History and Practice of Executive Impoundment of Appropriated Funds

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I. INTRODUCTION

In late 1972, Congress passed the Federal Impoundment and Information Act. On February 5, 1973, Roy L. Ash, then director-designate of the Office of Management and Budget ("OMB"), delivered the first report required by the Act, indicating budget reserves in effect as of January 29, 1973: approximately $8.7 billion was, according to the OMB, being withheld from obligation. But the total did not reflect that about $5 billion which was to be spent for water pollution control was impounded. The actual re-
serve of about $15 billion far exceeded the amount impounded by any other President.

Each year since first assuming office, President Nixon has impounded 17-20 per cent of controllable funds appropriated by Congress. Nearly $12 billion appropriated for the building of highways and pollution control projects has been withheld. Hundreds of millions of dollars appropriated for medical research, higher education, rural electrification, rural environmental assistance, public housing, urban renewal and myriad other programs

the last days of the session. And within 24 hours, both the House and the Senate had overridden it. The President got only 12 votes in the Senate and 23 votes in the House to support his veto. Now, how many times, may I ask, must Congress speak before our intention is clear?


5. See Indianapolis Star, Feb. 6, 1973, at 3, col. 3. There has been considerable controversy about the total amount impounded. Note, Impoundment of Funds, 86 Harv. L. Rev. 1505-06 n.2 (1973) [hereinafter cited as Impoundment].

6. Compare OMB figures in Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Power of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 7-13 (1971) [hereinafter cited as 1971 Hearings], with figures set out by Boggs, Executive Impoundment of Congressionally Appropriated Funds, 24 U. Fla. L. Rev. 221, 226 (1972) [hereinafter cited as Boggs]. But see Hearings on Impoundment Reporting and Review Before the House Comm. on Rules, 93d Cong., 1st Sess., pt. 1, at 82 (1973) (testimony of Representative Cederberg), where, based upon the erroneous OMB reports, it is contended that President Nixon has impounded a much lower percent of total outlays than have other recent Presidents.

7. For a detailed discussion, see notes 88-117 and accompanying text infra.

8. Note 4 supra.

9. E.g., the President has withheld: (1) over $70 million of HUD's "312" housing rehabilitation loan program funds within the past two years, see 119 Cong. Rec. H381 (daily ed. Jan. 22, 1973) (remarks of Representative Drinan); (2) nearly $18 million of funds appropriated to implement the Indian Education Act, 20 U.S.C.A. § 1211a et seq. (Supp. 1973), see Minnesota Chippewa Tribe v. Carlucci, 358 F. Supp. 973 (D.D.C. 1973); and (3) all funds, after Jan. 19, 1971, appropriated to complete the Cross-Florida Barge Canal, which was, at the time funds were impounded, one-third completed and on which $50 million had been spent, see 1971 Hearings, supra note 6, at 53 (testimony of Representative Bennett). On Dec. 19, 1973, Deputy Press Secre-
have been impounded. And, in part due to his notions about the constitutional and statutory viability of executive impoundment and his 1974 Budget Message, President Nixon precipitated a crisis of some magnitude. The nature of the funds and amounts impounded have been without precedent.

The rationale President Nixon developed to justify impoundments have been novel. One example of these rationale is the reason the President gave, in part, for vetoing H.R. 3298, a bill designed to revive federal grants for rural water and sewer projects which the President terminated on January 1, 1973, through the impoundment of funds. In vetoing H.R. 3298 on April 5, 1973, the President indicated that the measure raised a "grave constitutional question" because it purported to mandate spending the full amount appropriated by Congress. The President explained that the Attorney General had advised him that such a mandate "conflicts with the allocation of executive power to the President made by Article II of the Constitution." The legislative and judicial responses to the impoundments have been speedy, though not yet dispositive of the several ramifications of the 1973 impoundment crisis.

II. A BRIEF OVERVIEW OF IMPOUNDMENT

Executive impoundment of appropriated funds is not a recent phenomenon. The first major instance of executive impoundment appears to have been in 1803 when President Jefferson refused to spend $50,000 appropriated by Congress. Thirty-five years later Gerald L. Warren announced that President Nixon had ordered the release of $1.1 billion in impounded health and education funds. The Lincoln Star, Dec. 20, 1973, at 24, col. 6.

13. Id. See notes 145-55 and accompanying text infra.
14. The term "impoundment" is normally used in a generic sense. It can refer to reserving, withholding, delaying, freezing or sequestering appropriated funds or deferring the allocation of funds. 1971 Hearings, supra note 6, at 1 (testimony of Senator Ervin); Fisher, Funds Impounded by the President: The Constitutional Issue, 38 GEO. WASH. L. REV. 124 (1969) [hereinafter cited as Fisher] ("In its broadest context, impoundment occurs whenever the President spends less than Congress appropriates for a given period."). See S. 373, 93d Cong., 1st Sess. § 4 (1973), which on May 10, 1973, passed in the Senate by a vote of 86-4. 119 CONG. REC. S8871 (daily ed. May 10, 1973).
15. In his third annual message to Congress, on Oct. 17, 1803, President Jefferson stated that, "The sum of fifty thousand dollars appropriated
ter the United States Supreme Court decided the first case in which it discussed, tangentially, the practice of impoundment. President Jackson's Postmaster General refused to pay a contract claim of one who had rendered services by carrying mail. Congress passed private legislation authorizing payment of the claim; and *Kendall v. United States ex rel. Stokes* held that the Postmaster General, an official of the executive branch, could not refuse the "purely ministerial" duty of paying the claim. The Court firmly rejected the notion that the President's obligation to see the laws faithfully executed carried with it an implied power to forbid execution.17

*Kendall* did not, as foes of impoundment some times assert,18 establish the lack of presidential control over appropriated funds. Rather, as the Department of Justice recently indicated,19 the 1838 *Kendall* decision established that mandamus will lie to compel the performance of a non-discretionary duty to pay prior contractual obligations.20

Chief Justice Taney and Justices Barbour and Catron dissented in *Kendall*. They did not dissent because they felt the majority view would impinge upon presidential authority. The crux of the dissents was that inferior federal courts had no jurisdiction to issue writs of mandamus.21 Moreover, an examination of the Congress for providing gun boats remains unexpended. The favorable and peaceable turn of affairs on the Mississippi rendered immediate execution of that law unnecessary. . . .” 13 ANNALS OF CONG. 14 (1803).

17. Id. at 610–13.
18. E.g., Memorandum on the Legality of the Department of Agriculture's Termination of the Rural Electrification Act Two Percent Loan Program from Arnold & Porter, Washington, D.C., to the National Rural Electric Cooperation Association, Jan. 22, 1973, at 11–12 [hereinafter cited as Arnold & Porter Memorandum]. The Memorandum makes the dubious assertion that the *Kendall* decision “firmly established that the President's power, if any, to spend or not to spend appropriated funds derives from legislatively delegated powers and is not inherent in Article II of the Constitution. . . .” Id. at 11. See 1971 Hearings, supra note 6, at 39 (testimony of Representative Bennett) (cautiously relying on *Kendall*).
19. See Joint Hearings on S. 373 before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 386 (1973) [hereinafter cited as 1973 Hearings].
sional Globe\textsuperscript{22} for the year following the Kendall decision reveals that no senator or representative suggested the Supreme Court had rendered an opinion treating of congressional or presidential authority vis-à-vis the power of the purse.

Further indication that the Supreme Court in Kendall did not find a lack of presidential control over appropriated funds is the case of Decatur v. Paulding,\textsuperscript{23} where, only two years after Kendall, the Court upheld the Secretary of Navy's refusal to pay a widow's claim based on a congressional resolution. After discussing Kendall, the Court opined that the Secretary of Navy's duty to pay, unlike the Postmaster General's ministerial act involved in Kendall, required discretion and judgment and would not allow mandamus.\textsuperscript{24} At best, Kendall can be said to have indirectly set forth an outer parameter for executive discretion.\textsuperscript{25}

Every President from George Washington to Richard Nixon has almost certainly impounded appropriated funds. The very early instances of impoundment were largely attributable to the fact that, unlike today, appropriations bills "were quite general in their terms and, by obvious . . . intent, left to the President . . . the [power] for determining . . . in what particular manner the funds would be spent."\textsuperscript{26} The first truly significant withholding of

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\item \textsuperscript{22} 25th Cong., 3d Sess. (1838-39), 26th Cong., 1st Sess. (1839-40).
\item \textsuperscript{23} 39 U.S. (14 Pet.) 497 (1840).
\item \textsuperscript{24} \textit{Id.} at 516-17. Had the Court not taken the position that discretion was involved, the result would have been inequitable since the widow would have received a pension from the resolution and another from a general pension bill.
\item \textsuperscript{25} \textit{See also} United States \textit{ex rel.} Goodrich v. Guthrie, 58 U.S. (17 How.) 284, 304 (1854); Reeside v. Walker, 52 U.S. (11 How.) 272, 290 (1850).
\item \textsuperscript{26} 1971 \textit{Hearings}, \textit{supra} note 6, at 233 (testimony of Assistant Attorney General Rehnquist). One distinguished constitutional law scholar has indicated that the Constitution "assumes that expenditure is primarily an executive function, and conversely that the participation of the legislative branch is essential for the purpose simply of setting bounds to executive discretion—a theory confirmed by early practice . . . ." \textit{E. Corwin, The President: Office and Powers}, 1787-1957, at 127-28 (4th ed. 1957).
\end{itemize}

A controversy over budget itemization and executive discretion took place as early as Jefferson's presidency. Alexander Hamilton and Albert Gallatin insisted that specific sums for specific purposes were unwise since Congress could not foresee contingencies the President might encounter. Secretary of the Treasury Gallatin suggested that "a reasonable discretion [over appropriated moneys] should be allowed" to the proper executive department. \textbf{3 The Writings of Albert Gallatin} 117 (H. Adams ed. 1879). Although Jefferson had in the first years of his presidency wanted specific appropriations, he later thought it better for Congress to appropriate funds in gross, leaving wide latitude for executive discretion. \textbf{4 The Writings of Thomas Jefferson} 529-30, 533 (H. Washington ed. 1854).
funds, however, took place in 1876 during President Grant's administration. Upon signing a measure which appropriated funds for harbor and river improvements, President Grant sent a special message to the House of Representatives in which he indicated that he did not plan to spend the total amount because, in his view, certain appropriations were for "works of purely private or local interest, in no sense national." [D]uring my term of office," the President declared, "no public money shall be expended upon them." Another reason Grant gave to justify impounding the funds was revenue deficiencies, and the President suggested that no expenditures might be made except for "works already done and paid for." He added, "Under no circumstances will I allow expenditures upon works not clearly national."

President Grant's message drew some heated remarks in the House: "What right has this great Caesar to decide," Representative Hereford asked, "what are and what are not national, when the American Congress has decided the question by making these appropriations. On what meat hath this our Caesar fed?" Hereford continued:

What right . . . has [President Grant] to say to us as he does today, "I will not carry out the law; I notify you in advance I will nullify and set at nought a law of Congress . . . . I notify you I will not carry it out unless in so far as it may suit my views."

Few Congressmen said anything about the planned impoundment, but most who did speak on the matter sided with the President. Representative Pierce's remarks likely reflected the views of most: "There is nothing mandatory in [the legislation]. It does not say that he shall spend a single dollar . . . ."

Pursuant to President Grant's instructions, Secretary of War Cameron and the Chief of the Army Corps of Engineers refused to spend $2.7 million of the $5 million which had been appropriated by Congress. The House of Representatives responded by passing a resolution asking the President to indicate the legal authority for impounding the funds. The Secretary of War replied that the language of the appropriations act was "in no way mandatory" and that it was not fiscally practical or legally appropriate for the

28. 4 Cong. Rec. 5628 (1876).
29. Id.
30. Id. at 5630 (original emphasis).
31. Id.
32. Id. at 5630-33 (remarks of Representatives Conger, Pierce and Kasson).
33. Id. at 5632 (original emphasis).
President's discretion to be otherwise limited than by the "interests of the public service" and the "condition of the Treasury."

The matter of harbor and river funds impoundment was quickly dropped by Congress, and no efforts were made to restrict presidential discretion over the appropriated money. President Grant's action is, for historical purposes if no other reason, important because it was very likely the first instance in which a President withheld large sums for any reason other than to prevent waste.

Although a few court decisions made during the late 1800s are at times cited for or against the proposition that executive impoundment of funds is constitutionally permissible, it has been adequately demonstrated that the decisions constitute meager authority on the matter. Some pertinent opinions of the United States Attorney General were made, however; and a statute of vital relevance was enacted in the early 1900s.

From 1896 through 1899, two United States Attorney Generals, Judson Harmon and John W. Griggs, issued four formal opinions on the subject of executive impoundment of appropriated funds.

35. A careful examination of the 1971 and 1973 Hearings on impoundment, supra notes 6 and 19, reveals that several people think that impoundment itself began either in the 1920s under President Harding or in the 1940s under President Roosevelt. Although the practice perhaps began with our first President, it was in any event started no later than 1803. Note 15 and accompanying text supra.

36. E.g., Compagna v. United States, 26 Ct. Cl. 316 (1891); Hukill v. United States, 16 Ct. Cl. 562 (1880). Both cases were relied upon in a 1967 Attorney General's Opinion for the proposition that "[t]he courts have recognized that appropriation acts are of a fiscal and permissive nature and do not in themselves impose upon the executive branch an affirmative duty to spend the funds." 42 Op. ATT'Y GEN., No. 32, at 4 (1967).

37. E.g., United States v. Louisville, 169 U.S. 249 (1898); United States v. Price, 116 U.S. 43 (1885). These cases are repeatedly cited for the proposition that the Treasury cannot refuse to make payments when Congress has appropriated funds to pay a certain amount to a specified person. Local 2677, Am. Fed'n of Gov't Emp. v. Phillips, 358 F. Supp. 60 (D.D.C. 1973); Arnold & Porter Memorandum, supra note 18, at 12; 1973 Hearings, supra note 19, at 147 (testimony to Representative Bennett); Davis, Congressional Power to Require Defense Expenditures, 33 FORDHAM L. REV. 39, 54 n.91 (1964) [hereinafter cited as Davis].

38. See Arnold & Porter Memorandum, supra note 18, at 19; Fisher, supra note 14, at 127; Ramsey, Impoundment by the Executive Department of Funds which Congress has Authorized It to Spend or Obligate 15 (Legislative Reference Service, May 10, 1968); 1973 Hearings, supra note 19, at 362 (testimony of Deputy Attorney General Sneed); 1971 Hearings, supra note 6, at 45–49 (the lively colloquy among Professors Miller and Bickel, Representative Bennett and Senator Udall).
In all four opinions the Attorney General unequivocally stated that the intent of Congress, not necessarily the specific statutory language used, was to be the critical factor in determining whether expenditure of funds was permissive or mandatory.

When asked by Secretary of War Lamont whether the language "there may be expended ... not exceeding fifty thousand, or so much thereof as may be necessary" meant that "the expenditure of the amount [was] left to the discretion of the Secretary of War," Attorney General Harmon answered affirmatively. However, the opinion specifically drew Secretary Lamont's attention to the condition that Congress wanted corrected and stated: "[I]t is made your duty, if that condition be found . . . to proceed with the expenditure authorized if . . . an improvement of that condition may fairly be expected to result." On September 29, 1896, approximately two months after issuing the above opinion, the Attorney General again responded to a query posed by Secretary of War Lamont. This time the query concerned a statute which provided that, of the sum appropriated in a river and harbor act, a certain amount "shall be expended" for a specified project. The Attorney General indicated that, in spite of "the emphatic language in the proviso," a direction to expend funds was not mandatory "to the extent that . . . the work can be done for less" or if work was not recommended by the Mississippi River Commission. Attorney General Harmon suggested that this construction of the statute was necessary to be "in harmony . . . [with] the purpose of Congress . . ." In construing the same statute ten days later vis-à-vis the contract authority of the Secretary of War, the Attorney General advised Secretary Lamont: "[Y]ou should proceed with the projects specified to the extent of the appropriations without inquiry as to their wisdom."

In early 1899, Secretary of the Treasury Lyman L. Gage asked Attorney General Griggs whether it was mandatory for the Treasury to pay a brewer $13,500 which had been appropriated for that purpose by Congress, although no claim had been adjudicated, or

40. The statute recited that the east bank of the Mississippi River was caving in and washing away at a certain point. Id.
41. Id. (emphasis added).
42. 21 Op. ATT'Y GEN. 414 (1896).
43. Id. at 414. (emphasis added).
44. Id. at 416.
45. Id. at 415.
46. Id. at 416.
47. 21 Op. ATT'Y GEN. 420 (1896).
48. Id. at 422.
whether the act left it to the Secretary's "discretion and judgment to decide upon the facts whether such amount or any portion thereof ought to be paid..."49 The appropriations statute contained the words "to enable the Secretary of the Treasury to pay..."50 Although the Attorney General noted that "to enable" was permissive, it was his opinion that the language was intended as mandatory because the phrase was "so frequently employed throughout"51 the statute. Attorney General Griggs held that "to enable" must be "read as mandatory whenever to do so is more in harmony with the context."52 The context was to govern the construction, and Attorney General Griggs found that only a mandatory construction could be squared with congressional intent.

Undoubtedly prompted by budget deficits caused by the Spanish-American War, the Panama Canal and several pension bills, as well as the river and harbor projects of the late 1800s and early 1900s, Congress passed the Anti-Deficiency Acts of 1905 and 1906.53 The Acts provided a technique to avoid excessive expenditures in one portion of a year that could require deficiency or supplemental appropriations and stipulated that expenditure of appropriated funds could be waived in the event of extraordinary emergencies which could not be foreseen when appropriations were made. Procedures for impounding funds pursuant to the Anti-Deficiency Acts were formalized during the Harding Administration shortly after the passage of the Budget and Accounting Act of 1921,54 but large scale impoundment on a regular basis did not begin until the latter part of World War II.55

50. Id.
51. Id. at 297.
52. Id.
53. 31 U.S.C. § 665 (1970); Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48; Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257. In 1971, Senator Mathias remarked, "[T]he original act was for one purpose and one purpose only, for the building of reserves, for a sound fiscal management program. I feel sure it has gone very far afield from that." Assistant Comptroller General Kellar agreed. 1971 Hearings, supra note 6, at 257. See also Impoundment, supra note 5, at 1517-18.
54. Act of June 10, 1921, ch. 18, 42 Stat. 20. See also H.R. Doc. No. 1006, 65th Cong., 2d Sess. (1918), where a national budget system was outlined.
55. See generally J. Williams, THE IMPOUNDING OF FUNDS BY THE BUREAU OF THE BUDGET (ICP Case Series No. 28, 1955) [hereinafter cited as WILLIAMS] (the best practical commentary on impoundment during the war years). Earlier, the Economy Acts of 1932 and 1933 authorized the President to reduce the compensation of federal employees, make layoffs and economize by reorganizing executive departments. Act of Mar. 3, 1933, ch. 212, § 403, 47 Stat. 1518; Act of June 30, 1932, ch. 314, § 101, 47 Stat. 399. The 1933-34 War Appropriation Act ex-
President Roosevelt impounded funds in the 1930s in order to cope with the emergencies of economic depression and war.\textsuperscript{56} Clamor of some magnitude developed in Congress, however, in the early 1940s when Budget Director Smith\textsuperscript{57} ordered impoundment of amounts ranging from $1.6 million to $95 million which had been appropriated for the Civilian Conservation Corps’ surplus labor force, civilian pilot training projects, the Surplus Marketing Corporation and various civil and military efforts which the War Department could not complete because the projects did not have the requisite priority ratings to obtain scarce resources. The public cry and political fighting were greatest, though, when funds appropriated for a flood control reservoir at Markham Ferry, Oklahoma, and a flood control levee on the Arkansas River at Tulsa were impounded.\textsuperscript{58}

The 1940-41 impoundments set the stage for the first strong congressional response: In mid-1943, Congress passed a measure\textsuperscript{59} which prohibited any agency or official other than the Commissioner of Public Roads from impounding funds appropriated as federal aid for the construction of certain highways. Hence, Congress managed to slightly curtail the power of the Budget Bureau by routing funds to avoid its tight-fisted Director.\textsuperscript{60} Another later major effort to control the purse-strings, however, failed. On December 16, 1943, the House of Representatives defeated, 283-13, a powerfully worded anti-impoundment rider to the First Supplemental National Defense Appropriation Bill.\textsuperscript{61} The rider had passed the Senate eight days earlier by voice vote.\textsuperscript{62}

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\item pressly authorized the impoundment of funds determined unneeded pursuant to an economy survey ordered by the President. Act of Mar. 4, 1933, ch. 281, § 4, 47 Stat. 1602.
\item See WILLIAMS, supra note 55, at 7-8.
\item It has been suggested that the Bureau of the Budget, now the OMB, became a “major device for presidential control” over executive agencies after the Bureau was moved to the Executive Office of the President in 1939. N. POLSBY, CONGRESS AND THE PRESIDENCY 89 (1964).
\item See generally WILLIAMS, supra note 55.
\item Act of July 13, 1943, ch. 236, § 9, 57 Stat. 563.
\item See 89 CONG. REC. 6309, 6313 (1943) (remarks of Senators McKellar, Hayden and Vandenberg).
\item H.R. 3598, 63d Cong., 1st Sess. § 305 (1943).
\item 89 CONG. REC. 10,419 (1943) (Senate approved § 305); id. at 10,781 (House rejected § 305). Objections to § 305, Senator McKellar's proposed rider to the Defense Appropriation Bill, were almost exclusively based on the ground that the proviso would interfere with President Roosevelt’s power as Commander-in-Chief to develop priorities which would prevent waste and allow the energetic and successful prosecution of war efforts. Id. at 10,362 (remarks of Senator Truman); id. at 10,405, 10,419 (remarks of Senator Lodge); id. at 10,780-81 (remarks of Representatives Cannon and Tabor). See Letter from Secretary
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At the end of World War II, appropriated funds of several billions of dollars remained in excess of military needs. Due to this and other pressures, Congress accepted a rider to the Omnibus Appropriations Act of 1951 which amended the Anti-Deficiency Acts by adding language to expressly allow for reserves to be established for various reasons. The 1950 amendment states:

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 apportionment was made available.

The above proviso has subsequently become the main authority cited for justifying executive impoundment of funds even though the House of Representatives lucidly declared that the measure was not to be used to abrogate congressional intent.

After the economic chaos caused by depression and the eco-

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64. See Fisher II, supra note 62, at 370.


67. See Boggs, supra note 6, at 224; 1973 Hearings, supra note 19, at 271, 284, 286, 502 (testimony of OMB Director Ash). Cf. 38 Fed. Reg. 3474 (1973), where information released pursuant to the Federal Impoundment and Information Act indicated that the alleged reason for most impoundments was that existing tax laws and the statutory limitation on the national debt would not provide sufficient funds during the fiscal year to cover total outlays contemplated by the individual acts of Congress.

68. The House declared that it was justifiable and proper to effectuate savings whenever possible but added the following caution:

'There is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds. If this principle of thwarting the will of Congress by the impounding of funds should be accepted as correct, then Congress would be totally incapable of carrying out its constitutional mandate and providing for the defense of the nation.

omic turbulence precipitated by World War II had subsided, Presidents continued to impound large amounts of appropriated funds. Until President Johnson's Administration, however, the exercise of impoundment power—as distinguished from some supposed impoundment authority—was tempered with a high degree of consistency and shrouded by at least some small vestige of constitutional legitimacy, viz. the power of the President as Commander-in-Chief. The prime instances of impoundment during Harry Truman's presidency were the withholding of funds appropriated for a 70-group Air Force and the giant aircraft carriers U.S.S. United States and U.S.S. Forrestal. President Eisenhower impounded funds which had been appropriated for various defense projects, most noticeably including funds for strategic airlift aircraft and initial procurements of Nike-Zeus hardware.

President Kennedy's major impoundment controversy centered about the RS-70, a long-range bomber. Congress appropriated nearly two times the amount that the President had requested, and Secretary of Defense McNamara refused to release the excess funds and emphasized that America's missile deterrence capability combined with existing bomber strength was more than adequate. Later, the House Armed Services Committee voted to direct utilization of an amount not less than $491,000 for the RS-70 and de-

70. U.S. Const. art. II, § 2.
71. See 95 Cong. Rec. 14,355 (remarks of Senator Thomas); id. at 14,855 (remarks of Senators Ferguson and Salstonsall); Hearings on the National Military Establishment Appropriation Bill for 1950 Before the Senate Comm. on Appropriations, 81st Cong., 1st Sess. 328 (1949) [hereinafter 1949 Hearings] (testimony of Secretary of the Air Force Symington); Letter from President Harry S. Truman to Secretary of Defense Louis A. Johnson, Nov. 8, 1949, reprinted in 1971 Hearings, supra note 6, at 525 (directing that funds be placed in reserve). The debates in Congress and testimony taken in the hearings suggest that President Truman did not exactly thwart the will of Congress. The Senate was quite reluctant to vote for the extra funds and did so mainly to avoid an impasse created by the House vote.
72. See 1949 Hearings, supra note 71, at 162 (testimony of Admiral Denfeld); see also W. Millis, The Forrestal Diaries 392-93, 464-77 (1951) [hereinafter cited as W. Millis].
73. 1973 Hearings, supra note 19, at 98 (testimony of Comptroller General Staats). See also W. Millis, supra note 72, at 464-77.
74. In 1956, $46.4 million appropriated to increase Marine Corps personnel strength was impounded; in 1959, $48 million in Hound-Dog missile funds, $90 million in Minuteman program funds, $55.6 million for additional KC-135 tankers, $140 million for additional strategic airlift aircraft and other funds were withheld; in 1960, $35 million for advanced procurements for nuclear-powered carriers and $137 million in Nike-Zeus procurement funds were impounded. 1971 Hearings, supra note 6, at 526.
declared that if the language commanding expenditure "constitutes a test as to whether Congress has the power to so mandate, let the test be made . . .". Thereupon the President wrote a letter to Representative Vinson, the Committee Chairman, requesting that the language be made permissive rather than mandatory, and Congress acceded.

The Special Counsel to President Eisenhower and the Counsel to President Kennedy strongly advised against impounding funds for domestic programs, but both Presidents did so in a few instances. President Johnson, however, refused to allow the ex-

76. The letter stated, in pertinent part:
   "I would respectfully suggest that, in place of the word "directed," the word "authorized" would be more suitable to an authorizing bill (which is not an appropriation of funds) and more clearly in line with the spirit of the Constitution.
   Each branch of the Government has a responsibility to "preserve, protect and defend" the Constitution and the clear separation of legislative and executive powers requires it. I must, therefore, insist upon the full powers and discretions essential to the faithful execution of my responsibilities as President and Commander-in-Chief, under article II, sections 2 and 3, of the Constitution.

77. In a letter dated Aug. 12, 1955, to a member of Congress, the Special Counsel to President Eisenhower stated:
   "Because of the President's Constitutional obligation to faithfully execute the laws, I am strongly of the view that when Congress has appropriated funds for a particular project, that the President cannot set aside the will of Congress and direct that no funds be spent on that project.
   It is true that in the past Presidents have declined to spend funds appropriated . . ., but I have not found any instance of this that did not relate to funds appropriated for the national defense . . ., These national defense precedents, however, cannot, in my opinion, be used as precedents for withholding funds appropriated for a non-defense purpose."

78. The Counsel to President Kennedy concluded a memorandum of October 1961, by stating: "Previous Presidents, in their roles as Commander-in-Chief, have 'impounded' Defense appropriations. Similar action in the civilian area is not customary and of doubtful legal basis." Quoted in 1973 Hearings, supra note 19, at 333 (testimony of Senator Kennedy).
79. E.g., in fiscal year 1958, President Eisenhower asked agency heads to delay and reduce expenditures to avoid the possibility of having to
penditure of funds for numerous civilian projects: He impounded agricultural appropriations, highway trust funds, education funds, and funds appropriated for flood control projects, low-cost housing and other programs. 80

President Johnson undoubtedly felt that impoundments relating to domestic projects were legally sanctioned. In 1967, Acting Attorney General Ramsey Clark opined that the impoundment of highway trust funds 81 was lawful; 82 and the Comptroller General agreed. 83 Budget Director Schultze maintained that it was the "general power of the President to operate for the welfare of the economy and the Nation in terms of combating inflationary pressures. . . ." And the Director implied that withholding the highway funds would help put the brakes on inflation. 84 Accordingly, President Johnson refused to release for obligation billions of dollars which were appropriated for federal aid to highway construction projects. He did not, however, terminate any existing highway or other domestic projects; nor did he refuse to acknowledge the political realities of his day and the potentially explosive crisis over separation of powers which comes to light whenever a President refuses to spend significant portions of funds which have received the imprimatur of Congress.

III. NIXON ADMINISTRATION IMPOUNDMENTS

Testifying before a Senate committee on February 6, 1973, Deputy Attorney General Joseph T. Sneed maintained, in reference to impoundment practices over the past 30 years, that "such a long-continued executive practice, in which Congress has generally acquiesced, carried with it a strong presumption of legality." 85 Ear-
lier in the same hearings Roy L. Ash, then Director-Designate of OMB, suggested that upon consideration "of all the applicable historical precedents, facts and statutes—including appropriations acts, past statutory spending ceilings, the limit on the public debt and the Antideficiency Act—action in reserving funds from time to time is fully consistent with the President's constitutional duties." Moreover, at a news conference held on January 31, 1973, President Nixon asserted that his "constitutional right" to impound funds was "absolutely clear." In order to ascertain the extent to which statements such as these are legally viable and to determine whether an "impoundment crisis" currently exists, and, if so, how deep it cuts, two recent court decisions and other events pertaining to the impoundment of appropriated funds must be reviewed.

A. Highway Trust Fund Case

In early April, 1973, the United States Court of Appeals for the Eighth Circuit became the highest court in the nation ever to decide a case directly dealing with the legal propriety of executive impoundments. The case was Missouri Highway Commission v. Volpe. The issue before the court was whether the Secretary of Transportation could refuse or defer authority to obligate highway funds which had been apportioned to Missouri when the reasons given for impoundment by the Secretary and the OMB Director pertained to the status of the economy and the need to control inflationary pressures. In affirming the judgment of the district court, the court of appeals held that the highway funds could not be lawfully impounded for the reasons asserted. The case did not raise or settle, however, any constitutional question on whether the Congress can direct the executive branch to spend appropriated funds.

went "equipped with a copy of the Constitution" whereupon Senator Ervin chided, "I really am glad to know there is somebody in the executive branch who has a copy . . . ." Id. at 358.

86. Id. at 271.
87. The President's statement was as follows:
The constitutional right for the President of the United States to impound funds and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people, that right is absolutely clear.

N.Y. Times, Feb. 1, 1973, at 20, col. 6 (city ed.).

88. 479 F.2d 1099 (8th Cir. 1973), aff'g 347 F. Supp. 950 (W.D. Mo. 1972).
For further discussion of this case, see Impoundment, supra note 5, at 1524-27.
89. 479 F.2d at 1103.
90. Id. at 1118.
Since President Johnson began the practice in November of 1966, huge amounts of highway funds have been withheld from obligation. The instant case arose when the State Highway Commission of Missouri filed a complaint in August of 1970 seeking the restoration of approximately $26 million in contract authority for fiscal year 1971. According to Secretary of Transportation Volpe, ample moneys were in the trust fund; but, in his view, the "law invested in him discretion to withhold from time to time authority for Missouri to obligate its unexpended apportionments." The Secretary argued that (1) appropriations acts are permissive in nature and do not mandate the expenditure of funds authorized to be apportioned, (2) states have no vested rights in the appropriated funds until he approves arrangements for expenditures, and (3) the language of section 15 of the Federal-Aid Highway Act, expressing a congressional desire that the funds not be impounded, is precatory. The Eighth Circuit, Judge Stephenson dissenting, found the arguments unavailing.

In Missouri Highway Commission the court assumed, arguendo, that it might be true that appropriations acts are permissive in nature but opined that such a proposition "does not provide a bottom on which to premise either a direct or implied authorization" for the impoundment of the highway funds. Judge Lay, writing for the split court, continued:

For although a general appropriation act may be viewed as not providing a specific mandate to expend all of the funds appropriated, this does not a fortiori endow the Secretary with the authority to use unfettered discretion as to when and how the monies may be used.

91. See 1971 Hearings, supra note 6, at 59 (testimony of Federal Highway Administrator Turner).
92. Shortly after the original complaint was filed, the Highway Commission was notified that it would be allowed to obligate the full amount. Hence, the Commission filed an amended complaint to pursue claims for fiscal year 1973 and after. On June 15, 1972, four days prior to trial, Missouri was notified that it could obligate all funds apportioned for fiscal 1973. 479 F.2d at 1104 nn.4 & 5. Hence, the writ of mandamus granted by the district court ordering the release of $80 million in fiscal 1973 funds, 347 F. Supp. at 953-54, was vacated as moot by the circuit court. 479 F.2d at 1104, 1118.
94. 479 F.2d at 1108-09.
95. Id. at 1109.
96. Id. Judge Stephenson, citing the Anti-Deficiency Act, approached the problem somewhat differently—putting the onus on Congress: "[I]n the absence of specific statutory language to the contrary, Congress has given the Executive branch the power to withhold authorized but unobligated funds from expenditure." Id. at 1120. The dissenter attempted to lend credence to this assertion by noting that Congress
By taking such a position, the court tacitly adopted the view that the intent of Congress should normally be dispositive, i.e., when permissive language is used, that does not, eo ipso, create a presumption that executive discretion over "whether and when" of the expenditure of funds is without limitation. The district and circuit courts, moreover, found that it was the intent of Congress to prohibit the President from withholding funds for purposes not related to the highway program. In the district court opinion, Chief Judge Becker maintained that

[a]nticipating the possibility of executive or administrative impoundment or withholding of the apportioned Fund for legally impermissible reasons, Congress undertook to avoid such unauthorized action by making its intent clear and unambiguous in paragraph (c) of § 101 of Title 23.

The original Federal-Aid Highway Act did not contain specific language which would compel the executive branch to expend funds. However, soon after Acting United States Attorney General Clark held that the executive branch could withhold funds from obligation, Congress amended the Act by adding paragraph (c) to section 101 of Title 23 of the United States Code. The added section provides:

It is the sense of Congress that under existing law no part of any sums shall be impounded or withheld from obligation by any officer or employee of the executive branch of the Federal

had made several attempts to make it unlawful to impound the highway funds, and it was reasoned that such attempts demonstrated that Congress itself thought that the President had the authority to impound funds in the absence of such legislation. Id. at 1119 n.1, 1120 n.3.

97. See notes 39-52 and accompanying text supra.

In 1971, Justice William H. Rehnquist, then an Assistant Attorney General in Office of Legal Counsel of the Justice Department, stated: "[T]o find a mandatory intent on the part of Congress, it is not a question of looking for the word 'shall' as opposed to 'may.'" 1971 Hearings, supra note 6, at 234. Rehnquist suggested that if Congress used mandatory language the intent would be clear and, where expenditures were for domestic programs, the President could not lawfully ignore the language. And it was further indicated that, in the absence of specific mandatory language, all the laws, including the Anti-Deficiency Act and statutory debt limitations, must be considered to ascertain whether "the intent of Congress was to mandate the spending. . . ." Id. at 235.

99. 479 F.2d at 1112-14, 1116.
100. 347 F. Supp. at 952-53.
102. 42 Op. ATT'Y GEN., No. 32 (1967). It was suggested that an appropriation act "does not constitute a mandate" to spend but, rather, "places an upper and not a lower limit on expenditures." Id. at 4, 5.
Government, except such specific sums as may be determined by the Secretary of the Treasury, after consultation with the Secretary of Transportation, are necessary to be withheld from obligation for specific periods of time to assure that sufficient amounts will be available in the Highway Trust Fund to defray the expenditures which will be required to be made from such funds.103

It is generally held that language such as that used in section 101(c) is not mandatory.104 Accordingly, the Secretary of Transportation argued in Missouri Highway Commission that the language was horatory and that Congress had expressly refused to enact proscriptive language of a mandatory nature and, thus, left the executive branch with impoundment authority.105

The circuit court found this argument faulty in two respects. Most importantly, the court indicated that the argument missed the fundamental issue of the case. The Constitution gave the authority to establish roads to Congress; and, although the Congress had given the Secretary of Transportation some discretion to approve state highway programs,106 the Federal-Aid Highway Act also set out "detailed considerations to guide the Secretary's action"107—beyond which the Secretary had no discretion without authority from Congress which could be "gleaned from the language of the Act itself."108 Secondly, the Missouri Highway Commission court found that the language of section 101(c) "corroborates what . . . the statute as a whole already provides—that apportioned funds are not to be withheld from obligation for purposes totally unrelated to the highway program."109 Observing that the Act had given the Secretary discretionary authority which expressly included a limited authority to withhold funds,110 the court of ap-

104. 1971 Hearings, supra note 6, at 84 (testimony of Professor Bickel). Senator Ervin added, "It is sort of like what we used to call prefatory language in the will." Id.
105. 479 F.2d at 1111.
107. 479 F.2d at 1112.
108. Id. at 1111. The circuit court quoted Richards v. United States, 369 U.S. 1, 11 (1962), which called for courts to look to the whole law, its object and purpose, in interpreting legislation. See also Connecticut Power & Light Co. v. FPC, 324 U.S. 515, 527 (1945); Thompson v. Clifford, 408 F.2d 154, 158 (D.C. Cir. 1968).
109. 479 F.2d at 1116.
110. Section 209(g) of the Act, 70 Stat. 400, authorizes the withholding of obligational authority if the Secretary of the Treasury determines that amounts available in the fund "will be insufficient to defray expenditures which will be required as a result of the apportionment to the States of the amounts authorized . . . ." That is, the Act guards against depletion of the funds.
peals remarked that "[w]here Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power."111

The conclusion that the "sense of Congress" language was not precatory when examined with the entire statute was firmly supported by a House Report112 issued in 1970 when the Act was amended further. There it was emphasized that it was the intent of Congress that the highway funds not be impounded.113 Moreover, the language "[i]t is the sense of Congress that under existing law"114 was "legislation declaring the intent of an earlier statute [and] entitled to great weight in statutory construction,"115 the Missouri Highway Commission court stated.

After dispensing with the arguments of the Secretary of Transportation,116 the appellate court discussed the applicability of the Anti-Deficiency Act,117 which was not argued on appeal, and af-

111. 479 F.2d at 1114, quoting Alcoa Steamship Co. v. Federal Maritime Comm’n, 348 F.2d 756, 758 (D.C. Cir. 1965).
113. Members of the House declared:

The withholding of highway trust funds as an anti-inflationary measure is a clear violation of the intent of Congress as expressed [in 23 U.S.C. § 101(c) 1970]. We again wish to emphasize the clear legislative intent that funds apportioned shall not be impounded or withheld from obligation . . . .

116. The court discarded in one paragraph the contention that states have no vested interest in the funds. See note 94 and accompanying text supra. Secretary Volpe had contended that 23 U.S.C. § 106(a), which states that the Secretary's approval is a prerequisite to the obligation of funds, made expenditures permissive. The court of appeals retorted:

Assuming arguendo that the states have no vested right in the funds until such time as the Secretary approves the specific projects we fail to see that this provides a basis for finding that the Secretary has lawful discretion to withhold his approval of projects for reasons not contemplated within the Act.

479 F.2d at 1109-10 (original emphasis).
117. 31 U.S.C. § 665(c) (1970). See note 53 and accompanying text supra. In Missouri Highway Comm’n v. Volpe, the court of appeals pointed out that the reserves which, pursuant to the Anti-Deficiency Act, could be established "to effect savings," etc., were authorized only when the funds "will not be required to carry out the purposes of the appropriation concerned . . . ." 479 F.2d at 1119, quoting 31 U.S.C. § 665(c) (1970) (original emphasis). The court
firmed the declaratory and injunctive relief granted by the district court.

The court's decision in Missouri Highway Commission enhances the "sharing of power,"118 for, although no constitutional question is directly at issue, the case treats of an instance in which legislative intent has been clearly abrogated by executive action. The rationale of the court of appeals provides a well-reasoned basis for resolving this conflict over the purse-strings to the highway funds.

B. Water Pollution Control Act Case

On May 8, 1973, the United States District Court for the District of Columbia decided the nation's second impoundment case of major importance. In City of New York v. Ruckelshaus119 plaintiffs were granted summary judgment in a class action which was brought to compel the Environmental Protection Agency ("EPA") to allot among the states the total amounts authorized to be appropriated by the Federal Water Pollution Control Act Amendments of 1972.120

Unlike the Highway Trust Fund case,121 the instant case did not involve the executive branch's refusal to expend funds. In Ruckelshaus, the impoundment practice which was successfully challenged was the refusal of the EPA, at the President's direction,122 to allot $5 billion of $11 billion authorized123 for fiscal years 1973 and 1974. And the EPA maintained that discretionary authority over the allotting of funds was clearly intended by Congress.124

The outcome of the case was predictable, however, because the EPA incorrectly characterized the issue before the court and unwittingly quoted for the court's consideration portions of debates which, rather than supporting the EPA's position, tended to give

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124. 1973 Hearings, supra note 19, at 403-10 (colloquy between EPA Administrator Ruckelshaus and Senator Muskie).
credence to the plaintiff's argument. The Act, as passed on October 18, 1972, over the President's veto, clearly mandated the allotment of funds, although the EPA Administrator was given some discretion with regard to the obligation of the funds after allotment. The EPA, however, relied upon the remarks of Representatives Harsha and Ford which pertained to certain minor amendments which were made in order to give the executive branch some discretion over obligational authority. And the President, in his veto message, recognized that such discretion existed: "[The bill confers] a measure of spending discretion and flexibility upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures. . . ."

In *Ruckelshaus*, Judge Gasch recognized that the President did not exercise "those provisions" which gave him discretion. The President had instead directed the EPA Administrator not even to allot the funds—an act the court found to be a purely ministerial duty. It remains to be decided whether the Federal Water Pollution Control Act funds must be spent, as that issue, to reiterate, was not before the court in *City of New York v. Ruckelshaus*.

125. The Act provides:

Sums authorized to be appropriated pursuant to section 1287 of this title for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after October 18, 1972. Sums shall be allotted among the States by the Administrator. . . .


128. The fact that the making of allotments was a purely ministerial act was, it appears, never openly acknowledged by the executive branch. EPA Administrator Ruckelshaus, in referring to the congressional debates, correctly stated, "[W]hat they had intended was that the President have authority to limit the spending." 1973 Hearings, supra note 18, at 406. Nevertheless, he was unwilling to admit that mandatory allotments were something less than expenditures.

129. If the impoundment issue vis-à-vis the actual expenditure does arise,
Nevertheless, the case did establish that Congress can validly com-
mmand that the executive branch "shall allot;" and, to a limited ex-
tent at least, the case thus suggests, as Missouri Highway Com-
mission expressly found, that the power of the purse is in fact
where the Constitution placed it—in Congress.

C. Other Impoundments And Reactions

In the eyes of many United States Senators and Representatives,
the impoundment practice most anathematic to democratic ideals
has been that which has threatened to completely terminate pro-
grams. Congress has viewed the terminations, and threatened
terminations, as a last-ditch effort by President Nixon to impose
his will at a point in the law-making process where Congress can
do little about it, absent specific controls which will encompass the
penumbra of the spending process. The President who has had
more vetoes overridden than any other President in history has,
the Ninety-third Congress believes, attempted to achieve by exec-
utive fiat that which he could not by the veto. Congress has en-
visaged the President's actions as constituting a direct challenge to
the system of checks and balances and has responded with un-
precedented, though sometimes intermittent, zeal.

1. Rural Electrification Loans

On December 29, 1972, the Department of Agriculture an-
nounced that, beginning on January 1, 1973, all Rural Electrifica-
tion Act ("REA") loans would be made as guaranteed and in-
sured loans under the Rural Development Act ("RDA") of 1972.
This "conversion" from one loan program to another effectively
terminated REA two per cent loans and made loans available
only at somewhat higher interest rates and under more stringent
qualification standards.

Missouri Highway Comm'n may control. Although the legislative
history of the Federal Water Pollution Control Act Amendments of
1972 makes it clear that the executive branch was to have some
discretion over expenditures, the debates do not suggest that impound-
ments were sanctioned for purposes not relating to the Act.

130. Rural Electric and Rural Telephone Loan Programs Change, Dep't of
133. The Rural Electrification Act of 1936 provides: "[A]ll such loans shall
be self-liquidating within a period of not to exceed thirty-five years,
and shall bear interest at the rate of 2 per centum per annum ...."
134. Under Secretary of Agriculture J. Phil Campbell succinctly described
Congress found the REA two per cent loan termination to be a direct affront: (A) The language of the Rural Electrification Act of 1936 made mandatory the allotment of funds.\(^{136}\) (B) Despite impoundments, Congress evidenced its intent, by persistently increasing the appropriations, that the two per cent loan program be expanded.\(^{136}\) (C) By enacting the Rural Development Act of 1972, Congress clearly did not wish to replace REA loans.\(^{137}\) Moreover, the ordered "conversion" from REA to RDA loans indubitably ran afoul of the Reorganization Act of 1949.\(^{138}\) The Reorganization Act does give the President the authority to initiate the termination of agency functions; but it does not allow him to abolish a function without first submitting a reorganization plan to Congress, which then has 60 days to reject such a plan unless it wishes to allow it to become effective.\(^{139}\) No reorganization plan, however, was ever submitted to Congress.

At first Congress reacted vigorously to the REA loan termination: On January 18, 1973, a measure which was designed to mandate the complete restoration of the loan program was introduced in the House of Representatives.\(^{140}\) Within less than two months, the Department of Agriculture's strenuous objections to the powerfully-worded measure resulted in a compromise, of sorts, which

\(^{135}\) E.g., 7 U.S.C. §§ 903(c) & (d) (1970), respectively provided that "sums herein made available or appropriated [for rural electrification] shall be allotted yearly by the Administrator for loans" and that "such annual sums shall be available . . . in the several States . . . ." See Arnold & Porter Memorandum, supra note 18, at 24-30.

The Memorandum pointed out that the language quoted above is similar to language found in legislation dealing with aid to impacted schools and in the Elementary and Secondary Education Act which former Assistant Attorney General Rehnquist relied upon in concluding that expenditures under the Acts were mandatory. Id. at 37 n.9, citing 1971 Hearings, supra note 6, at 279, 285.


\(^{137}\) "The Rural Development Act was not designed for that purpose and was never intended by the Congress to be used in such fashion." H.R. Rep. No. 91, 93d Cong., 1st Sess. 3 (1973). A principal spokesman for the RDA, Senator Talmadge remarked during debates, "We seek here not to duplicate or supersede . . . other programs but to supplement and strengthen them." 118 Cong. Rec. S13930 (daily ed. Aug. 17, 1972). See Arnold & Porter Memorandum, supra note 18, at 39-47.


met all but three of the Department's criticisms. But that was not enough, and the bill which President Nixon signed into law on May 11, 1973, was indeed a temperate measure.

Although the final compromise included an agreement that "not less than" $105 million would be available at the two per cent rate for new loans beginning in fiscal 1974, the measure contained no language mandating the expenditure of funds. Moreover, the REA Administrator was given unprecedented discretion in determining whether criteria is met for obtaining the loans. In a word, Congress forgave the executive branch for attempting to completely abolish the loan program and, in return for the Secretary of Agriculture's promise—in a letter—to make funds available for at least three years, Congress agreed not to violate the Secretary's "one cardinal principle" by compelling him to do so.

2. Water And Waste Disposal Grants

On March 1, 1973, the House of Representatives passed, by a vote of 297-54, a measure which the Senate approved three weeks later by a vote of 66-22. The bill, H.R. 3298, was geared to revive a water and sewer grant program administered by the Farmers Home Administration ("FHA") of the Department of Agriculture. Three months earlier that Department had announced that the grant program had been terminated: The funds appropriated in 1972 for the FHA water and sewer grant funds had been impounded.

141. H.R. 5683, 93d Cong., 1st Sess. (1973); see 119 Cong. Rec. H1847 (daily ed. Mar. 15, 1973). The measure (a) retained mandatory provisions of the loan program, (b) utilized the REA revolving fund rather than the Rural Development Insurance Fund and (c) gave generation and transmission loans the same treatment as other types of loans rather than subject them to private market interest rates. The Agriculture Department opposed all of these provisos. H.R. Rep. No. 91, 93d Cong., 1st Sess. 6, 33-39 (1973).


144. Id.


When Chairman Poage of the House Agriculture Committee asked the executive branch to supply the legal basis for the termination of the grant program, the Agriculture Department's General Counsel, John A. Knebel, suggested that refusal to spend was sanctioned because the appropriation act was permissive: "[T]hat legislation authorizes but does not require that the programs be carried out by the Secretary."\(^{148}\) Although the legal opinion upon which the Department of Agriculture relied was at best deceptively phrased,\(^{149}\) Representative Poage's committee amended H.R. 3298 in such a way as to circumvent the legal basis used to justify the termination of the water and sewer grant programs.

\(^{148}\) Id. at 1. General Counsel Knebel continued by quoting from "[m]emoranda from the Department of Justice dealing with the question insofar as it relates to funds appropriated for assistance to Federally impacted schools and other education programs . . . ." Id. at 2. Mr. Knebel quoted for the Agriculture Committee remarks stating that it was important to consider

whether the pertinent legislation compels the obligation and expenditure of the full appropriation or leaves sufficient discretion to the Executive Branch to justify a Presidential directive to impound.

A few general comments are in order. As we stated in our previous memorandum, an appropriation is not in itself ordinarily interpreted as a direction to spend. To determine whether or not there is a duty to spend, one must examine the substantive legislation.

Id., quoting Memorandum from Assistant Attorney General William H. Rehnquist to Edward L. Morgan, Deputy Counsel to the President, Dec. 19, 1969, at 2. (For full reprints of both memoranda, see 1971 Hearings, supra note 6, at 279, 285).

149. The Department's General Counsel grossly mislead the Agriculture Committee by selectively quoting from Mr. Rehnquist's memoranda. The documents contained the following remarks which were not called to the Committee's attention:

[W]e conclude that the President does not have a constitutional right to impound [financial aid to federally impacted schools] notwithstanding a Congressional direction that they be spent. With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that the existence of such a broad power is supported by neither reason nor precedent.

1971 Hearings, supra note 6, at 282.

The first memorandum of December 1, 1969, continued particularly denouncing impoundments which could "defeat the Congressional intent" due to permanent loss of funds. It was further noted that one Attorney General, in an unpublished letter to President Franklin Roosevelt, rejected "any idea that the President has any power to refuse to spend appropriations other than such power as may be found or implied in the legislation itself." Id. at 283. Making specific reference to "not to exceed" language in one appropriation law, the second memorandum of December 19, 1969, stated: "In the absence of any positive evidence that the intended effect of this language is to permit [allotment of] less than the full sum . . ., we would still view these funds as not subject to impounding." Id. at 289.
Very simply, the Agriculture Committee made mandatory the expenditure of the appropriated funds. And, as noted above, the effort to mandate spending the funds was given overwhelming approval in the House and Senate. On April 5, 1973, however, Congress received a Catch-22 from the President: H.R. 3298 was vetoed. The President indicated that the grant funds program was duplicative of programs available through the EPA and revenue sharing projects. Moreover, President Nixon declared that the mandatory spending provisos gave rise to "grave constitutional questions" because the mandate "conflicted with the allocation of executive power to the President made by Article II of the Constitution." An agent of the executive branch had suggested that funds could be impounded because the original Act had permissive language, so Congress used mandatory language, and then

150. H.R. 3298, 93d Cong., 1st Sess. § 306(a) (2) (1973), was revised from "The Secretary is authorized to make grants aggregating not to exceed . . ." to "The Secretary shall make grants in the amounts in appropriations Acts aggregating not to exceed . . ." The other change deleted "may" and inserted "shall" in § 306(a)(b). See H.R. Rep. No. 21, 93d Cong., 1st Sess. 8-9 (1973).

151. Representative Matsunaga declared that it was the intent of Congress to "remove alleged ambiguous language in existing law, and substitute therefor a clear mandate that rural water and waste grant funds . . . are to be expended . . ." 119 Cong. Rec. H1276 (daily ed. Mar. 1, 1973). Representative Poage saw the administration's effort to terminate the grant program as "a blatant infringement of congressional authority," and called on Congress "not to sit idly by" and watch its power "drift away." Id. at H1278. Representative O'Neill argued that the discretionary authority allowed in the original Act had been "blatantly abused." Id. at H1281. Representative Randall quoted General Counsel Knebel's opinion and then remarked, "[T]he Congress is faced with no choice but to act to remove the discretionary features [and to insert] such mandatory language as 'shall.'" Id. at H1284.

152. 119 Cong. Rec. S5560-78 (daily ed. Mar. 22, 1973) (remarks of Senator McGovern); id. at S5578 (remarks of Senator Humphrey); id. at S5582, S5588 (remarks of Senator Aiken); id. at S5590-91 (remarks of Senator McClellan). Senator Carl T. Curtis and Senator Roman L. Hruska of Nebraska voted against H.R. 3298, reasoning that funds administered through the Environmental Protection Agency and the revenue sharing program could best fulfill the need for the water and waste disposal facilities. Id. at S5579, S5590.


154. It seems appropriate to note that the memorandum, authored by then Assistant Attorney General Rehnquist, which the Department of Agriculture quoted, in justification of impounding the water and sewer grant funds, contained this caveat: "It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the
the President vetoed the measure in part due to the mandatory language. The House of Representatives, with some reluctance, sustained the veto.\textsuperscript{166}

IV. SUMMARY AND CONCLUSION

Executive impoundment of appropriated funds did not begin during the presidency of Richard M. Nixon. In fact, the practice has a history at least 170 years old.\textsuperscript{155} Although President Grant frustrated the will of Congress by refusing to spend funds in 1876, massive impoundments did not take place until the economic crisis precipitated by depression and war in the 1930s and 1940s. After that, Presidents continued to withhold large sums, usually funds relating to foreign policy and defense priorities. President Johnson altered the traditional rationale for impounding funds, however, by taking into account a factor unrelated to his powers as Commander-in-Chief or to the goals of the Anti-Deficiency Act. President Johnson impounded funds to undercut inflationary pressures. Under the next President, the practice of impoundment changed even more.

President Nixon has continued to use the impoundment of funds as a device to reduce inflationary pressures, although the courts may completely halt such a practice.\textsuperscript{156} The major development to evolve within recent years, however, has been the utilization of impoundment as a tool with which to effectuate the alteration of domestic priorities. The attempted termination of the IREA two per cent loan program and other domestic projects\textsuperscript{157} and the ac-

\textsuperscript{155} See 13 \textit{Annals of Cong.} 414 (1803), where President Jefferson announced that he was not spending full sums appropriated. \textit{But cf.} 1973 \textit{Hearings, supra} note 19, at 676–77, where Professor Cooper of Rice University substantiated that President Jefferson spent the funds within one year. Representative Pickle has made the same argument with respect to the 1803 impoundment. \textit{Hearings on Impoundment Reporting and Review Before the House Comm. on Rules,} 93d Cong., 1st Sess., pt. 1, at 97 (1973).


\textsuperscript{157} Acting Director of the Office of Economic Opportunity (“OEO”) Howard J. Phillips, at President Nixon's direction, began to dismantle the OEO immediately after the President submitted his 1974 Budget Message to Congress on January 29, 1973. The message requested that no funds be appropriated for OEO in fiscal 1974; and, on the same day,
tual termination of the FHA water and waste disposal grant program epitomize a propensity of the President to alter congressionally sanctioned domestic priorities to conform to his notions about what the nation needs and how those needs should be met.

In fairness to the President, one must recognize that it usually devolves upon him to keep inflation checked, to keep spending below the statutory debt limit, and to prevent waste. To conclude that such burdens make it incumbent on the President to drastically cut or terminate programs does not necessarily follow. And the Ninety-third Congress has forcefully been made aware that executive impoundments used to reorder priorities are checks on the legislative branch which have no corresponding checks and have, hence, led to an imbalance in the law-making process.

Congress has attempted to regain control of the purse-strings.159

The most recent legislative move to curb the President’s impoundment of appropriated funds is a measure which would require the President to submit a special message to both Houses of Congress within ten days after he impounds or authorizes any person to im-

Acting Director Phillips issued memoranda to all Community Action Agencies, see 42 U.S.C. § 2790 (1970), instructing grantees to begin to phase out their programs. On March 15, 1973, further instructions were given in OEO Instruction 6730-3: CAA’s were required to submit phase-out plans and budgets, and failure to submit an acceptable plan was to result in summary suspension and the stoppage of financial assistance from OEA.

Local 2677, Am. Fed’n of Gov’t Emp. v. Phillips, 358 F. Supp. 60 (D.D.C., 1973), granted plaintiff’s motion for summary judgment. The court found the procedures utilized in the attempted termination to be violative of the Reorganization Act of 1949, 5 U.S.C. §§ 901-13 (1970), and the Economic Opportunity Act Amendments of 1972, 42 U.S.C.A. §§ 2837, 29716 (Supp. 1973), and to be clearly at odds with a congressional intent that the programs continue. However, the decision infers that termination may be acceptable if the procedural requirements are met.

159. S. 518, 93d Cong., 1st Sess. (1973), would have made the Director and Deputy Director of the OMB subject to Senate confirmation. The House passed the measure on May 1, 1973, by a vote of 229-171. 119 Cong. Rec. H3228 (daily ed. May 1, 1973). The Senate passed the bill by a vote of 73-19. Id. at S8232 (daily ed. May 3, 1973). President Nixon vetoed S. 518 because, in his view, to enact the measure would be “a grave violation of the fundamental doctrine of separation of powers.” The President alluded to the fact the bill would abolish the OMB and immediately recreate it in order to make the current Director and Deputy Director subject to Senate approval. Id. at S9375 (daily ed. May 21, 1973). The Senate overrode the President’s veto by a 66-22 vote. Id. at S9606 (daily ed. May 22, 1973). The House sustained the veto by a vote of 236-178, 40 votes short of the two-thirds needed to override. Id. at H3920 (daily ed. May 23, 1973).
pound funds for any reason. The bill, S. 373, was passed by the Senate on May 10, 1973, and sent to the House where it was amended and passed on July 25, 1973. The Senate disagreed with the House amendments and appointed Senate conferees. Both the Senate and House proposals would require the President to set out in his message the period of time during which funds are to be withheld, the reasons for the action and probable effects of the impoundment. The Senate and House proposals differ on the most important provision of the measure. Section 3 of the Senate proposal provides that the President, and other executive branch officials, "shall cease the impounding" within 60 calendar days after the impoundment message is received by Congress, unless Congress ratifies the impoundment by concurrent resolution, and it further stipulates that Congress may, by concurrent resolution, direct that the impoundment cease before the 60-day period has passed. The House proposal's section 102, on the other hand, provides that any impoundment "shall cease" if within 60 calendar days after the message is received, the specific impoundment shall have been disapproved by passage of a resolution of either House of Congress.

Until Congress is able to regain control of the purse-strings, libertarians should hope that whoever is President will adopt practices which do not flout the separation of power. To govern by fiat is to tread beyond the rule of law and to retreat from democratic ideals. This does not mean that executive impoundment of appropriated funds can never be within the purview of constitutional precepts. It does suggest, however, that the executive

162. 119 Cong. Rec. H6597-630 (daily ed. July 25, 1973). The House amended the Senate bill by striking out all clauses of S. 373, as passed by the Senate, and inserting in lieu thereof the provisions of H.R. 8480, 93d Cong., 1st Sess. (1973), which earlier that day was passed by the House.
164. Id. at H7155 (daily ed. Aug. 1, 1973).
166. Id. at S8872 (daily ed. May 10, 1973).
branch should be able to clearly identify a valid constitutional or legislative base for every refusal to spend funds for programs which have received the imprimatur of Congress.

169. Authorization for presidential action "must stem either from an act of Congress or from the Constitution itself." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 379, 585 (1952). It is, of course, extremely doubtful that any constitutional or legislative base can be found, except for the Anti-Deficiency Acts, to justify the impoundment of funds. Neither the Missouri Highway Comm'n nor the Ruckelshaus cases hinted that a statutory base existed to justify impoundments of Highway Trust Fund or pollution control monies, and none of the several other recent impoundment decisions has recognized a statutory base. See, e.g., Pealo v. FHA, No. 1028-73 (D.D.C., July 31, 1973); Massachusetts v. Weinberger, No. 1308-73 (D.D.C., July 26, 1973); Community Action Programs Executive Directors Ass'n v. Ash, No. 899-73 (D.N.J., June 29, 1973); Pennsylvania v. Weinberger, No. 1125-73 (D.D.C., June 28, 1973). That there exists a constitutional base upon which to justify impoundments is such tenuous assertion that the government rarely alludes to it in litigation. Moreover, it has demonstrated that such an alleged base is clearly nonexistent. See Waicukauski, The Impoundment Crisis: The Role of the Courts and the Constitution, June 1, 1973 (unpublished thesis in Harvard Law Library); Note, Presidential Impoundment: Constitutional Theories and Political Realities, 61 GEO. L.J. 1295 (1973). In accord, another piece which examined the justifications... both constitutional and statutory... offered for [recent] impoundments [reached the conclusion] that the only potentially valid ones arise when particular impoundments are based on developments within the affected program, as authorized by the Anti-Deficiency Act, or on permissive language in the statute governing the particular program itself. Impoundment, supra note 8, at 1534.