choosing by reallocating national resources in contravention of congressional dictates." 31 CONG. Q. WK. REPT. 215 (Feb. 3, 1973). Senator Humphrey, in a February, 1973, address, reiterated Senator Ervin's message, with particular reference to the Nixon administration:

"Policy impoundment is practiced by President Nixon. . . . Under policy impoundment, funds are withheld not to effect savings, not as directed by Congress, not as commander in chief, but because the president *unilaterally decided to impound money for programs that are not his priorities.*" 54 CONG. DIG. 114 (April, 1973) (emphasis added) (reprint of Senator Humphrey's address of February 15, 1973, at the University of Virginia Law School).

105. Moreover, there is no real statutory conflict between the Employment Act of 1946 and the mandatory language of various appropriation acts. *See* note 91 *supra.*

106. PUB. L. No. 91-379, tit. II, 84 Stat. 799 (1970), *as amended,* PUB. L. No. 92-

substantial powers over the national economy, beyond the language of the Employment Act of 1946, stating more directly the national policy of controlling inflation,[107] it specifically gives the president various powers to achieve that goal, by "issu[ing] such orders . . . as he deems appropriate . . . to stabilize prices, rents, wages, and salaries. . . ."[108] The Nixon administration contended that impoundment may be employed, pursuant to this act, to reduce the overall level of federal expenditures.[109] However, in the text of the Economic Stabilization Act no mention is made of the impoundment power. Moreover, the procedures set up in the act provide the president with controls over the private sector of the economy;[110] no powers are granted to the president to control government spending.

The scope of the language in the Economic Stabilization Act led to a court suit, *Amalgamated Meat Cutters & Butcher Workmen v. Connally*,[111] wherein the plaintiff union charged that the act amounted to an unconstitutional delegation of legislative powers. While upholding the constitutionality of the statute, the three judge panel applied a narrow standard to the interpretation of its language. Circuit Court Judge Leventhal, writing for the court, concluded that nothing either in the nation's past experience or in the legislative history of the Economic Stabilization Act of 1970 suggested a broad conferral of presidential power beyond the authority to impose wage-price controls.[112]

Recent legislative action clarified any doubts about the congressional intent within the act. Section 4 of the Economic Stabilization Act Amendments of 1973 added the proviso that the 1970 Act shall not be taken "to authorize or require the withholding or reservation of any obligational authority provided by law. . . ."[113]

D. Statutory Spending Ceiling

Spending ceilings[114] have also been claimed as a source of im-

210, 85 Stat. 743 (1971), *as amended*, PUB. L. No. 93-28, 87 Stat. 27 (1973).

107. Economic Stabilization Act Amendments of 1971, PUB. L. No. 92-210, tit. II, § 202, 85 Stat. 744.

108. *Id.* § 203(a).

109. *1973 Hearings, supra* note 7, at 366 (prepared statement of Deputy Attorney General Sneed).

110. PUB. L. No. 92-210, tit. II, § 203, 85 Stat. 744 (1971).

111. 337 F. Supp. 737 (D.D.C. 1971).

112. *Id.* at 747-50.

113. PUB. L. No. 93-28, 87 Stat. 27.

114. Act of Dec. 18, 1967, PUB. L. No. 90-218, §§ 201-06, 81 Stat. 662; Revenue and Expenditure Control Act of 1968, PUB. L. No. 90-364, § 202, 82 Stat. 271; Second Supplemental Appropriation Act, 1969, PUB. L. No. 91-47, § 401, 83 Stat. 82; Second Supplemental Appropriation Act, 1970, PUB. L. No. 91-305, §§ 401, 501, 84 Stat. 405.

poundment power.[115] The rigidity of the ceiling, it has been argued, puts "constraints . . . upon the President in the management of appropriated funds . . . limit[ing] budget outlays. . . ."[116] However, this view is inconsistent with the past history of statutory ceilings. For example, the fiscal 1970 expenditure ceiling was expressly subject to variation should Congress appropriate more or less funds than previously expended.[117] In fact, President Nixon spoke of the congressional limit as a "rubber ceiling" in the sense that "increased spending later enacted by Congress would be added to the ceiling and decreases taken away."[118] Yet when Congress continued to appropriate more funds than requested, the president, referring to his "obligation under the Constitution and the Laws" reversed his position by indicating that he would not expend funds in excess of the original ceiling.[119]

Generally, Congress has applied a flexible standard to spending ceilings, whether or not the president has acknowledged it as such.[120] Careful examination of Title V of the Second Supplemental Appropriation Act, 1970[121]—the ceiling on outlays and expenditures for fiscal 1971—tends to bear this out. The bill makes clear that the amount stated as the ceiling "is a beginning figure, not an ending figure."[122] Coupled with that beginning figure, which is based on the president's initial projection of budget outlays, is a provision which provides for the adjustment of that estimate: "whenever action, or inaction, by the Congress on requests for appropriations and other budgetary proposals varies from the President's recommendation . . . the limitation set forth herein shall be correspondingly adjusted. . . ."[123] Furthermore, "other actions" of Congress which affect budget outlays will trigger the same automatic adjustment mechanism.[124] In short, "the language

115. *1971 Hearings, supra* note 2, at 96 (testimony of C.W. Weinberger); *1973 Hearings, supra* note 7, at 366 (statement of Deputy Attorney General Sneed).

116. *1971 Hearings, supra* note 2, at 96 (testimony of C.W. Weinberger).

117. Second Supplemental Appropriation Act, 1969, PUB. L. No. 91-47, tit. IV, § 401, 83 Stat. 82.

118. *1971 Hearings, supra* note 2, at 594, 595 (letter from President Nixon to the House of Representatives, December 17, 1969) (quoted in Fisher memo).

119. 5 WEEKLY COMP. OF PRES. DOC. at 1142 (1969).

120. Louis Fisher, in a 1971 memo to Senator Ervin, noted: "While it is true that Congress has established spending ceilings in recent years . . . it is also true that Congress reserved for itself the right to add funds to the President's budget. In such situations the 'ceiling' is raised automatically, and the president would have no statutory basis for impounding the add-ons." *1971 Hearings, supra* note 2, at 594-95 (Fisher memo).

121. Second Supplemental Appropriation Act, 1970, PUB. L. No. 91-305, tit. V, 84 Stat. 406.

122. *Id.*

123. *Id.* at § 501(a).

124. *Id.*

would operate continuously to adjust the ceiling . . . to comport with . . . specific Congressional actions or inactions having budgetary impact."[125] Executive contingencies also came under Title V of the 1970 Appropriation Act.[126] The president was specifically empowered by the act to seek supplemental relief, if unforeseen and unavoidable outlay increases "cannot be accommodated within the overall total."[127]

In general, the spending ceiling acts show a consistent congressional purpose to retain control of expenditures and to delegate only a modicum of impoundment power to the chief executive. The appropriations committee report, which accompanied the Second Supplemental Appropriation Act of 1970, specifically addressed this issue:

> The committee, in initiating an all-encompassing ceiling last year, was not seeking to advance a vehicle for arbitrary broad-axe type cutbacks that would leave to the Executive the allocation of any spending reduction to specific agencies and programs. The whole idea was to focus on the totality of Federal spending by putting the control of *total* spending in the hands of the Congress, adjustable *only* by the Congress.[128]

In 1972, President Nixon urged a $250 billion spending ceiling "without exceptions and without loopholes" to fight inflation and to avoid higher taxes.[129] Unlike past ceilings, the administration proposal to fix an expenditure limit "notwithstanding the provisions of any other law", would have empowered the president to set his own spending priorities by allowing for the impoundment of mandatory as well as permissive appropriations.[130] The Senate rejected a compromise version of this spending ceiling amid vigorous debate that the bill cut too deeply into congressional prerogatives.[131] The Senate's unyielding attitude geared with the president's reluctance to have any ceiling conferring less latitude than the original conference version resulted in the bill's defeat in a second conference.[132]

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125. *1971 Hearings, supra* note 2, at 567.

126. *Id.* § 501.

127. *1971 Hearings, supra* note 2, at 567.

128. H.R. REP. No. 1033, 91st Cong., 2d Sess. 95 (1970) (emphasis in original).

129. Message from the president of the United States urging Congress to curb federal spending, H.R. DOC. No. 329, 92d Cong., 2d Sess. 3 (1972).

130. H.R. 16810, 92d Cong., 2d Sess. § 201(b) (1972).

131. 118 CONG. REC. 36854 (1972). *Id.* at 36837, 36844, 36848-49, 36852 (remarks of Senators Moss, Taft, Nelson and Mondale respectively).

132. 118 CONG. REC. 37065 (1972). A brief summary of events follows:

The administration's version of this legislation, H.R. 16810 (see note 130 *supra*), which included full authority to impound for the purpose of staying within the expenditure ceiling, passed the House by a vote of 221-163, 118 CONG. REC. 34636-37 (1972). The bill was amended on the Senate floor to provide that no program would be cut more than ten percent and to require the same proportional reductions in all programs. *Id.* at 35954. The Senate passed the amended version by a vote of 61-11. *Id.* at 35992.

Congressional opposition to presidential impoundment was further evident in a 1973 interim report by the Joint Study Committee on Budget Control:

> Congress rejected the President's proposal for imposing a rigid spending ceiling for fiscal year 1973 because it would delegate to the President the responsibility of Congress to establish spending priorities.[133]

Thus, there is substantial evidence to indicate that the administration was not in fact being forced to choose between conflicting statutory directives. The spending ceiling does not grant the president the discretion to ignore the mandate of recent appropriation acts.[134] Furthermore, selective impoundment of funds by the executive branch to limit expenditures is inconsistent with the will of Congress.

E. Public Debt Limit

The statutory limit on the public debt presents a somewhat different situation.[135] If Congress adds to the president's budget without a commensurate raise in taxes to increase revenue, the debt limit will be approached, affording the president a reason to impound.[136] However, Congress, in the past, has regularly enacted legislation raising the ceiling to prevent this result.[137] It would therefore appear that Congress favors increased spending over maintenance of a debt ceil-

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A House-Senate conference raised the percentage cut to twenty percent in each of fifty general categories and dropped the Senate provision requiring proportional reductions. *Id.* at 36520-21. In refusing to accept this version of the bill, the Senate thwarted the president's bid for a rigid spending ceiling and thereby, a broad impoundment power. *Id.* at 37065. The end result was that no expenditure ceiling was passed by Congress for fiscal 1973. (For fiscal 1974, however, Congress set the spending ceiling at $268.7 billion. H.R. 8410, 93d Cong., 1st Sess., § 42 (1973).

133. H.R. REP. No. 13, 93d Cong., 1st Sess. 1 (1973).

134. *See* note 48 *supra*, for examples of mandatory language in appropriations acts.

135. 31 U.S.C. 757(b) (1970), *as temporarily amended* PUB. L. No. 93-173, 87 Stat. 691. The debt ceiling, which is a limitation on the accumulated federal debt, must be distinguished from an expenditure ceiling, which is a limitation on the amount of obligation the federal government may incur in any one fiscal year.

136. *See 1971 Hearings, supra* note 2, at 594-96 (Fisher memo).

137. The following chart sets forth the rate of increase in the public debt over the period 1941-1972.

See also S. REP. No. 1292, 92d Cong., 2d Sess. 3 (1972). For a summary of the history of debt ceiling legislation, *see* 1 U.S. CODE CONG. & AD. NEWS 957-78 (1971); *see also* Brite, *Public Debt Limits: A Brief History and Some Arguments For And Against It*, LIBR. OF CONG. LEG. REF. SERV. NO. 73-81E (1973) at 11 and addendum (1974).

ing,[138] and does not wish substantive programs to be sacrificed to preserve a statutory limit. In fact, Secretary of the Treasury Fowler, in a 1967 appearance before the Senate Finance Committee, attested to

STATUTORY DEBT LIMITATIONS, FISCAL YEARS 1941 TO DATE, AND PROPOSED LIMITATION FOR THE FISCAL YEARS 1971 AND 1972
[In billions]

Fiscal year	Statutory debt limitation		
	Permanent	Temporary additional	Total
1941 through Feb. 18	$49		$49
1941: Feb. 19 through June 30	65		65
1942 through Mar. 27	65		65
1942: Mar. 28 through June 30	125		125
1943 through Apr. 10	125		125
1943: Apr. 11 through June 30	210		210
1944 through June 8	210		210
1944: June 9 through June 30	260		260
1945 through Apr. 2	260		260
1945: Apr. 3 through June 30	300		300
1946 through June 25	300		300
1946: June 26 through June 30	275		275
1947-54	275		275
1955 through Aug. 27	275		275
1955: Aug. 28 through June 30	275	$6	281
1956	275	6	281
1957	275	3	278
1958 through Feb. 25	275		275
1958: Feb. 26 through June 30	275	5	280
1959 through Sept. 1	275	5	280
1959: Sept. 2 through June 29	283	5	288
1959: June 30	285	5	290
1960	285	10	295
1961	285	8	293
1962 through Mar. 12	285	13	298
1962: Mar. 13 through June 30	285	15	300
1963 through Mar. 31	285	23	308
1963: Apr. 1 through May 28	285	20	305
1963: May 29 through June 30	285	22	307
1964 through Nov. 30	285	24	309
1964: Dec. 1 through June 28	285	30	315
1964: June 29 and 30	285	39	324
1965	285	39	324
1965	285	43	328
1967 through Mar. 1	285	45	330
1967: Mar. 2 through June 30	285	51	336
1968[1]	358		358
1969 through Apr. 6[1]	358	7	365
1969 after Apr. 6[1]	358		358
1970 through June 30[1]	365	12	377
1971 through June 30[1]	380	15	395
Later years	380		380
Proposed:			
from enactment through June 30, 1972[1]	400	30	430
After June 30, 1972[1]	400		400

[1] Includes FNMA participation certificates issued in fiscal year 1968.
Source: 1 U.S. CODE CONG. & AD. NEWS 958 (1971).

138. Presidents also have placed budgetary expansion before obedience to the debt limit. The 1973 hearings have shown that even in most recent times the chief executive has petitioned Congress to raise the debt ceiling:

Senator Chiles: The Administration did not concern itself in 1970 in its spending so that it felt that it had to impound some funds, it simply went to the

the general lack of concern with the implementation of a rigid debt ceiling: "[I]t has been very clearly demonstrated that during recent years . . . [the public debt limit] has proved to have no effect on either the actions of the Congress or the action of the Executive in the spending field."[139]

If it is necessary, however, the president has at his disposal various alternatives to impoundment so as not to exceed the debt ceiling. Contingency funding represents one such expedient. Since future events cannot be anticipated with any great precision, Congress has provided special funds to cover contingencies and emergencies.[140] The tapping of these resources has become a well-established practice.[141] Although the bulk of contingency funding cases indicate a purpose other than curbing the rising public debt, Congress has nonetheless recognized that they could serve this end.[142] Across-the-board expenditure cuts provide another means by which the administration can avoid piercing the debt ceiling.[143] By requiring proportional reductions in program funding, expenditure outlays could be decreased. At the same time, spending priority determination would largely be left to congressional prerogative.

The basic difficulty with these two approaches is that they are

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> Congress and asked that they increase the debt ceiling. Did they not do that in 1971?
> *Mr. Sneed*: *Yes, sir; my recollection is that they did, and I daresay they will again this year of necessity.*
> *Senator Chiles*: So they did not feel they were violating a sacred law in that instance by the fact they might be spending beyond [the statutory debt ceiling] —they are now citing that is the reason they struck out a number of these programs?

1973 Hearings, supra note 7, at 378 (emphasis added) (testimony of Deputy Attorney General Sneed).

Clearly, the Nixon administration selectively interpreted the public debt ceiling in applying the rigidity test.

139. *Hearings on H.R. 10867 Before the Senate Finance Comm.* 90th Cong., 1st Sess. 30 (1967).

140. *See 1973 Hearings, supra* note 7, at 683, 685 (reprint of article by Louis Fisher, *Presidential Spending Discretion and Congressional Controls,* (hereinafter referred to as Fisher article). The treasury department, when it determines the present and future public debt, is authorized to include a cash reserve of $6 billion and a margin for contingencies of $3 billion. S. REP. No. 1292, 92d Cong., 2d Sess. 5-6 (1972).

141. *See 1973 Hearings, supra* note 7, at 683, 685 (Fisher article). The utilization of contingency and emergency funding has become widespread, especially since World War II. To cite a few examples in past administrations: President Kennedy financed the Peace Corps program for seven months in 1961 through the use of $1 million from contingency funds—until such time as Congress appropriated monies. *Id.* at 686. In 1965, Johnson decided to increase the American fighting force in Vietnam; the funds he expended came from a $1.7 billion emergency fund. *Id.* at 685.

142. *See* S. REP. No. 249, 93d Cong., 1st Sess. 10 (1973).

143. *1973 Hearings, supra* note 7, at 860, 865-66 (reprint of Louis Fisher memo to Senator Stevenson: Congressional Remedies for Impoundment of Funds).

short-term solutions. However, taking into account the continuous rise of the public debt,[144] contingency funding and across-the-board percentage cuts can be considered no less effective alternatives than impoundment[145] in delaying the inevitable. Consequently, the argument that the administration is required to impound to meet the restrictions set by the debt ceiling[146] loses much of its force.

The duty of the president to "faithfully execute" *all* the laws has been cited by the administration as a justification for impoundment.[147] A number of difficulties appear in this reasoning. First, the theory is predicated upon the notion that a real conflict exists between mandated appropriation acts and the statutory authority claimed by the president. Closer examination, however, reveals that the conflict is more apparent

144. *See* note 137 *supra* on rate of debt increase. In December, 1973, Congress raised the statutory debt ceiling from $465 billion to $475.7 billion. Act of December 3, 1973, PUB. L. No. 93-173, 87 Stat. 691. When this limitation expired on June 30, 1974, Congress passed a further extension to the debt ceiling, raising it to $495 billion. This new "temporary" limit expires March 31, 1975. Act of June 30, 1974, PUB. L. No. 93-325, 88 Stat. 285.

145. In fact, the ever-increasing public debt is not the only reason to question the rationale for recent impoundments. Indeed, one of the programs whose funds were cut, specifically in order to keep the debt from rising, could have had no conceivable impact on the existing debt. On February 5, 1973, the OMB announced that it had impounded $210 million from the Rural Environmental Assistance Program (REAP). 38 Fed. Reg. 3474, 3478 (1973). The object subject to impoundment was contract authority—the statutory grant of permission to sign contracts for work to be performed. The releasing or withholding of contract authority has no effect on the debt until the contracts are liquidated—the obligations paid off—after the work has been partially or completely performed. *See Budget of the United States Government, Fiscal Year 1974*, 314-24 (1973). No money leaves the treasury for REAP until Congress appropriates funds to liquidate previously obligated contracts. *Cf.* 16 U.S.C. §§ 590g-o, 590p(a), 590q (1970). The contracts in question would have been liquidated by an appropriation for fiscal 1974; and REAP could not have had any possible on the national debt until that appropriation was passed.

146. *See 1973 Hearings, supra* note 7, at 366-67 (statement of Deputy Attorney General Sneed); *1971 Hearings, supra* note 2, at 96 (testimony of C. W. Weinberger). Aside from these statements before congressional committees, however, the administration has not relied upon the fear of piercing the debt ceiling in its defense of executive impoundment. *See Budget of the United States Government, Fiscal Year 1974*, 7-14 (1973).

147. Compare with the conclusions reached by the special counsel to President Eisenhower in a letter, August 12, 1955, to a member of Congress:

"Because of the President's Constitutional obligation to faithfully execute the laws, I am strongly of the view that when Congress has appropriated funds for a particular project, that President cannot set aside the will of Congress and direct that no funds be spent on that project. *1973 Hearings, supra* note 7, at 338-339 (reprint of memorandum to the president: Authority to Reduce Expenditures, written by the Bureau of the Budget, October, 1961) (the 1955 letter is quoted therein). In addition, the views taken in the special counsel's letter represented the position of the Bureau of the Budget in the 1961 memorandum.

than real. The dispute is over spending priorities[148]—policy-making responsibility specifically delegated by the Constitution to the legislative branch.[149] Second, the statutes relied upon by the administration neither individually nor collectively support the impoundment practice. The economies and contingencies contemplated under the Antideficiency Act provide no broad grant of spending discretion to the executive. Similarly, the Employment Act of 1946 and the Economic Stabilization Act of 1970 carefully circumscribe their respective functions: In the Employment Act of 1946 the president's control over policy is limited to the making of "such recommendations for legislation as he may deem necessary or desirable";[150] the Economic Stabilization Act of 1970, as amended in 1971, sets up executive controls over the private sector of the economy to "stabilize prices, rents, wages and salaries"[151]—the only reference to impoundment is in a 1973 amendment to the act which stated it to be contrary to congressional intent.[152] Moreover, the legislative histories of the statutory spending and debt ceilings indicated a consistent purpose: the subordination of rigid expenditure limits to the continued maintenance of congressionally-authorized programs. Third, it would be within the power of Congress to take away the executive authority asserted, either through outright repeal of conflicting acts or the amendment of them. Taken together, these observations underline the inadequacy of the statutory arguments for impoundment.

III. The General Intent of Appropriation Acts

A necessary element of the impoundment arguments is that an appropriation bill is intended merely as an authorization to spend and that a bill does no more than place an absolute ceiling on expenditures, leaving ultimate distribution decisions to executive judgment.[153] Al-

148. *See* H.R. REP. No. 13, 93d Cong., 1st Sess. 1 (1973) (report of the Joint Study Committee on Budget Control). Senator Humphrey noted on January 12, 1973: "Impoundments are being made deliberately to thwart the authorization and appropriations priorities set by Congress in law." 31 CONG. Q. WK. REPT. 215 (Feb. 3, 1973). Thereby, former Assistant Attorney General Rehnquist's standards for conflicting statutory demands fall short: "the conflict must be real and imminent for this argument to have validity; it would not be enough that the President disagreed with spending established by Congress." *1971 Hearings, supra* note 2, 279, 284.

149. *See* U.S. CONST. art. I, § 1.

150. 15 U.S.C. § 1022(a)(4) (1970).

151. PUB. L. No. 92-210, tit. II, § 203(a), 85 Stat. 743.

152. Economic Stabilization Act Amendments of 1973, PUB. L. No. 93-28, § 4, 87 Stat. 27.

153. *See 1971 Hearings, supra* note 2, at 94 (testimony of C.W. Weinberger); *1973 Hearings, supra* note 7, at 367-68 (prepared statement of Deputy Attorney General Sneed).

Further support for this position can be found in a February, 1967, memorandum

though some support for this theory is found in early practice under the Constitution,[154] the general trend of congressional action represents a desire to retain control of the purse.[155]

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by Acting Attorney General Clark to the secretary of transportation. Clark argued that "[t]he courts have recognized that appropriation acts are of a fiscal and permissive nature and do not in themselves impose upon the executive branch an affirmative duty to expend the funds." *1973 Hearings, supra* note 7, at 872, 874 (reprint of opinion of Acting Attorney General Clark). The following cases were cited in the opinion: McKay v. Central El. Power Coop., 223 F.2d 623 (D.C. Cir. 1955); Lovett v. United States, 66 F. Supp. 142 (1945), *aff'd on other grounds*, 328 U.S. 303 (1946); Campagna v. United States, 26 Ct. Cl. 316 (1891); and Hukill v. United States, 16 Ct. Cl. 562, 565 (1881).

Upon analysis, these decisions are not authority for the position advanced. In fact, *Hukill*, a suit by a mail carrier to recover for mail transportation services before the Civil War, contains a statement directly contrary: "Every appropriation for the payment of a particular demand, or class of demands, necessarily involves and includes the recognition by Congress of the legality and justice of each demand, and is equivalent to an *express mandate* to the Treasury officers to pay it." 16 Ct. Cl. at 565 (emphasis added). The language favored by Acting Attorney General Clark states that "[a]n appropriation . . . is not a designation of any particular pile of coin or roll of notes to be set aside . . . but is simply a legal authority to apply so much of any money in the Treasury to the indicated object." *1973 Hearings, supra* note 7, at 872, 874. Accepting this, it does not follow that the executive has discretion regarding the effectuation of the indicated object. Moreover, the case actually turned on questions unrelated to the impoundment issue, i.e., whether the claim in question had been previously paid by the Confederacy. *Compagna* involved the issue of whether an appropriation to pay a group of musicians at a certain rate should be controlling in the face of a statute which fixed their compensation at a lower rate. The court concluded that the appropriation was contingent or variable, and that therefore, the excess amount over the statutory figure was to provide for contingencies—not to alter the pay scale. In its decision, the court did note that "[a]n appropriation is *per se* nothing more than the legislative authorization prescribed by the Constitution that money may be paid out of the Treasury," 26 Ct. Cl. at 317; however, in light of the facts of the case, it is difficult to perceive how this single sentence can support the broad proposition that an appropriation poses no duty on the executive to expend funds. *Lovett* and *McKay*, the other two cases cited, present a totally different issue, *i.e.*, whether the courts can *require* certain payments to be made despite evidence of contrary legislative intent. Three Supreme Court cases not referred to by Acting Attorney General Clark indicate that when Congress makes an appropriation in terms which constitute a direction to pay, the office of the treasury cannot refuse to make payment. *See* United States v. Louisville, 169 U.S. 249 (1898); United States v. Price, 116 U.S. 43 (1885); United States v. Jordan, 113 U.S. 418 (1885). See notes, and text accompanying notes, 31-32 *supra*.

154. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, 127-30 (1957). Early appropriation bills authorized unqualified sums of money and left to executive discretion the specific items and persons the money ultimately would reach. *Id.* at 127-28. Moreover, Louis Fisher writes: "Lump-sum appropriations became particularly noticeable during emergency periods of war and national depression. During the Civil War, an act provided for $50 million to pay two- and three-year volunteers; $26 million for subsistence; another $14 million to cover transportation and supplies; and $76 million for an assortment of items, to be divided among them 'as the exigencies of the service may require. . . .'" *1973 Hearings, supra* note 7, at 683, 684 (Fisher article).

155. The courts have recognized this desire to retain control of the purse, through

Admittedly, there is little dispute with the spending power of the executive in a case where Congress has clearly intended the appropriation to be permissive.[156] In a similar vein, it is recognized that strongly-worded legislation can mandate spending.[157] The majority of statutes, however, do not involve such extreme positions; a question thus arises as to the amount of discretion provided the president in this "twilight zone". Accordingly, standards must be established to evaluate middle-range impoundments.

Former Assistant Attorney General Rehnquist, testifying before the Senate Subcommittee on Separation of Powers in March, 1971, indicated certain guidelines which could be followed in the interpretation of a given appropriation act: "taking the overall language of the authorization bill, the enabling statute if there was one in the particular appropriations language, and construing them together to try to find . . . a reasonable basis. . . ."[158] Moreover, the courts have evolved a body of doctrine to aid in statutory construction, the cardinal rule of which is "to give effect to the intent of Congress."[159] Therefore, the justification for a given impoundment is contingent upon the consistency of the executive action with congressional purpose.

The determination of statutory intent is decidedly a judicial function.[160] With respect to appropriation acts, the courts have held that where Congress imposes conditions upon the expenditure of funds, the

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their statutory interpretation of congressional intent in the recent impoundment cases. *See, e.g.*, text accompanying notes 160-75 *infra*. Moreover, by employing clearly defined language in its appropriation acts, Congress has taken steps to reassert itself and re-establish its power over the purse. See note 48 *supra*.

156. Two examples of permissive statutory language: Department of Transportation and Related Agencies Appropriation Act, PUB. L. No. 92-398, tit. I, 86 Stat. 580, provides "[f]or necessary expenses of the Office of the Secretary of Transportation, including not to exceed $27,000 for allocation within the Department for official reception and representation expenses *as the Secretary may determine. . . .*" (emphasis added). Title VI of the Civil Rights Act of 1964 expressly grants the president the power to withhold funds from federally financed programs in which discrimination by race, color, or national origin exists. 42 U.S.C. § 2000d-1 (1970).

157. Deputy Attorney General Sneed, as spokesman for the Nixon administration on the subject of impoundment, accepted this view. *See 1937 Hearings, supra* note 7, at 368 (prepared statement of Deputy Attorney General Sneed). For examples of mandatory language in statutes, see note 48 *supra*.

158. *1971 Hearings, supra* note 2, at 234 (prepared statement of William H. Rehnquist).

159. United States v. American Trucking Ass'n, 310 U.S. 534, 542 (1940). *See also* Vermilya-Brown Co. v. Connell, 335 U.S. 377, 386 (1948); Miguel v. McCarl, 291 U.S. 442 (1934).

160. Woods v. Benson Hotel Corp., 177 F.2d 543, 546 (8th Cir., 1949). That is, the reviewing court's construction of a statute will prevail over the executive's interpretation. *Id.* at 546.

president has no discretion to ignore those conditions.[161] *Spaulding v. Douglas Aircraft Co.* illustrates this principle:

> The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same.[162]

Furthermore, the courts have applied the 'consistency with congressional purpose' standard to the recent impoundment cases.[163] In *State Highway Commission of Missouri v. Volpe*,[164] the court of appeals, in affirming the lower court's ruling,[165] singled out the issue of statutory construction: "The issue before us is not whether the Secretary [of Transportation] abused his discretion in imposing contract controls but whether the Secretary has been delegated any discretion to so act in the first place."[166] In finding the impoundment of highway funds illegal, the court noted:

> The claim that a general appropriation act is deemed permissive in nature as far as it constitutes a mandate to expend funds has not escaped criticism. Nevertheless, assuming the proposition to be true, it still does not provide a bottom on which to premise either a direct or implied authorization within the Federal-Aid Highway Act to administer contract controls. *For although a general appropriation act may be viewed as not providing a specific mandate to expend all of the funds appropriated, this does not a fortiori endow the Secretary with the authority to use unfettered discretion as to when and how the monies may be used. The Act circumscribes that discretion and only an analysis of the statute itself can dictate the latitude of the questioned discretion.*[167]

Judge Jones, in *Local 2677, The American Federation of Government Employees v. Phillips*,[168] held unlawful the dismantlement of the Office of Economic Opportunity (OEO); in performing this function, OEO Director Phillips was exceeding his statutory authority.[169] "The OEO director has been granted discretion in the disbursing of funds

161. *See* Perkins v. Lukens Steel Co., 310 U.S. 113, 127, 129 (1940); Rhodes v. Iowa, 170 U.S. 412, 422 (1898).

162. Spaulding v. Douglas Aircraft Co., 60 F. Supp. 985, 988 (S.D. Cal. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946). *But see* note 147 *supra*.

163. *See* note 62 *supra*.

164. 479 F.2d 1099 (8th Cir. 1973).

165. State Highway Comm'n v. Volpe, 347 F. Supp. 950 (W.D. Mo. 1972). The circuit court affirmed the injunction and declaratory judgment issued by the district court against the secretary of transportation, but vacated, because of mootness, the lower court's issuance of a writ of mandamus. State Highway Comm'n v. Volpe, 479 F.2d at 1118.

166. *Id.* at 1106-07.

167. *Id.* at 1109 (emphasis added).

168. 358 F. Supp. 60, 83 (D.D.C. 1973).

169. *Id.* at 67.

so as to effectuate the goals of the program. . . . *But discretion in the implementation of a program is not the freedom to ignore the standards for its implementation.*"[170]

Finally, in the case of *Berends v. Butz*,[171] the secretary of agriculture was directed to reinstate emergency loans to farmers. After examining the legislative history of the relevant statutes, the court concluded:

> It is clear . . . that Congress has directed the Secretary to accept and consider loan applications from those counties which have been designated as "emergency loan areas." *The Secretary's refusal to comply with the statutory language, and the subsequent termination of the emergency loan program was accomplished in excess of the Secretary's authority. . . .*[172]

The president and the various executive agencies, it would seem, have some discretion[173] as to the allocation of funds in the statutory "twilight zone"; but clearly not enough to abuse the purpose Congress intended by law. It is necessary to distinguish between savings effected by more efficient performance of a function,[174] and impoundments made by curtailment of a service or omission of a project. In the former case, the executive is within his constitutionally and legislatively defined bounds, consistent with congressional intent. In the latter, he has exceeded the legal authorization provided him, by ignoring the substantive issue of law: the purpose for which the act was enacted. As the courts have maintained, an appropriation statute need not be clothed in mandatory language to direct the accomplishment of its stated goal.[175]

V. Conclusion

The recent exercises of impoundment appear to be seriously lacking in justification. No constitutional power to impound resides in the executive. Little merit can be found for the proposition that the president's duty to faithfully execute the laws provides for their nonexecution. With respect to the lawmaking powers of the president, as the court held in *Youngstown*, they are limited to "the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[176]

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170. *Id.* at 77 (emphasis added). *See also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 411 (1971).

171. 357 F. Supp. 143 (D. Minn. 1973).

172. *Id.* at 151 (emphasis added).

173. The scope of executive discretion is dependent upon the language of a specific statute.

174. That is, pursuant to the Antideficiency Act, 31 U.S.C. 665 (1970), *as amended*, PUB. L. No. 93-344, tit. X, 88 Stat. 332.

175. *See generally* note 62 *supra*.

176. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

Nor is the veto power an absolute one—the founding fathers circumscribed the power of the chief executive to preclude the effectuation of national legislation. The statutory arguments are equally unconvincing. The Antideficiency Act, the Employment Act of 1946, and the Economic Stabilization Act of 1970, all fall far short of granting the president broad spending discretion. Similarly, the expenditure ceiling and debt limit do not measure up to the criterion of rigidness. Finally, the "consistency with congressional purpose" standard, as applied by the courts to the general appropriation acts, contravenes the assertion that the expenditure of funds is an executive function.

Clearly, the president's authority to act "must stem either from an act of Congress or from the Constitution itself."[177] However, in the current case for impoundment, neither claim can be made.

Postscript:

As this issue goes to press, the Supreme Court decided the consolidated cases of *Train v. City of New York* (No. 73-1377) (Feb. 18, 1975) and *Train v. Campaign Clean Water, Inc.* (No. 73-1378) (Feb. 18, 1975) (N. Y. Times Feb. 19, 1975, at 1, col. 8) (see note 62, *supra*, for case histories).

In a unanimous decision the Court held that the administrator of the Environmental Protection Agency has no authority under the 1972 amendments to the Federal Water Pollution Control Act to spend less than the full amount appropriated by Congress.

Relying exclusively on the legislative history of the act, the Court did not reach the constitutional issue of whether the president has inherent authority to refuse to spend funds appropriated by Congress.

177. *Id.* at 585.