

Norman Pine

The Impoundment Dilemma: Crisis in Constitutional Government

Do we have a centralized control in this country? Do we no longer have a co-equal branch of government? . . . I had the thought that we had a responsibility to appropriate funds. I had the thought that once Congress passed the appropriation bill and the President approved it and signed and said to the country 'this has my approval' that the money would be used instead of sacked up and put down in the basement somewhere.

*Senator Lyndon B. Johnson, 1959*¹

The average American is just like the child in the family. You give him some responsibility and he is going to amount to something . . . If, on the other hand, you make him completely dependent and pamper him and cater to him too much, you are going to make him soft, spoiled, and eventually a very weak individual.

*President Richard M. Nixon, Nov. 5, 1972*²

Norman Pine is a second-year law student at Boalt Hall, Berkeley. He researched the issue of impoundment as part of a larger study on "The OMB and Executive Usurpation of Congressional Powers." This study was undertaken in Washington, D.C., as part of the Ralph Nader Congress Project and is due for publication in the summer by Grossman Press.

I Introduction: The President's Budget

In accord with his view that Americans have been overly "pampered" by the Federal Government, President Nixon has presented a proposed fiscal 1974 budget calling for drastic cutbacks of federal social programs.³ Among the hardest hit projects were those providing assistance to urban and rural lower income groups.

The Nixon budget seeks to stem the tide of forty years of governmental action and philosophy: massive federal spending to combat a myriad of social problems. The budget proposal is perhaps the strongest evidence to date of the differing priorities held by the President and Congress. The first rhetorical salvos in this latest clash have already been fired by both sides. President Nixon maintains that the federal bureaucracy has degenerated into a "hodgepodge," while House Speaker Carl Albert charges that the Administration proposal "lays waste" decades of "compassionate government."⁴

These charges and countercharges, however valid, are merely symptomatic of a far deeper problem. More important than which particular programs are cut in the proposed budget is the fact that Congressional objections can be easily circumvented through Presidential impoundment of funds.

While at one time the budget "proposal" was seen as the President's recommendations on federal spending, it is fast becoming the formulation of his "final offer" which Congress can't refuse. Eileen Shanahan observed in the *New York Times* that Mr. Nixon's most powerful weapon in the fight is his ability to present Congress with a series of faits accomplis:

The relatively short list of programs . . . [already impounded] will be augmented by scores of additional refusals to spend, *despite what Congress has legislated, authorized and appropriated.*⁵ (emphasis added)

Furthermore, President Nixon claims that most of the proposed terminations and cutbacks can be accomplished without Congressional concurrence.⁶ Thus, the President has decided how much he intends to spend, and Congressional agreement, however much appreciated, is not really considered essential.

The current unilateral budget cuts, though more ambitious in scope and more defiant in tone, do not constitute a radical departure from past Nixon policy. For years, Presidential-Congressional disputes over spending have been resolved in the President's favor, through impoundment. Timothy Ingram has noted in the *Washington Monthly* that "budget examiners frankly admit that programs are cut back when the appropriated amount differs from the President's budget."⁷ Thus, for example, "the \$200 million impounded for mass transportation [in 1971] is almost exactly the same figure by which Congress's appropriation exceeded the President's original budget request."⁸

Two hundred million dollars is but a small fraction of the amount of appropriated funds which President Nixon has refused to spend. As of June, 1972, over \$10.5 billion had been withheld for various reasons.⁹ Thus, although Congressional leaders are currently bemoaning terminations or massive cutbacks in the areas of housing, education, poverty, health, employment, water control, and agriculture in the new budget, each of these had already been unilaterally denied funds by the President in previous years.¹⁰

Congress has every right to be enraged by the continued Presidential flouting of its will – but little right to be surprised. The handwriting was placed on the wall last October when the Senate denied the President's "request" for a spending ceiling. Citing inflationary pressures, President Nixon had asked Congress for unlimited discretion in deciding how to keep federal spending below \$250 billion. Despite a strong executive lobbying campaign, the Senate, asserting Congressional prerogatives over spending, refused to accede. Undaunted, the President merely said that he would make the cuts anyway. The request had apparently been made to lend respectability to a Presidential decision, not to influence the outcome of that decision in any way. A red-faced Congress was left to ponder the words of Timothy Ingram:

Increasingly, Congress is less the underdog and more the old fighter who is no longer even invited into the ring.¹¹

Though certainly an accurate description of Congress's current role in the budgetary process, Ingram's words are somewhat misleading. Congress has consistently turned down invitations into the "ring" and has, at times, dived out between the ropes to escape its responsibilities. The impoundment issue cannot be discussed without making the frank observations that Congress has: forced the executive to play an ever-increasing role in setting budgetary policy, consistently tolerated Presidential abuses in this area, and, until recently, refused to even consider making the reforms of its own budgetmaking process which would make impoundment wholly unjustifiable and unnecessary.

This essay will attempt to place the impoundment process in its proper perspective. It will begin by discussing how impoundment has developed into a second and final presidential veto. The historical development of the power to impound will be examined to consider how and why the President has accumulated such powerful discretion over federal spending. Following will be an attempt to define the proper limits of Presidential discretion on spending with a particular emphasis on the statutory basis of impoundment. Because this analysis concludes that the statutory basis grants a very limited area of discretion, the administration argument for far broader power will be examined and challenged. The paper will then consider the ways in which impoundment has been abused by thwarting Congressional policy and securing partisan political objectives for the President. Finally, Congress's role in the budgetary process will be examined. This analysis will consider Congressional irresponsibility in the budgetary process, how Congress has responded to the impoundment problem, and the possibilities of reform.

It should be noted that although previous Presidents have wielded the impoundment power, this article will center on its use by the Nixon administration. The reason is two-fold: Nixon impoundments and the Congressional response are obviously of the greatest topical concern. Furthermore there is little doubt that abuse of impoundment has reached its greatest peak under the current administration.

II Impoundment: The Veto That Can't Be Beat

Impoundment refers to the executive practice of refusing to spend funds which have been duly appropriated by Congress and signed into law by the President. As will be made clear, there are certain conditions under which the President is expected not to spend a full Congressional appropriation. Impoundment, by definition, excludes these situations and only refers to those refusals to spend funds in which the will of Congress is flouted or ignored.

The rise of impoundment may be traced to two Presidentially-perceived flaws in the Constitution: 1) lack of a line item veto¹² and 2) the Chief Executive's limitation to a single veto, subject to Congressional override. Feeling that these limitations have left them unable to cope with the exigencies of complex, modern-day government, Presidents have developed and refined this awesome power.

From a President's perspective, impoundment is preferable to vetoing for a number of reasons. Lacking a line item veto, a President must often sign bills, which, from his standpoint contain some objectionable features, in order to secure the desired portions of the bill. Presidents, therefore will sign an appropriations bill and then impound the objectionable portions of the funds – giving themselves the item veto they constitutionally lack.¹³

Besides the *ad hoc* creation of an item veto power, impoundment provides additional benefits for the President. Impoundment, by its nature, is politically far more subtle than a direct veto. Vetoes are often front page news while impoundment usually goes unnoticed for long periods of time. This is true both because there has been no systematic reporting of impoundment actions to either the Congress or the media and because funds are often delayed or deferred for legitimate reasons. Thus, it may be months or years before people outside the affected agencies realize that a particular program has been axed. This subtle form of veto has allowed the President to postpone or escape accountability to either Congress or the public.

Another advantage of impoundment is that it provides a continuous, on-going mechanism with which to control programs. Last year the Administration bowed under Congressional pressure and released portions of impounded agricultural funds before the November election. Then the Administration chose the Holiday Season to undertake a quiet "farm economy drive" which included re-impounding the funds. Thus, Congress celebrated its "victory," but farmers soon learned that the money would again be frozen. Unlike the one-shot veto, impoundment gave President Nixon the chance to reverse himself, and to control the timing of his decisions.

Finally, veto through impoundment obstructs efforts to reverse the action. A veto can be immediately overridden by Congress, especially if strong public support is evidenced. However, the Congressional flow of adrenalin can rarely be pumped up by the time, often months later, that an impoundment is discovered. This is especially true if changed conditions, higher costs or a different political milieu are present. Because impoundment was presumably not anticipated by the Founding Fathers, there has been no quick, direct method developed to override the action once it has been discovered.¹⁴ In fact, Congress has never developed satisfactory oversight mechanisms to keep it informed of executive agency actions. Members of Congress frequently discover Presidential impoundment the same way we do — through reading the morning newspaper.

Once Congress has been alerted, there are serious barriers to rectifying the situation. In effect the entire legislative process would have to be geared up all over again — from introducing a bill to committee hearings, to floor votes, to conference committees. And when all is said and done, there is no assurance that a new bill with stronger language won't be ignored also. As a result, Congress has so far been virtually helpless to deal with impoundment (see section VI for a detailed look at the current Congressional response).

In its nearly absolute finality lies the great attractiveness, and the great danger, of impoundment.

III The Historical Perspective

The need for a degree of executive control over spending has been Congressionally recognized since the passage of the Antideficiency Acts of 1905 (33 Stat. 1257) and 1906 (34 Stat. 49). The former instituted a requirement that appropriated funds be apportioned over the fiscal year in order to prevent overspending in the early months, necessitating supplemental appropriations for the remainder of the year. Department heads of the Federal agencies were given responsibility for making the apportionments.

The 1906 Act amplified this power by permitting the modification or waiver of the apportionments in the event of "some extraordinary emergency or unusual circumstances which could not be anticipated at the time of making such apportionment."¹⁵ Thus, by 1906 Congress had recognized the need for some executive discretion over the spending of appropriated funds, but had also established the legal parameters (emergency, changed circumstances) of that power.

This recognition of executive discretion within Congressionally drawn limits has changed little over the past sixty years. What has drastically changed is the extent of centralization, within the Executive Office of the President (EOP), of budgetary decisions. Gradually, but irresistibly this centralization has evolved:

The massive spending and resultant debt occasioned by World War I produced the undeniable need for budget reform. Recognizing its own inefficiencies and inadequacies in complex budget areas, Congress passed the Budget and Accounting Act of 1921. This law established the "national budget" — an itemized Presidential proposal for national spending presented to Congress at the opening session in January. To aid the President in this mammoth undertaking, the Act created a Bureau of the Budget (BOB) and placed it within the Executive Branch, in the Department of the Treasury. And to solidify the President's control of budgetary affairs, Congress established the principle that agency heads could only make their budget requests to the President, rather than directly to Congress. In short, a full-range of budget preparation and program evaluation was left largely to the Executive.

The BOB was strengthened immensely in 1933 when the President transferred the function of "making, waiving, and modifying apportionments of appropriations" from agency heads to the Director of the BOB. Having strengthened the Budget Bureau, President Roosevelt then sought to exercise greater control over its workings. Accordingly, in 1939, the President transferred the BOB from the Treasury Department to the Executive Office of the President.

In 1950, Congress statutorily recognized that the full amount of appropriations need not be spent, under certain specified conditions. The 1950 revision of the Anti-

Deficiency Act recognized what had generally been accepted for years – funds could remain unspent to provide for special contingencies (within a department) and to effect savings. However, since 1950, Presidents have broadened this Act through “interpretation” and cited it as a statutory ground to justify impoundment (see below).

The most recent transformation of the Budget Bureau occurred in 1970. President Nixon further consolidated Presidential control over the budgetary process by reorganizing the BOB into the OMB (Office of Management and Budget). Through this action, the semi-independent bureaucratic agency was transformed into a direct political extension of the White House.

However, this evolution is only half the story. Superimposed on this chronology of Presidential and Congressional acts is a chronology of events: the Depression, World War II, the Korean War, the Cold War, the Vietnam War, and recurring bouts of inflation and recession. Each crisis has added to the President’s growing power to re-direct priorities and to control federal fiscal policies.

It is clear that the growth of the impoundment power is merely a reflection of the larger trend for power to flow from Congress to the Executive branch which has become increasingly evident since the days of the New Deal. While discussing the historical currents responsible for the developing imbalance is beyond the scope of this article, it should be borne in mind that any “solution” to the impoundment issue will necessarily entail broad-based efforts to strengthen the Congress on a variety of fronts.

The reason for singling out impoundment for study, rather than other areas of Congressional decline (e.g., the war-making power), is that it strikes at the heart of Congressional power – the control of the purse-strings. Realization of this threat is undoubtedly the reason that Congressional leaders have chosen the impoundment issue on which to make their stand against Presidential encroachment.

IV The Administration Case and Its Weaknesses

A *The Statutory Basis of Impoundment*

102

As we shall see, the 1950 Revision of the Anti-Deficiency Act does grant the President the right to refrain from spending appropriated funds, under certain specified conditions. As a result, a good deal of confusion has arisen about whether there is a legal right to impound. Much of this confusion has been created by the loose usage of the word “impoundment” to denote *all* situations in which funds are not expended by the President. A President is acting consistently with the will of Congress when funds are withheld to “provide for contingencies” or to “effect savings,” as the Act puts it. This statutorily-recognized withholding may loosely be labelled “routine financial administration,” and its use has never been questioned. However, Presidents have also withheld funds in contravention, rather than in

furtherance, of the will of Congress, as manifested in the Anti-Deficiency Act. These latter cases, which constitute an illegal withholding of funds, may be called “impoundment.” The purpose of this section is to attempt to draw the line between the two.

Since there is no case law, an interpretation of the Anti-Deficiency Act must be based directly on the statutory language and the legislative history of the Act. The revised act requires apportionments to prevent deficiencies and to “achieve the most effective and economical use” of appropriated funds. Besides these routine apportionments, the act recognizes the Executive’s right to create reserves (i.e. return unspent funds to the Treasury), for certain specified reasons:

“In apportioning any appropriation, reserves may be established to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available.”⁶

Professor Joseph Cotton, Chairman of the Rice University Political Science Department has noted that the legislative history of the statute and the report submitted at that time by the Budget Bureau make it clear that a narrow interpretation of the language was held by the BOB as well as by Congress. This analysis indicates that the BOB did not interpret changing conditions broadly to justify any impoundment:

Rather it understood it to mean change of conditions with reference to a particular program to mean situations where something had happened in terms of a program, not inflation or anything general . . . that would make it wasteful to implement that program.¹⁷

This narrow interpretation of the impoundment power is further substantiated by another portion of the revised Antideficiency language:

Whenever it is determined . . . (by the OMB Director) that any amount so reserved will not be required to carry out the purposes of the appropriation concerned, he shall recommend the rescission of such amount . . .¹⁸

Obviously any reserves made with the intent to thwart, modify or reduce those “purposes” are made contrary to the Congressional policy as expressed in the Anti-deficiency Act.

Under authority of the 1950 Act, impoundment is being widely used today to reduce or kill programs which the President finds objectionable. To see how much of a departure this is from the original purpose of the Act, one should consider the views of those who helped formulate and draft the relevant language: officials of the Budget Bureau.

Professor J.D. Williams's study of the development of impoundment reveals that following World War II, the Budget Bureau had reservations about its right to continue withholding funds during peacetime.¹⁹ Lacking the President's broad war powers authority, the Bureau decided to seek Congressional sanction of the practice through statute. Working with the General Accounting Office (GAO) the Bureau helped draft the language which was eventually adopted in the 1950 Act. Williams notes that although some Bureau officials welcomed the new law, others disagreed:

Was it a good thing, they asked, to have Congress define a power which the Bureau had exercised up to that point without such explicit definition? 'He who can give, can take away'. Officials inclined to 'strict interpretation' emphasized that Section 1211²⁰ reduced rather than expanded the Bureau's authority by stating only two purposes [contingencies and savings] for which reserves might be established.²¹

It should be clear, then, that neither the Act nor its legislative history will support claims that the President has a broad discretionary power to impound. But just when does the Act authorize the President to withhold appropriated funds?

In general, the key factor must be not the actual *withholding* of funds but rather consistency or inconsistency with the will of Congress, that determines whether the withholding is legal. Defining the will of Congress is not always an easy task. However, a conscientious President will always attempt to understand, rather than obscure, Congressional intent.

Judge Learned Hand gave an example of how the judiciary would attempt to unearth "legislative intent:"

When we ask what Congress 'intended' usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with this concrete occasion.²²

Analogously, a fair-minded President should ask "would Congress, sitting in my position *today*, want this money spent?"

In most cases, it is not difficult to answer the question. For example, if circumstances change such that the appropriated funds are *objectively* no longer needed for the purpose intended, the money should not be spent. The unexpectedly rapid conclusion of World War II forced President Roosevelt to withhold funds appropriated to continue the war.

Similarly, savings made possible through efficiency or unanticipated technological breakthroughs should be returned to the Treasury. Professor Williams has noted

the classic example in which Congress appropriated a million dollars to control the Mediterranean fruit fly. Because the Department of Agriculture was able to accomplish the objective by spending only half a million dollars the remainder was "saved."

As another example, routine financial administration would also require the deferral of money for production of a weapons system or aircraft until proper tests have been completed or plans laid. In none of these cases has the Congressional will been compromised by the expenditure of fewer dollars than Congress anticipated.

Routine financial administration gives way to impoundment when Presidential judgment is substituted for that of Congress on a question of the wisdom, merits, scope or speed of addressing a problem. Assume Congress appropriated \$6 billion to reach Mars by 1977. A President would be unjustified in withholding \$3 billion in the belief that reaching Mars by 1979 is "fast enough." Inherent in the legislative function is the right to determine the pace at which an objective will be attempted.

Also inherent in that function is the right to determine the scope of a program. If Congress decided that anyone earning less than \$6000/year was entitled to a fixed amount of food stamps, the President would exceed his statutory authority by adjusting either the base level or the amount of stamps allocated because of the belief that either was excessive. "Effecting savings" cannot be broadly interpreted to include providing a lesser amount of service than Congress anticipated. By such definition, *any* withholding of funds would be made legitimate because "savings" would be created.

If the affirmative powers of Congress to enact laws are to have any meaning, the President must be bound to execute the laws in the way, at the speed, and to the extent, that Congress ordains. Once a President declares the right to judge the philosophical desirability or the degree of success of various programs, and the right to withhold funds accordingly, the President's veto power and the right to *recommend* legislation become as redundant as the Congress's right to enact laws becomes irrelevant.

It is apparent that Congress has authorized only an extremely limited presidential power to withhold appropriated funds. But President Nixon has attempted to justify his exercise of much wider power by reference to the following factors: interpretation of appropriations as permissive, conflicting statutory authority, precedent, and the U.S. Constitution. More questionable justifications include "necessity" and "responsibility." And when other rationales have seemed insufficient, Congressional incompetence always serves as a defense.

Although the Nixon Administration has often been accused of denying information to Congress, it has never

been loathe to send its ablest spokesmen to defend the practice of impoundment. Caspar Weinberger, then-Deputy Director of OMB, presented what probably constitutes the President's most cogent and complete defense in hearings before Senator Ervin's subcommittee in 1971.²³ As we take up the remaining elements of the Administration case, Weinberger's testimony will serve as our primary reference point.

B Appropriations as Permissive Ceilings

The Administration case begins with the assertion that appropriations are permissive ceilings rather than mandates to spend and that the Antideficiency Act grants explicit authority for withholding funds. Weinberger acknowledges that the Act does place broad restrictions on the impoundment power, "but I do not think it is so broad as to prevent the President from exercising the power that, as we read it, Congress undoubtedly intended him to have."²⁴

From the previous discussion of the statutory language and legislative history of the Act, it seems clear that what Congress "undoubtedly intended" was nothing more than a limited impoundment power under specified circumstances and certainly not the broad, policy power which the Administration has exercised. However, to support his view of Congressional intent, Weinberger quotes from the House Report (No. 1797) which accompanied the Act:

Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity. 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 the Congress . . .²⁵ (emphasis mine)

This excerpt hardly supports Weinberger's claim. The italicized portion makes clear that an appropriation is only a ceiling if "all necessary service" can be provided for a smaller amount than appropriated. If not, the full amount should be spent to provide the "necessary service" to the extent mandated by Congress. Clearly, Presidential impoundments for "policy" as opposed to "efficiency" reasons are precluded by the quoted language. Any doubt about this interpretation can be resolved by examining a portion of the House Report omitted by Weinberger:

It is perfectly justifiable and proper for all possible economies to be effected and savings to be made. But there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds . . . [otherwise] Congress would be totally incapable of carrying out its constitutional mandate . . .²⁶

Normally, this should be sufficient to resolve the matter. However, Samuel Cohn, an OMB official who accompanied Weinberger, pointed out that the 1950 Omnibus Appropriations Bill which amended the Antideficiency Act and which was the subject of the House Report, called for a \$55 million reduction by the President of appropriated funds.²⁷ To understand this seeming contradiction between Congressional policy and Congressional action, one must consider the circumstances surrounding the expenditure ceiling.

At the time in question, Congress felt the need to limit federal expenditure. The House proposed a spending ceiling which limited the President to only ten areas in which cuts could be made and permitted only 5% or 10% cuts in those areas.²⁸ However, Louis Fisher notes that by the time the Senate began debate on the bill, South Korea had been invaded and President Truman was already curbing non-defense spending. "Legislative action after this point was not much more than a sanctioning of presidential war prerogatives."²⁹

Thus there were two very diverse actions taken by the 81st Congress. The permissive nature of appropriations was recognized for the purpose of allowing possible savings. But this grant of discretion to impound was limited by the requirement that "all necessary service" be provided, i.e., that impoundments not be made to thwart Congressional policy. However, in view of the emergency created by imminent war, the President was allowed, by specific Congressional grant, to cut non-defense expenditures for the year in question. This is hardly a precedent for any broad impoundment power.

For the remainder of his case that appropriations are permissive, Weinberger cites an opinion by Acting Attorney General Ramsey Clark issued in 1967.³⁰

The Clark memorandum is of little aid to Mr. Weinberger's case. In the first place, William Rehnquist has noted that the opinion "appears to us to have been based on the construction of the particular statute (Federal Aid Highway Act), rather than on the assertion of a broad constitutional principle of Executive authority."³¹

Second, the cases upon which Clark relies for his assertion that appropriations are permissive do not sustain the broad proposition for which they are cited. More specifically, the cases upon which Clark had relied in his opinion are *Hukill v. United States*, 16 Ct. Cl., 562, 565 (1880); *Compagna v. United States*, 26 Ct. Cl., 316 (1891); *Lovett v. United States*, 104 Ct. Cl., 557 (1945), affirmed on other grounds, 328 U.S. 303 (1940); and *McKay v. Central Electric Power Corp.*, 223 F. 2d 623 (1955). The *Lovett* and *McKay* cases "involved a totally different issue, i.e. whether the courts can require certain payments to be made despite evidence of a contrary legislative intent." (*Hearings*, p. 303).

Neither *Hukill* nor *Compagna* deals with funds appropriated for public purposes; both concern private claims.

Although *Hukill* does contain some language which supports the administration position, there is contradictory language as well. After saying that an appropriation is "simply a legal authority to apply so much of any money in the Treasury to the indicated object," the court undercuts the administration position by stating: "Every appropriation for a particular demand, or a 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." (*Hearings*, p. 302.) 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.

The *Compagna* case is similarly not on point. The legal question involved was 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.

Thus it is fair to conclude that although particular phrases from these opinions seem to support the administration position, on closer examination, it is clear that there is no legal precedent for the broad claim made by the administration that appropriations are nothing more than mere authority to spend.

The final possible argument on behalf of the administration's case is that appropriations are usually phrased in permissive language. In a memo prepared by the American Law Division of the Congressional Legislative Research Service, Mary Louise Ramsey countered this point. She noted that when there is substantive legislation directing that a thing be done, coupled with a later appropriation, "the two measures . . . constitute a mandate to spend so much of the appropriation as is necessary to give effect to the substantive law."³²

This is only common sense. Mandatory spending language would make it difficult or impossible to comply with the provisions of the revised Antideficiency Act. The entire process of legitimate executive discretion to withhold funds would be unduly hampered. Given the specified reasons for the reservation of funds under the Act, there is no reason for Congress to feel that permissive spending language should be misconstrued to mean that Congress is somehow indifferent about whether its policies are being properly implemented.

C *Conflicting Statutory Authority*

As the previous discussion indicated, the Administration has gone to great lengths to interpret Congressional appropriations and statements of policy as merely permissive. However, at other times, the administration has

erred on the side of interpreting Congressional policy as more binding than Congress intended. These latter actions are neither the product of schizophrenia nor of retrospective contrition for past "sins." Rather, they are an integral part of the administration's determination to justify impoundment.

On their face, some laws seem to lend justification to impoundment. These are the laws that, however worded, are claimed by the administration to be totally inflexible. They are then used to legitimize the voiding or modification of other Congressional enactments. The administration calls this taking care "that the laws be faithfully executed;" a layman may more properly label the action "playing both ends against the middle."

In presenting his case for impoundment, Weinberger stresses that the President must execute all the laws, not simply authorization or appropriations. He claims that "several laws explicitly restrict the spending of funds regardless of what sums may have been appropriated on an individual basis."³³ Specifically, he relies on spending ceilings and the public debt ceiling. In addition, the Employment Act of 1946 which calls for the maximization of employment, production and purchasing power is cited for the proposition that the President has a broad responsibility to fight inflation by use of impoundment.³⁴

Weinberger's case was perhaps best summarized by Senator Mathias at the Hearings:

Mr. Weinberger has painted a very graphic picture of a President standing at a crossroad with several sets of directions from Congress. He then feels that he has the complete discretion to use any one of these avenues . . .³⁵

Examination of the three areas of conflicting statutory authority mentioned above illustrates the fallacy of the Weinberger case.

- 1 Weinberger's strongest case for impoundment seems to rest in the area of spending ceilings. Indeed, the recent ceiling proposed by the administration which would have vested full discretion in the President to keep spending below \$250 billion would have constituted, if passed, full Congressional approval of impoundment as it is now being used. The crucial fact, however, is that precisely because of this, the Senate voted down the proposal.

Nonetheless, the administration has unilaterally chosen to limit itself to this \$250 billion ceiling and has thereby attempted to justify current impoundments. Thus, in his budget message for fiscal 1974, the President said

Holding 1973 spending to \$250 billion . . . will be difficult . . . If we did not budget with firm restraint our expenditures in 1973 would be over \$260 billion.³⁶

This statement makes clear that: 1 the President is proceeding as if Congress had passed his ceiling request and 2 Congressional actions indicate a willingness to spend over \$260 billion. The President is certainly within his right to charge fiscal irresponsibility if he chooses, but he cannot maintain that, in the present year at least, Congress has given him conflicting statutory obligations insofar as any spending ceiling is concerned.

In the past, however, such ceilings have been imposed and Weinberger did rely heavily on them in his 1971 defense of impoundment. In particular, he said that such "constraints . . . are aptly illustrated by Title V of the Second Supplemental Appropriations Act 1970."³⁷

Weinberger was challenged on this point by Professor Alexander Bickel of Yale Law School who asked how the President could be restricted by the ceiling in question "if (it) consists of no more than the figure he . . . (initially estimates) plus or minus whatever Congress adds to it?"³⁸ Weinberger's response claimed that if the administration estimates are wrong, "the outlay ceiling does not expand automatically at all. It remains firm."³⁹ Consequently, "a management job or a job of complying with the will of Congress has to be done."⁴⁰ Thus, Weinberger puts the finishing touches on a beautiful portrait of the President, harried in his attempts to obey the every wish of his Congressional taskmaster.

Careful examination of Title V indicates that Weinberger's portrait is not authentic. The bill makes clear that the amount stated as the ceiling "is a beginning figure, not an ending figure."⁴¹ Coupled with that beginning figure, which is based on the President's initial projection of budget outlays, is a provision which states that:

whenever action, or inaction, by Congress, on requests for appropriations and other budgetary proposals, varies from the President's recommendation (budget proposal) . . . the limitation set forth herein shall be correspondingly adjusted.⁴²

Furthermore, "other actions" of Congress which affect budget outlays will trigger the same automatic adjustment mechanism.⁴³ In short, "the language would operate continuously to adjust the ceiling . . . to comport with . . . specific Congressional actions or inactions having budgetary impact."⁴⁴

The only contingency which would prevent adjustment of the ceiling would be the Budget Bureau (OMB) Director's failure to comply with the order that he inform Congress of the projected effect of Congressional actions or inactions. In fact, the President is specifically empowered by the Act to seek supplemental relief if unforeseen and unavoidable outlay increases "cannot be accommodated within the overall total."⁴⁵ The automatic rise in the ceiling was present in both the fiscal 1970 and 1971 laws. And, it should be noted, that despite Wein-

berger's testimony, the Administration was fully aware of the flexibility in the ceiling. In fact, as Louis Fisher observed, President Nixon spoke of the Congressional limit as a "rubber ceiling" in the sense that "increased spending later enacted by the Congress would be added to the ceiling and decreases taken away."⁴⁶

Thus, Administration concern for Congressional will seem limited to those cases in which such "concern" allows the President to impose his own will by citing his Congressional "mandate." Congress was apparently aware that such was the case. Title V notes that in initiating the previous year's ceiling, the Appropriations Committee

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 . . . The whole idea was . . . (to put) the control of total spending in the hands of Congress, adjustable only by the Congress.⁴⁷

- 2 The argument based on the second conflicting Congressional authority, the debt ceiling, suffers from the same basic infirmity – selective interpretation. The debt ceiling is hardly as binding as the administration sometimes likes to claim. Over the years, Presidents have developed a number of ways of circumventing it.⁴⁸ Testifying before the House Ways and Means Committee on March 5, 1969, Treasury Secretary Kennedy outlined the means the Treasury Department would employ (and has employed in the past) if the debt ceiling were not raised.⁴⁹ The methods available are somewhat technical and need not be discussed here. What is important is the fact that, when it has served their ends, administrations have had little trouble in circumventing the debt ceiling. As Treasury Secretary Fowler concluded before the Senate Finance Committee in 1967 "it has been very clearly demonstrated that during recent years . . . (the debt ceiling) has proved to have no real effect on either the actions of the Congress or the action of the executive in the spending field."⁵⁰

Thus, the administration argument that it is required to impound to meet the restrictions set by the debt ceiling loses much of its force. This is not to suggest that the administration should circumvent the debt ceiling. Whether such action would constitute a violation of the will of Congress would largely depend on whether the "loopholes" permitted are Congressional oversights or whether they are Congressional devices intended to permit flexibility. However, no administration should be allowed to pick and choose its interpretation to resolve each situation in its own favor. In his previously cited memo, William Rehnquist conceded that, at times the ceiling may create a conflict "but it appears to us that the conflict must be real and imminent for the argument to have validity; it would not be enough that the President disagreed with spending authorities established

by Congress.”⁵¹ The conflict could hardly be real and imminent if, as Senator Humphrey says, “the debt ceilings increases are granted by Congress almost upon request by the President.”⁵² If the debt ceiling is “inflexible,” it is so because the President has so chosen, not because he is unwillingly bound by Congress.

- 3 Rehnquist’s comment is particularly relevant in addressing the administration’s third claim of conflicting Congressional authority – The Employment Act of 1946. The Act was passed to give official sanction to the tacit acceptance of Keynesian economics. 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. The administration has broadly interpreted the Act to give it wide powers to cut spending as an anti-inflation device. In few other areas has the Administration been as guilty of cloaking its policy disputes with Congress behind the veil of a Congressional “mandate.”

Weinberger quotes Section 1021 of the Act as the Administration’s justification:

(It 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.⁵³ (emphasis added)

Weinberger is correct that the quoted section makes clear that there is a strong Congressional policy concerning inflation (promoting maximum purchasing power). However, as in the Anti-Deficiency Act, limits are placed on the Executive’s freedom to implement that policy. The italicized portions of the quoted section makes this clear.

Note that the Act says “Federal Government” rather than “Executive.” Obviously, Congress intended to have a role in promoting the economic policies of the country in pursuance with the law. Nowhere in the Act is the President given plenary power to act unilaterally in the fight against inflation. On the contrary, section 1022 of the Act instructs the President to transmit an annual Economic Report to Congress setting forth various economic data and “a program for carrying out the policy declared in section 1021 of this title, together with such recommendations for legislation as he may deem necessary and desirable.”⁵⁴

The requirement that the President submit a program and specific legislative recommendations to Congress would seem to preclude any broad power to act unilaterally in this area.

Furthermore, the italicized portion of Section 1021 restricts governmental action by requiring that it be

limited to “practicable means consistent with its needs and obligations and other essential considerations of national policy.” To the extent that 1) an appropriation is considered some form of obligation on the Executive and, 2) that the Congressional right to set fiscal and spending priorities is deemed “an essential consideration of national policy,” executive impoundment to fight inflation is in conflict with the Employment Act. As Professor Cooper noted, it might be “very nice, very convenient, and very effective”⁵⁵ for the Executive to control inflation through impoundment, but none of these factors creates a legal right to impound for such purposes.

Even as the Employment Act did create a right to impound for inflationary control, the Administration must still be held accountable for the selective and often inconsistent ways it has acted. Louis Fisher pointed out the inconsistency in a memo written “to examine points raised by Mr. Weinberger.”⁵⁶ Fisher observes that while the President’s fiscal 1971 budget was “anti-inflationary,” the budget message for fiscal 1972 spoke of a “turnaround of this inflationary trend” thereby allowing the

Administration to follow “more expansive economic policies without losing ground in the battle against inflation.”⁵⁷ Furthermore, economic priorities had shifted from fighting inflation to fighting unemployment (which the Employment Act also establishes as a high national priority).⁵⁸ In this regard, Fisher notes that one of the Administration’s key arguments in support of the supersonic transport was that it would provide more jobs.⁵⁹ He concludes:

At least that is consistent with the objective of an expansionary budget. But why are jobs associated with Model Cities, urban renewal, regional medical programs – and other programs affected by impoundment – of less importance?⁶⁰

Others who feel that the Administration has used inflation as an excuse for killing unwanted programs have asked the same basic question. After the Nixon Budget proposal for fiscal 1973 was unveiled, Congressman William Anderson expressed concern that while numerous urban and rural projects were suffering impoundment cuts, the President had requested a 64% increase in the budget of the Subversive Activities Control Board (SACB).⁶¹ The SACB increase was particularly galling because the courts had so narrowly circumscribed its activities that, in recent years, it had come to be viewed as little more than a Washington sinecure.⁶²

The late Senator Allen Ellender, Chairman of the Senate Appropriations Committee, pointed out that in 1970, the Congress had appropriated about three and a half billion dollars less than the President had requested.⁶³ Thus, any funds impounded in that year on the grounds of inflation were more likely impounded because the

President had different spending priorities than the Congress. Of course, all appropriations do not contribute equally to inflation. Thus, it is conceivable that the President could have impounded funds which were particularly inflationary while requesting more funds than Congress felt were necessary in less inflationary areas. Nevertheless, the presumption is that where the President requests \$3 billion more than Congress appropriates and then proceeds to impound appropriated sums, he is more likely substituting Presidential judgment on spending priorities than earnestly attempting to fight inflation.

Professor Cooper has recognized the fatal flaw in the Administration's entire case. In each of the three areas of conflicting Congressional authority, the Executive has ignored less drastic alternatives than impoundment in trying to meet its obligations. Furthermore, rather than seeking Congressional guidance in resolving the difficulties the President has assumed plenary power to act.⁶⁴

For there to be any validity to the claim that the President must ignore Congressional appropriations in order to reconcile conflicting statutory obligations, the burden is on the President to prove that 1) there is an *objective*, as opposed to subjective, conflict in Congressional mandates, 2) the conflict must be "real and imminent" rather than a distant possibility and 3) there cannot be any less drastic remedy available to resolve the problem.

Weinberger had opened his argument by citing the Constitutional provision requiring that the President "take care that the laws be faithfully executed." The word "faithfully" makes clear that the President has a duty to act "in good faith." Selective interpretation to justify thwarting of Congressional policy is undoubtedly not what the Framers had in mind.

D *Precedent of Congressional Acquiescence*

Precedent is heavily relied upon by the Administration as part of its overall justification for impoundment. On one level the argument can run as follows: Congressional acquiescence to executive action over a period of time somehow constitutes creation of a right which otherwise might not exist. On a second level, the Administration might argue that acquiescence is evidence that Congress has felt that its will has not been thwarted by impoundment.

A colloquy between Weinberger and Professor Cooper is illustrative of the first thread of the argument. Based on an analysis of the BOB's highly restrictive view of its right to impound, Cooper asked what had changed since the first thirty years: "Why can the Budget Bureau now claim inherent power . . . after 170 years in which this has not been clear at all?" Weinberger retorted by citing the importance of administrative interpretation and action under the statutes. Cooper agreed. "I think the best case . . . for the current withholding is precedent, Congress having allowed you to get away with it over the last 10, 12, 15 years."⁶⁵

In the Administration's most recent defense precedent was again stressed. Deputy Attorney General Joseph Sneed cited a case of impoundment dating back to President Jefferson in 1803 and maintained that Congressional acquiescence to such a long-continued practice "carries with it a strong presumption of legality."⁶⁶

However, to the extent that Congressional acquiescence is considered an important element of justification, another Administration argument, that there is an indisputable inherent Constitutional right to impound is weakened.⁶⁷ Strong reliance on Congressional assent is a tacit admission that contrary Congressional action would be significant. If the Administration truly believes that there is an inherent impoundment power, Congressional acquiescence should be considered irrelevant in terms of the legal case for impoundment.

However, the fundamental point to recognize in addressing this aspect of the Administration's case is that past practice cannot create a right which otherwise would not exist. If impoundment as practiced is indeed an abuse, then Congressional acquiescence merely serves to discredit Congress, not to justify the President. The Administration would certainly not argue that a district attorney's refusal (well within his broad discretionary power) to prosecute corruption cases would, over a period of time, thereby justify corruption.

As to the second argument derived from Congressional acquiescence, it is true that if Congress's inaction is interpreted as consent, then it is indeed difficult to argue that impoundment constitutes a thwarting of Congressional will. Nevertheless, the argument, though compelling, is not ultimately persuasive.

In the first place, Congressional inaction is often indicative of little more than Congressional inaction. There are so many obstacles to overcome before any bill can become law that drawing inferences about Congress's will on such a basis is simply unreliable.⁶⁸ In an analogous situation, concerning whether courts could construe Congressional silence as assent to their interpretation of statutes, Justice Rutledge once observed:

(T)here are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business.⁶⁹

Justice Rutledge might have added a filibuster, a stubborn chairman, or a conference committee deadlock, as possible explanations for Congressional silence in a particular area. None of these factors can be fully equated with Congressional consent to presidential policy.

Lack of deference for Congressional actions constitutes the second major flaw in the Administration's case. Implicit in the argument that Congressional will is not being thwarted because of alleged consent is the assumption that, were Congress to remove such consent, the Administration would alter its practices.

This is clearly not so. In fact, suit is now pending before the Supreme Court over the Administration's refusal to release highway trust funds which had been frozen *despite mandatory Congressional language* (see discussion of Missouri Highway Trust Funds below) and John Ehrlichman's previously noted statement that the Administration will not release funds which it considers wasteful, even in the face of a Congressional override of a veto, indicates that Congressional dissent, however strong, is not considered binding by the Administration. Given this fact, any argument based on supposed Congressional assent seems more a smokescreen or public relations device than an earnest position.

E *The Constitutional Issue*

As with any basic conflict over the respective roles of branches of government, both sides inevitably look to the Constitution to support their case.⁷⁰ Given the political milieu in which the Constitution was drafted, it is not surprising that the issue of impoundment was not squarely addressed. The Constitution was written by a group of men who shared the progressive political theories of their age—fear of autocratic rule by Kings, Congress, and particularly the House, was viewed as the peculiar representative of the people. Many Constitutional provisions can only be understood in this light. For instance, the requirements that no funds could be drawn but in consequence of an appropriation made by law or that all Revenue Bills must originate in the House were limitations on the Executive based on Parliament's previous clashes with the King. Given this political context, it is not surprising that the Framers did not explicitly provide for the contingency that the Executive might wish to spend less than the Congress appropriated.

Because of this, and the absence of Supreme Court cases, both sides have been forced to base their Constitutional argument on logic, inference, and extension. In arguing their cases, each side adheres to a broad view of its own Constitutional powers coupled with a more limited view of those of its opponent.

Defining the Congressional appropriations power in the most limited way, the Administration claims for itself broad discretionary powers in spending. Citing Congress's affirmative powers, opponents of impoundment see executive discretion limited to the implementation rather than the formulation of policy. The Administration claims broad inherent Constitutional powers which its opponents readily dispute, citing Congress's own enumerated powers against this proposition. Constitutional clauses, case law, and arguments based upon "necessity" are all embroiled in the dispute.

1 **The Limited View of Appropriations**

Weinberger opens his constitutional case for the executive branch by quoting Article I, section 9, which states "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." From this language, two corollary assumptions are drawn: 1) Spending is an executive function, and 2) an appropriation is not a mandate to spend.

According to Weinberger's analysis, the particular clause "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."⁷¹ This interpretation had been strongly repudiated by William Rehnquist in the aforementioned memo for the Justice Department. After making the broad statement that it is "extremely difficult to formulate a constitutional theory" justifying a Presidential refusal to comply with a Congressional spending directive, Rehnquist says:

It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the executive is bound to execute the laws, it is free to decline to execute them.⁷²

Weinberger's second assumption arising from Section 9 is based on the broadest possible interpretation of the "permissiveness" of appropriations and the narrowest interpretation of Congress's policy-making function. Seizing upon the negative phrasing of the language in the provision, Weinberger claims that although money cannot be spent without an appropriation, it need not be spent merely because of an appropriation.⁷³ Though Weinberger concedes that the Executive can probably be required to spend, if mandatory language is used, he maintains that in the absence of such language, the President has broad discretionary power.⁷⁴ In other words, appropriations are viewed as merely permissive, not obligatory.

By this argument, Congress is forced to assume a tremendous burden. It must somehow prove that it wants its appropriations spent before the Executive is obliged to do so. In fact, a seemingly disproportionate amount of time during the hearings was devoted to a debate on what form language must take before it is considered mandatory. Numerous experts solemnly addressed themselves to the question of how to phrase legalistically the concept "and we mean it."⁷⁵ At one point, the Republican Counsel of the Subcommittee, Joel Abramson, was forced to conclude: "Perhaps we should publish a book as to what words mean 'and we mean it' and which ones don't."⁷⁶ Even assuming this could be done, it still would not resolve the previously-discussed problem that such mandatory language would unduly restrict the proper exercise of executive discretion.⁷⁷

Nevertheless, Weinberger maintains his case based on the negative phrasing of the provision. In so doing, he has molded a single negative phrase into the cornerstone of a philosophy which decrees Congressional activism. Because most parties to the dispute generally agree that Congress can ultimately force the executive to spend if sufficiently strong language is used, it is the Administration's shifting of the presumption from obligatory to permissive appropriations which has aroused such a furor. With this shift, many Congressionally desired programs would undoubtedly be lost. Thus, shifting the presumption would do far more than inconvenience the Congress or force it to be more exact. In many cases, the shift would determine whether Congress's will would prevail—or the President's.

This raises the fundamental issue: Implicit in the shift of presumption is the question of the respective roles of Congress and the President in formulating national policy and priorities. Simply stated, the question is who did the Framers intend to have primary responsibility in this area? The President limited only by specific Congressional prohibitions and absolutely explicit Congressional demands? Or, the Congress, limited by enumerated grants of legislative power to the Executive such as recommending legislation or vetoing? The Administration would probably balk at phrasing the question in such a direct manner; however, when appropriations are characterized as ceilings within which the Executive is free to exercise broad discretion, the question must be addressed.

2 Congress's Affirmative Powers

Before turning to the text of the Constitution to resolve this dispute, one must remember the political context in which it was written. "Separation of Powers" was one of the great driving forces behind progressive political theory in the second half of the 18th Century. Montesquieu had written, in "The Spirit of the Laws" that there could be no liberty when the executive and legislative powers resided in the same person or body.⁷⁸ Montesquieu was particularly concerned lest the power of raising money reside in the executive.

This fear was reflected in Federalist No. 58 which emphasized the fact that the power of the purse was to reside in the representative of the people (the House) which could use it to reduce "all the overgrown prerogatives of the other branches of the government."⁷⁹ However, as important as this negative power was, the Federalist placed equal stress on the affirmative uses of the appropriations power. "The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government."⁸⁰ This affirmative aspect was emphasized in the Federalist:

This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.⁸¹

With this background, it is now possible to examine the Constitution to see what guidance it gives in resolving the dispute.

Any discussion of this issue must begin with the Constitution's broad grants of power. "The Executive Power shall be vested in a President of the United States . . ."⁸² There is no consensus as to exactly what the executive power is, but it is clear that, as Justice Douglas put it, "the power to execute the laws starts and ends with the laws Congress has enacted."⁸³ Justice Douglas underscored this point by noting that the President's "power to recommend legislation . . . serves only to emphasize that it is his function to recommend and that it is the function of Congress to legislate."⁸⁴ Article I, Section 1 of the Constitution explicitly states "All Legislative powers herein granted shall be vested in a Congress of the United States."

These broad statements, of course, have been undercut, compromised, and qualified by courts since Justice Marshall's day.⁸⁵ Though they do serve as useful points of departure, the complex issues of impoundment must be addressed by more specific Constitutional clauses.

To support his claim that appropriations are basically permissive, Weinberger had cited Section 9 of Article I which sets forth a list of limitations on the government and particularly on Congress. More appropriate in resolving the impoundment question, however, is Section 8 which lists the affirmative powers of Congress and which indicates for what purposes money might be drawn from the Treasury.

Chief among the affirmative powers granted to Congress is that "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the Common Defense and General Welfare of the United States." This clause may be broken down into two powers. Explicitly, Congress is to have the taxing power; implicitly, Congress is the branch of government given responsibility to provide for the common defense and the general welfare. As Jefferson wrote, "the laying of the taxes is the power and the general welfare the purpose for which the power is to be exercised."⁸⁶

If this clause is now coupled with the negative clause cited by Weinberger, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . .," an entirely different picture presents itself than the one painted by the Administration. No longer does the language cited by Weinberger appear to limit the meaning of an appropriation to a mere ceiling. Rather, in context with Section 8, Section 9 seems a clear limitation on the power of the President to make policy or establish priorities. The argument runs as follows: 1) Congress can provide for the common defense and general welfare (through imposition of taxes); 2) spending money is the chief means of so doing;

3) no money can be drawn from the Treasury except by Congress; 4) therefore, Congress is the only branch which can set spending priorities for the nation—in providing for the general welfare or common defense.

If Congress is the branch specifically entrusted with setting priorities, then Weinberger's argument about the broad permissiveness of appropriations must fall for two reasons. First, it claims for the Executive an authority which was specifically denied by Section 9. Undoubtedly, the purpose of that clause was to prevent the Executive (or anyone else) from having the power to allocate the distribution of Federal monies. Underlying the phrase "no money shall be drawn" must be the concept "no spending priorities shall be set."

Second, Weinberger's claim denigrates the affirmative power of Congress to provide for the general welfare and common defense. In construing the relevant clause, the Supreme Court has adhered to a broad definition which recognizes Congress's substantive power to appropriate, limited only by the requirement that such appropriations be made to provide for the general welfare.⁸⁷ In so ruling, the Court explicitly rejected the theory that the powers granted by the clause were limited by Congress's other enumerated powers.⁸⁸ If Congress's attempts to exercise this substantive power to provide for the general welfare (as embodied in appropriations) are deemed to be merely permissive, then the entire power is downgraded. They then do become merely "attempts to exercise" the power. In redefining the presumptions concerning appropriations, the Administration has, in effect, rewritten the Constitution to read:

Congress shall have Power to lay and collect taxes . . . to set the ceiling under which the Executive may provide for the common defense and general welfare.⁸⁹

This interpretation of broad Congressional power and commensurately restricted Executive power in the field of policy-making and priority-setting for the nation is greatly enhanced by the "necessary and proper clause."⁹⁰ This final clause in Section 8 states that Congress shall have power:

to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof. [Emphasis added.]

The italicized portion of the clause makes it clear that Congress is not only empowered to make laws to execute its own enumerated powers, but it is also empowered to make laws to regulate the execution of all powers vested in the Executive Department. An appropriation does more than academically declare a Congressional policy; it also sets the scope and speed at which Congress wishes the policy implemented.⁹¹ Thus, any impoundment designed to modify a Congressional

policy, or its scope and speed, is an Executive infringement on Congress's right to make laws regulating the execution of powers vested in the President. As Rehnquist asserted in his Justice Department memo, impoundment of funds for federally-impacted schools would constitute "defeat of the Congressional intent that the operations of these districts be funded at a *particular level* for the fiscal year."⁹² [Emphasis added.]

3 Inherent Powers of the President

It is in the area of inherent Presidential powers that the Administration makes its broadest claims for impoundment. It is here that the Administration paves its collision path with Congress. Deputy Attorney General Sneed asserted that the Congress could not prohibit the President from withholding funds nor could Congress turn to the courts.⁹³ Weinberger was even more explicit, stating that someone has to decide whether the President is properly executing powers and authority which the Administration claims he possesses and "It is very important that the President himself reserve the right to make these decisions."⁹⁴ These statements make clear that, however politely and deferentially the Administration will testify before Congress, in the final analysis, the President does claim the inherent right to impound—regardless of Congress's dissent.

The Administration case for inherent powers is based on specific and general Constitutional bases. Specifically, reliance is placed on the Commander-in-Chief power. More generally, the Administration claims the right under its broad management and executive functions and under the "faithful execution of the laws" provision. Finally, the precedent of past presidential action is cited. Each claim will be considered in turn.

The Commander-in-Chief Power

Control of the armed forces is an excellent example of the doctrine of separation of powers. Fear of the possible abuses inherent in either branch fully controlling the military lead the Framers to divide the power between Congress and the President.⁹⁵ Thus, "The President shall be Commander-in-Chief of the Army and Navy" (article II, sec. 2, cl. 1). However, Congress is empowered through Article I, section 8:

To lay and collect taxes . . . to . . . provide for the common defense;
To raise and support armies, but no appropriation of Money to that Use shall be for a longer Term than two years;
To provide and maintain a navy;
To make rules for the Government and Regulation of the land and Naval forces; and
To make all laws which shall be necessary and proper . . .

These provisions make clear that the military power is to be shared and that the power of the Commander-in-Chief is limited by Congress's enumerated powers. Edward S. Corwin, a Constitutional scholar, has noted that the clauses of the Constitution giving Congress enumerated powers over the military were not inserted

for the purpose of endowing the National Government with power to do these things “but rather to designate the department of Government which should exercise such powers.”⁹⁶ Lawrence Brady put the matter more simply, by noting that although there are no express limitations on the President’s power as Commander-in-Chief, “it should be remembered that he must first come to Congress to get an Army and Navy to command.”⁹⁷

Despite the division of responsibility over military affairs set forth by the Constitution, the Administration has made a claim of tremendously strong authority. Weinberger said that a good legal case could be made for the proposition that the overriding powers that “have to go” with the authority of the Commander-in-Chief “are such that they may well be in a separate category and that the powers incident to that authority *are not subject to other powers or limitations in the Constitution.*”⁹⁸ Weinberger cites no authority for this broad statement and it seems clear that Constitutional construction would militate against it. No power was more feared by the Framers than that over the military. As noted, the power was carefully distributed between the two branches. In fact, Congress was specifically prohibited from delegating its powers to the President by the two-year limitation on military appropriations bills. Much of the motivation for placing the power of the purse in Congress was to put limitations on the President’s military authority. And, of course, Congress, not the President, was given the power to declare war. Given these factors, it is difficult to imagine how Weinberger could claim that the single-most feared and carefully circumscribed power was intended to be beyond “other powers or limitations in the Constitution.”

It is not sufficient to assert that the military power is shared between the two branches. More important is the attempt to describe the exact lines of division. Implicit in the different grants of power is the idea that the President shall be the tactical and strategic commander of the forces which Congress shall provide, maintain and regulate.⁹⁹ Thus, the President has the general power to direct the military in its operations but Congress, through the appropriations power, decides how large, well-equipped, etc. the military is to be, as well as which weapons systems are to be procured or not.

This division of power was explicitly recognized in the Federalist which stated that the Commander-in-Chief’s power “would amount to nothing more than the supreme command and direction of the military and naval forces . . .”¹⁰⁰ Furthermore, the Courts have also addressed the problem. In *McBlair v. United States*, the Court stated that Congress has the right to legislate for the army as long as it does not impair the President’s efficiency as Commander-in-Chief and when a law is

passed, with that qualification, the President “becomes as to that law an executive officer, and is limited in the discharge of his duty by the statute.”¹⁰¹

This statement poses the central issue in the dispute over the Commander-in-Chief function. The President has a tremendous amount of flexibility in exercising these powers. Deference to the role of supreme commander is shared by most members of Congress and by the nation as a whole. In emergencies or during war, this deference soars. However, the power to regulate and equip the armed forces rests in Congress. Congressional action in these areas of proper responsibility necessarily preempts any inherent powers the President might otherwise have. Certainly, the right to make decisions embracing the equipment, size and nature of the armed forces is a Congressional power, subject only to Presidential recommendation or veto.¹⁰²

In the field of appropriations, it may be argued that Congress has affirmatively acted to establish its right to determine the size and equipment of the armed forces. In 1949, Congress amended the National Security Act of 1947 and recognized the right of Service Secretaries and members of the Joint Chiefs of Staff to by-pass the President (and BOB) to make recommendations concerning their budget needs on their own initiative and directly to Congress. As Brady pointed out, the military will inevitably desire more funds than the President is willing to approve. Hence, their right to appeal directly to Congress “becomes a nullity unless Congress also possesses the right to act upon their appeal.”¹⁰³ In short, the inherent power a President possesses as Commander-in-Chief does not include the right to withhold monies appropriated by Congress for the armed forces.

Broad Claims of Inherent Power

Justifications based on the Commander-in-Chief theory are quite specific compared to the broad claims of inherent power which have been advanced by various Administrations. In 1967, the Director of the Budget Bureau was asked about the legal authority to impound. He replied, “Basically, it is the general power of the President to operate for the welfare of the economy and the Nation in terms of combatting inflationary pressures.”¹⁰⁴ Weinberger referred to “the Constitutional provisions which vest the executive power in the President” and the “general management power” of the Executive.¹⁰⁵ And most recently, Sneed succinctly said “We rest on Articles I, II and III!”¹⁰⁶

These broad claims rest on two basic premises. The first is simply the need for someone to be able to act on an efficient, day-to-day basis because of the cumbersome-ness of Congress. This need necessarily entails the President being able to make policy decisions.¹⁰⁷ The second premise is that the President must faithfully execute all the laws, including some which may be mutually inconsistent.¹⁰⁸ This, too, necessarily involves discretion and

policy-making since the President must decide how to resolve the conflict.

The argument based on faithful execution was discussed in the "Conflicting Statutory Authority" section of this paper. Briefly to recapitulate, it was found that for the argument to be persuasive, there must be:

- 1 an objective, as opposed to manufactured, conflict in Congressional laws,
- 2 the conflict must be "real and imminent" and
- 3 there must not be any less drastic remedies available.

If any of these factors is not present, the Executive cannot claim legitimate conflicting authority to justify impoundment.

The issues involved in the first premise have been argued and decided by the Supreme Court in the *Steel Seizure Case*.¹⁰⁹ This decision, though not based on an impoundment controversy, has been called by Professor Bickel "the principle statement of the relationship between Congress and the President where powers are inherent."

The case arose when President Truman ordered the seizure of steel mills to prevent a nation-wide strike of steel workers. The action occurred in 1952 during the Korean War. The mills were seized and the President promptly informed Congress, which took no action.

In its brief the government did not argue that the seizure was based on specific statutory authority. Rather, it cited "the aggregate of (the President's) . . . constitutional powers as the Nation's Chief Executive and the Commander-in-Chief of the Armed Forces . . ." ¹¹⁰ This broad claim of inherent power was rejected by a 6-3 majority of the Court. The decision was badly splintered, with 5 concurring opinions; however, a consensus was reached by 6 justices as to one crucial issue. Though the President may have some inherent powers in the absence of Congressional action in a particular field, once Congress does act, those powers are necessarily preempted. If Congress has proper authority to legislate in an area, that legislation defines the limits of Presidential action. Justice Jackson formulated the principle of the Court:

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.¹¹¹

In examining the statutes dealing with labor disputes, the Court found that granting to the President the power to seize property, though considered, had been rejected by Congress.¹¹² Congress had thus set the limits under which the President was forced to act.

The opinion of the Court is directly relevant to a consideration of the President's inherent powers in the impoundment area. In certain respects, the seizure was more justifiable than impoundment:

- 1 The seizure occurred in the midst of a war when a steel strike could have had a serious, detrimental effect on the national defense.
- 2 The action was a temporary, *ad hoc* executive response to an emergency situation, unlike the routine use of impoundment.

The appropriations power is clearly within the scope of Congressional authority. Thus, any Congressional action which limits impoundment precludes inherent Presidential power to act otherwise. Congress has acted to limit impoundment through the passage of the revised Antideficiency Act. As previously noted, the Act permits reservations of funds for only two purposes:

- 1 to provide for contingencies and
- 2 to effect savings.

Furthermore, the House Report accompanying the Act was explicitly clear that though savings were to be effected, "there is no warrant or justification for the thwarting of a major policy of Congress by . . . impounding . . ." ¹¹³ Thus, the *Steel Seizure Case* coupled with the *Antideficiency Act* precludes impoundment for policy reasons. As Professor Bickel stated:

I read the Antideficiency Act with its legislative history . . . as being the assumption by Congress of its residual power in this area. I read it as mandatory . . . and I read it as telling the Executive in what circumstances he can establish reserves . . . my professional puzzlement as a lawyer is why is this section . . . not the decisive answer? Why does anybody go to this problem with anything before him but this document?¹¹⁴

It was precisely this analysis that the Budget Bureau officials, opposed to the Antideficiency Act, feared. Two years before the *Steel Seizure Case*, they recognized that having Congress statutorily recognize and define the impoundment authority would reduce rather than secure the power.¹¹⁵

Precedent to Justify Inherent Powers

It is difficult to address the argument concerning the role of past presidential action as a justification for impoundment because the Administration seems to shift ground in presenting its claim. On one hand, Weinberger points to the long history of Presidential action and interpretation of powers as an important authority. He immediately qualifies this by adding that Congress has the ability to override the decisions if they are contrary to its will.¹¹⁶ Later, however, he makes the blanket assertion that it is important that the President himself must decide whether his actions are proper

exercises of his powers.¹¹⁷ This would seem to preclude Congress reversing the action. Reconciling all the available data indicates that the basic premise in this regard is that Presidential interpretation and actions, in determining the executive's definition of its office, may serve as an independent ground for supporting impoundment.

The argument of previous Presidential action as legitimizing authority for current action was raised by the government in defense of the steel seizure. Justice Black, writing for the Court, rejected this claim:

It is said that other Presidents without Congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution in the Government of the United States, or any Department or officer thereof.¹¹⁸

The analogy to the impoundment controversy is inescapable—both as to past Congressional limitations of the power (the Antideficiency Act Revision) or to prospective limitations on the power. Congress clearly has the power to modify, reduce or terminate any presidential power to impound—regardless of what Presidents in the past have done.

Finally, in considering the overall question of precedent, one must remember that, like a double-edged sword, it cuts both ways. The Administration has cited one example after another of Presidential use or defense of impoundment. However, the Administration has not discussed the legislative history of the Antideficiency Act, the BOB's restrictive view of impoundment, or other equally important "precedents."

Evaluation of the Constitutional Issues

Because no Constitutional provision and no Supreme Court decision is directly on point, the Constitutional issue cannot be resolved in any blanket statement. What can be done is to weigh the arguments pro and con, consider the relevant cases and Constitutional text, and attempt to draw the fairest conclusions based on this analysis. On each count, the balance falls in favor of the Administration's right to reserve funds for statutorily-approved reasons but heavily against the Administration's right to impound for policy reasons.

The spending of money is an executive function, but coupled with the requirement that the laws be *faithfully* executed, the Administration is estopped from selectively enforcing only those laws of which it approves. Congress's right to pass laws, under the necessary and proper clause, which regulate the President's execution of his powers is another important limitation on Presidential prerogatives in this area.

The Administration claim that appropriations, as distinguished from all other laws, are permissive unless otherwise stated is a deprecation of the affirmative powers of Congress set forth in Section 8 and an attempt to circumvent the clear limitation on Executive policy-making which is embodied in Section 9 (allowing no one but Congress to allocate Federal funds from the Treasury and, implicitly, to set spending priorities). Furthermore, it creates a form of item veto which is difficult, if not impossible, to override. The veto granted by the Constitution was carefully restricted. It was to be neither an item veto, nor an absolute veto.¹¹⁹ The fact that the President, through impoundment, can exercise a power of item veto which was explicitly denied him by the Constitution may serve as an independent basis for invalidating the practice on Constitutional grounds.¹²⁰

Claims for impoundment based on the aggregate of the Commander-in-Chief function similarly must fall. The Constitution clearly divides the power over military affairs between the two branches and places policy-making for the provision of the armed forces in Congressional hands. Furthermore, the *Steel Seizure Case* repudiated this notion of inherent Commander-in-Chief powers at least in those cases where Congress has asserted its residual powers through legislation.

The *Steel Seizure Case* stands for the proposition that once Congress passes legislation in an area of its proper responsibility, any broad inherent powers which the Executive might otherwise claim are necessarily restricted by the Congressional enactment. The Antideficiency Act constitutes the Congressional assumption of responsibility in its clear area of prerogative: the spending of funds. Taken with its legislative history, the Act permits reservation of funds for contingencies and to effect savings but precludes impoundment for policy reasons.

In short, the necessary and proper clause, the Antideficiency Act, the *Steel Seizure Case*, and the faithful execution clause combine to set the Constitutional limits on impoundment. Taken together, they present an extremely strong case against the practice of impoundment to effect policy changes.

To some, this may be unfortunate. Given the complexities and scope of modern government, the increasing need to control spending and the proven irresponsibility of Congress¹²¹ in fiscal matters, impoundment looks like a very desirable and efficient device. However, as Justice Brandeis pointed out, the "doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."¹²²

V Abuse Through Impoundment: Thwarting Congress to Achieve Presidential Policy Objectives

The foregoing discussion has attempted to draw the line between the legitimate and illegitimate withholding of funds. Absent a truly inflexible spending or debt ceiling, the President is acting within his statutory and Constitutional authority only when funds are withheld to meet specific contingencies within a program or to effect savings within a program. Savings may be effected only if the full amount of service mandated by Congress can be provided for less than anticipated originally. In making decisions to withhold funds, Congress's intent, not the President's desires or beliefs, must be controlling.

Despite these limits, the Nixon record of impoundment reveals an unparalleled disregard and contempt for the will of Congress. Congressional programs not favored by the Administration are simply dispensed with. Frequent use of impoundment is having a wide impact, previously unknown. The President has imposed broad priority shifts on Congress. Large numbers of programs are being terminated, rather than merely deferred, in a dangerous new departure of the practice. Such terminations are occurring regularly, whenever the President unilaterally decides that particular programs are not effective or efficient. Given the absence of specified and fixed criteria to measure "effectiveness", the President is able to exercise *carte blanche* in making these determinations. These abuses have all been magnified by the Executive department's use of duplicitous devices to shield its acts from Congressional and public scrutiny.

Dispensing with Unfavored Programs

In the past, foreign wars were generally the occasions for impoundment. However during the Nixon Administration, the overriding source for impoundment has been a domestic war — that between the Congress and President over differing policies. Congressman Henry Gonzalez of Texas has pointed out that "we have had, of course, more vetoes and more vetoes overridden within the last 30 months than we had in the prior administrations of three different Presidents"¹²³

When vetoes are made and overridden with this frequency, two facts readily become apparent. Most obvious is that there are vastly differing priorities held by the two branches. This sets the climate for policy-motivated impoundment.

But more significantly, vetoes and overrides on this scale are evidence of a loss of trust and respect between the President and Congress. This removes the constraints from policy impoundment.

Lack of trust, in and of itself, is certainly not inimical. In fact, separation of powers is enhanced by a healthy distrust of the other branches. However, when that distrust is coupled with an unhealthy lack of respect, there is a serious danger that one branch will usurp whatever powers its political muscle is strong enough to seize and

maintain. At such times, the Constitution may be viewed more as an obstacle to be overcome than as a code of restrictions to be adhered to.¹²⁴

At the present it is the Executive branch which is on the offensive and which is usurping the powers of the other branch. The power of Congress to establish governmental policies and to order priorities through legislation is being dangerously undermined.

The Administration is making no secret of its disregard for Congressional spending policy. One of the better verbal examples was provided by the President himself. Playing the role of the stern parent, he scolded Congress by saying: "But if you are going to have responsibility, you have to be responsible, and Congress . . . has not been responsible on money."¹²⁵ The implication is that if Congress does not behave "responsibly," its appropriations powers will be taken away. Because the Constitution apparently did not foresee this particular need, there has been no branch of government specifically entrusted with the power of deciding whether Congress has acted maturely.

In the interim, the Administration has filled the vacuum. When it has decided that either specific programs were undesirable or that broad-range priorities were misplaced, it has used impoundment to redress the problem. As John Ehrlichman put it "does the President just abandon common sense when *he knows better*?" (emphasis added)¹²⁶

A good example of this common sense approach occurred in fiscal 1971 when Congress and the Administration differed on the use of categorical grants to promote water and sewer facilities projects.¹²⁷ Congress had initially appropriated \$500 million for the projects. The President vetoed the bill. Thereafter, Congress passed a \$350 million appropriation which became law. The President still felt that this amount was being misplaced so impoundment as a "second veto" was used and \$200 million was frozen. Congressman Zablocki wrote to OMB officials to voice his concern.

The OMB reply came from Caspar Weinberger who told Zablocki that:

. . . the President firmly *believes* that revenue-sharing represents a *much more effective* way of helping local governments . . . than the *narrowly focused* categorical programs which now exist. (Emphasis added)

Weinberger then explained why the Administration favored revenue-sharing and concluded by stating that *some* of the categorical grant programs would continue to be funded, "to facilitate transition to general and special revenue-sharing."

Similar reasons were cited for withholding funds from urban renewal, Model Cities, low-rent public housing and

other urban programs. Testifying before a Senate Committee, HUD Secretary George Romney explained that funds were being withheld from these areas because there was no point in accelerating programs which were "scheduled for termination."¹²⁸

What Romney did not explain was, simply, scheduled by whom? Congress had neither passed a revenue-sharing bill nor indicated that there was "no point in accelerating" categorical grant programs. On the contrary, its refusal to do so was what had led to the impoundments.

If Congress had passed a revenue-sharing law at the time, the Administration could have offered a colorable argument that it would be inefficient to continue funding of the categorical grants.¹²⁹ But unilaterally deciding which form of program is preferable is a clear abrogation of legislative authority. Furthermore, revenue-sharing would have to be equivalent in amount of service provided, for this argument to be persuasive. Mayor Richard Hatcher of Gary, Ind., has estimated that the current revenue-sharing will bring his city less than 40% of what individual Federal grants amounted to in 1972.¹³⁰

At best, the Administration was guilty of a high degree of presumption in assuming revenue-sharing would be enacted and would be intended to supplant categorical aid. However, at the time in question (1971), the *New York Times* reported that "The Mayors are doubtful that Congress will enact the Nixon (revenue-sharing) Proposal."¹³¹ This raises the possibility that the impoundments were a form of political blackmail with the Administration saying in effect, that the funds for the various urban projects would *only* be made available in the form of revenue-sharing. Congressional opponents of revenue-sharing would then be given the Hobson's choice of approving the Nixon proposal or seeing the cities denied the needed funds.¹³²

The political blackmail possibility is increased by the fact that when Congress has not acted in accord with Administration "expectations", the President's actions have not been any different. A recent example, reported by the *New York Times*, entailed the gradual elimination of emergency employment assistance, a public employment program designed to provide temporary work during the recent period of high unemployment.¹³³ The President's 1974 budget delegates the functions of manpower projects to the state and local levels where the option to rekindle the programs will be left. This may sound like a replay of the Administration arguments for impounding urban funds because of the pendency of revenue-sharing. However, in this case, such pendency cannot be claimed as a rationale. As the *Times* observed:

In effect, President Nixon is now *creating* a manpower revenue-sharing by administrative action that is similar to a program that *Congress failed to act on legislatively*. (emphasis added)

The revenue-sharing cases might be interpreted as a Presidential attempt to cut through the *status quo* and force Congress to update its programs. However, impoundment has been used in reverse: to prevent shifts from the *status quo*.

Prior to food stamps, rural poor were fed through a commodity-distribution program.¹³⁴ However, this arrangement proved unsatisfactory. The Senate Select Committee on Nutrition and Human Needs had outlined the program's shortcomings. As Timothy Ingram noted, the main problem was that this method was designed

more to absorb farm surplus and keep farm prices up than to feed the hungry. The result is insufficient food, nutritional imbalance, dangerous shortage conditions and red tape.¹³⁵

Because of these problems, Congress decided to switch to food stamps to feed the poor. Nevertheless, in many areas food stamps were simply unavailable: OMB had impounded \$200 million of the funds.

What is clearly going on is not merely an executive attempt to promote the most efficient programs in each area. Rather, it is the President's attempt to promote the programs which he finds philosophically or politically most desirable in each area. This much has been privately admitted by the Administration. A high-ranking OMB official confidentially told the *National Journal* in 1971: "Take urban renewal and model cities (\$783 million impounded at the time), Nixon doesn't believe in (the programs). Draw your own conclusions."¹³⁶

Not surprisingly, the 1974 budget served notice that these and other urban programs disliked by the President would be terminated. After July 1, HUD will approve "no new projects for urban renewal, Model Cities, open space, neighborhood facilities, water and sewer systems, rehabilitation loans and public facility loans."¹³⁷

The *New York Times* reports that survival of these programs, after their unexpended funds are exhausted, "would depend on whether Congress enacts the President's special revenue-sharing plan for community development."¹³⁸

Sweeping terminations such as these raise the inevitable question of how impoundment decisions are made by the President and the OMB. In a confidential interview (August, 1972), a high-ranking OMB official gave a candid answer.¹³⁹ He listed four criteria which are employed:

- 1 The programs involved is "ineffective" or "improperly functioning";
- 2 The program is philosophically objectionable. As an example, he suggested "... it's a welfare program and we should change the entire program to discourage people from staying on welfare";
- 3 A pending program is supposed to replace the program in question. His example was the impoundments of HUD funds in anticipation of revenue-sharing.

- 4 Congress appropriates more funds for a program than the President's budget request calls for (termed "add-ons"). "Obviously, when we must impound, we do it to the add-ons".

Examining these four items reveals how completely the President has seized the legislative power to set spending priorities. Items #2 and #4 indicate that impoundment decisions are often based on pure Presidential desires. Items #1 and #3 grant broad justifications to scrap virtually any program.

The President has demanded for himself the power to define the "effectiveness" and the "efficiency" of programs.¹⁴⁰ The power to define, no less than the power to tax, is ultimately the power to destroy. Congress's disagreement with the President's assessments is evidenced by its continual funding of the programs in question.¹⁴¹

Congressional disagreement with Presidential assessments is especially significant when the question of add-ons is considered. Nowhere else is disdain of Congress more evident. By definition, add-ons are only made when Congress and the President differ on a budgetary matter. They are also made only after the Congress has considered the President's requests and heard testimony from the affected agencies. Because agency heads are constrained from departing from the President's recommendations,¹⁴² and because Congress usually shows a great deference for those recommendations,¹⁴³ the deck is already stacked largely in the President's favor. When the President is given the power to impound, his control of spending becomes virtually complete.

An illustration of this totality is provided by the following table which appeared in the *National Journal*. Though the table only deals with urban impoundments, it is indicative of the general treatment of Congressional add-ons.

The first three columns reveal that it is the President's budget, not Congressional appropriations, which determines the amount of funds spent. Given the "unmet demand" and "program backlog," Congress apparently did appropriate in a discriminating and responsible manner.¹⁴⁴ Nevertheless, every time Congress attempted to alter the President's "request," the full amount of that alteration was withheld.¹⁴⁵ There was apparently no Congressional input, via the appropriations process in any of these spending decisions.

Furthermore, Administration statements make clear that no change in this practice should be expected if Congress attempts to alter the current budget proposal.¹⁴⁶ It is for these reasons that the President's budget proposal is considered less a proposal than a "final offer."

A good illustration was the termination of a project to build a national aquarium in Washington. At a time of inflationary pressure and limited resources, many saw the Aquarium's \$10 million cost as a needless luxury. Furthermore, a number of people on Capital Hill have admitted that the appropriation was passed more as a favor or sign of respect for its chief sponsor, Congressman Kirwan, than because of the pressing need for a Washington Aquarium.

Impoundments in Urban Sector

This table lists impoundments of major housing and transit programs for fiscal 1971. Program backlog is the total demand for funds for approved programs and does not include pending applications. Unmet demand is the difference between program backlog and the Nixon Administration's spending plans. In most cases, the Nixon budget and the funds withheld add up to the appropriation. In the case of model cities, however, the Administration now plans to spend more than the \$375 million it budgeted; thus, the budget figure and the amount withheld fall short of the appropriation. All figures are in millions of dollars.

	appropriated	Nixon budget	withheld	program backlog	unmet demand
Urban renewal	\$1,200	\$1,000	\$ 200	\$2,756	\$1,756
Model cities	1,107	375	583	*	*
Water and sewer	350	150	200	2,500#	2,350
Public housing	320	128	192	560	432
Mass transit	600	269†	200	1,000†	731†
Total	\$3,577	\$1,922	\$1,375	\$6,816#	\$5,269#

*— Approximately 50 per cent of initial applications and 30 per cent of initial program budgets were approved for model cities program. Few, if any, additional cities are to be designated under pending fiscal 1972 budget.

#— \$465 million of the total backlog is listed as active backlog for fiscal 1971.

‡— Excluding model cities.

†— Capital grants only. The total Administration budget for mass transit is \$400 million.

SOURCE: Senate Committee on Banking, Housing and Urban Affairs

The aquarium, for all its doubtful importance, did carry with it a duly enacted appropriation couched in *mandatory* spending language.¹⁴⁷ Nevertheless, the Administration terminated the project.¹⁴⁸

In response to a charge that policy-making rather than fiscal management was entailed, Caspar Weinberger replied:

Well, the Administration has decided not to fund the project and thereby, certainly, *given Congress another opportunity to consider* the relative importance of the fish in this particular fiscal year.¹⁴⁹ (emphasis added)

Elsewhere, Weinberger indicated that based on the relative priorities, the termination was a good decision.

The fact that Weinberger was probably correct in his assessment raises the central issue of policy impoundment. There are basically two types of disdain which the Administration can show for Congress. The first is a contempt for Congressional actions, priorities, judgments, etc. Preference for revenue-sharing over categorical grants or for termination of the aquarium fall within this category. The Administration has every right to *feel* contempt at this level.

However, the second level of disdain is far more serious. This is disdain of Congress as an institution. Thwarting programs, repealing laws, ignoring directives, fall in this category. It is when "feelings" of disdain manifest themselves in "actions" of disdain that a real threat to the Constitutional separation of powers emerges.

According to America's doctrine of rule by laws, the average citizen has the right to rant, rave or rage at the actions of Congress, but not the right to ignore laws on the grounds of disagreements. The Administration has the same right coupled with the same obligation.

Broad Scale Impact of Impoundment

Although impoundment has existed as a serious Presidential policy tool since Roosevelt's time, the level of criticism has never been deeper or harsher. The reason is that critics of Nixon policy-impoundment feel that it differs in kind rather than degree from past practice. Explaining the greater amount of criticism which has been directed at Nixon, Congressman Pickle observed that in the past, "the major cases were isolated and sporadic". He continued: "recently, however, the use of impoundment by OMB has developed into a tool of broad policy legislation."¹⁵⁰

For reasons to be discussed below, there is insufficient data with which to compare Nixon impoundment quantitatively with past practice (See "Absence of Fixed Criteria" section). However, there is a strong feeling that the practice differs qualitatively for three reasons: 1) basic spending priorities have been drastically altered; 2) there has been a more direct adverse effect on many citizens

than under previous impoundments; 3) termination rather than deferral has become more common.

Altering Priorities: Domestic Cuts to Pay for Defense

"The only casualties in the war on inflation are still civilian"¹⁵¹

In the recent Nixon budget it was decided that the nation could not afford \$384 million to continue support of the Community Action Program. However, when Budget Director Robert P. Mayo once questioned Defense Secretary Laird about the need for a \$300 million item in the defense budget, the irritated Secretary snapped back: "For heaven's sake, stop nickel-and-diming me to death." Nothing could better illustrate where the Nixon Administration places its priorities.

The President has every right to believe in whatever priorities he chooses. However, in recent years Congress has evidenced differing views of the needs of the nation. Through impoundment the President has been able to ensure that his views prevailed.

Any discussion of priority-shifting must begin with the frank recognition that most of the budget is "uncontrollable" in that past legislation has created obligations which must be met. For instance, interest on the public debt must be paid, whatever the costs, on the previously established rates. Similarly, many programs are open-ended in that all qualifying claims must be paid, regardless of other limits. Among these programs are Social Security, Medicare, military retirement, Veterans Benefits, and certain public assistance grants. In 1971, two-thirds of the budget was uncontrollable.¹⁵² And President Nixon's 1974 budget sets the uncontrollable figure at 75%.¹⁵³

What this, of course means is that Congress, through appropriations, and the President, through the budget, can only establish their respective spending programs by juggling 25% of the budget. Relatively few decisions will determine spending priorities for a given year. Therefore, in considering the policy consequences of impoundments, one must calculate the effects on the relatively small "controllable" portion of the budget rather than on the overall budget figure.

In 1971, an OMB official told the *National Journal* that the President only had a "fringe at the top" to establish his Administration's program.¹⁵⁴

Once Nixon decided he did not want to cut the defense budget any more - that's where the real money is - there was very little room for us to play with, to get his program in and stay within a predetermined ceiling of \$229 billion.

Of course, the statement reveals that within the "fringe" broad discretion was exercised. Louis Fisher pointed out the extent of this policy determination by carefully analyzing budget and impoundment figures for 1971. Noting

that impoundments can only be made in the “controllable” portions of the budget, Fisher calculated the Defense Department’s (DOD) share of the controllable budget and its share of impounded figures. Although its share of the controllables was 76%, its share of impoundments was only 10.5%. Fisher concluded:

If DOD is underrepresented in the area of impounded funds, domestic programs are necessarily overrepresented and must bear the brunt of the burden.¹⁵⁵

While massive cuts were being made in Congress’s social programs in order to fight inflation, the President was requesting additional funds for B-1 Bombers, SST’s, Trident Submarines, Safeguard Missiles and other such programs.¹⁵⁶ One Congressman was particularly galled by the fact that although funds for loans to small farmers were cut, loans for Lockheed were advocated by the Administration.¹⁵⁷ Clearly, Congress and the President held strongly differing views of broad questions of national policy. Through impoundment, the dispute was resolved in favor of Presidential control of such decisions. Priority shifts on this massive scale are a new departure in the long history of impoundment.¹⁵⁸

Adverse Effects on Broad Numbers of Citizens

Another unique aspect of Nixon impoundments has been equally responsible for much of the acrimonious criticism which has been heard. Except during the height of war, never have so many citizens been as directly and adversely affected by the practice. In the past, most cuts have generally come from the defense budget or highway trust funds. Though these projects have their ardent supporters, cuts in the Nike-Zeus or Polaris programs have not had as disastrous an effect as cuts made in health, poverty, housing and similar social programs. As Timothy Ingram noted, “It is hard not to agree with Senator Percy, who can give up a little Congressional power to stop the highways, but can find such a loss unacceptable when it comes to food stamps.”¹⁵⁹

Of course, an impoundment purist would be equally aghast at the withholding of funds for highways or for needed medical care. But most people, including members of Congress, are not that objective and many of the following cuts undoubtedly flamed the fires of anti-impoundment feelings.

Over 90 members of Congress signed a strong letter of protest to President Nixon in 1970 when it was discovered that approximately \$3 million (including a \$2 million supplemental appropriation) had been withheld from the Indian Health Care Program. The letter noted that as a result, Indian hospitals were being “forced to close wards, refuse admissions, curtail surgery, postpone elective but necessary medical care, and discontinue immunization shots to children.”¹⁶⁰ The full implications of these cuts

were revealed in an exchange between Congresswoman Hansen and a doctor testifying before a House Appropriations committee:

Mrs. Hansen: On contract medical care, assuming the provision for increased cost is sufficient to maintain the current level, what percentage of your program are you now reaching with the funds you have?

Dr. Rabeau: At the present time, we are reaching between 60 and 70 percent of the total need.

Mrs. Hansen: Isn’t it true that when you lack funds in this area, before recommending care for one person or another, it could involve the decision of whether one person will die or live?

Dr. Rabeau: This actually very often happens, Madam Chairman, that a physician has to make a judgment because of limited funds.¹⁶¹

An equally strong letter was sent by a group of Senators to express deep concern that the Emergency Food and Medical Services program administered by O.E.O’ (Office of Economic Opportunity) was being “arbitrarily dissolved” by the OMB. After citing strong indications of continued Congressional support for the program (including a Supplemental Appropriation “directing” expenditure of the funds),¹⁶² the letter enumerated some of the results of termination:

Termination . . . would jeopardize the nutritional status of a specially vulnerable group: pregnant women, new mothers and young infants . . . ;

Termination would affect experimental group feeding programs for the elderly poor;

Termination would mean the end of the only extensive experimentation underway in the uses of the mass media to provide nutritional education;

funds being made available . . . to transport food commodities to eligible but homebound elderly poor . . . would no longer be available.¹⁶³

Termination Rather Than Deferral

The third new dimension of impoundment has been added by the increasing use of termination rather than deferral of projects. Although “mere” deferrals can often spell life and death, as with the cuts in the Indian Health Program, termination is obviously much more serious.

Even during periods of intense national crisis, Congress has only sanctioned *deferral* of projects. At the outset of World War II, President Roosevelt explicitly said “During this period of national emergency, it seems appropriate to *defer* construction projects that interfere with the defense program by diverting manpower and materials.”¹⁶⁴ (emphasis added) His added reference to the desirability of establishing “a reservoir of post-defense projects to help absorb labor that later will be released by defense industry” serves only to underline that the impoundments were temporary.¹⁶⁵

The lesson from history is clear: if even during the height of war, the President has been expected to postpone rather than terminate projects, terminations made during peacetime are that much more odious.¹⁶⁶

In the absence of all-out war, impoundment in recent years has derived most of its justification as an anti-inflation device. During inflationary periods, even the President's right to unilaterally *defer* expenditures is questionable. There is no question, however, that he cannot terminate programs because of inflation.

Nevertheless, under the cloak of inflationary pressures, the Nixon administration has been unilaterally announcing the termination of a broad range of social projects. As previously noted, no new projects for urban renewal, Model Cities, open space, neighborhood facilities, water and sewer systems, and other urban projects will be "approved".¹⁶⁷ Senator Ervin has noted the termination of several agricultural programs, including the rural environmental assistance program and emergency disaster loans to farmers.¹⁶⁸

Other social areas are receiving the same treatment. While proposing a subsidy, in the form of tax credits, to parents sending their children to *private* or *parochial* schools, President Nixon "proposes the elimination of dozens of popular education programs".¹⁶⁹ This is less a proposal than an order because parts of these programs are to be shifted to revenue-sharing. There has been considerable Congressional resistance to educational revenue-sharing and, according to the *New York Times*, "most legislators influential in education matters doubt that the Nixon proposal will become law this year."¹⁷⁰ Nevertheless, "Caspar Weinberger . . . *threatened* that money might not be made available for continuation of the programs in their current format *if revenue-sharing was not enacted*."¹⁷¹ (emphasis added)

In more general terms, OMB's new director Roy L. Ash has confirmed that President Nixon will strive to reduce the number of Federal employees year by year.¹⁷² According to the *Times*, "the reductions will be sought by the abolition of Federal programs and agencies . . ."¹⁷³ Nowhere is this more apparent than in the current dismantling of the Office of Economic Opportunity (O.E.O.).

Though certain OEO functions are to be delegated to other agencies, some functions are to be undermined or destroyed. The most notable termination is the Community Action Program (CAP), considered the heart of the "War on Poverty". Under its umbrella, a wide range of employment, health, and other anti-poverty programs were co-ordinated.¹⁷⁴ While CAP is to be outrightly abolished, another OEO offshoot, the Office of Legal Services, is slated for emasculation. The President has called for abolition of the present system with legal services to be funded through a private corporation. The corporation would decentralize the program and allow state and local governments to determine its future direction. Of course,

it is precisely these governments who have been the victims of many legal service lawsuits. Furthermore, if revenue-sharing actions are any indication, there is a strong danger that Congress will have the choice of either accepting the Nixon proposal or seeing the legal services money denied. Continued funding of the *present* system faces the full range of Presidential opposition (vetoes, impoundments, harassment, etc.).

The grounds for termination of these programs are quite illuminating. The *New York Times* notes that apparently inconsistent reasons were given in the budget for the abolition of the Community Action Program.¹⁷⁵ The main budget volume claims that community action concepts have now been "successfully incorporated into ongoing programs and local agencies." However, the more detailed budget appendix says that the program was being terminated because of its failure. And an OMB official offered a third explanation: that the concept of seeking political power for the poor through community action had failed, offending local officials while rarely aiding the poor.

Success, more than failure, is the most likely explanation for the programs' elimination. For years, the legal services program has been "a bone in the throat of conservatives because it provides lawyers to *combat government programs in court*."¹⁷⁶ (emphasis added) These lawsuits were often costly and/or embarrassing to the government. The *New York Times*, in a strong editorial, noted that "once again, a Legal Services Director (Ted Tetzloff) in Washington has been fired for defending the program and fighting its politicization".¹⁷⁷ He is the third director to leave that job "under fire" in the last 27 months.¹⁷⁸

It is far from clear that the programs were failures. Angry protests have greeted the announcement of termination — protests by those whom the programs were supposed to have failed. A number of OEO employees are working voluntarily, despite losses of their salaries, to keep the programs functioning for as long as possible. In its editorial, the *Times* observed:

the storefront lawyers for the poor have brought a fuller meaning to the idea of equal justice under law . . . This public service law has . . . changed attitudes and courtrooms for the better while helping to restore faith in the legal system.¹⁷⁹

Perhaps the strongest evidence of legal services' success can be measured by the vengefulness with which it is being destroyed. Phillip V. Sanchez, OEO director, has been replaced by Howard Phillips who has been assigned for the purpose of overseeing the OEO's dismantlement.¹⁸⁰ When he fired the latest head of legal services, Phillips declared:

Every country needs its Cato. Well, I'm going to be this country's Cato. Carthage was destroyed because it was rotten. *I think legal services is rotten, and it will be destroyed*.¹⁸¹ (emphasis added)

The view of Phillips as Nixon's executioner is shared by others. Detroit's OEO Director James Oliver observed "Phillips is nothing more than a massive ball on the end of a wrecking crane."¹⁸²

But whatever the merits or failures of legal services and Community Action, the President's swift and unilateral action in dismantling them raises ominous questions. Before Congress has even had a chance to act on the budget proposal, OEO offices are being cut and staffs fired. This, despite the fact that the "92nd Congress, in renewing the agency, wrote into law a number of provisions intended to insure it against executive cuts."¹⁸³ For instance, the OEO "director" was specifically barred from delegating OEO functions to any other agency.¹⁸⁴ This has been circumvented by replacing OEO Director Sanchez with "acting director" Phillips.¹⁸⁵

The haste with which OEO has been dismantled was prompted by far more than mere "over-eagerness". A 20-page leaked memo revealed the alarming degree of the Administration's contempt of Congress. The document entitled "Congressional Strategy on OEO", had been drafted by an OMB official. The memo suggested the following strategy to effect termination of OEO:

- 1 avoid "confrontation" on the constitutional power questions;
- 2 steer debate on the issue to the House and Senate Appropriations Committees "whose interests most closely align with the President's";
- 3 dismantle the program *quickly* to present Congress with a "fait accompli."

The memo even contained tactical suggestions, such as the following:

develop adverse public and Congressional reaction to the scattered, angry demonstrations that are *virtually inevitable when these decisions are announced*. (emphasis added)¹⁸⁶

Thus, the Administration's haste was prompted by its fears that Congress did not share its feelings of the undesirability or failure of the program. This is the essence of disdainful, policy-making by the President.

Absence of Fixed Criteria to Evaluate "Effectiveness"

By refusing to announce the criteria employed in weighing a program's "effectiveness" the President has given himself tremendous lee-way in destroying those of which he does not approve. The *true* battle against inflation is compromised, and inefficiency in certain areas of the budget is encouraged, by this practice. In this regard, and because of the deception of the country involved, the President has performed a great disservice.

No one is against helping the sick, the poor, the needy, the farmer, the unemployed, or the ghetto-dweller. Thus,

when programs designed to do just that are cut back, the reason cited is invariably that the particular program has been inefficient, duplicative, or, in some way, a failure. This is a basic political maxim which cuts across partisan and ideological lines.

Some programs are really failures and deserve to be terminated. However, the words "ineffective" and "failure" have been so debased by constant use for political purposes that these classifications immediately arouse suspicion. Thus one of the dangers of selective definitions is the creation of a credibility gap.

With these thoughts in mind, it is possible to examine recent Nixon cut-backs and terminations of social programs which have been based on failure, duplication or ineffectiveness.

It is fair to say that no group has been more guilty of "overkill" in the use of these concepts than the present Administration. The President's budget message is filled with references to outmoded, inefficient, unwise programs:

Common sense tells us that it is more important to save tax dollars than to save bureaucratic reputations. *By abandoning programs that have failed, we do not close our eyes to problems that exist; we shift resources to more productive use*".¹⁸⁷ (emphasis added)

With these words, over 100 programs were cut or terminated.¹⁸⁸

No one disagrees that failures and inefficient programs should be cut (though by Congressional action not Presidential fiat). However, more than a label should be required before a program becomes a failure. The President has not outlined specific objective criteria against which *all* programs can be measured. Nor has he carried a burden of proof before destroying "ineffective" programs. What is the cost-benefit ratio of Model Cities or OEO? What percentage of overhead is considered ineffective in feeding the poor? Who decides? Congress assumedly disagrees with the President's evaluation because the "ineffective programs" have been strongly supported and re-funded.

There is no greater tool of policy than the power of selective definition. If inflation and tax increases must be avoided, *all* programs should be scrutinized for inefficiency, not merely those not favored by the President. Unfortunately, the Administration's selective scrutiny has examined social programs with a microscope while eschewing even a telescope for defense-related areas. Even the most casual logician would be forced to conclude that there is a double standard operative in the following examples.

While the President speaks of social programs whose "overlapping of responsibilities has increased the costs of government",¹⁸⁹ the army is building two air-defense

missiles which are virtually identical in function.¹⁹⁰ The improved Hawk System carries an \$800 million price-tag while the SAM-D will require \$5.2 billion tax dollars (including \$1.3 billion already in cost overruns.) But Congressman Aspin notes that “if the improved Hawk is as effective as army officials claim, then the SAM-D is simply not needed.” Furthermore, the House Appropriations Committee identifies no less than nine different laser or optically guided missiles in use or development by the navy and air force.¹⁹¹ Strong words of criticism were pronounced on these costly examples of interservice competition.¹⁹²

The same fears of the burgeoning domestic bureaucracy are not applied to the Defense Department. “Today, there are some 900,000 *fewer* officers in uniform than . . . in 1945, but we have about 5000 *more* colonels, lieutenant-colonels, Navy Captains and Commanders . . .”¹⁹³ (emphasis added)

In terms of audacity, no domestic department would dare ask Congress for one billion dollars to build a project for which it did not yet even have the working drawings. But with the proposed Trident missile-firing submarine, the Navy did just that.¹⁹⁴

And HEW, HUD and other such domestic programs are simply incapable of matching the Pentagon’s inefficiency record in cost overruns. The General Accounting Office (GAO) released a report last year which documents in great detail the waste and inefficiency of such overruns.¹⁹⁵ In an examination of 77 weapon systems, the GAO discovered that the difference in original and revised estimates totaled about \$28.7 billion (31%) and that was before the systems had even been completed.¹⁹⁶ Thus the overruns are expected to run even higher.¹⁹⁷

The Pentagon’s way of dealing with this serious problem has not been to prevent overruns – it has been to try to hide them. The favored “cosmetic” method is to reduce the number of weapons bought, but accept the higher prices. Thus, had the Pentagon purchased the full number of ships, guns and missiles for which Congress had appropriated funds, the overrun figures would have reached almost \$40 billion rather than the \$28.7 billion quoted.¹⁹⁸

122

An equally favored device is silencing Pentagon employees. Untold billions of dollars in military aid and equipment is *secretly* given to foreign countries but no accounting is called for.¹⁹⁹ On the contrary, an official in the Pentagon’s Comptroller’s Office, J. Frank Crow admitted: “Hell, man, that’s my job.: to lose track of it.”²⁰⁰

Executive Branch Deceptions

Besides the obvious waste and inefficiency involved, the notorious cases of attempts to hide Pentagon waste raise serious questions of the Executive department’s attempts to deceive the Congress and the public. Unfortunately,

such deceptions have become common practice in the Administration’s handling of budgetary affairs. A wide range of duplicitous devices have been created to conceal policy decisions and to misinform. Nowhere is this more apparent than in the Administration’s handling of impoundment information.

Withholding Information

The first obvious area of deception concerns the supplying of information to Congress. Previously, the statement was made that it was difficult to quantitatively compare Nixon impoundments with those of his predecessors. The reason is not that it would be so difficult for the Budget Bureau to keep accurate records, but rather that it is so difficult to get the Budget Bureau to give Congress accurate information.

For a long time, it was a formidable task to get *any* information. Requests for impoundment figures were apparently viewed as unimportant or wastes of time. For instance, an informal request by House Appropriations Committee members that OMB merely keep them abreast of impoundment decisions was dismissed by (then) OMB Director George Shultz:

I would not want to make a commitment that every time we turn around . . . we make a report and send it around. If we did, we would be buried in paperwork.²⁰¹

Thus, through *reductio ad absurdum*, the Administration dismissed a valid request for proper information. The members would probably have been quite satisfied with just the major pieces of information because of the tremendous resistance Congress had met in seeking any impoundment data. According to Bill Goodwin, staff member of the Separation of Powers Subcommittee, “We had a hell of a time. We had been after the budget bureau for three and a half years before the information was finally released.”²⁰² (The breakdown on impounded figures was given to the Subcommittee during the 1971 hearings.)

During this three and a half year period, a previous attempt by the Subcommittee had produced a very distorted report from the Budget Bureau in 1969. Writing in a law review, Senator Franch Church discussed the bureau’s response:

The document which took “months” to prepare . . . presents a very sparse listing of “reserving” incidents, and fails to even mention several examples of impoundment cited in the scholarly literature. In fact, the Budget Bureau *seems to have been very careful to select only those cases that least call into question the practice of impoundment.*²⁰³ (emphasis added)

Then, restricting himself to only the “more blatant impoundments of military programs”, Church notes some of the more conspicuous absences from the list: 1950 cancellation of the aircraft carrier *Forrestal*; 1949 cut-back of the airforce by President Truman; 1959 impound-

ment of appropriated funds for construction of twenty superfort bombers; 1959 refusals to spend for the Polaris submarine and for support of the Marine Corps at a particular level.²⁰⁴ These are among the examples which have flooded the academic literature on impoundment, and, as Church suggests, “anyone casually acquainted with the history of impoundments must wonder how the Budget Bureau could have forgotten some of . . . (these) examples.”²⁰⁵

Church’s comments make clear that the problem was not so much one of amnesia as it was an outright attempt at distortion. If nothing else, the Bureau has always been renowned for its efficiency.

The most recent list supplied by the OMB has been called “unacceptable” by Senator Humphrey.²⁰⁶ Humphrey had been the author of the “Federal Impoundment and Information Act” (P.L. 92-599) under which the President was obligated to inform Congress of impoundments. Although the \$6 billion in unallocated water pollution funds is not even included in the report, it is the OMB’s presentation of the admitted impoundments that Humphrey found offensive. “The most striking aspect of this message is its incompleteness – full reasons for fund impoundment are not specified and little information is given as to when (we) can expect the funds to be released.”²⁰⁷ More particularly, Humphrey notes that two requirements, specified by law, were waived with a sweep of OMB’s broad pen.

The law requires that *each* impoundment action be accompanied by an estimate, to the maximum extent practicable, of the fiscal, budgetary and economic effect of the action.²⁰⁸ OMB simply dismissed this directive by observing that since the “reserves listed are consistent with the 1974 budget . . .”, the estimated effects have already been reflected in the President’s budget proposal.²⁰⁹ Humphrey points out that neither the budget nor the impoundment list gives Congress any information as to the specific effects that termination of, for example, REA (Rural Environmental Assistance) or the federal subsidized housing program will have on employment, inflation, or construction-materials production.²¹⁰ But this is precisely the information needed by Congress to establish priorities rationally through legislation.

Another specific question, embodied in the Federal Impoundment and Information Act, was given the same unresponsive treatment. The Act requires an estimation of the period of time during which the funds will remain impounded. The OMB replied by stating: 1) the Anti-deficiency Act requires quarterly review of all apportionment by OMB; 2) the period of impoundment is dependent in all cases upon the results of the review.²¹¹ Therefore, no estimates of duration of impoundments were given.

In both these cases, OMB could have provided far more information than it did. But complying more fully with the law would have: 1) given Congress information which could prove embarrassing and 2) undermined the Administration’s position that impoundment is inherently an Executive function and one in which Congress’s role should be minimized. Underlying each denial of information is this philosophy:

Don’t worry about how long the funds will be frozen. The same people who impounded them in the first place will be double-checking themselves every three months.

Don’t worry about the fiscal and other effects of our impoundments. We’ve figured it all out for you and it’s all consistent with the budget we gave you. Now if you will just sign here . . .

These formulizations may sound unfair; however, OMB director Ash has basically said as much in testimony before Congress. Claiming that preliminary budget data is so complex that Congress could not “make meaningful sense out of the hundreds of thousands of bits of information”, Ash maintained that this information should be withheld.²¹² Congress should only be given the “finished” product – the Administration’s spending recommendations.²¹³

The information which Ash wants withheld from Congress basically consists of the agencies’ funding requests submitted to OMB for examination, revision and inclusion in the President’s budget. Because agencies are expected to stand by the President’s recommendations when testifying before Congress, this information would really be the only way Congress could know how much the agencies, as opposed to the President, felt they needed. Withholding this information gives the President a quasi-monopoly on fiscal decisions. Withholding impoundment information helps complete the circle. At both ends, the President is, in Senator Muskie’s words, “spoon-feeding” the Congress.

Misinformation

When information is withheld, Congress is at least put on guard. When misinformation is offered, Congress is disarmed. The latter action is more disdainful of Congress, and more dangerous.

Some examples of misinformation are revealed by an examination of the OMB hand-out “Budgetary Reserves: June 1972.”²¹⁴ Unfortunately, the description of the agencies and programs involved and the reasons for impoundment are so broad that it is difficult to find many abuses which might present themselves in a more detailed document.

The OMB list is divided into two categories. The smaller one, in terms of dollar amounts (\$1.5 billion), is entitled “Reserves for Reasons Other than Routine Financial Administration, June 30, 1972”. These impoundments, made

for broad policy reasons, such as inflation control, spending ceiling limits, etc., contain many of the programs impounded because of Presidential disfavor.²¹⁵ A reasonable interpretation of the Antideficiency Act would label this entire list an unjustifiable use of impoundment.

However, the misinformation is contained in the larger category of impounded funds (\$9.1 billion) entitled "Budgetary Reserves for Routine Financial Administration". The reasons given for these reserves are the awaiting of 1) development of approved plans; 2) completion of studies for the effective use of the funds; 3) establishment of the administrative machinery necessary to manage the programs, and 4) the arrival of certain statutorily-prescribed contingencies. Furthermore, the hand-out states "the reserves established for routine financial administration are recognized by all concerned to be *temporary deferrals* and their need or wisdom is usually not questioned." (emphasis added)

An unsuspecting reader would, of course, assume that the \$9.1 billion was fully justifiable and that only the \$1.5 billion represented possible differences of opinion between Congress and the President. Closer examination of the "routine" reservations, however, reveals that this is not so.

The most glaring example of deception involves the classification of "Federal-Aid Highways: 1973 Contract Authority" as routine administration.²¹⁶ No reason is suggested in the hand-out for this impoundment. However, the amount involved, \$5.7 billion, is almost two-thirds of the entire \$9.1 billion of "routine reservations".

Congress had specifically stated that these funds were *not to be impounded*.²¹⁷ This entire case has been argued in a Federal Court which found the impoundment unauthorized, illegal and in excess of executive discretion.²¹⁸ Of special interest is the fact that during the trial the Administration sought to justify the withholding *not* on routine administrative grounds but rather for the "prevention of inflation of wages and prices in the national economy."²¹⁹ Thus, two-thirds of the "routine reserves" are admittedly "broad economic and program policy" reserves.²²⁰

There are other inconsistencies in the OMB's hand-out classifications. For instance, included in the "routine" impoundments is \$9. million for construction of the previously discussed Washington Aquarium.²²¹

The hand-out states that the money was withheld because the "facility cannot be constructed within the funding limits established by the authorization".²²² But, for two years, the full appropriation had been impounded because of inflation and similar broad policy problems.²²³ At the time of the initial impoundment (1969) the funds were sufficient to complete the project.²²⁴ But after a two-year delay, with all work stopped and rising construction costs in the interim, the 1969 amount was, of course, insufficient to complete the project in 1971.

Thus, by "deferring" the project for a sufficient period, the OMB *created* a "legitimate" reason to then terminate it. On the books, it appears to be a perfectly justifiable businesslike exercise of executive discretion. But, as Professor Bikel concluded "especially in construction contracts, an impoundment for a period of years, like this, amounts pretty well to saying the project is dead."²²⁵

Once the inconsistencies and distortions involved in the highway funds and aquarium case are recognized, certain phrases in the OMB hand-out begin to leap out at the reader. Among the often cited reasons for "routine" impoundments are:

"amount in excess of 1972 needs"
"excess of funds which could be *effectively used*"
"will be released when *needed*"
"awaits development of *approved* plans and specifications" (emphasis added)

Any healthy skeptic must wonder about how these words are used and who defines them.

Deceiving the Public

Of course, the average citizen does not spend time reading OMB compilations of budgetary reserves so that deception of the public takes a different form. The uppermost reason for deception of the public is for political advantage, particularly to pressure members of Congress who may wish to dispute the President's spending priorities. Many Congressmen who might otherwise oppose the Administration's budget cuts have been so intimidated by the reckless charges which have been made that most experts expect the President to win the current battle of the budget.

It is in the use of faulty either-or reasoning that the Nixon administration has attempted to gain the upper hand in budgetary matters. The Nixon message to Congress and the American people is clear; either the proposed budget cuts are accepted *or* the nation will face increased taxes or inflation.²²⁶

Eileen Shanahan, in an analysis of the budget for the *New York Times*, points out the obvious flaw in this reasoning:

(There) is the implication that the Administration examined every single government spending program to determine whether it was worth less to the body politic than avoidance of a tax increase.²²⁷

Clearly, this was not done. Numerous critics have pointed out that two obvious alternatives to the Nixon cuts were ignored: tax reform to raise additional revenues and a redistribution of the burden of spending cuts. Either of these would have prevented the massive cuts in social programs while not increasing the risk of a general tax increase or inflation.

The House Ways and Means Committee has begun hearings on tax reform. Numerous tax inequities which benefit big business and wealthy individuals have been discussed. "Capital gains, estate and gift taxes, real estate depreciation, rapid amortization of equipment, mineral depletion allowance and oil-well drilling costs are some of the areas urgently in need of reform."²²⁸ Despite this meaningful alternative to social program terminations, Shanahan observed that the budget was silent on the subject of taxes, "except to warn over and over (at one point, five times on a single page) that rejection of spending constraint would inevitably lead to the need to increase taxes."²²⁹ This silence is unfortunate because, according to testimony taken by the Ways and Means Committee, upwards of \$10 billion could be added to annual revenue through elimination of special privileges.

The Administration also ignored the wide range of possible spending cuts – other than its own. Because a number of Congressmen have indicated a willingness to adhere to the President's ceiling figure, the real question is how to distribute the priorities within that ceiling.²³⁰ Despite rhetoric about inflation and tax increases, it is here that the true conflict lies. During hearings, Congressman Whitten asked Administration officials whether the President would obey Congressional appropriations if Congress kept overall spending at or below the President's ceiling but rearranged spending priorities.²³¹ According to the *New York Times*, "none of the Administration officials would give the committee any assurance that in that hypothetical case, the President would spend the . . . (Congressionally-sanctioned) funds regardless of the total size of the budget."²³² Nothing could better demonstrate the Administration's duplicity and naked grab for power than this silence.

Abuse for Partisan Political Objectives

Thus far, a multitude of abuses have been documented, each entailing the substitution of Presidential policy judgments for those of Congress. However, there is an additional abuse of impoundment which deserves special consideration. Impoundment for *purely partisan objectives* cannot be justified by even the most distorted interpretation of the Anti-Deficiency Act or the Constitutional prerogatives of the President.

Nowhere is the Executive's power to "orchestrate events" for political advantage more apparent than in the selective freezing and unfreezing of funds. This power is employed both in election and non-election years.

In non-election years, funds can be released to weather various political storms. Two advantages accrue. A President with good political acumen can release *just enough* of the funds to take the edge off mounting criticism or to temporarily placate strategic Congressional members while important legislation is pending. Secondly, when the problems ebb, the funds can be re-frozen. Like the operator of a dam, lowering the waters when storms threaten and then replenishing the reservoir, the President is generally in complete control.

Though impoundment was not relied upon very heavily in the previous administration, President Johnson illustrated how impoundment storms could be ridden out. When \$1.1 billion in highway trust funds were frozen, strong criticism began rising in the states. Accordingly, President Johnson released \$175 million of the funds.²³³ Similarly, \$791 million in other domestic funds were released "on the eve of a conference . . . with governors."²³⁴

The Nixon Administration is equally adept at backtracking when necessary. Because of impoundment, the Federal Communications Commission (FCC) was forced to cancel an investigation into the reasonableness of prices and profits of the manufacturing subsidiary of A. T. & T.²³⁵ This launched an intense public reaction,²³⁶ so OMB quickly released the impounded funds and recommended an increase in the FCC's next budget for the program.²³⁷

Similarly, when anti-impoundment feeling reached a peak after the 1971 Hearings, President Nixon released some of the frozen funds.²³⁸ Selective action of this kind has also been used to placate Congress when important legislation was pending. The administration felt that "there was no question" that Nixon lost the SST because of impoundment.²³⁹ Therefore, in a "deep background" session with reporters, Herb Klein predicted the release of funds by mid-May, 1971, to help secure votes for the President's revenue-sharing and reorganization plans.²⁴⁰ Though OMB officials disagreed with Klein's prediction, they admitted "a certain amount always gets loosened up under pressure."²⁴¹

In making daily impoundment decisions, the OMB is careful not to offend certain powerful Congressional chairmen. An ex-OMB official confided that certain Congressional districts, those represented by these chairmen, are usually exempted from impoundments.²⁴² A classic illustration of the role of partisanship in the administration of the budget occurred in the Truman administration. During a long briefing by Budget Bureau officials, Truman discovered that, in cost-benefit ratio terms, there was a stronger case for the construction of a dam in a state represented by two Republicans, than in Wyoming which was represented by a powerful Democrat, Senator O'Mahoney. Truman reportedly said:

That's fine. You fellows do terrific work. That's why I like you. Now why don't you figure out a cost benefit ratio that lets Senator O'Mahoney have his dam.²⁴³

Besides these day-to-day political adjustments, once every two years, a particular opportunity for abuse presents itself – elections. The financial spigot power can be used on a broad national basis to manipulate the economy for overall political advantage. It can also be used on the narrower, district-by-district and project-by-project level as a carrot or whip to be held over the heads of particular Congressmen.

Two weeks before the 1970 elections, \$498 million in education funds were released.²⁴⁴ HEW Secretary Richardson was pointedly asked by the press whether the Administration decision was affected by the up-colling election. He unsurprisingly responded: "there is no connection whatsoever."²⁴⁵

The reason for the Press's skepticism is obvious. Maximum psychological advantage can be garnered by the timely release of funds. The beneficiaries will often turn grateful eyes to the White House, tending to forget the previous period during which the funds were withheld and often, failing to question why they were frozen and then suddenly released. Furthermore, the release of large sums can temporarily retard unemployment or stimulate the economy if politically desirable.

In early 1972, a number of leading Democrats voiced fears that funds would be released for maximum Republican advantage prior to the November election. However partisan these Democratic statements may have been, it appears they were correct. Senator Ervin, glancing nervously at the \$1.5 billion in "broad economic and program policy objectives" noted that release of several billion dollars

would provide a long-overdue stimulus to our sagging economy, and, I suppose that the occurrence of the resulting boomlet just before the presidential election this fall would be purely coincidental.²⁴⁶

Though Ervin's estimate was high, his prediction was essentially correct. On July 1, 1972, \$447 million of the non routine" reserves in REA, water and sewer grants, HUD loans and community assistance grants were released.²⁴⁷

In January of 1972, Congressman William Anderson of Tennessee actually attempted to estimate the amount to be released in the second half of the fiscal year (Jan.-June 1972) in anticipation of the upcoming election. Limiting themselves to two departments, HUD and Agriculture, his staff made informal inquiries to discover how much of the then-impounded money was to be released in this period. Their rough estimation came to over \$3.5 billion.²⁴⁸

126 Noting that this \$3.5 billion figure constitute approximately 80% of the total appropriated funds for these projects, Anderson screamed foul. "The tactic is simply this: spend at a 20% rate in a non-election year; 80% as an election rolls near"²⁴⁹

Besides the political aspects of the estimated release, Anderson was angry about the economic mismanagement involved. Citing the inconvenience, uncertainty, delays and layoffs, he concluded "such sporadic, shotgun disbursement of Federal Funds is the grossest form of business mismanagement and wastes countless millions."²⁵⁰ (emphasis added)

To attempt to separate rhetoric from fact, Louis Fisher was later requested to look at the actual releases made by June 30th. His memo reveals that Anderson's predictions were essentially correct.²⁵¹ The obvious footnote to this episode is to consider what happened after the election. Within two months, the President's new budget was released, and many of the programs which had been given a temporary stay of execution, such as Model Cities, Housing Subsidies, Urban Renewal, etc. were given the axe.

Unfortunately, it is difficult to pinpoint the exact degree of political manipulation involved when large amounts of funds are released prior to an election. Undoubtedly, there is some truth in the charges that "politics" is a strong motivating factor. But separating this from possibly legitimate factors is difficult.

However, on the narrower, district-by-district level, conclusions drawn can be more reliable. Congressman Sisk's staff has documented a case which can only be described as "crass politics" at its lowest. The Westlands Water District episode is so illustrative that it bears lengthy recounting.

On October 29, 1970, Congressman Sisk learned of an impoundment which would force the shut-down of part of the Westlands Water District project. The project had been the frequent victim of Presidential under-funding and impoundment in the past.²⁵² This latest impoundment was of particular concern because it would cost over 1200 jobs in this exceedingly high unemployment area, as well as another year's delay in providing needed water for small farmers.²⁵³

Fortunately for the district, California's Senator George Murphy was fighting for his political life against John Tunney. Murphy's seat was considered so important to the Republicans that President Nixon had joined him and Governor Reagan on a statewide election-eve broadcast.

In view of the political emergency, a truce was called in the war against inflation in California's 16th Congressional District. The election-eve broadcast was used as an opportunity to announce that Senator Murphy had been able to secure release of the funds to forestall the impending lay-off of California workers. The theme of successful "teamwork" between the Republican President, Senator and Governor was played to the hilt. Governor Reagan, in dramatic fashion, made the point:

It was almost noon when they found me . . . (concerning) a Federally-funded water project under construction - the money had not been released - and beginning Monday, there would have to be a lay-off of these California working men.

I got on the phone to track down the Senior Senator of California . . . By evening, the call came back from the nation's Capital . . .

The money has been released - there will need to be no lay-off of these working men in California!²⁵⁴

Few releases of impounded funds have been as politically timely as this. But that is only half of the political drama which unfolded.

Unfortunately for the Westlands Water District, and the “working men in California”, the release was not timely enough to save Murphy’s Senate seat. Soon after that defeat, Congressman Sisk learned that the \$10 million was not going to be released!²⁵⁵

Congressman Sisk wrote a strong letter to the President protesting the continued impoundment and the political bad faith employed. Writing on behalf of the President, Caspar Weinberger explained that “no commitment was made to use the funds *added by the Congress* for the Westlands development.” (emphasis added) Only the money which the Administration has *requested* in its own budget and then impounded, was supposedly promised for release. Weinberger concluded:

It is indeed unfortunate that false hopes were raised. It is difficult to identify the cause – but I believe it resulted from a misunderstanding. Nevertheless . . . the Administration has met its commitments . . .²⁵⁶

The postscript is not surprising. The funds remained withheld until after the Ervin impoundment hearings in 1971 when, along with funds for a number of other projects, they were unfrozen because of mounting pressure.²⁵⁷

In August of 1972, Sisk’s staff added:

In this election year all our funds have been released . . . they’ve given us so much that, if they had given it at the proper intervals, we could have used it more efficiently.”²⁵⁸

And a year and a half after the broadcast and election, Congressman Sisk was still wondering “what would have happened if he [Murphy] had won”.²⁵⁹

None of the examples of impoundment being used as a political football are offensive merely because “politics” is being played. Presidents, no less than Congressmen, are politicians and will use numerous devices to improve their political standing. Rarely can a natural disaster occur or a project be christened without some politician attempting to capitalize on the event.

What is offensive is that impoundment for partisan political purposes lacks even the most “tenuous justification.” However much the President may have distorted and abused the supposed Constitutional responsibility to fight inflation, prevent tax increases or replace inadequate programs – at least these, theoretically, are in the national interest. But using Congressionally enacted laws as so many political bargaining chips can be justified on absolutely no such grounds.

The dangers of this abuse are enormous. One person is given the power to manipulate the entire Federal budget, to dole out and withdraw needed funds purely to suit narrow, self-interested objectives. The entire theory of representative government is destroyed, and members of Congress are blackmailed or bribed with their own appropriations bills.

As Congressman Pickle complained:

To have someone try to buy my vote would anger me enough in itself – but to have someone try to buy my vote with my own appropriations . . .²⁶⁰

VI Erosion of Congressional Power:

Slippage Along Its Own Fault

Congress has only recently awakened to a number of sobering facts. Appropriations laws have generally become recommendations, while the President’s budget proposal is now law. The item veto which Congress has consistently refused to grant to the Executive has, nonetheless, sprung into existence. And Congress’s role in setting national priorities has been reduced to that of complaints and obstruction.

Massive shifts of power such as these are too great to have occurred overnight or without Congressional compliance. If they are to be remedied, Congress must recognize how and why they have developed. If they are to be fully understood, Congress must view them as part of a far greater Constitutional crisis. If they are to be prevented in the future, Congress must begin to view itself as an institution rather than as a group of parochial lobbyists for particular sections of the country.

Development of Executive Preeminence: Congressional Inefficiency and Irresponsibility

Procedure

The Congressional budgetary process is so outworn, inefficient and clumsy that it literally cried out for somebody to save it. At various times, during this century, the President has volunteered; at other times, Congress has volunteered him; often circumstances left no choice. But however inevitable or understandable some of the power shifts have been, they nonetheless constitute a serious erosion of the separation of powers.

One basic problem with the Congressional budgetary process is that it is splintered. Besides the obvious political differences which often become embroiled in budget decisions (Senate v. House, Democrat v. Republican, Urban v. Rural, etc.) there is the overriding problem of a two-step approval system. A ceiling figure for an agency is first approved by one of the various authorizing subcommittees. The agency then takes the authorization to the proper appropriations subcommittee to see how much of it will be granted. This creates the problem. At each end of the process, subcommittees will often “pass the buck”

in setting dollar amounts. Congressman Pickle notes that authorizing committees will often give cursory consideration to the proper amounts needed, fully expecting the appropriations committee to set the proper limit.²⁶¹

Meanwhile, appropriations committees often defer to the "expertise" of the authorizing committee and merely rubber-stamp its recommendations.²⁶²

This irresponsibility is heightened by the fact that some bills are passed as tributes or favors to particular members of Congress or to score "political points" in the home district.²⁶³ Many members secretly hope that these bills will be vetoed or face impoundment.

Besides encouraging abdication of responsibility on the individual committee level, the splintered appropriations process has led to irresponsibility on the overall Congressional level. The system functions in such a way that each program is evaluated somewhat in a vacuum. Each committee knows how much a particular program is expected to cost and roughly how much income the government is expecting in the next year. But it does not know what increases may be necessary for programs being evaluated by other committees. Thus, it might really be nice to give the Air Force its new bomber and, on the merits, the bomber may seem really economical. But Food Stamps or Revenue-Sharing might also be able to spend increases in a beneficial way. Nowhere in Congress does a broad overview committee sit to weigh these competing priorities. The day of reckoning is usually postponed until much later when Congress is suddenly faced with the need to increase the deficit, raise taxes, expand the debt ceiling, or impose a spending ceiling on the Executive.

Information

Reform of the entire appropriations process would be meaningless if not coupled with drastic overhauling of Congress's outmoded and insufficient methods of compiling information. Totally inadequate staff and computer capability have forced Congress to rely almost exclusively on the Executive department for its information.

Congress's inadequate staff would be laughable if it were not so serious. The OMB has a staff of 650-700 who spend a year preparing the President's budget. The *combined* House and Senate appropriations committees have six months and 79 staff members to review and alter this massive document.²⁶⁴ The staff shortage has reached such proportions that Senator Mondale recounts his experience in attempting to block a proposed increase in aircraft carriers during a hearing. It was a case of "myself and one college kid versus the U.S. Navy and everybody who wanted to build a carrier, or who had a friend who was an ensign or above."²⁶⁵

Unfortunately, Congress's problems in securing information run far deeper than inadequate staff and time. While the Executive branch utilizes 4000 computers in various ways, the Congress of the United States has allowed itself "at best three". And these are mostly operating part-time

on payroll and housekeeping functions!²⁶⁷ Concludes one observer, Congress has "the computer capability, roughly, of the First National Bank of Kadoka, S. Dakota".²⁶⁸

Congressional unwillingness to increase and update its information sources has had far more deleterious effects than mere inefficiency. It has forced Congress to rely almost totally on the Executive Branch for its information. Thus, in its pivotal responsibility of monitoring Executive performance, Congress depends on information and evaluations supplied by its charge. Such a system of checks and balances, were it to occur in a foreign country, would be labeled a sure sign of totalitarianism.

The Executive branch has been quite eager to supply Congress with information — *at times*. This responsiveness has been noted by Senator Mondale:

Whenever I am on the side of the Administration, I am surfeited with computer print-outs that come within seconds to prove how right I am . . .²⁶⁹

Of course, when the news is less cheerful, the Executive is not as quick with its handouts: "But if I am opposed to the Administration, they (computer print-outs) always come late, prove the opposite point, or are on some other topic".²⁷⁰

Information is at times distorted, but Congress rarely has enough independent knowledge to even know what questions to ask.²⁷¹ When they do know what questions to ask, and the answers are likely to be embarrassing, information can be withheld on the grounds of "national security" or "executive privilege": witness Watergate, ITT, and the Pentagon Papers.

Thus, Congress has *left itself* ill-equipped, uninformed, and wholly unprepared to handle budgetary affairs in the Twentieth Century. Tradition and reluctance to change may supply part of the explanation. Possible fear of adverse public reaction to increased Congressional expense may also be a cause. Even a degree of laziness cannot be discounted. However, the crucial factor must be the self-centered hoarding of power by influential Congressional leaders. Increased staffs, besides promoting efficiency, would necessarily entail a diminution of the power of these chairmen. Reorganization of the splintered appropriations process would entail a loss of power for at least certain Congressional leaders.

Though the present system, in all its clumsiness, inefficiency and reliance on the Executive is harmful to the public interest, it is not likely to be reformed until it becomes harmful to entrenched Congressional Chairmen. As long as the White House can still be counted on for special favors and the sanctity of the "pork barrel" is not attacked in *certain* districts, the appropriations dinosaur will probably survive.

Abdications

Though the present system adequately suits the electoral needs of incumbent Congressional leaders, it is wholly inadequate for discharging the national budget. Congress had admitted as much by granting increasing authority to the Executive in this area. In fact, the last fifty years may be characterized as a steady process of give and take: Congressional give and Executive take.

The process began with the Budget and Accounting Act of 1921, which established the Budget Bureau and the concept of a Presidential budget proposal. With this simple act, Congress 1) granted to the President the right to set the agenda for Congressional budget considerations; 2) placed the nation's most valuable budget-making resource, the BOB, in the Executive rather than the Legislative branch; and 3) cut itself off from vital information by requiring that Executive agencies make their budget requests to the President, not Congress.²⁷²

In the following decades, whenever a national crisis such as war or depression would occur, Congress would temporarily take itself out of the budget process by granting *ad hoc* impoundment powers to the President.²⁷³ To fight inflation and mounting deficits in the 1960's Congress passed a number of spending ceilings which created various degrees of Executive discretion in spending appropriated sums.²⁷⁴

From Truman to Johnson, Presidents have supplemented these broad powers by *occasionally* impounding sums in the absence of Congressional authorization to do so. However, since the Nixon Administration, impoundment has become a *routine* policy device. This *ad hoc* power, sometimes granted, sometimes taken, has now become an entrenched Presidential "prerogative."

Unrestrained impoundment gives the President complete control of the budget. The process has now come "full circle", as the Executive 1) sets the agenda, 2) controls agency testimony at hearings and now, 3) prevents any Congressional attempt to deviate from the game plan. As in the prelude to an earthquake, Congressional slippage had occurred gradually and imperceptibly until it was too late.

Constitutional Crisis: One-Branch Rule

Budgetary control is but one, albeit significant, component of the across-the-board erosion of Congressional power. Its full importance can only be realized by considering the entire range of increasing Executive hegemony in most areas of national decision-making. As with the budget, Executive control has been made possible by a combination of Presidential fault and Congressional default. But however the blame is apportioned between the two branches, the overriding fact is that the resultant Executive ascendancy has posed this century's Constitutional crisis.

Upon solid foundations erected by President Roosevelt and his successors, President Nixon has been able to construct a "shadow" Congress within the Executive Office of the President.²⁷⁵ This facsimile has all the powers of the original: war-making, treaty ratification, confirmation of officials, powers of executive reorganization, budget allocations. In addition, it has some additional powers which recent Congresses have lacked: unfettered access to information, access to the President and his top advisors, and a meaningful say in decision-making. With these additional powers, the shadow Congress runs more efficiently, if not as democratically, as the original.

The requirement that only Congress could declare war, once regarded as the people's greatest protection against executive tyranny, has become all but meaningless.²⁷⁶ U.S. troops have been committed to active duty in Korea, Lebanon, Dominican Republic, Cambodia, Laos without declarations of war. Congressional "approval" has only been sought, if at all, long after the troops have been dispatched. Though only Congress can declare war, Presidents claim the power to declare "protective reaction strikes" and similar actions which are different from war in name only.

For over a decade U.S. servicemen have been fighting and dying in one such non-war. They were brought there under pretense ("advisors"); their numbers were multiplied under pretense (the Gulf of Tonkin); their stay was lengthened under pretense (the annual "light at the end of the tunnel"). While Congress grew increasingly disenchanted with the Vietnam action, it was too late. American honor was at stake, prisoners were hostage, and soldiers were under fire. These *faits accompli* guaranteed continued Congressional appropriations.

Undeclared wars can be ended through unratified treaties. The Kissinger-Tho peace settlement includes a provision for U.S. reconstruction aid to North Vietnam. If Congress balks at this, the aid can be arranged informally through a host of Executive bookkeeping devices which allow untold billions of dollars to flow into foreign countries without Congressional approval.²⁷⁸ Congress has been bypassed in thousands of informal military and economic accords by the simple device of substituting the words "executive agreements" for "treaties".

Congress could decide that it does not like the way that Henry Kissinger has handled his job. But there is nothing it can do about it. Though Kissinger is conceded to be the man in charge of American foreign policy, he was never confirmed by the U.S. Senate. Along with John Ehrlichman, Nixon's domestic affairs power-broker, Kissinger is a Presidential "advisor" accountable only to Mr. Nixon. By separating authority from title, the President has rendered the Senate's powers of confirmation of Cabinet officials meaningless. Republican Senator Percy has alluded to reports that the President would circumvent the plan to require confirmation of OMB Director Ash by simply giving him a different title but the same responsibilities.²⁷⁹

Furthermore, Congress cannot even ask men like Kissinger or Ehrlichman about how and why decisions are made. Executive privilege prevents them from testifying before Congress. This *informal* understanding between the branches has been so greatly expanded by the present administration that it is now being used to prevent administration officials from testifying before Congress about their knowledge of the commission of a crime: the Watergate bugging. This is particularly ironic given the Administration's feelings that even a newsman's First Amendment privilege doesn't extend that far.

Any significant executive reorganization entails shifts in Congressional attempts to oversee the Executive department. Though Congress had so far declined to approve the President's proposed reorganization, the plan has nonetheless been effected. Three Cabinet appointees were recently elevated to the title of White House Counselor and given broader authority.²⁸⁰

Long confronted with most of these losses of power, Congress had consoled itself with its powers over the purse. But with the Executive's plethora of flexible spending devices and now, with the President's flaunting of Congressional appropriations, this too is being destroyed. In this final area of power, Congress is once again left holding an empty bag.

Senator Humphrey had concluded that in the budgetary area, there is no need for Congress "to scrutinize the budget, there is no need to appropriate funds. Indeed, there is little or no need for Congress".²⁸¹ Humphrey's statement may be somewhat overdrawn. Were Congress to suddenly disappear, at least one man would be sorry to see it go. President Nixon would no longer have Congress "to kick around any more."

Past Congressional Response: Cries of Wolf and Parochial Protest

Since the opening of the 93rd Congress, there has been the promise that impoundment will constitute one of the great political battles of the next year. For a number of reasons, this previously obscure issue has sprung full-grown into newspaper headlines and the daily lexicon. A pugilistic Congress has apparently crawled back into the ring and is squaring off with the Executive.

However, for a more accurate evaluation, this current response must be viewed from the perspective of past Congressional reaction. Though past behavior is no certain guide to present action, particularly because there are now a number of significant new factors, it is important to note that many of the current angry Congressional statements have a familiar and somewhat empty ring to them. In the past, Congressional reaction has generally been restricted to nine parts talk and one part lethargy.

Crying Wolf: A Case Study

One of the more celebrated clashes between Congress and the President occurred in 1962 over the RS-70 (B-70) bomber. Though an intense debate had occurred in the House, the issue was ultimately resolved when two men "took a little stroll" in the White House Rose Garden. The entire incident, which is quite illustrative of Congressional wavering, bears recounting.

The controversy really began the previous year when Congress voiced concern that the Kennedy Administration was planning to phase out strategic bombers and rely, instead, solely on intercontinental ballistic missiles. Accordingly, \$695 million more than the Executive had requested was appropriated (in fiscal 1962) for the procurement of bombers and a more vigorous prosecution of the B-70 program.²⁸² These funds were not spent despite a strong expression of Congressional desire.²⁸³

Angered by this refusal, and fifteen previous defense impoundments, the House Armed Services Committee in its fiscal 1963 authorization, ordered the Secretary of the Air Force to spend *not less than* \$491 million on the B-70.²⁸⁴ Leaving no doubt as to its intentions, the committee report said that the Secretary was "directed, ordered, mandated, and required" to spend the full amount.²⁸⁵

This harsh directive was coupled with some of the strongest language ever used by Congress in denouncing impoundment. The accompanying report (House Report No. 1406) made clear that the Congressmen understood the full implication of the controversy.²⁸⁶ It noted that the committee's "extended and infinitely detailed hearings" are not merely designed "as an exercise in self-improvement in the area of *knowledge*" but rather to give Congress information "to be *used*, not merely to be *possessed*." The report offered one of the best descriptions of Congressional decline in the area of policymaking ever written:

More and more the role of Congress has come to be that of a sometimes querulous but essentially kindly uncle who complains while furiously puffing on his pipe but who finally, as everyone expects, gives in and hands over the allowance, grants the permission, or raises his hand in blessing, and then returns to his rocking chair for another year of somnolence . . .

Having clearly framed the issue, the angry committee accepted the Presidential challenge and declared itself ready to make the stand. "If this language constitutes a test as to whether Congress has the power to so mandate, *let the test be made* . . ."²⁸⁷

The President agreed and the test was made. Kennedy sent a letter "respectfully urging" deletion of the manda-

tory language.²⁸⁸ This was followed up with a personal meeting with Vinson who agreed to change the language. Congressman Brown summed up the “confrontation”:

Yesterday two of the most distinguished Americans of our time met together and took a little stroll in the Rose Garden behind the White House . . . and discussed some of the provisions of the bill.

As a result, the Committee . . . agreed to . . . change the wording . . . (of the mandatory authorization.)²⁸⁹

Vinson later explained to the House that the strong language had been used to show the intent of Congress and to “force the Department of Defense to take some action”. Once “assured” that action would be taken, the committee wished to delete the mandatory language.²⁹⁰

Louis Fisher has supplied the postscript to the story. He noted that after the House had acceded to the President’s request:

. . . the Administration went ahead with *its plans* to complete two prototypes . . . before considering full-scale production. One prototype crashed in June, 1966, and the second now sits in the Air Force Museum at Dayton, Ohio.²⁹¹

Lessons from the RS-70

Despite the stroll through the Rose Garden, neither side came out of the incident smelling very good. President Kennedy had “insisted” on a much greater degree of discretion than any impartial understanding of separation of powers could possibly permit.²⁹²

Congressional action was suspect in a number of ways. First, as the Fisher postscript suggests, the plane had apparently not been sufficiently tested to warrant production. Thus, the initial use of mandatory language was quite irresponsible.

One must ask why, after declaring a showdown, Congress withdrew after receiving little more than “assurance” that the program would be “re-examined”. If the reason for the withdrawal was that Congress had known all along that the plane was not ready for production, then the Committee had performed a great disservice to itself and the Congress by framing the entire issue in broad Constitutional terms of separation of powers. Congress can be just as guilty as the President in “crying wolf” or rhetorical overkill.

Finally, one must wonder how much of the decision to drop the language was motivated by form rather than substance. Was Chairman Vinson truly satisfied that the Administration would seriously reverse its previous policy or was he, in effect, bowled over by the President’s courteous letter and personal invitation? Members of Congress

are all too notorious for their susceptibility to Presidential niceties and social invitations. As Senator Ervin has sadly noted:

Too often, I fear, there have been those among our ranks in the legislative who would rather receive a social invitation to the White House than display loyalty to the governmental institution to which they were elected.²⁹³

Parochial Protest

Congress has, in the past, often exhibited an interesting dichotomy. When protesting the broad Constitutional issues of impoundment, it has screamed bitterly but done little. However, when specific impoundments have hit specific programs or districts, the Congressional response has been more successful and funds have been released on an *ad hoc* basis.²⁹⁴

This might be explained by the fact that Congressmen are far more concerned about impoundment as it affects them and their districts than they are about philosophical issues of separation of powers. Or, it can be explained by the fact that Presidents feel they can well afford to give in on specific decisions, when the pressure is strong, in order to preserve the broad power of impoundment. Both factors are probably at work. However, the end result reveals a far-sighted Executive protection, versus a narrow and short-sighted Congressional squandering, of respective powers.

Over the years, Congress has perfectly played the role of co-optee to the President’s able performance as co-optor. Timothy Ingram has observed:

Congress has not helped itself any by the way it has chosen to attack the growing Presidential prerogatives. Mostly, the legislators have attacked such tactics as impoundment *only to save a pet project, and often one of questionable worth*. There are legendary stories about the abilities of subcommittee chairmen like Jamie Whitten to go *to the source of authority and bargain*, often continuing a program that everyone else wants killed.²⁹⁵ (emphasis added)

Furthermore, Congress members have been quite selective in voicing their Constitutional complaints. In 1971, the *Wall Street Journal* observed this phenomenon. The *Journal* contrasted impoundment critic Senator Ervin, who “hasn’t been complaining of *specific* project freezes in *North Carolina*, though there have been some” with “many of the other avowed Constitutional-preservers, who are alarmed at ice in the pork barrel”.²⁹⁶ The article then listed a number of seemingly parochial complaints by some Congressmen and noted that “critics of big Pentagon spending aren’t saying much about the \$1.3 billion frozen military funds. Conservative lawmakers aren’t loudly demanding release of \$38 million in anti-poverty money”. Even Senate Majority Leader Mansfield, one of the most respected men in the Senate, has been guilty of

this selective reading of the Constitution. Though he suggested in 1971 that the Administration be taken to court over the impoundment issue, in referring to a specific impoundment, of which he approved, he said "as far as I'm concerned, they can impound that from now till doomsday".²⁹⁷ Statements such as that are certain to undermine the credibility of Congress's otherwise strong case.

Besides selectivity, Congress members have been guilty of transparent "politics" in many of their actions and complaints. Referring to the recent Nixon budget cuts, an unidentified Senate Democrat indicated that "from a political standpoint", the best thing that could happen to the Democrats might be to "let government services dry up as a result of the Nixon cuts".²⁹⁸ Perhaps he is correct that "the people would react against the Republicans in the 1974 elections". However, the callousness of the suggestion indicates that those people would not have a very viable alternative if fellow Democrats shared his manipulative views.

This Senator is arguing that perhaps Congress should give the President enough rope to hang himself. However, in the process, thousands of powerless citizens will suffer a similar fate. Disregard of this fact belies the Senator's concern for the programs involved.

VII Current Congressional Response: A New Seriousness?

By most accounts, the 93rd Congress is expected to be one of the most "fiesty" and "contrary" in years. For the first time, Congress has indicated a willingness to tackle the great areas of Executive dominance: war powers, executive privilege, and the entire budgetary system.²⁹⁹ More significantly, Congress has *begun* to consider and undertake the necessary internal reforms which are a pre-condition of any successful Congressional challenge. However, there are already signs of Congressional hedging and backtracking, disunity and short-sightedness, which could turn the bright prospect of Congressional re-assertion into a sour replay of the RS-70 confrontation.

Reasons For the New Seriousness

There are a number of factors which help explain why the current Congressional response seems more serious than previous *threats* of action. As noted, President Nixon has added new dimensions to the use of impoundment. Frequent use of the power on a broad scale may have finally alerted Congress that *something* has to be done and an unpopular minority President would seem the perfect choice for an opponent. Furthermore, because of the broad scale of current impoundments, more people, and more Congress members, have felt the direct lash of the President's whip. This could help to reduce the normal disunity which ordinarily hampers Congress as conservative and liberal, urban and rural, and Democratic and Republican members are now forming unfamiliar coalitions.

The proportionate increase in a wide number of other Presidential prerogatives (war power, executive privilege, etc.), reaching an apex in the Nixon Administration, has added more fuel to the fire. Each affront magnifies the effects of the others.

But perhaps the most significant new factor is the contempt of Congress which has been increasingly shown. President Nixon has made little secret of his disregard of Congress. Republican members have often felt more slighted than their Democratic counterparts when excluded from the normal "public relations" briefings and consultations with the President with which Nixon has largely dispensed. In recent hearings before Senator Ervin's subcommittee, Ralph Nader observed:

It is President Nixon's great contribution to these hearings that he offended the sensitivities of the Congress. He did so in a bi-partisan, etiquette-breaching manner. Even now, one senses that too many members of Congress are upset not by what he has done, nor the means by which he has done it (via usurpation), but by the inconsiderate way he has gone about it.³⁰⁰

Combined, these factors may be sufficient to overcome the previous parochial limitations of the Congress. At this stage, reform, even for the wrong reasons, is desperately needed if Congress is to survive as a viable institution.

Signs of the Congressional Offense

In 1971, Hubert Humphrey trumpeted the charge "we're going to have a ring-a-ding on this one . . ." (impoundment).³⁰¹ And, indeed, Congress seems to be counter-attacking on all fronts.

A number of court challenges to impoundment are being undertaken or supported by members of Congress. Twenty-two Senators (including almost all of the standing committee chairmen) and five members of the House have filed *amicus curiae* briefs in the Missouri Highway Trust Fund Case.³⁰² In January, 1973, Congressman George Brown filed a class action suit challenging the Nixon impoundment of \$589.3 million appropriated to fight water pollution in California.³⁰³ Other court suits have been commenced and still others can be anticipated.³⁰⁴

Congress has also begun to assail the practice on a program-by-program basis. Senate Majority Leader Mansfield signaled his intention to ask the Senate to revive nine bills vetoed by the President after the adjournment of the 92nd Congress.³⁰⁵ Furthermore, both the House and Senate have begun to pass bills, in mandatory language, to reinstate programs cut by the President's budget.

Probably the first of these to reach the President's desk will be the bill to revive the Rural Environmental Assistance Program (REAP). The program was killed by a \$210 million impoundment in December, 1972. Within three months, both Houses had voted to restore the program.

The House vote was 251-142 (11 votes short of the number needed for override) while the Senate approved the mandatory spending by a wide 71-10 margin (easily enough to override a veto.)³⁰⁶

REAP was apparently carefully chosen as the vehicle for the first challenge to the President.³⁰⁷ The program enjoys such wide bi-partisan support that “every President since Harry Truman has failed in attempts to curtail or end it”.³⁰⁸ Nevertheless, the President has announced plans to veto the bill.³⁰⁹

Much more than REAP’s fate will be determined by the President’s success or failure. REAP will represent the first test of strength of the respective impoundment and anti-impoundment forces. Each side shares the belief that the first few skirmishes will largely determine the outcome of the entire budgetary battle. Thus, an intense lobbying campaign can be expected by both sides. In the balance will hang the crucial 11 House votes currently needed to override the President and establish the credibility of the anti-impoundment movement.

On two other fronts, Congress has established early successes. The Senate voted 64-17 to require confirmation of the OMB director.³¹⁰ Because of OMB’s central role in impoundment, this must be seen as another indication that Congress has grown increasingly serious in its concern over the practice.³¹¹ Meanwhile, the House, by an overwhelming margin of 297 to 54, has voted to require the President to spend an estimated \$220 million for rural water and sewage projects before the end of the fiscal year on June 30.³¹² In these, and in countless pending votes, the crucial factor is not passage, but rather, passage by a sufficiently large margin to ensure override of the inevitable Presidential vetoes.

Though both Houses are currently involved in these stop-gap measures to protect endangered programs, there is a growing recognition that impoundment must be fought on a broad institutional level, rather than case-by-case. Members in each House have, therefore, presented bills intended to curb the practice itself rather than merely to revive its countless victims. These bills would limit the President’s discretion and ensure varying degrees of Congressional consent to impoundment as each case arose.

The most notable Senate Bill is S283 proposed by Senator Ervin. Forty-five co-sponsors have already been enlisted and passage of the bill is anticipated.³¹³ Basically, the proposal would require the President to inform each House of any Executive action which effectively “precludes the obligation or expenditure of the appropriated funds.” If both Houses did not approve the action within 60 days, the President would be obligated “to cease the impounding.”

The basic thrust of the proposal is admirable.³¹⁴ It attempts to ensure Congressional participation in the full range of impoundment activities and it properly places the burden of persuasion on the President.³¹⁵

However, the Ervin approach does have a number of important weaknesses. Comptroller General Staats and Ralph Nader have both pointed out that there is no indication in the bill of *how long* the President must “cease” impounding. He could release the funds after the 60-day period and then impound them again – indefinitely.³¹⁶

More basically, Nader has noted that the proposal gives the President “sixty days worth of impoundment on any issue” during which Congress would be helpless.³¹⁷ Senate Majority Whip Robert Byrd has suggested that it might be preferable to require Congressional approval *before* rather than *after* the fact.³¹⁸ Nader has endorsed this idea, pointing out that the President must seek prior Congressional approval before increasing spending (through a supplemental appropriations request), and wondering why the same formal procedure should not be required before decreasing spending.³¹⁹ Imposing the requirement that a formal request be made, subject to possible committee hearings when appropriate, would do much to reduce the “all-or-nothing” and “hurry-up” approach implicit in the Ervin proposal.³²⁰

The House has produced three different approaches to impoundment. Under a proposal by Congressman Silvio Conte, the President would not be given 60 days of “free” impoundment.³²¹ A second approach, suggested by a number of Congressmen, is quite similar to the Ervin proposal.³²² House Appropriations Committee Chairman George Mahon has offered yet a third alternative.

The Mahon plan, if approved, would probably do more harm than good. Under its provisions, an impoundment would stand unless the appropriations committees reported out, and each House approved, a concurrent resolution of disapproval.³²³ In effect, each appropriations committee, and particularly each appropriations chairman, would have a near veto over any Congressional attempt to disapprove the impoundment. If the influential members of an appropriations committee supported the President’s action, they could simply refuse to report out any resolution. This would hamstring the entire Congress. Concentration of so much power in the hands of the appropriations committee leaders would lead to little more than “confrontation among oligarchs.”³²⁴

Passage of the Mahon bill could be disastrous. Spending decisions would not be democratized by substituting three-or-four-man rule for one-man rule. Congress’s powers would not be restored; rather a few influential members would be given more bargaining chips for their dealings with the President. Worst of all, criticism of impoundment would be muted. The President would be able to point to “Congressional approval” of all future impoundments.

Prospects of Broad Budgetary Reform

Little will be gained by passage of an anti-impoundment bill unless Congress simultaneously puts its budgetary house in order. Fortunately, there are hopeful signs that Congress has accepted the challenge.

Looking towards the future, a special joint committee of senior members of Congress unanimously approved an interim report calling for major innovations in the budgetary process.³²⁵ The report calls for the creation of a "budget committee" for each house to establish annual spending ceilings and a goal for revenues early in each session. Furthermore, a procedure would be created for reconsideration of the spending ceiling and revenue goal late in the session to reflect changing economic requirements.

Though the interim report did not address several key questions (e.g. how to allocate the total amount among the various committees and how to ensure Congressional compliance with the limits), it represents a new departure for Congress. For the first time, an *overall* appraisal of revenues and spending would be made directly in Congress and reliance on Executive responsibility would be commensurately reduced.

This proposal, however significant in the long-run, would do little to help Congress address this year's budget conflicts with the President. Accordingly, Senate Democrats have unveiled an unparalleled proposal for the current fiscal year — "a counter budget".³²⁶ This alternative to the President's budget, being prepared by the Senate Democratic Policy Committee, is intended to demonstrate that Congress can act "responsibly" in fiscal matters. Therefore, any deficit in it will not be larger than the 12.7 billion figure called for by the President, and the budget will include an outlay ceiling. However, that is where the similarity will end.

The purpose of the counter budget is to recognize the need for overall fiscal responsibility, but ensure that Congress, rather than the President, orders priorities within those broad limits. Thus, the alternate budget will call for decreased military and foreign aid spending in order to save the domestic programs slated for termination by the President.³²⁷ In addition, tax reform proposals will be included to increase government revenues without adding to the tax burdens of middle-income or poor families.³²⁸

Once approved by the Democratic Policy Committee, the budget will be presented to the full Senate Democratic caucus for debate and consideration. If approved, it will become official party policy and Democratic chairmen within the Senate will be expected to respect its guidelines and limitations.

Of course, such a plan, at this stage, is still highly problematical. To be effective: 1) the Senate Democratic caucus will have to approve it, 2) committee chairmen will have to respect it, and 3) the House will have to make similar provisions. However, the possibilities of House co-operation in this plan have been enhanced by a number of reforms which have been instituted by the House Democratic caucus.³²⁹ These reforms are intended to shift power from the independent committee chairmen to the party leadership and caucus. Strengthening of the central party leadership would be essential for the counter budget to succeed. If Senate and House Democratic leaders are able to strengthen their powers vis-a-vis the chairmen, the Congress may be able to reassert its test powers over Federal spending.

Overall Prospects for Change: Institutional Obstacles Block Reform

Despite the outbreak of a flurry of reform activity, the overall prospects for change are not encouraging. The reasons are rooted deep in the institutional nature of Congress. Entrenched powerful interests and the parochial perspective of Congress must be overcome before meaningful reform will be possible.

As with most institutions, those in Congress who have the power to effect change in the *status quo* are those who stand to lose the most by any such change. For Congress to limit spending and order priorities effectively, binding restrictions would have to be placed on the independence of committee chairmen. Power would have to flow from these Congressional fiefdoms to the centralized majority party leadership.

Although a number of chairmen have supported individual anti-impoundment actions (suits, bills, etc.), their support for the necessary broad structural realignment of Congress is far more doubtful. In this area, the feudal lords of Congress can be expected to ward off encroachment of their authority with the full range of the powers of their office. Whenever possible "objectionable" reform measures will be killed in committee. If reform bills do reach the floor, individual members may find themselves pressured by the tremendous leverage their chairmen can exert to punish or reward them at the committee level.³³⁰ In the past, a chairman has rarely been challenged because, as a committee staff director remarked, "there's no percentage in it. He could make the committee member's life miserable and futile for a long, long time".³³¹

A Congressman's life can be made just as miserable by an angry President. Fear of Executive retaliation is a second major obstacle to reform. Congressman Joe Waggoner of Louisiana has already indicated where his loyalties will lie in the up-coming budget battle between Congress and the President:

I'm not going to get myself into a position of being so much against the Administration that I can't talk to agencies when I need help. I've got

*some things I need that are bigger than these little itty bitty programs the President has cut.*³³² (emphasis added)

Chief among Waggoner's "broader" concerns is the securing of funds for a navigation project on the Red River in his district.³³³

The central paradox of this position is obvious. Congressmen like Waggoner are so preoccupied with the scramble for the "golden eggs" that they are willing to let the "goose" escape. Republican Senator William Saxbe has helped explain this parochialism. The duties of responsible lawmaking have often been eclipsed by a more basic need. "Congress has declined into a battle for individual survival . . . [where] if you don't stick your neck out, you won't get it chopped off."³³⁴

For House members in particular, survival means one thing — constantly running for re-election. And re-election usually is believed to depend upon continually providing "service" to the home district. The key to such service is held jointly by powerful committee chairmen and the President, both of whom have a common interest in preventing major Congressional reform of the budget process.

The President has already begun his campaign against his Congressional foes. The extent to which he can utilize the media to maximum political advantage can intimidate all but the most determined potential renegades in Congress. Economists and political scientists can afford to scoff at the simplicity of the Nixon assertion that deviation from his budget will result in a 15% tax hike or increased prices for most Americans.³³⁵ Congressmen facing re-election do not have that luxury.

The President can supplement this general broadside with the unspoken threat of specific political impoundments. The past use of impoundment in such ways should sufficiently establish the credibility of such a threat.

A unified Congress could largely destroy the axe which the President holds over the heads of individual members. However, from each member's own perspective, the danger of antagonizing the President usually outweighs the prospects of success. Here, again, there does not seem to be much "percentage in it."

That body, renowned for the abilities of its members to log-roll to save pet projects, appears totally incapable of log-rolling to save its waning institutional powers. Because voters remain less interested in preserving Congressional prerogatives than in obtaining Federal funds for needed projects, Congress is likely to remain fractionalized and cautious. Revolutions have never been waged by the cautious and wary, and reassertion of Congressional spending control would be little less than a revolution.

The Stakes

In the battle for the budget, the stakes are far greater than individual programs or projects. Impoundment has become a central battlefield in the struggle over the Constitutional Separation of Powers.

No power was more carefully entrusted to Congress than that over the purse and in no area was the President as carefully restricted. Congress was given this ultimate power for both positive and negative reasons. Affirmatively, it was believed that Congress, collectively, would be more sensitive to the needs of *all* the people than could any President.

The great function of Congress is to harmonize diversity, to compromise the differences, to arrive at a solution that the *nation as a whole* can live with in peace.³³⁶ (emphasis added)

Inherent in that compromise is waste, inefficiency and some abuse. Numerous unneeded projects have been funded to serve special interests and for political expediency. However undesirable, this was considered tolerable because of the second basic reason for Congressional control over spending. The Constitution unequivocally prefers the risks of Congressional abuse to those of Presidential abuse. Some unneeded highways and military bases were seen as a small price to pay to prevent the concentration of spending policy decisions in a single individual.

Although the President is currently amassing control of the budget, an action so feared by the Founders, an equally great danger is being evidenced — the overall deterioration of the system of checks and balances. The genius of the American system is that it allows a strong President to offset the conservatism and inefficiency of Congress. Change is thus encouraged, but in a controlled environment. As the President rises to pre-eminence, those controls are destroyed.

The Presidency is the antithesis of the Congress. The ability to act, to act swiftly and with one mind, gives the President awesome powers vis-a-vis Congress. As the single personalized branch of government, the Executive has an unmatched mass appeal to the public — acting as spokesman and moral leader for the country. And given the comparative invulnerability of incumbency, the President has far greater potential for rising above parochial pressures to act in a visionary way, for the greater good.³³⁷

Ideally, the President and Congress complement each other. The President can overcome the institutional weaknesses inherent in a collective body of representatives; the Congress can check the natural dangers of a powerful and efficient Executive.

This ideal system has broken down. In the face of too much Congressional inefficiency, America has become increasingly tempted by the President's ability to get things done. In foreign affairs and now in domestic affairs, Congress has been forfeiting its authority. Congress

sional resistance to change in its out-moded budgetary system will ensure continuation of this trend.

The Constitution gave Congress its powers but only Congress can act to secure them. Supreme Court Justice Robert Jackson, voting with the majority in the *Steel Seizure Case* to strike down the President's "emergency" measure, had a prophetic warning for Congress. He noted the importance of maintaining the separation of powers, then added:

But I have no illusion that any decision by this court can keep power in the hands of Congress if it is not wise and timely in meeting its problems . . . We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.³⁵⁸

- 1 Andrew Glass, "Impoundment Policy Fuels Political Struggle with Congress," *National Journal*, vol. 3, no. 20, May 15, 1971 pp. 1027, 1038 (hereinafter: *National Journal*, "Impoundment").
- 2 Garnett D. Horner, "President Pledges an End to 'Era of Permissiveness'," *New York Times*, Nov. 10, 1972, p.1. (Pre-election interview with the President).
- 3 "Social Projects are Hardest Hit," *San Francisco Chronicle*, Jan. 30, 1973, p.1.
- 4 "Excerpts from President Nixon's Budget Message as presented to Congress," *New York Times*, Jan. 30, 1973, p.C21. The Albert quotation may be found in: James M. Naughton, "Congress Regards Nixon's Plan to Curb Programs as Challenge," *New York Times*, Jan. 30, 1973, p. C21.
- 5 Eileen Shanahan, "Behind the Budget: Nixon is Trying to Alter the Trend of Spending and How It is Controlled," *New York Times*, Jan. 30, 1973, p. C22.
- 6 "Sweeping Cuts in New US Budget: 112 Federal Programs Affected," *San Francisco Chronicle*, Jan. 30, 1973, p. 1; also cf. Shanahan, *id.*
- 7 Timothy Ingram, "The Billions in the White House Basement," *The Washington Monthly*, Jan. 1972, p. 36, 47.
- 8 *Id.*
- 9 "Budgetary Reserves: June 1972", compiled by the Office of Management and Budget. The current figure, depending on whose definitions one believes, ranges from \$8.7 billion to \$14.7 billion. The difference hinges on how one defines the \$6 billion authorized by Congress but not allocated by the President for water pollution control.
- 10 *Id.*
- 11 Ingram, *op.cit.*, p. 49.
- 12 Line item veto would allow the President to veto a portion of a bill but sign the remainder. However, Article 1, section 7 of the Constitution makes it clear that the President must accept the entire bill or veto it entirely.
- 13 Gerald Ford, defending the Administration, has said, "I admit that in effect it's a line-item veto, but there is no question that he has the final authority to impound." *National Journal*, "Impoundment," p. 1029. Ford's comment is quite illustrative of the Administration's blithe view of the issue. In one breath, he admits that the practice amounts to an item veto. As previously noted, this is an unconstitutional form of the veto power. However, in his next breath, Ford merely says that there is no question that this can be done.

- 14 One possible method with which to deal with impoundments on a case-by-case basis would entail the passage of supplemental appropriations, couched in mandatory spending language, as riders to bills the President considers essential. However, this approach is indirect and wholly dependent upon maintaining strong Congressional interest in a program months after passage of its appropriation. Changed circumstances or Congressional preoccupation with other matters would make this a very haphazard approach to fiscal matters or to the problem of reasserting waning Congressional power over the national budget.
- 15 Louis Fisher, "The Politics of Impounded Funds," *Administrative Science Quarterly* 361 (Sept. 1970) (Hereinafter: Fisher, "Politics"), reprinted in "Executive Impoundment of Appropriated Funds," *Hearings before the Subcommittee on Separation of Powers of the Senate Judiciary Committee*, 92nd Congress, 1st sess., March 1971 (hereinafter: *Impoundment Hearings*), pp. 103, 104 (all page references are to the hearings unless otherwise indicated).
- 16 Section 3679 (c)(2) of the Revised Statutes as amended (31 U.S.C. 665), reprinted in *Impoundment Hearings*, p. 5.
- 17 *Impoundment Hearings*, p. 162.
- 18 See n. 16, above.
- 19 Williams, *op.cit.*, p. 392.
- 20 Section 1211 refers to the section of the 1950 General Appropriations Act which revised the Anti-Deficiency Act. This is the same section as has been referred to elsewhere as Section 3679 of the Revised Statutes, as amended. (31 U.S.C.665).
- 21 Williams, p. 393.
- 22 *U.S. v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952).
- 23 *Impoundment Hearings*, pp. 93-166.
- 24 *Impoundment Hearings*, p. 149.
- 25 Committee on Appropriations, House Report No. 1797, 81st Congress (1951), excerpt reprinted on p. 94 of *Impoundment Hearings*.
- 26 *Id.*, excerpt reprinted on p. 153 of *Impoundment Hearings*.
- 27 *Impoundment Hearings*, p. 154.
- 28 Fisher, "Politics," *op.cit.*, p. 112.
- 29 *Id.* However, it is noteworthy that even during this period of imminent war, when Presidential prerogatives were at their peak, the Senate still exercised a degree of responsibility for the cuts by exempting certain programs. Only when the House and Senate were unable to agree to restrictions in conference was the President given the broad discretion noted by Mr. Cohn.
- 30 See *Impoundment Hearings*, p. 94.
- 31 William Rehnquist, (then) Assistant Attorney General, Office of Legal Counsel, "Memorandum Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools," Dec. 1, 1969, (hereinafter:"Rehnquist Memo") reprinted in *Impoundment Hearings*, pp. 279, 283.
- 32 Library of Congress, Legislative Reference Service, American Law Division, "Impoundment by the Executive Department of Funds Which Congress has Authorized it to Spend or Obligate," by Mary Louise Ramsey, Legislative Attorney, American Law Division, May 10, 1968 (hereinafter: Ramsey, "Impoundment"), reprinted in *Impoundment Hearings*, pp. 291, 297.
- 33 *Impoundment Hearings*, p. 95.
- 34 *Id.*
- 35 *Id.*, p. 142.
- 36 "Excerpts from President Nixon's Budget Message as Presented to Congress," *New York Times*, Jan. 30, 1973, p. C21.
- 37 *Impoundment Hearings*, p. 96.
- 38 *Id.*, p. 146.
- 39 *Id.*, p. 147.
- 40 *Id.*, p. 146.
- 41 Excerpt from H.R. 17399, Second Supplemental Appropriations Bill, 1970, 91st Congress, 2nd Sess., Title V, "Limitation on Fiscal Year 1971 Budget Outlays," reprinted in *Impoundment Hearings*, p. 566.
- 42 *Id.*
- 43 *Impoundment Hearings*, p. 566.
- 44 *Id.*, p. 567.
- 45 *Id.*
- 46 These excerpts are from a letter from the President to the leadership of the House and Senate on Dec. 17, 1969. They are reprinted in a memo by Fisher dealing with "Presidential Impoundment of Funds," April 12, 1971, prepared for Senator Erwin by the Congressional Research Service (hereinafter: Fisher, *memo*). The memo is reprinted on pp. 594-596 of the *Impoundment Hearings*, and the Nixon excerpts may be found on p. 595.
- 47 *Id.*, p. 566.
- 48 Much of the material on the debt ceiling is taken from a paper by Ramond C. Groth entitled, "The Debt and Expenditure Ceilings: Failures in Controlling Total Federal Spending", June 1, 1971. The paper was written for a seminar on "Problems in the Law of Spending by the Federal Government." Professor Preble Stoltz who led the seminar at Yale Law School graciously supplied a copy of the paper for my use.
- 49 Statement reprinted in *Hearings on H.R. 8505 Before the Senate Finance Committee*, 91st Congress, 1st Session, March 24, 1969, p. 12.
- 50 Hearings on H.R. 10867 before the Senate Finance Committee, 90th Cong., 1st Sess., June 23, 1967, p. 30.
- 51 Rehnquist memo, *op.cit.*, *Impoundment Hearings*, p. 284.
- 52 *Congressional Record—Senate*, Feb. 8, 1973 at S1491. Furthermore, Congressman William Anderson noted that Congress does put upper limits on expenditures, "but it is equally true that the administration fails consistently to come near these limits and makes public debt ceilings increase because of waste, cost overruns, and a warped sense of priorities," *Congressional Record—House*, Feb. 1, 1972, at H491.
- 53 Quoted in *Impoundment Hearings*, p. 96.
- 54 15 U.S.C. 1022(a)(4). Specifically, the President is also required to inform Congress of 1) the levels of employment, production and purchasing power obtaining in the U.S. and such levels needed to carry out the policy set forth in section 1021, 2) current and foreseeable trends in such levels, 3) a review of the economic program of the U.S. and of economic conditions.
- 55 *Impoundment Hearings*, p. 161. Cooper continued, "The Employment Act tells you to achieve certain objectives but it does not tell you to achieve them through use of impoundment." *Id.*
- 56 Fisher, *memo*, p. 594.
- 57 *Id.*
- 58 *Id.*, pp. 594, 596.
- 59 *Id.*, p. 596.
- 60 *Id.*
- 61 *Congressional Record—House*, Feb. 1, 1972 at H491.
- 62 In the fiscal 1974 budget proposal, the President conceded as much. SACB was finally terminated "as a result of court decision limiting workload." See "Savings Expected to be Made Through Reductions and Terminations in Federal Programs in Three Fiscal Years", *New York Times*, Jan. 30, 1973, p. C20.
- 63 *Impoundment Hearings*, p. 396.
- 64 *Impoundment Hearings*, p. 180.
- 65 *Id.*, p. 162.
- 66 James M. Naughton, "Official Upholds Nixon", *New York Times*, Feb. 7, 1973, p. 40.

- 67 Elsewhere, Sneed maintained that Congress could not prevent the President from impounding even if it so desired. See Naughton, *op. cit.*
- 68 This is something of an over-simplification. There is what one might call a hierarchy of Congressional inaction. At one extreme is a bill which can never reach the floor (having been pigeonholed by its substantive committee or the Rules committee). In such a case, any inference about Congress's will on the merits of the bill is a little more than wild guesswork. This is particularly true because of the unwritten rules of the "club", e.g., deference to committees or to powerful chairmen. At the other extreme is the measure which is duly considered, debated and voted down. Here one may say that Congress has acted, and has manifested its will. An example of such a case was the Nixon request for the \$250 billion spending. The Senate considered, debated and voted down the proposal.
- 69 *Cleveland v. United States*, 329 U.S. 14, 22 (1946).
70. For ease in writing, the dichotomy between the two sides has been over-simplified in the sense that, there are members of Congress who support the Administration view as well as members of the Administration who support the "Congressional" view.
- 71 *Impoundment Hearings*, p. 94.
- 72 Rehnquist, Memo, reprinted in *Impoundment Hearings*, at 283.
- 73 *Impoundment Hearings*, pp. 94, 144. This is, of course, obvious if savings can be effected or other provisions of the Antideficiency Act are complied with. The dispute concerns whether appropriations can be ignored because of policy disagreements over the particular bill's merits or on broad, fiscal policy grounds (such as fighting inflation).
- 74 *Impoundment Hearings*, pp. 137, 143.
- 75 See, for example, pp. 29, 30, 137, 271, 273.
- 76 *Impoundment Hearings*, p. 273.
- 77 This problem was well-formulated by Professor Bickel. See *Impoundment Hearings*, p. 224.
- 78 Excerpt quoted by Senator Robert Byrd in a statement entitled "Constitutional Collision on Impoundments", reprinted in *Congressional Record-Senate*, Feb. 7, 1973, at S2245, 2246.
- 79 *Id.*, at S2246.
- 80 *Id.*
- 81 *Id.*
- 82 U.S. Constitution, Art. IV, sec. 1.
- 83 Concurring opinion, *Youngstown Sheet and Tube Co. v. Sawyer*, 343, 579, 633. (The *Steel Seizure Case*).
- 84 *Id.*, at 632.
- 85 For a few examples, see Fisher, "Funds Impounded by the President: The Constitutional Issue", 38 *The George Washington Law Review* 124, (1969), (hereinafter: Fisher, "Constitutional Issue") reprinted in *Impoundment Hearings* at 120, 128.
- 86 3 *Writings of Thomas Jefferson* (Library Edition, 1904), pp. 147-149, excerpt reprinted in Edward S. Corwin, *Constitution of the United States of America Revised and Annotated*, U.S. Government Printing Office, 1963, pp. 144-145 (hereinafter: *Corwin*).
- 87 *U.S. v. Butler*, 297 U.S. 1, 65, 66 (1936) quoted in *Corwin, op. cit.*, p. 146. *Corwin* also cites *Cleveland v. U.S.*, 323 U.S. 329 (1945).
- 88 *Id.*
- 89 Of course, it must be re-emphasized that other than in occasional references (as by Ehrlichman), the Administration does not verbally propogate this strong view. However, the implications of its justifications and the actual use of the power (see "Abuses" below), make it clear that the Administration acts more strongly than it speaks.
- 90 Edward S. Corwin has stated: "That this clause is an enlargement, not a constriction of the powers granted to Congress . . . was established by Marshall's classic opinion in *McCulloch v. Maryland*," *Corwin, op. cit.*, p. 357.
- 91 With, of course, full consideration given to routine management decisions and unavoidable contingencies. See t.a.n. 16-22.
- 92 Rehnquist, Memo, p. 283.
- 93 James Naughton, "Official Upholds Nixon", *New York Times*, Feb. 7, 1973, p. 40.
- 94 *Impoundment Hearings*, p. 138.
- 95 Gerald W. Davis, "Congressional Power to Require Defense Expenditures", 44 *Fordham Law Review*, 39 (1964) reprinted in *Impoundment Hearings*, pp. 569, 573.
- 96 *Corwin, op. cit.*, p. 330. *Corwin* goes on to say that this distribution of powers grew out of the conviction that the executive should be deprived of the sole power of raising and regulating fleets and armies (citing Blackstone's Commentaries as authority).
- 97 *Brady, op. cit.*, pp. 8-9.
- 98 *Impoundment Hearings*, p. 144.
- 99 *Impoundment Hearings*: Professor Bickel, p. 144, *Davis, op. cit.*, pp. 574-575; *Brady, op. cit.*, pp. 8-9.
- 100 Federalist No. 69 at 475. Excerpt quoted in *Davis, op. cit.*, p. 574. *Davis* also cites 2 Story, Commentaries, sec. 1492 (5th Ed. 1891) and *Fleming v. Page* 50 U.S. (How.) 602 (1850).
- 101 19 Ct. Cl. 528 (1884) excerpt quoted in *Brady, op. cit.*, p. 8.
- 102 *Davis, op. cit.*, pp. 574-575.
- 103 *Brady*, p. 18.
- 104 *Brady*, p. 9.
- 105 *Impoundment Hearings*, pp. 95, 97.
- 106 Naughton, "Official Upholds Nixon", *op. cit.*, p. 4. Senator Ervin replied that he couldn't reconcile that with what the words say, to which Sneed said with a smile, "Well, I've tried." *Id.*
- 107 *Impoundment Hearings*, pp. 97-98.
- 108 *Id.*, pp. 95-96.
- 109 *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
- 110 343 U.S. 579, 582.
- 111 343 U.S. 576, at 637-638.
- 112 Though Justices Black and Douglas based their decisions more on a strict interpretation of the lack of inherent presidential power to legislate, the other four concurring justices placed strong emphasis on the exclusion of the power to seize property in statutes regulating labor disputes.
- Frankfurter*: "Congress has expressed its will to withhold this power from the President as though it had said so in so many words." (p. 602); *Jackson*: Congress had "not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure."; *Burton*, referring to the Taft-Hartley Act and citing the Congressional debate: ". . . the most significant feature of that Act is its omission of authority to seize." (p. 657); *Clark*: ". . . where Congress has laid down specific procedures to deal with the crisis confronting the President, he must follow these procedures in meeting the crisis . ." (p. 662).
- 113 *Impoundment Hearings*, p. 153. See "The Statutory Basis of Impoundment" section of this article for a fuller discussion.
- 114 *Id.*, p. 148; also p. 72.
- 115 See n. 25 and surrounding text. It should be noted that although the Budget Bureau officials had expressed this fear two years before the *Steel Seizure* decision was handed down, the Supreme Court had established the applicable principle as far back as 1804. In *Little v. Barreme*, 2 Cr. (6 U.S.) 170 (1804), the Court invalidated a Presidential directive ordering the seizure of ships trading

- with French ports. The Court declared the order was in conflict with a Congressional Statute in which Congress had permitted certain seizures but prohibited others. The analogy to the Antideficiency Act is strong.
- 116 *Impoundment Hearings*, p. 136.
- 117 See n. 103 and surrounding text.
- 118 343 U.S. 579, 589 (1952).
- 119 U.S. Constitution, Article I, section 7, limits the President's options, upon receiving a bill, to either signing it or vetoing it. No middle ground, such as an item veto, is permitted. And upon veto, Congress was explicitly given power to override by a two-thirds majority of each House.
- 120 Article V of the Constitution sets forth the rigorous requirements for amendment of the Constitution. Nowhere in this carefully drawn provision is there a suggestion that the President can unilaterally amend the Constitution by renaming Constitutionally-prohibited practices. Congress could not pass an *ex post facto* by calling it an efficient attempt to redress oversights nor could the privilege of *Habeas Corpus* be suspended by labelling it protective reaction.
- 121 The problem of Congressional irresponsibility in fiscal matters will be discussed in a later section.
- 122 *Myers v. United States*, 272 U.S. 87, 119-120 (1925).
- 123 *Congressional Record – House*, July 26, 1972 at H3631. The outlook in the next six months is more of the same as Nixon is expected to impound, veto and "second veto" Congressional attempts to depart from his fiscal 1971 budget.
- 124 The Constitution has been similarly viewed in times of national crisis. The worst offenses against the Constitution have been committed and tolerated during such periods. The suspension of habeas corpus during the Civil War and the internment of Japanese-Americans during World War II are among the more notorious cases. At such times, the Supreme Court has usually turned a blind eye to the Presidential actions. Any redress has customarily had to await the subsiding of the crisis.
- 125 "Nixon Holds Firm on Impounding of Funds," *San Francisco Chronicle*, Feb. 1, 1973, p. 20.
- 126 Quoted on ABC's "Issues and Answers," March 11, 1973.
- 127 All the following information on the water and sewer project is taken from Zabloci's statement before the 1971 Ervin Subcommittee Hearings, *Impoundment Hearings*, p. 307. The Zabloci-OMB correspondence is reproduced *ibid*, pp. 309-10.
- 128 Statement made by Secretary Romney while testifying before the Senate Committee on Banking, Housing and Urban Affairs on March 4, 1971. Excerpt quoted in Fisher, *Memo*, p. 594 of *Impoundment Hearings*.
- 129 The persuasiveness of the argument would hinge on interpretation of Congressional intent, *i.e.*, was revenue-sharing to supplement or replace categorical grants and if it was to replace them, was the transition to be retroactive or prospective?
- 130 "What's Really in the Budget?," *Time*, March 5, 1973, p. 11.
- 131 John Herbers, "Nixon Aides Defend Postponing Outlays," *New York Times*, March 3, 1971, article reprinted in *Impoundment Hearings*, p. 606, 607.
- 132 Mayors and other lobbyists for the cities would be forced to make the same difficult choice. In fact, the mayors never realized how much of an either/or choice they had. They claim that the Administration had led them to believe that passage of revenue-sharing would not cost the cities large sums of other Federal grants. With the massive budget cuts announced in the 1974 Budget, the mayors have yelled "Betrayal!"
- 133 Philip Shabecoff, "Control of Job-Training Services to be Delegated to Local Areas," *New York Times*, Jan. 30th, 1973, p. 619.
- 134 Information on the commodity distribution program and the food stamp impoundments is all taken from Ingram, *op.cit.*, p. 44.
- 135 *Ibid*.
- 136 *National Journal*, "Impoundment," p. 1037.
- 137 John Herbers, "U.S. Commitment to Renew Cities is in Doubt Under New Program," *New York Times*, Jan. 30th, 1973, p. 619.
- 138 *Ibid*.
- 139 Confidential interview, August 11, 1972, OMB office.
- 140 See f/n 8 and surrounding text.
- 141 Presidents have argued as much themselves, though in a very different context. Presidents Johnson and Nixon both relied heavily on continued Congressional appropriations for Viet Nam to justify the absence of a declaration of war. Their claim was that through these appropriations, Congress had manifested its will.
- 142 Because of OMB supervision, the agency heads are usually quite reluctant to ask for more money than the President, through OMB, approves. Among its other powers, OMB makes quarterly apportionments of all agency funds; writes and supervises the President's budget; helps make impoundment decisions; recommends Presidential acceptance or veto of bills; recommends agency proposals for inclusion in the President's program; regulates the legislative clearance process of the White House; and, generally, oversees the workings of the Federal Bureaucracy. In short, it is the eyes, ears, mouth and hands of the President. Antagonizing it can spell darkness or doom for any agency or official of the Federal Government and OMB is quite sensitive about agency heads departing from the President's budget recommendations in their hearings before Congress.
- 143 For an indication of the amount of Congressional deference to the President's budget, see the tables submitted by Caspar Weinberger to the Joint Economic Committee in the 1972 "mid-year review" hearings. These tables show the relatively small amounts of Congressional "tinkering" with the President's budget proposal. For instance, the tables for fiscal 1972 show "the total effect of Congressional action and inaction" on budget requests resulting in a \$3.9 billion increase in the first session of Congress and a \$3.6 reduction in the second. The full tables and explanation should be available in the printed hearings of the Joint Economic Committee.
- 144 As the last two columns reveal, each Congressional appropriation fell short of the actual need to be met. This use of discretion and restraint indicates that rather than signing blank checks, Congress did attempt to weight various priorities and to budget accordingly.
- 145 The one apparent exception, Model Cities, does not seem an exception at all. As the text indicates, it was a Presidential decision, not an appropriation, that led to the increase in spending over the initial budget figure.
- 146 See note 8.
- 147 The appropriation employed the phrase "shall spend" rather than "may spend" or "is authorized to spend". Whatever disagreements may exist about the possible permissiveness of the latter phrases, it is generally conceded by both sides that "shall spend" is mandatory.
- 148 *Ibid*, p. 214.
- 149 *Ibid*, p. 140.
- 150 *Congressional Record – House*, July 26, 1972, at H6929. Similarly, criticism, though intense at times, was sporadic. After each large impoundment, Congressional criticism would reach a crescendo and then recede, awaiting the next big controversy. Two such crescendos occurred in 1959 over the withholding of funds from the Mariner and the Polaris program, and in 1962 over the RS-70 controversy (See Ramsey "Impoundment", pp. 300-301.)
- 151 *New*
- 152 Fisher, "Politics," p. 114; Fisher, *Memo*, p. 596.
- 153 See "Budget Message of the President," excerpts printed in *New York Times*, January 30, 1973, p. 210.
- 154 *National Journal*, "Impoundment," p. 1037.
- 155 Fisher, *Memo*, p. 595. All information in this paragraph is taken from this source.
- 156 See, for example, Fisher, "Politics," p. 114; Fisher, *Memo*, p. 596. Humphrey, *Congressional Record – Senate*, Feb. 8, 1973, at S2492; Pickle, *Congressional Record – House*, July 26, 1972, at H6930.
- 157 Pickle, *Congressional Record – House*, July 26, 1972 at H6930.

- 158 See F/N 175,176. Other than during periods of large-scale war, the major impoundment controversies involved one-shot policy disagreements, usually over specific defense items. The major exception to this generalization occurred in 1966-67 when President Johnson impounded a number of domestic programs to help finance the Vietnam War. Criticism was severe and some of the funds were restored. Fisher "Politics," p. 113
- 159 Ingram, *op.cit.*, p. 49.
- 160 Representative Arnold Olsen (D.-Mont.) obtained the 90-plus signatures. The letter was dated Jan. 23, 1970. A copy of the letter and the accompanying press release by Olsen's office was supplied by the Staff of the Separation of Powers Subcommittee of the Senate Judiciary Committee. The incident is also recounted in Ingram, *op.cit.*, at 44-45.
- 161 Excerpt taken from a statement made by Representative Julia Butler Hansen, before the House Rules Committee, May 5, 1969, concerning HR350 (a bill to establish a joint committee to study the Budget Bureau sponsored by Congressman John Moss in 1969.)
- 162 As quoted in the letter, Senate Report No. 92-549 contained the following language: Accordingly, the Committee *intends and directs* that \$52,700,000 (including \$20,000,000 previously enacted) of the appropriation provided *be for* the Emergency Food and Medical Services . . . (emphasis added)
- 163 Letter to the President signed by Philip Hart, Gaylord Nelson, Marlow Cook, Richard Schweiker, and Charles Percy. A copy of the letter was supplied by the staff of the Separation of Powers Subcommittee of the Senate Judiciary Committee.
- 164 Budget Message of January 3, 1941; excerpt quoted in Williams, *op.cit.*, *Impoundment Hearings*, p. 378.
- 165 *Ibid.*
- 166 There have been rare terminations in the past, usually centered around certain defense projects.
- 167 See note 159A.
- 168 *Congressional Record - Senate*, January 16, 1973 at S636.
- 169 David Rosenbaum, "Dismantling of a Landmark Act As Federal Program Proposed," *New York Times*, January 30, 1973, p. 20C.
- 170 *Ibid.*
- 171 *Ibid.*
- 172 Edward Cowan, "Some Programs to be Abolished In Move to Reduce Size of Staff," *New York Times*, January 30, 1973, p. 20C.
- 173 *Ibid.*
- 174 "Drastic Cuts in Social Programs Asked," *New York Times*, January 30, 1973, p. 22C.
- 175 *Ibid.* All three reasons later mentioned are taken from this source.
- 176 "Dismantling of OEO Is Confirmed," *San Francisco Chronicle*, January 27, 1973, back page.
- 177 Editorial: "Saving Legal Services," *New York Times*, Feb. 18, 1973, p. 14E.
- 178 Anthony Ripley, "OEO: Strategy for an Execution," *New York Times*, February 18, 1973, p. 3E.
- 179 Editorial, *op.cit.*, note 214.
- 180 "Dismantling of OEO Is Confirmed," *op.cit.*, F/N 213.
- 181 "What's Really In the Budget?," *Time*, March 5, 1973, p. 11.
- 182 *Ibid.*
- 183 "Dismantling of OEO is Confirmed," *op.cit.*, F/N 213.
- 184 Ripley, *op.cit.*, note 215.
- 185 *Ibid.*
- 186 *Ibid.*
- 187 "President Nixon's Budget Message," excerpts reprinted in *New York Times*, January 30, 1973, p. 21C.
- 188 "Nixon Budget Would Limit or Cut 100 U.S. Programs," *New York Times*, January 30, 1973, p. 1, 22C.
- 189 Budget message, *op.cit.*
- 190 Example cited by Congressman Lee Aspin of the Armed Services Committee. See Peter J. Orgnibene "The Pentagon's Cost Overruns," *New Republic*, September 2, 1972, p. 13 (hereinafter "Overruns".) All information about these programs is taken from this source.
- 191 House Appropriations Committee Report, excerpts quoted in Walter Pincus, "Congress and the Pentagon," *New Republic*, October 14, 1972, p. 18.
- 192 *Ibid.*
- 193 *Ibid.*
- 194 Ognibene "Overruns," p. 12.
- 195 "Acquisition of Major Weapon Systems," GAO report discussed in Ognibene "Overruns," pp. 12-13.
- 196 *Ibid.*, p. 12.
- 197 *Ibid.*
- 198 *Ibid.*
- 199 For a fuller description of the countless devious ways this is accomplished, see Ingram, *op.cit.*, pp. 38-41. Louis Fisher estimates that in the 1972 fiscal budget of \$249 billion, secret funds might amount to \$15-20 billion.
- 200 *Ibid.*, p. 40.
- 201 *National Journal*, "Impoundment," p. 1028.
- 202 quoted in Ingram, *op.cit.*, at 45.
- 203 Church discusses the document in F/N 21 of a comment entitled "Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion," 22 *Stanford Law Review* 1240 (1970), reprinted in *Impoundment Hearings*, p. 367.
- 204 *Ibid.*, F/N22, pp. 367-368.
- 205 *Ibid.*
- 206 *Congressional Record - Senate*, February 8, 1973, at S2490.
- 207 *Ibid.*
- 208 *Ibid.*
- 209 *Ibid.*
- 210 *Ibid.*
- 211 *Congressional Record - Senate*, February 5, 1973, p. S2013.
- 212 "Budget Chief Vs. the Senators," *San Francisco Chronicle*, February 8, 1973, p. 8.
- 213 *Ibid.*
- 214 OMB handout, "Budgetary Reserves: June 1972," reprinted in *Congressional Record - Senate*, August 16, 1972, at S13668-13671, (hereinafter "Handout"). Other page references are to this source.
- 215 For instance, the recently terminated REA program and such HUD pariahs as rehabilitation loans, grants for new community assistance and basic water and sewer grants.
- 216 "Handout," p. S13670.
- 217 23 USC 101 (c) reads in pertinent part, ". . . no part of any sums authorized . . . (for the) Federal-Aid System . . . shall be impounded or withheld from obligation . . ." The only qualification of this broad statement of policy was that specific sums could be withheld for specific periods "to assure that sufficient amounts will be available in the Highway Trust Fund . . ." But this contingency was not at issue in the controversy because OMB had asserted that the funds were withheld to fight inflation.
- 218 *State Highway Commission of Missouri v. Volpe*, 347 F. Supp., 951 (June 19, 1972); opinion reprinted in *Congressional Record - Senate*, September 13, 1972, at 14749-14750.
- 219 These are Judge Becker's words in the court's opinion. See *ibid.*, at S14750.

- 220 This phrase is taken from the list of reasons for impoundment "other than routine financial administration".
- 221 See F/N 169-175 and surrounding text.
- 222 "Handout," p. S13669.
- 223 *Impoundment Hearings*, p. 141.
- 224 *Ibid.*, p. 213.
- 225 *Ibid.*, p. 214. Furthermore, it should be noted that routine reservations are, by OMB definition, "temporary deferrals," yet the project had been officially terminated at the time it was included in the "routine" category. (Termination occurred in 1971; see *Ibid.*)
- 226 "Budget Message," *op.cit.*
- 227 Shanahan, *op.cit.* f/n 7.
- 228 Editorial, "The Tax Bettle," *New York Times*, February 11, 1973, p. 12E. The editorial has taken much of its information from the House Ways and Means Committee hearings.
- 229 Shanahan, *op.cit.*
- 230 "Democratic leaders have pledged that their majorities in the Senate and House . . . will try to keep total appropriations for 1974 at about \$268 billion. But as Mike Mansfield . . . said . . . there will be 'friendly competition' over priorities for use of the money," James Naughton, "Congress Regards Nixon's Plan to Curb Programs as Challenge," *New York Times*, January 30, 1973, p. 21C.
- 231 Editorial, "Impoundment Issue," *New York Times*, February 11, 1973, p. 12E.
- 232 *Ibid.*
- 233 Fisher, "Politics," p. 113.
- 234 *Ibid.*
- 235 The cancellation is recounted in *Hearings Held Before the Senate Subcommittee on Inter-Governmental Relations on S448, Regulatory Agency Budgets*, 92nd Cong., 2nd sess., February, 1972, p. 28. The relationship of the impoundment to the cancellation is discussed in *Hearings before the Subcommittee on Communications of the Senate Commerce Committee, "Overview of the FCC"*, 92nd Cong., 2nd sess., February 1972.
- 236 FCC Chairman Burch admitted "naively . . . I did not foresee the intensity of public concern that our decision brought forth." *Ibid.*
- 237 The budget increase for the program is acknowledged in the "Regulatory Agency Budget" hearings, *op.cit.*, p. 24. Charles Lichenstein, FCC Chairman Burch's Administrative Assistant, said that the funds were released to continue the investigation. Telephone interview, August 21, 1972.
- 238 Personal interview with Rufus Edminston, Chief Counsel of the Separation of Powers Subcommittee. July 15, 1972.
- 239 Statement by Clark MacGregor who had been President Nixon's chief liaison for Congressional relations, quoted in *National Journal*, "Impoundment," p. 1034.
- 240 Statement by Herb Klein, quoted *Ibid.*
- 241 *Ibid.*, p. 1036.
- 242 Confidential interview, July 27, 1972.
- 243 "OMB: Washington's Most Feared Agency," *L. A. Times*, Dec. 26, 1972, p. 16.
- 244 The incident was recounted by Louis Fisher of the Congressional Research Service of the Library of Congress. He telephoned the information to the Separation of Powers Subcommittee. The subcommittee has a memo dated, July 25, 1972 "Release of Impounded Funds Prior to Elections," with the information.
- 245 *Ibid.*
- 246 *Congressional Record - Senate*, March 13, 1972 at S3846.
- 247 Impoundment "handout," *op.cit.*, F/N 237, at p. S13671.
- 248 "President Nixon's \$3½ Billion Campaign Fund," *Congressional Record - House*, January 19, 1972 at H99-101.
- 249 *Ibid.*, p. H100.
- 250 *Ibid.*
- 251 Fisher had been requested by Ben Darling, Congressman Sisk's press secretary, to compute the actual funds released between Jan. - June 1972. He sent a 5-page memo entitled "Federal Appropriations, Obligations, and Reserves for Major Programs Within the Departments of HUD and Agriculture, Fiscal Years 1971-1972," August 21, 1972.
- Fisher began by stating a number of conceptual difficulties in updating and verifying the Anderson estimation. Chief among these was the problem of "lapsed Funds" and "the use of loan authority as a substitute for appropriations."
- With these disclaimers, Fisher compared the estimated and actual spending. He found that Anderson's estimates had been accurate with regard to the HUD programs. Because of the "conceptual difficulties" mentioned, Anderson's staff had more problems estimating the Agricultural programs. They were approximately \$250 million too low in estimating the reserves that would remain in the agricultural programs after June 30. But this is only 7% of the \$3.5 billion figure they were assessing.
- 252 "Public Works, Pollution Control, and Power Development and Atomic Energy Commission Appropriation" *Hearings, before a Subcommittee of the House Appropriations Committee*, 91st Cong., 2nd sess., Part 5, p. 800-801.
- 253 Letter to President Nixon from Congressman Sisk, November 12, 1970, supplied by Sisk's office.
- Congressman Sisk has noted that reclamation law prohibits anyone from irrigating more than 160 acres of land using water supplied through federally financed water projects; therefore, small farmers would be the chief beneficiaries of the program. "Public Works for Water and Power Development and Atomic Energy Commission Appropriation Bill, 1972," *Hearings, before a Subcommittee of the House Appropriations Committee, 92nd Cong., 1st. sess., part 5, p. 1017.*
- 254 The Reagan account is taken from a transcript of the political broadcast supplied by Sisk's staff.
- 255 Sisk letter, *op.cit.*, f/n 313.
- 256 Weinberger's statements are all taken from a letter to Sisk, dated January 20, 1971. The letter was supplied by Sisk's staff.
- 257 Personal interview with Sisk's Administrative Assistant, Tony Coelho, and press secretary Ben Darling, August 10, 1972.
- 258 *Ibid.*
The full extent of the inefficiency of the entire series of impoundments has been described by Sisk in testimony before the House Appropriations Committee. See "Public Works Appropriations for 1970 for Water and Power Resources Development and the Atomic Energy Commission," 91st Cong., 1st. sess., Part 5, p. 1092. Also the 1972 Hearings, *op.cit.* f/n 313, p. 1017.
- 259 *Congressional Record - House*, July 26, 1972 at H6938.
- 260 Statement made in personal interview, August 17, 1972.
- 261 *Congressional Record - House*, July 26, 1972, p. H6931.
- 262 *Ibid.*
- 263 This phenomenon is particularly applicable to Committee Chairman.
- 264 The breakdown is 55 staff members in the House and 24 in the Senate. The 79-person total includes clerical employees. Thomas Foley, "Reformers Push Fight to Update Congress," *Los Angeles Times*, December 26, 1972, Part I, p. 15.
- The article puts the OMB figure at 650. However, more recent accounts put the figure at 700. See, Mary Russell, "Putting Congress Back Together Again," *Los Angeles Times*, March 18, 1973, Part IV, P. 6.
- Unfortunately, the 650 figure was not broken down into budget review people vs. "others". However even with that breakdown, the disparity would be staggering. Furthermore, the OMB is a tightly-knot organization with the longest "institutional memory" in the government. OMB budget examiners have full access to the knowledge and expertise of the full 650 member compliment (e.g. program evaluator, etc.) and the institutional records, projections, figures, etc.

- 265 "The Crack in the Constitution," *Time Cover Story*, January 15, 1973, p. 16. (Hereinafter, *Time Cover Story*.)
- 266 Rep. John Culver, "For the Record: The Papers and the Role of Congress," *Washington Post*, June 26, 1971.
- 267 *Ibid*.
- 268 The statement was made by University of Pittsburgh Professor Charles Jones, quoted in *Time Cover Story*, *op.cit.*, p. 16.
- 269 Statement of Senator Mondale, quoted *Ibid*.
- 270 *Ibid*.
- 271 A classic illustration of such distortion was reported in a CBS Documentary, "The Long War-Congress vs. the President," aired on March 10, 1973.
- The case involved Caspar Weinberger's testimony before a House Subcommittee on health. Weinberger maintained that the fiscal 1974 budget contained a billion dollar "increase" in health activities. Fortunately, in this *exceptional case*, Chairman Paul Rodgers and his lone committee staff assistant had "done their homework". Under strong cross-examination, Weinberger was forced to concede that the "increase" really consisted of 1) a health program which was merely shifted from one department account to another and 2) an increase which was to be spread over a five-year period. The actual total increase in health activities for fiscal 1974 was negligible.
- 272 Section 206 of the Budget and Accounting Act of 1921 forbade agency heads from appealing above the President's Budget Proposal directly to Congress. Only if agency members were specifically asked by Congress members could they indicate any dissatisfaction with their budgetary allowances. An exception was made for the heads of the military departments who were allowed to appeal directly to Congress. See f/n 23 and surrounding text.
- 273 Fisher, "Politics," pp. 105-107, 112.
- 274 *Ibid*, pp. 113-115.
- 275 Statement of Relph Nader in "Impoundment of Appropriated Funds by the President," *Joint Hearings Before the Ad Hoc Subcommittee on Impoundments of the Government Operations Committee and the Sub-Committee of Separation of Powers of the Judiciary Committee*, U.S. Senate, 93rd Cong., 1st. sess., on S373, Jan. 1973, p. 32. (hereinafter "Impoundment Hearings, 1973").
- 276 Jefferson wrote in 1789:
We have already given . . . one effective check to the dog of war by transferring the power of declaring war from the executive to the legislative.
- Quoted in Steve Harvey, "Congress vs. the Presidency: Running Debate on Executive Power," *Los Angeles Times*, February 18, 1973, Part VII, p. 4.
- 277 President Truman did not declare a state of emergency until six months after the troops were sent to Korea.
- 278 Ingram's article, "Billions in the White House Basement," *op.cit.*, other than Congress intended or desired. Reprogramming, secret funds, transfer authority, the pipeline, "excess" military stock are some of the common devices employed. The flexibility is so tremendous and the devices are so concealed that the President was able to wage a "secret war" in Laos without Congressional knowledge for a few years.
- 279 James Naughton, "Struggle Over the Power of the Purse," *New York Times*, February 11, 1973 p. 1E.
- 280 The three are Caspar Weinberger (HEW Secretary), now in charge of all "human resources" functions in the various departments; James T. Lynn (HUD Secretary), now administering all "community-development programs; and Earl Butz (Agriculture Secretary), now handling all "natural resources-activities." See *Time Cover Story*, *op.cit.*, p. 12.
- 281 Senator Hubert Humphrey, "Spending Ceiling Not Answer to Inflation," reprinted from the *Washington Post* in the *Los Angeles Times*, October 8, 1972, section J, p. 7.
- Humphrey's remarks were specifically addressed to President Nixon's 1972 proposal for a spending ceiling which would have given the President *unlimited discretion* in keeping spending below \$250 billion. This proposal, labelled "A Domestic Gulf of Tonkin Resolution" by Humphrey, was rejected by the Senate. However, President Nixon, by proceeding to act as if it had been passed (see f/n 49 and surrounding text) has breathed new meaning into Humphrey's statement. Therefore, Humphrey's conclusion may be applied to the President's use of impoundment.
- 282 Davis, *op.cit.*, F/N 114, at P. 570 (*Impoundment Hearings*).
- 283 *Ibid*.
- 284 Fisher, "Politics," p. 111. A list of 13 of these previous impoundments plus reference to two others is found on pp. 300-301 of the *Impoundment Hearings*.
- 285 *Ibid*.
- 286 House Report No. 1406, 87th Congress, 2nd sess., 1 (1961); excerpts reprinted on pp. 300-301 of *Impoundment Hearings*. All quotes taken from the report can be found herein.
- 287 Quoted in Fisher, "Politics," p. 111.
- 288 The letter is reprinted on p. 526 of the *Impoundment Hearings*.
- 289 Excerpt from the 108th *Congressional Record* 4691 (1962) reprinted in Davis, *op.cit.*, p. 573.
- 290 *Ibid*. at 4693, quoted in Davis, *Ibid*.
- 291 Fisher, *op.cit*.
- 292 In very courteous terms, President Kennedy suggested that the word "authorized" might be more suitable than the word "directed" in an authorizing bill. However, citing the separation of powers doctrine, he "insisted" upon the "full powers and discretion essential to the faithful execution" of his responsibilities as President and Commander in Chief. This appears to be a strong statement of the "inherent powers" of the President. However, Kennedy did qualify his statement. He said that it would be "unwise if not impossible" for the legislature to "direct" the Executive on matters within the latter's jurisdiction. He also said that it was incumbent upon the Executive "to give every possible consideration" to the views of Congress.
- 293 Quoted in John Averill, "Furor Over Impoundments: A Dilemma of Power and Duty," *Los Angeles Times*, February 18, 1973, Part VII, p. 4.
- 294 For instance, the letter by the 90 Congressmen was sufficient to secure the release of the Indian Health Care Funds (Edmiston interview, *op.cit.*). Various other Congressional attempts to free funds for specific projects have been successful.
- 295 Ingram, *op.cit.*, p. 48.
- 296 Arlen J. Large, "Frozen Money - Can President Refuse to Spend Some Funds?" *Wall Street Journal*, April 22, 1971, reprinted in *Impoundment Hearings*, p. 609, 610.
- 297 *Ibid*.
- 298 Quoted in Norman C. Miller, "Nixon is Sure to Win Battle of the Budget Despite Howls of Foes," *Wall Street Journal*, Feb. 21, 1973, p. 1.
- 299 There is insufficient space to discuss fully Congress's attempt to reassert its powers in these areas. Therefore, these attempts can only be briefly alluded to. Legislation has been proposed to restrict the President's war-making power. Under this legislation, troops could not be committed to active duty for more than 30 days without Congressional approval. There is similarly an attempt to prevent the President from undercutting the treaty-ratification power of the Senate through the use of Executive agreements. The Presidential practice of leaving important policy decisions to non-confirmed Presidential advisors is also facing attack. The Senate recently voted to require confirmation of the OMB Director. And, Executive Privilege is expected to be challenged by Senator Ervin's threat to subpoena and prosecute for contempt, if necessary, Presidential advisors who have knowledge of the Watergate incident.
- The hedging and back-tracking is evidenced more by what Congress has *not* done than by what it has done. For instance, the Senate could have used the confirmation hearings for Caspar Weinberger as HEW Secretary to inquire far more into past and prospective uses of impoundment. As OMB Director, Weinberger was directly responsible for writing the fiscal 1974 budget which terminated so many programs. Although two Senate Committees, Finance and Education and Labor "had a shot at . . . Weinberger . . . neither committee seemed interested

enough in information on the impoundment procedure and decisions behind the upcoming budget to want to conclude the hearings until after the budget appeared." "A 'Tough' Congress", *New Republic* February 3, 1973.

Furthermore, a really serious Congress could apply tremendous informal pressure to release funds. Threats to deny funds for Presidentially desired programs could easily unblock frozen funds. The Executive department has to come before the Appropriations Committees almost daily with requests for supplemental appropriations, approval of reprogramming requests, etc.

One example of this ability to exert pressure occurred in 1971 when Congress included an Anti-Impoundment Amendment in an Act which amended the Foreign Assistance Act of 1961. Section 658 precluded release of appropriated funds for Foreign Military Sales until the President released funds for a number of domestic programs, which has been impounded. (See HR9910, Sec. 658, 92nd Cong., 1st. Sess., October 21, 1971.) Because of his desire for the military assistance funds, the President did release the funds impounded during the particular fiscal year. Despite the success of the anti-impoundment rider, Congress has not pursued this course in subsequent years.

300 *Impoundment Hearings, 1973*, p. 33.

301 *National Journal*, "Impoundment," p. 1032.

302 *Impoundment Hearings, 1973*, p. 34.

303 This figure is California's portion of the \$6 billion in funds to fight water pollution nationwide which were withheld by the Administration. See "Nixon Sued Over Blocked Funds," *San Francisco Chronicle*, January 27, 1973, p. 14.

304 There are at least 7 other cases dealing with impoundment which are currently being litigated. For descriptions of these cases, and supplemental materials including complaints, defenses, etc., see pp. 908-1010 of *Impoundment Hearings, 1973*.

305 John Averill, "Mansfield Vows to Fight Nixon's Freeze of Funds," *Los Angeles Times*, December 17, 1972.

306 For the House Vote, see "House Votes for Bill Nixon Killed," *San Francisco Chronicle*, Feb. 8, 1973, p. 8. For the Senate Vote, see "Senate, House Rebuff Nixon on Rural Aid," *San Francisco Chronicle*, March 2, 1973, p. 10.

307 James Naughton, "Struggle Over the Power of the Purse," *New York Times*, February 11, 1973, p. 1E.

308 *Ibid.*

309 *Ibid.*

310 *Ibid.*

311 It is also an indication of growing Senate anger at the use of non-confirmed "advisors" in key policy positions within the Administration.

312 "Senate, House Rebuff Nixon on Rural Aid," *San Francisco Chronicle*, March 2, 1973, p. 10.

313 For a list of the 45-co-sponsors, see *Congressional Record - Senate* January 16, 1973 at S636.

314 Some of the "Technical" problems with the bill are noted by Senator Byrd. See *Congressional Record - Senate*, Feb. 7, 1973, at S2247-48.

315 The burden is placed on the President by requiring full Congressional approval rather than absence of Congressional disapproval.

316 "Impoundment; Congress Wants Control Over Spending," *Congressional Quarterly Weekly Review*, Volume XXXI, Nov. 5, Feb. 3, 1973, p. 248.

317 *Impoundment Hearings, 1973*, p. 35. Nader is also concerned that passage of the bill might be construed as Congressional approval of previous impoundments. He, therefore, urges that the legislative history of the bill explicitly state that in no way does passage indicate any approval of previous impoundments.

318 *Congressional Record - Senate*, Feb. 7, 1973, at S2248.

319 *Impoundment Hearings, 1973*, p. 38.

320 *Ibid.*

321 Conte's bill, HR. 415, would require the President to obtain Congressional approval before, rather than after, any impoundment could be made. Conte's bill is, thus far, the most desirable proposal which has been set forth legislatively. See copy of the bill on p. 131 of the *Impoundment Hearings, 1973*, and Conte's discussion of his proposal, pp. 129-130.

322 Congressmen Pickle, Sarbanes, Harrington and William Ford have co-sponsored a bill similar to the Ervin bill. *Impoundment Hearings, 1973*, p. 204.

323 For a description of the Mahon bill, H R. 5193, see "The Case for Congress," *New York Times*, Editorial, March 18, 1973, p. 12E.

324 The phrase is taken from Professor Bickel's remarks about the undesirability of leaving impoundment decisions to the leaders of the Appropriations Committees. See *Impoundment Hearings*, p. 31.

325 For a fuller description of the interim report and the proposed budget reforms, see Edwin L. Dale Jr., "Wide Spending Reforms Urged in Congress Study," *New York Times*, Feb. 7, 1973, p. 1.

326 For a fuller description of the counter budget, see James Naughton, "Democrats in Senate Plan Budget to Counter Nixon's," *New York Times*, March 18, 1973, p. 1.

327 *Ibid.*

328 *Ibid.*

329 *Washington Post* Columnist Mary Russell discussed a number of such reforms instituted by the House Democratic Caucus:

It has put a serious dent in the seniority system by making committee chairmen subject to confirmation by the caucus. It has opened up formerly closed committee hearings. It has restricted the use of closed rules that prevented amendments to bills on the floor. It has given subcommittee chairmen more authority to act independently of their chairmen.

It has limited the number of major committee assignments for each member. It has put the House Leadership on the Committee for Committees and voted to form a Policy and Steering Committee to recommend policy stands to the caucus and possibly the committees.

What all this signifies is that an important shift in power in the House is already under way - a shift away from the independent chairmen and toward more central authority. See Mary Russell, "Putting Congress Back Together Again," reprinted in the *Los Angeles Times*, March 18, 1973, part VI, p. 1.

330 Among the more potent weapons available to a strong chairman are 1) the power to set-up or disband subcommittees; 2) the power to appoint subcommittee chairmen; 3) the power to direct bills to favorable or unfavorable subcommittees, thus largely determining the fate of the bills; 4) the power to hire, fire and largely control committee staff members; 5) a miscellany of bargaining chips, such as helping name conference committee delegates or floor managers of bills, which can be doled out or retracted to exert pressure.

331 Quoted in *Who Rules Congress*, by Jim Fallows, Mark Green and David Zwick, A Bantam/Grossman Book, New York, 1972, p. 71.

332 quoted in Norman Miller "Nixon is Sure to Win Battle of the Budget Despite Howls of Foes," *Wall Street Journal*, Feb. 21, 1973, p. 1, 13.

333 *Ibid.*

334 Quoted in *Time Cover Story*, p. 15.

335 Statement made by the President in a nationwide radio and television address, March 29, 1973.

336 Quoted in Russell, *op.cit.*, f/n 386.

337 It is generally conceded by most political scientists that "respect for the office" and the ability to "orchestrate events" for political advantages makes the incumbent President all but invulnerable. President Nixon was able to sail to a massive victory after waging a "non-campaign" largely because of these advantages.

Because of the tremendous advantages of incumbency, a President is not answerable to the public, in terms of political pressure, to the same extent as are members of Congress. This means that Congressional action constitutes the single most important restraining influence on the President's actions. Therefore, to the extent that Congressional influence is minimized, this important political check is destroyed.

338 Excerpt quoted in "The Supreme Court's Role: Will it Referee the Fight?," *Los Angeles Times*, Sept. 18, 1973, part VII, p. 5.