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B-135564 July 26, 1973

Number: B-135564

Date: 1973-07-26

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The honorable Sam J. Ervin, Jr., Chairman Subcommittee on Separation of Powers Committee on the Judiciary United States Senate

Dear Mr. Chairman:

This is in response to your letter of February 20, 1973, which resds in part:

The President has stated that he has the Constitutional authority to impound funds appropriated by the Congress. I should like to request that the office of the Comptroller General of the United States issue an opinion as to the legality of such actions on the part of the Executive. Specifically, I should like an opinion on recent instances of Executive impoundment of funds, such as the impoundment of monies designated for Waste Treatment Grants to states and local governments under the auspices of the Environmental Protection Agency, the elimination of funding for the Rural Environmental Assistance Program (REAP), and the withholding of Highway trust funds.

In accordance with your request, our response is also being submitted to the Committee on Government Operations.

At the outset it should be noted that we would not presume to offer a difinitive resolution of the many factual, legal, policy and other considerations relating to impoundment. Perhaps the most accurate general observation which could be offered is that there really are at present few clear answers to the varied issues and problems arising from impoundment. Also, as you are of course aware, a number of impoundment actions are now in ltigation. It is not our purpose to address the merits of positions taken in such litigation. Rather, in accordance with your request, it is hoped that the discussion herein presented may be of assistance in the consideration of legislative proposals.

I. CURRENT IMPOUNDMENT PRACTICES

Section 203 of the Budget and Accounting Procedures Act of 1950, added by the Federal Impoundment and Information Act, approved October 27, 1972, PUb. L. 92-599, title IV, 86 Stat. 1324, 1325, as amended by H. J. Res. 345, approved March 8, 1973, Pub. L. 93-9, 87 Stat. 7, requires the submission to the Congress and to the Comptroller General of reports of impoundment actions and certain information relating to such actions. On February 5, 1973, the Office of Management and Budget submitted the first report pursuant to the act, S. Doc. No. 93-4. /1/ Quantitatively, the OMB report of February 5, 1973, discloses a total gifure for impoundments of $8.723 billion. The report states that this

fugure represents 3.5 percent of total unified budget outlays for fiscal year 1973 (as esitmated in the 1974 Budget). The report also lists almost $284 million is proposed rescissions in 1973 appropriations. It is stated that hters amounts have been apportioned pending congressional action--although presubably the will not be availabel for obligation--and the are not included in the total figure. Whether or not the OMB report complies with the letter of Public Law 92-599, as amended, it seems clear that the $8.7 billion figure does not fully reflect all actions and proposed actions which may fairly be said to comprise the executive branch program of holding budget outlays below the levels provided by law. For example, the report does not reveal the withholding of $6 billion in contract authority for the construction of waste treatment facilities, the anticipated level of highway trust fund impoundments, and announced reductions to be made in budget authority for the Departments of Labor and Health, Education, and Welfare. A recent Library of Congress study of impoundment actions and plans places the total figyre for impoundments at approximately $18 billion. See Congressional Record for March 15, 1973, at K1586.

In qualitative terms, the OMB report sets forth a number of "codes" which are disigned to indicate "the authorities and reasons" for impoundment actions. The first foru codes clearly purport to cover actins taken pursuant to subsection (c) of the Antidefieciency Act, 31 U.S.C. 665(c), and merely recite or paraphrase the language of that provision. Code 5 covers:

Temporary deferral[s] pending the establishment of administrative machinery (not yet in place) or the obtaining of sufficient information (not yet available) properly to approtion the funds and to insure that the funds will be used in "the most effective and economical" manner (31 U.S.C. 665(c)(1)). This explanation includes reserves for which apportionment awaits the development by the agency of approved plans, designs, specifications.

While this code seems to imply that it is based on the Antideficiency Act, it technically does not come within the specific language of subsection (c)(2) authorizing the establishment of reserves. Code 6 and its subcodes rely upon the President's constitutional duty to "take care that the laws be faithfully executed." In essence, this category comprises impoundments allegedly required by staatutes such as the Economic Stabilization Act, was amended, and the statutory debt limit, discussed infra. Codes 7 and 8 recite, respectively, the President's consittutional authority as commander-in-chief and in the conduct of foreign affairs. In addition to the codes, certain impoundment actions are explained and jsutified on the basis of requiements or conditions contained in particular appropriation acts. Many of the impoundment actions are justified by a combination of codes, with codes 5 and 6 being employed most often. Codes 7 and 8 are not employed at all. In a few cases where impoundments do not fall entirely under the stated codes, specific explanations are provided. Otherwise, the codes are cited without factual analysis or further elaboration.

The closest source we have found for a comprehensive, albeit general, explanation of current executive branch impoundment policies is the testimony of Mr. Roy L. Ash, Director of the Office of Management and Budget, during the 1973 impoundment hearings. Joint Hearing before the Ad Hoc Subcommittee on Impoundment of Funds of the Committee on Government Operations and the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 93d Congress 1st Session, on S. 373 (hereafter cited as "2 Hearings").

Mr. Ash began his testimony by commenting upon the lack of a congressional mechanism to review and act upon the overall Goverment fiscal situation in advance of actin on appropriations and other legislation authorizing obligations; and by emphasizing the "executive" nature of Government spending. 2 Hearing at 269-70. He then tesitified as follows:

To get down to specifics, and by way of background, let us review the overall budgetary and fiscal situation in which we find ourselves in the fiscal year 1973. The act of October 27, 1972--Public Law 92-599-- temporarily increased the permanent statutory public debt limit by $65 billion for the period ending on June 30, 1973. As a result, the total debt limitation through June 30, 1973, is $465 billion. The House and Senate Committee reports on H. R. 16810--which became Public Law 92-599-- make it quite clear that the $465 billion limit would be "wholly inadequate" if the expenditure level for this fiscal year exceeded $250 billoin. The President has determined to adhere to this spending level not only to stay within the congressionally established debt limit, but also to avoid higher taxes, higher interest rates, renewed inflation or all three. The previous witness offered an excellent analogy. That is the proposition of stopping a huge freight train. But in this case it is a head-on collision with another freight train. That has some problem, too, and that is the analogy we ahve before us now.

A review of the fiscal year 1973 budget was undertaken in the early fall of 1972 to update earlier estimates of spending on the basis of the latest available information. This review showed that, unconstrained, the 1973 outlay total would approximate $261 billion. This was $11 billion in excess of the resources expected to be available from revenues, miscellaneous receipts, and borrowing, under present laws.

When we realize that we can spend only money that is in the Treasury--and this is explicitly stated in each appropriation act--and that money gets into the Tresury only through taxation or through borrowing within the statutory debt limit, the compelling necessity to control the incurrence of financial obligations and the resulting expenditures of funds is apparent. The required expenditure adjsutment for the fiscal year 1973 are explained in detail in the section captioned "Program Reductions and Terminations" in the President's 1973 budget--beginning on page 47. Through a number of management actions that improve cash flow without affecting program operating levels, it is estimated that $6.5 billion in program reductions and terminations are needed to attain the appending level of $250 billion in this fiscal year. This reduction includes $2.3 billion already approved by the Congress in the limitation it placed on grants for social services under public assistance programs in the act of October 20, 1972--Public Law 92-512--General Revenue Sharing Act.

It is against this background that we will be reporting in a few days the information on "impoundments" called for by the Federal Impoundment and Information Act--title IV of Public Law 92-599. To the extent that items within the $6.5 billion of reductions previously referred to are reserved or "impounded," they will be included in the forthcoming report.

You will find that many of the reserves to be reportd are for purposes of routine financial management, such as those established pending the development of an organization to administer a new activity, or pending the development of plans, designs and specifications for construction or procurement purposes. These cases simply involve an executive function of determining how the statutes

may be most efficiently, economically, and effectively carried out. Other reserves are explicitly required by statute, such as Agriculture funds for fire ant control which are reserved for matching purposes for States which may come into the program.

All of the reserves which will be reported are reflected in the system of apportionments established in compliance with the so-called Antideficiency Act (31 U.S.C. 655). Some have been established under the explicit authority of that act: viz, "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." Reserves which may be required or authorized by other statutes will also be reflected in that apportioinment system and reported accordingly.

Although "impoundment" or reserving of funds has been a practice which began at least as early as the administration of President Thomas Jefferson, it is subject to much misunderstanding. The authority for some reserves or "impoundments" in the past has been derived from the President's constitutional authority in the area of foreign affairs, his role as Commander in chief, and his constitutional duty to "take care that the laws be faithfully executed." The position of the executive branch is that upon consideration of all the applicable historical precedents, facts, and statutes--including appropriation 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. Id. at 270-71.

There followed a colloquy between Senator Ervin and Mr. Ash concerning the conflict between the Administration's insistence upon unlimited discretion in reducing budget outlays and the Senate's insistence upon formula reductions which led to reuection of a statutory $250 billion Spending ceiling for fiscal year 1973:

Senator Ervin. I would asy all of that could have been avoided by the administration, by seeking the agreement of the House and senate in saying he couldn't exceed $250 billion and that the President could cut all programs in equal proportions.

Also the President could have avoided some problems in his recommendations. For example, there was the recommendation that we authorize appropriation for $30-odd billion for revenue sharing. We didn't have any revenue sharing, and I voted against that. In other words, the President could have spent the highway funds, and spent them within the $250 billion ceiling, and he could have refrained from recommendations for appropriation of revenue-sharing things when there was no money to take care of them. Then there wouldn't have been any bumping against the ceiling.

Mr. Ash. I am certain, sir, that if each of us were given the problem of which $11 billion to look for we would each have a different list or priorities. Yet at some point a list has to be selected of them all. We are not choosing between good programs and bad programs. In many cases we are forced to choose between good ones and better ones.

Senator Ervin. we are choosing between programs which Congress likes, and programs which the President dislikes, and programs which the President likes

and Congress dislikes. That is what it is.

Mr. Ash. Well, Congress, as you know, and again the President has Strongly recommended right at the beginning of his budget message that the Congress find that mechanism to first deal with the overall total of expenditures and within that, then, to itself consider each of the individual programs. The issue this year has been that the individual programs were dealt with without the consideration of the total, leaving only the President as the final point of solving the country's problems, of holding down further inflation, making sure that taxes didn't become more unbearable than they are or raising the prices of interest. Somebody had to do this job. He stepped up to the responsibility and did it but we would very much like to share that with the Congress.

Senator Ervin. He would like to share the responsibility of holding down funds with the Congress, but no the devising of programs and choosing which programs ought to be impoemented or funded.

Mr. Ash. Well, he has proposed in the 1974 budget the priorities he would offer. That doesn't necessarily mean each and every one will be accepted just as he offers them.

Senator Ervin. By impounding the funds appropriated for the year beginning July 1, 1972, and ending June 30, 1973, he has taken priorities set up by him, and denied those Congress set up.

Mr. Ash. Certainly for the 1973 expenditure, there being no better alternative if we are not to create that head-on collisoin with the other train coming down the track, higher prices, higher taxes, higher interest rates. Id. at 278-79.

The question of applying priorities and exercising selectivity in the reduction of budget outlays was also the subject of a colloquy between Senator Metcalf and Mr. Ash:

Mr. Ash. I think it is very simple to state here that because of the need to conform with the law not to spend $261 billion but $250 billion, choices had to be made between good programs and bad programs, in some cases between good ones and better ones.

What is in the best interest of the United States?

Senator Metcalf. Very well. How do you determine what is in the best interest of the United States? Now, I have to answer to my constituents as to how I vote on the determination as to the best interest of the United states, and I tell them that I feel a medical program is in the best interests but a war in Vietnam is not in the best interests. That is how I have to go home and say there are decisions that I have made.

How do you make your decisions?

Mr. Ash. Some what similar to that.

Senator Metcalf. You make these trade offs?

Mr. Ash. The President in addition to concerning himself with a particular State or even a district in it is judging the programs in terms of their overall best

interest relative to other programs for their overall best interest.

* * * * *

Mr. Ash. It is not political trade off. When one is constrained even by the total amount to be spent, even in your home budget or my home budget, the trade off you make isn't political, it is which buys you the greatest value for that limited amount of resources you have to spend. These are the judgments that were made and those are made by the best judgment that one can bring to bear just like you as a Senator--

Senator Metcalf. What criteria do you have to bring to bear your best judgment?

Mr. Ash. I think the very one as employed by yourself, in our opinion, that which is in the best interest of the United States.

Senator Metcalf. Well, in my opinion your consideration of what is in the public interest isn't the same as what I consider, so will you tell me what you think the criteria of public interest is?

Mr. Ash. I would agree that program by program we will not necessarily agree as to which is the best interest. Id. at 525, 527.

In response to a request by Senator Metcalf, OMB submitted for the record the following information regarding spending decisions:

A decision to reduce or eliminate funds for an existing Federal program follows from the application of several criteria, which may be summarized as follows:

Does the need which brought about the enactment of the Federal program still exist? The needs of the Nation change continually, and with them the needs for specific Federal programs. In some cases the needs are transitory, and pass; in other, Federal programs intended to fulfill a specific need become redundant when these needs are met with new, brader programs. we are continually called upon to identify and correct inequities created by provideing excessive benefits to some by virtue of overlapping programs and insufficient benefits to others because of funding limitations of the broader program.

Does the program achieve its intended goal? Many Federal programs, particularly those in the social welfare area, are essentially large-scale social experiments, for social legislation is rerely enacted which foresees fully the joing effects of the complex incentives of all the participants in these programs. As a consequences, some of the efforts simply fail to accomplish the objectives that they are intended to serve.

Is the program metting its objectives in a reasonably efficient way: Many programs fulfill the intended objectives, but at costs that far outweigh the benefits likely to be derived from the program. In some instances, the "real" beneficiaries of the program are not the beneficiaries toward which the program was directed. Often, after programs have been on the books for may years, their principal beneficiaries change and are not the intended, nominal beneficiaries. Assuming equal desirability of objectives, less efficient programs are considered for elimination before more efficient ones.

These are the principal criteria which have been used ini making decisions about

reductions or eliminations of funds for Federal Programs. In some instances, funds for programs have been reduced or eliminated because, in the President's judgment, the relative importance of the objective or the inefficiency of the solution places them at a point where, in light of limited resources, they seemed to rank lower than other programs. In other instances, funding has been asjusted because programs have, in the President's judgment, fulfilled meeds which no longer exist or failed to fulfill their stated objectives. Id. at 528.

Without belaboring any particular elements in the foregoing explanation of current impoundment proctices, two broad observations can be made. Fisrt, it seems clear that only to a limited extent can current impoundments be equated with the implementation of requirements and conditions specifically set forth in appropriation acts and other statutes, or the promotion of spending objectives provided by the Congress in the most efficient and effective manner. It also seems clear that impoundments are not being made on an ad hoc basis to remedy what are considered particular instances of excesses on the part of Congress. Rather, it is apparent that the practice of impoundment is currently being used as a mjor weapon of broad applicability in the President's effort to contain Federal spending. Secondly, Mr. Ash freely states--and even emphasizes--that impoundment actions are taken largely on the basis of conclusions by executive branch officials as to the relative merits and effectiveness of competing Federal programs. Apparently funding level alone can be the determinative factor despite relative merits and effectiveness. At least in one reported incident a decision was made on a funding basis to terminate program entitlement to persons qualifying under a secretarial determination while allowing the continuance of benefits to persons qualifying under presidential determinations where under law both secretarial and presidential determinations were allowable. See Berends et al. v. Butz, Secretary of Agriculture, et al., infra. Certain programs, which are considered to have outlived their usefulness, failed to achieve their objectives, or which are not proceeding efficiently, are reduced or eliminated.

We are not here concerned with the practical merits of the current impoundment practices, although as we testified recently before the Subcommittee on Consumer Economics of the Joint Economic Committee, the extent of real savings achieved and the methods used in arriving at these program decisions (to the extent that they can be evaluated) are open to question. However, consideration of the factual and proctical aspects of current impoundments provides a necessary context in addressing the legal issues presented.

As stated at the outset, the legal validity of impoundments, in their various contexts, has not been definitely settled by the courts--if indeed it can be. Accordingly reliance must be placed largely upon analysis of legal arguments and theories advanced, as well as the few judicial precedents which bear upon the legal issues involved.

The most current and comprehensive presentation of executive branch arguments in support of the legality of its impoundment program is derived from the testimony of Mr. Joseph T. Sneed, Deputy Attorney General, in the 1963 impoundment hearings, and the Justice Department's (Mr. Sneed's) subwequent written answers to questions posed in connection with this testimony. While the complex legal issues involved undoubtedly defy precise classification, these sources present a nnumber of policy, political, historical, statutory, and constitutional arguments which often appear to converge. However, we will attempt to trust these issues separately to the extent possible.

II. HISTORICAL BASIS FOR IMPOUNDMENT

Mr. Sneed stated in his testimony that legislative regulation of impoundment "seeks to reverse 170 years of presidential practices. It would be well to ponder the practical needs of Government underlying that history, before they are cast aside." 2 Hearings at 363. So stated, Mr. Sneed appeared to be raising only a policy argument. However, Mr. Sneed's subsequent written answers to the Committee's questions accord the President a constitutional power to impound to combat inflation--not amenable to congressional limitation--on the basis of historical precedent:

* * * The principal legal support for this authority is found in the historic practice of Presidents of both parties, which can properly be regarded as a practical interpretation of the Constitution. Presidents since Franklin Roosevelt have, on a regular basis, impounded funds in foreign and domestic programs in effort to control inflation.

We have, then, an established Presidential practice of some thirty years' duration resting primarily upon the President's authority as Chief Executive. In the Pocket Veto Case, 279 U.S. 655, 690 (1929), a unanimous Supreme Court quoted with approval the statement that:

[A] practice of at least twenty years' duration "on the part of the executive department, acquiesead in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning, "quoting from State v. South Norwalk, 77 Conn. 257, 264 (1904).

Numerous Supreme Court decisions recognize that the sanction of history goes far to esxtablish the legitimacy of a practice that might have been questioned as an original matter. see, e.g., United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915). Id. at 837-38.

In addition, Mr. Sneed rejected a memorandum authored in 1969 by the Honorable William H. Rehnquist, as Assistant Attorney General for the Office of Legal Counsel, which concluded that the Congress could mandate domestic spending, by stating:

* * * the memorandum does not deal at all with the historic proactice of Presidents in impounding funds, particularly for the purpose of controlling inflationl In my judgment, the warrant of historic practice is perhaps the strongest support for my position. Id. at 842.

Mr. Sneed's answers recite the historical basis for impoundment, dating the practice from President Jefferson's deferral of an appropriation for gunboats in 1803. 2 Hearings 835-36. This study of historical "precednets" for impoundments apparently is derived primarily from articles and other materials by several authorities reprinted in Hearings before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92d Cong., 1st sess., on Executive Impoundment of Appropriated Funds (hereafter cited as "1 Hearings"). The historical accounts, supplemented by materials appearing in the 1973 hearings and other sources, may be summarized as follows:

The gunboat episode is recounted by Professor Joseph Cooper at 2 Hearings

676-77. In early 1803 Congress appropriated $50,000 for the purchase of 15 gunboats. This appropriation was made in the midst of the crisis precipitated by the cession of Louisiana by Spain to France. In May of that year Jefferson resolved the crisis by the Louisiana Purchase. In his Third Annual Message to Congress, on October 17, 1803, Jefferson explained:

The sum of $50,000 appropriated by Congress for providing gunboats remains unexpneded. The favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary, and time was desirable in order that the institution of that branch of our force might begin on models the most approved by experience.

The gunboats were in fact subsequently obtained; thus application of the appropriation was merely deferred. There is no indication of any congressional objection concerning the course followed by the President. As Professor Cooper points out, this episode was nothing more than a classic example of the type of executive action which would now clearly fall within the application of the Antideficiency Act.

The only other cited references to impoundment prior to the 20th Century concern rivers and harbors appropriations. Mr. Sneed in answering the above referred to questions stated that in 1876 President Grant indicated his intention to withhold funds for "Works of purely private or local interest in no sense national," citing the "very great necessity for economy of expenditures at this time." 2 Hearing 835. Dr. Louis Fisher refers to an 1896 opinion by the Attorney General (21 Op. Atty. Gen. 415) advising the President that rivers and harbors appropriations were not mandatory "to the extent that you are bound to expend the full amount if the work can be done for less." 2 Hearings 707-708.

It has been suggested that actions such as Jefferson's have been taken in all administrations; and that disputes over expenditure of rivers and haarbors appropriations have arisen in several administrations of the 19th and 20th Centuries. 2 Hearings 835-36. However most authorities trace the origins of impoundment as a significant practice only as far back as the 1941-42 efforts of President Franklin Dl Roosevelt to limit public works expenditures to projects having significance in meeting national defense needs. See, e.g., 1 Hearings 293, 366, 378-79, 569-70, 586; 2 Hearings 677; Stassen, Separataion of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations, 57 Geo. L. J. 1159, 117 (1969). As noted previously, even Mr. Sneed's argument relies primiarily upon impoundments occurring during the past 30 years.

Professor J. D. Williams gives a thorough analysis of the history of Roosevelt's efforts to limit public works projects, particularly in terms of the Budget Bureau's own doubts as to the legality of such efforts. See 1 Hearings 378, 380-91. While some funds were permanently denied, others were eventually released. In response to executive impoundments legislation was enacted requiring that flood control project be "prosecuted as speedily as may be consistent with budgetary requirements," 55 Stat. 638,639, /3/, and authorizing impoundment of highway funds only upon certification by the War Production Board that the use of critical material for additional highway construction would impede the conduct of the war. 57 Stat. 560, 563, 9.

Two major impoundment disputes developed during the administration of President Truman. Fisrt, the President impounded appropriations increasing the number of

Air Force groups from 48 (the budget request) to 58. Dr. Fisher comments upon this incident as follows:

* * * President Truman's impoundment of Air Force Funds in 1949 would appear to be a clear denial of legislative intent, and yet the issue was not at all that simple. The House had voted to increase Air Force funds, while the Senate sided with the President in opposing the increase. The matter lay deadlocked in conference committee, with adjournment close at hand and the military services in need of funds to meet their payrolls. A Senate motion to vote continuing appropriations was rejected by the House. To break the impasse, the Senate reluctantly accepted the extra Air Force funds, but with the understanding, as Senator thomas said, that "if the money is appropriated it may not be used" by the President. In light of that legislative history, it is clearly an oversimplification to any that Truman's impoundment of funds represented a denial of "the will of Congress." 2 Hearing at 709.

The second major dispute during the Truman Administration involved cancellation of plans to build a "super" aircraft carrier in favor of a much smaller version. This action saw apparently taken, in part, upon the recommendation of Chairman Carl Vinson of the House Armed Services Committee.

Several other instances of impoundments in the area of defense spending are reported. see 1 Hearings 526. For example, in 1959 President Eisenhower impounded an appropriation for procurement of a Nike-Zeus antiballistic missle system pending the results of further testing. In 1960 these funds were released for development rather than production. In 1961 Congress added $180 million to President Kennedy's request for development of the B-70 (RS 70) manned bomber. Defense Secretary McNamara refused to expend the excess funds. Dr. Fisher describes the subsequent potential confrontation between the President and Congress, and its resolution, as follows:

* * * In March 1962, the House Armed Services Committee voted to direct the secretary of the air force to spend not less that $491 million during fiscal 1963 toward production of the B-70. To remove any doubts about its intention, the committee said that the secretary was "directed, ordered, mandated, and required to spend the fall $491 million. The committee added that "If this language constitutes a test as to whether Congress has the power to so mandate, 1st the test be made."

The confrontation took place and Congress lost. President Kennedy wrote to Chairman Vinson of the House Armed Services Committee, urging that the word "authorized" be substituted for "directed." The president contended that this was more suitable for an authorization bill, since funds had not been appropriated, and also thought the change in language would be "more clearly in line with the spirit of the Constitution" and its separation of powers. The House acceded to the president's request and the Administration went ahead with its plan to complete two prototypes of the B-70 before considering full-scale production. 1 Hearings at 111.

Dr. Fisher goes on to describe another defense spending controversy as follows:

A similar impoundment dispute over the nuclear-powered frigate reached the point in 1966 where the House threatened to direct that funds be spent on the vessel. The Senate softened the language to stipulate that contracts for construction of the frigates be entered into "as soon as practicable unless the President fully

advises the Congress that its construction is not in the national interest." Id.

Dr. Fisher notes that since enactment of the Employment Act of 1946, approved February 20, 1946, ch. 33, 60 Stat. 23, every President has considered that legislation as including Federal responsibility for combating inflation. 1 Hearings 111. However, with the exception of President Truman's refusal in 1949 to provide the full 58 Air Force groups authorized by Congress--which was apparently justified at least in part on the basis of avoiding a strain on the domestic economy--we are aware of no specific examples of impoundments to combat inflation until the administration of President Lyndon Johnson. Of course, such impoundments have greatly increased during the current administration.

We do not believe that the historical background discussed above has significant application in determining the legality of the impoundment practice. Mr. Justice Frankfurter's concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the "Steel Seizure" Case), suggests that historical practice might give some constitutional sanction to executive powers which would otherwise be doubtful:

* * * systematic, unbroken, executive practive, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have slso sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by 1 of Art. II. /2/

The history of impoundment obviously does not even approach Mr. Justice Frankfurter's concept. It appears that impoundment did not become a significant practice until the early 1940's and has only recently been employed on a significant scale as an anti-inflation device. Moreover, several authorities consider current uses of impoundment to be wholly unprecedented in a historical sense. Professor Harvey C. Mansfield offered the following observation:

A foruth broad use for impoundment emerged in 1969 and 1970 as the Nixon administration set about reordering the program priorities of its predecessor. Partly by votes and partly by cutbacks of grants for health research, urban renewal, and model cities, defended as anti-inflationary moves, the President tried to make room for funds for the SST, for NASA, for a larger merchant marine, for Safeguard ABM installations, and so on. Plainly the object was not an overall reduction, or not wholly an overall reduction, but despite continuing inflationary pressures, a redistribution of emphases in order to favor different constituencies from those the Johnson administration had cultivated. 1 Hearing 172-173.

Dr. Fisher, who is perhaps the foremost authority on the history of impoundment, expressed the same conclusion in more general terms in his recent book, President and Congress: Power and Policy, at 125-126:

In the cases cited thus far, funds have been withheld either in response to specific statutory directives or on grounds of prudent use of funds in weapons procurement. an entirely different situation has developed under the Nixon Administration, where funds have been withheld from domestic programs because the President considers those programs incompatible with his own set of budget priorities. In the spring of 1971, the Nixon Administration announced that it was withholding more than $12 billion, most of which consisted of highway money and funds for various urban programs. When Secretary Romney appeared before a

Senate committee in March, he explained that funds were being held back from various urban programs because there was no point in accelerating programs that were "scheduled for termination." He was referring to the fact that Congress had added funds to grant-in-aid programs which the Administration wanted to consolidate and convert into its revenue-sharing proposal. To impound funds in this prospective sense--holding on to money in anticipation that Congress will enact an Administration bill--is a new departure for the impoundment technique. Impoundment is not being used to avoid deficiencies, or to effect savings, or even to fight inflation, but rahter to shift the scale of priorities from one Administration to the next, prior to congressional action.

Even the historical evidence discussed previously, which provides a limited context for impundment, hardly demonstrates "a systematic, unbroken, executive practice never before questioned" by the Congress. Rather, the historical "precedents" seem to indicate rather clearly a process of give and take between the President and the Congress. certainly impoundment actions have provoked much objection and controversy within the Congress, with individual members asserting various opinions as to the legality or desirability of such actions. On several occasions the Congress has accepted and even ratified executive impoundment actions by adoption of accommodating language in appropriations legislation. On other occasions, the President has relented by releasing funds previously impounded. A notable example of a successful congressional challenge to impoundment is provided by President Nixon's eventual release fo certain impoundments relating to domestic programs as a result of section 658 of the Foreign Assistance Act of 1971, approved February 7, 1972, Pub. L. 92- 226, 86 Stat. 20, 32, which required such action as prerequisite to the availability of funds provided therein.

Perhaps the most telling evidence against reading too much into the history of impoundment is the well-documented ambiguity of opinion within the executive branc itself as to the extent of impoundment authority. While Presidents and their official spokesmaen have on many occasions espoused a bread and pervasive right to impound, such opinions and assertions are far from unanimous. Professor Williams' study of the development of impoundment practices within the Bureau fo the Budget is most revealing in this regard. See 1 Hearings 378-394. Among other things, this study observes that the constitutional role of the President as commander-in-chief was employed to justify wartime impoundments at least in part because of doubt concerning any other justification. Before, during and after enactment of the Antideficiency Act, the Bureau was also extremely careful to avoid suggesting that impoundment could be used to defeat the intent of the Congress. see also 2 Hearings 396-399. A 1961 memorandum from the Bureau of the Budget to the President Takes a very narrow view of impounment authority, even under the Antideficiency Act. 2 Hearings 338-340. Finally, [them] Assistant Attorney General William H. Rehnquist concluded ini his 1969 memorandum:

With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent.

1 Hearings 279-282; see also, id., 285-291. Both the 1961 Budget Bureau memorandum and the 1969 Rehnquist memorandum cited Attorney General Opinions and other executive branch legal opinions in support of their conclusions.

In sum, impoundment has traditionally been regarded as one of several "grey areas" in the legal and political relationships between the executive and

legislative branches. We believe the historical evidence indicates, if anything, that until very recently both sides were quite willing to let it remain so.

III. STATUTORY AUTHORITY FOR IMPOUNDMENT

There are instances in which the President can claim clear and affirmative authority to impound. A status providing obligational authority may itself contain direct limitations and conditions upon the availability of such authority, as may specific program statutes. In addition, statutory reuqirements of general applicability may serve to limit Federal expenditures. For example, title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d-2000d-4, rpovides for the withholding of Federal assistance in order to achieve compliance with statutory prohibitions against racial, religious, and other forms of discrimination. Also, Federal projects may be affected by statutory procedures and requirements relating to the environment. See Code 6a of the OMB impoundment report, supra. While the precise application of such statutory application of such statutory provisions must be determined on a case-by-case basis, we believe it may be observed that appropriations measures would generally be considered subject to the requirements and restrictions of the type described above.

Apart from the effect of individual statutory requirements, there are two legislative devices which are cited as providing general and direct authority to impound: statutory limitations upon overall budget outlays and the Antideficiency Act.

Expenditure limitations.

A number of statutes designed to reduce overall budget outlays for a particular fiscal year have been enacted in recent years. These statutes have taken either the form of a mandate to reduce outlays in a specified amount or the imposition of a specific "spending ceiling" which necessitataes reduced outlays. Statutes of this type, which are generally designed as anto-inflation measures, may be actively sought by a President or imposed upon him by the Congress. In either event, the central issue arising in connection with such legislation invariabley relates to the degree of discretion to be accorded the President in implementing spending reductions. See generally, Dr. Fisher's discussion at 1 Hearings 111-115.

The first such provision was section 1214 of the General Appropriation Act, 1951, approved September 6, 1950, 64 Stat. 595, 768, which mandated a reduction of obligational authority provided therein of not less than $530 million, subject only to the condition that the reduction be accomplished "without impairing national defense." Similar budget cutting measures, varying in terms of the degree of executive impoundment descretion accorded, were enacted for fiscal years 1968 (Pub. L. 90-218); 1969 (Pub. L. 90-364 202); 1970 (Pub. L. 91-47, as amended by Pub. L. 91-305,401); and 1971 (Pub. L. 91-305, 501). Public Law 90-218, approved December 18, 1967, 81 Stat. 662, was the most restrictive of executive discretion, providing for a reduction by application of a formula designed to apportion cuts among programs and agencies. The subsequent statutes generally afforded the President unlimited discretion in achieving reductions except as to a few special or "relatively uncontrollable" items.

A substantive spending ceiling for fiscal year 1973 was considered and rejected by the Congress in connection with legislation, H.R. 16810, 92d Congress

(enacted as Public Law 92-599) increasing the temporary debt limit. /4/ Obviously, therefore, no direct statutory authority supports the imposition and implementation of a $250 billion spending ceiling for fiscal year 1973; and so the matter might rest. However, it has been suggested that the legislative hsitory of H.R. 16810 actually supports the current impoundment program. See, e.g., The Washington Post for October 20, 1972, A-1, A-8 ("Nixon Still Aims to Curb Spending").

As reported and passed in the House, title II of H.R. 16810 provided for a $250 billion spending ceiling, and imposed no limitations upon the President's discretion is making the necessary budget cuts. The House report on the bill emphasized the need for a spending ceiling in terms of prevailing economic conditions. The report also concluded that the ceiling should be without exemptions and subject to implementation at the sole discretion of the President:

* * * the committee recognized that it would be better for Congress to indicate where the reductions are to be made in order to achieve the lower level of spending. However, in the current year, this has not been done and, therefore, through the expenditure limitation on aa temporary one- year basis, the committee believes that it would be better to ask the President to indicate the areas of expenditures which can appropriately be reserved for this one year rather than facing the additional problems of increased inflation or increased taxes. H. Rept. No. 92-1456, at 9.

The House-passed spending ceiling provision was reported in the Senate without amendment; and the Senate report reflected the same conclusions as the House report. S. Rept. No. 92-1292 at 7-9. The Senate as a whole accepted the spending ceiling. However, the Senate-passed version included the so-called Jordan amendment, which required that reserves be made proportionately (with Certain exemptions) and preclude reserves in excess of 10 percent for any individual activity or item. The first conference version of the bill reduced the nember of exemptions provided by the Senate and increased the authorized amount of individual reserves to 20 percent. See H. Rept. No. 92-1606. This version was rejected by the Senate. Subsequently a second conference report, H. Rept. No. 92- 1614, which omitted any substantive spending ceiling was agreed to by both Houses and the bill was enacted.

As was the case with similar legislation in the past, debate on H.R. 16810 centered upon the extent to which the executive should be given discretion in making budget cuts. See generally, Congressional Record for October 13, 1972, S18026-032, S18039-18118; id., October 17, 1972, H10224-34, S18506-33; id., October 18, 1972, H10277-84, S18632-35. Proponents and opponents of broad executive discretion express various opinions on the question of existing impoundment authority. Opponents generally took a narrow view of alleged existing power to impound, and argued that to accord such power in connection with the spending celing would constitute an abdication of congressional prerogatives. Some proponents of executive discretion agreed that their approach would constitute a congressional abdication of power, but concluded that a temporary abdication was necessary in view of the dire condition of the economy and the fact that Congress had failed to meet its budgetary responsibilities. Other proponents maintained that the President had existing constitutional power to achieve a spending ceiling by impoundment and, therefore, that Confress would lose nothing by enactment of the ceiling.

While the legislative history of H.R. 16810 does not contribute directly to resolving the legal validity of impoundment, several conclusions are apparent. First, there was virtually unanimous agreement as t the desirability of holding Federal spending for fiscal year 1973 at $250 billion. Secondly, both the Senate and the Administration in effect considered the method of achieving budget reductions to be more important than the spending ceiling itself. Thus the Senate rejected the compromise version set forth in the first conference report; and Congressman Mills indicated that further compromise was also unacceptable to the President:

The Secretary of the Treasury came to the meeting of the conference at 1 o'clock and told us that the President, himself, would rather not have any provision in the law relating to a spending ceiling, unless he could have the latitude that was in the last conference reort, or in the House-passed bill, as necessary for him to carry out the directive of the Congress. Congressional Record for October 18, 1972, at H10278.

Thirdly, by its current approach to impoundment the executive branch has adopted precisely the course which the Congress, in the final analysis, refused to approve.

The Antideficiency Act.

As indicated in our testimony during the 1973 impoundment hearings, the only general legislative authority for impoundment which we perceive is that contained in the Antideficiency Act, section 3679 of the Revised Act provides for the approtionment of fixed-year appropriations so as to prevent obligation or expenditure in a manner which would indicate a necessity for deficiency or supplemental appropriations, and for the approtionment of no-year appropriations and certain other obligational authority so as to achieve the most effective and economical use thereof. Subsection (c)(2) of the act states:

In approtioning 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. Whenever it is determined by an officer designeted in subsection (d) of this section to make apportionments and reapportionments that amy amount so reserved will not be required to carry out the purposed of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations.

The language of subsection (c) derives originally from draft legislation submitted to the Congress in a joing report by the Bureau of the Budget and the General Accounting Office dated June 5, 1947. In describing language virtually identical to that enacted as subsection (c)(2), the report stated in part:

* * * [T]his authority [to establish reserves] in believed to be essential to sound financial management. It is recognized that this provision presents a policy question for decision by the Congress. It is recognized, also, that the authority which would be granted must be exercised with considerable care in order to avoid usurping the powers of Congress.

Reactment of this language followed a recommendation in the 1949 Hoover

Commission report that authority be provided "to reduce expenditures under appropriations, if the purposes intended by the Congress are still carried out." Commission on Organization of the Executive branch of the Government, budgeting and Accounting, A Report to the Congress, at 17. It has also been noted that the 1952 edition of the Bureau of the Budget examiner's Handbook specifically warned, in discussing subsection (c), that: "Reserves must not be used to nullify the intent of Congress with respect to specific projects or levels of programs."

The foregoing references are illustrative of the clear conclusion that the authority and discretion conferred by subsection (c) is designed for application to actions which enhance, of at least preserve, the purposes and objects for which appropriations are provided. Accordingly, as we stated at the 1973 hearings:

There is abundant legislative history in connection with the enactment of the Antideficiency Act to support our conclusion that this legislation goes no further than authorizing the President to establish reserves to provide for contingencies, to reflect savings, and to take into account changes in requirements subsequent to the appropriation action, and to reserve funds because of changing circumstances. We are not aware of any specific authority which authorizes the President to withhold funds for general economic, fiscal, or policy reasons. /5/

This consturction of the act was affirmed in the recent opinion of the United States Court of Appeals for the Eighth Circuit in State Highway Commission v. Volpe, No. 72-1512 (filed April 2, 1973), slip. op. at 32- 33, as follows:

The legislative history [of the Antideficiency Act] is emphatic in noting that this power to withhold funds cannot be used if it would jeopardise the policy of the statute.

"It is perfectly justifiable and proper for all possible economics to be affected and savings to be made, but there is no warrant of 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 carring out its constitutional mandate of provideng for the defense of the Nation." (Emphasis ours.) H.R. Rep. No. 1797, 81st Cong., 2d Sess. 211 (1950).

It is thus apparent that say withholding in order to "effect savings" or due to "subsequent events," et cetera, must be considered in context of not violating the purpose and objectives of the particular appropriation statute. Such purposes and objectives are necessarily violated when one charged with implementing the statute act beyond his delegated authority.

Past opinions and positions taken by executive branch officials have seemed to be generally consistent which the foregoing construction of the act. For example the 1961 Burea of the Budget memorandum to the President on authority to reduce expenditures, referred to previously, states in part:

There is nothing in the statute [Anti-deficiency Act] of its legislative history to support a view that the Director's authority to establish reserves may be used to prevent the execution of projects or progress for which prevent the execution of projects or programs for which appropriations have been made by the

Congress. The language of the Act, when read in context, seems to indicate rather clearly that the provisions permitting the establishing of reserves are to be used only to the extent that they do not interfere with the executionf of the purposes for which appropriations are provided. there is nothing in the statute or its legislative history to support a view that the reserve authority may properly be used to prevent the use of appropriations because of overall fiscal considerations. 2 Hearings 340.

There is, however, some evidence that the current approach to the act by executive branch officials is at variance with its traditional interpretation. As noted previously, Code 5 of the OMB report does not seem to fall squarely within the act. Also, Mr. Ash suggested in his tertimony at the 1973 hearings that the Antideficiency act would accommodate the phase-down of an existing program pending congressional actioin on executive recommendations for their termination; and that inflationary pressures may be considered "other developments" within the application of the statutory language. The Office of Management and Budget has also recently stated:

In light of the fact that spending under conventional appropriations is not mandatory, the authority to establish reserves because of "other developments subsequent to the date on which such appropriation was made available" should be construed broadly. Thus "other developments" would encompass any circumstances which arise after an appropriation becomes available for use, which would reasonably justify establishment of a reserve. 2 Hearings at 529.

We believe that several rather obvious condiserations rpovide sufficient guidance for application of the language of subsection (c)(2) of the act. First the overriding policy of subsection (c)(2) is to promote the most effiective and efficient application of obligational authority t the purposes and objectives for which it is provided. Central to this policy is the anticipation that savings can and will be achieved. However, there is no indication of an intent to encourage or condone savings at the price of program objectives.

The phrase "other developments" is in a sense a catchball. However, the key to its application is the trailing qualifying language "subsequent to the date on which such appropriatioin was made available." The manifest purpose of this qualifying language is to exclude conditions or circumstances existing at the time of congressional consideration of an appropriation, and therefore within the scope of the congressional judgement as to levels of funding provided. In other words, the term "other developments" does not provide authority to reconsider or set aside determinations made by the Congress. For example, any considerations presented to the Congress in favor of a lower level of funding than that eventually provided could not be invoked anew under the guise of the Antideficiency Act. The same would hold true of any explanation or justification in support of a Presidential veto of an appropriations measure if the veto was subsequently overriden.

On the basis of the foregoing observations, it is apparent that the test to be applied to "other developments" which do generally arise after congressional consideration is whether it appears probable that the Congress would have acted differently in the face of such new developments of circumstances. Obviously, the test requires the exercise of considerable discretion;however, such discretion must be exercised in good faith. Finally, it is obvious that executive branch officials are without authority to impound or establish reserves on the basis of "other developments" of their own erection, such as the

anticipation that a program will be terminated upon their recommendation. This conclusion was implicitly affirmed in the recent decision of the United States District Court for the Destrict of Columbia holding that the "phaseout" of certain OEO programs is unauthorized. Local 2677, American Federation of Government Employees, et al. v. Phillips, et al., Civ. Nos. 371-73, 375- 73, 379-73, filed April 11, 1973, 41 U.S.L. Week 2542 (April 17, 1973).

Effect of appropriations language.

It has been suggested that legislation authorizing or making appropriations or otherwise providing budget authority generally employs "permissive" rather than "mandatory" language. On the basis of this conclusion it is maintained that such legislation merely establishes a ceiling upon outlays, so that the executive retains discretion to obligate any amount under the ceiling or nothing at all. Thus the statement of the Deputy Attorney General Sneed at the 1973 hearings reads, in part:

Most federal statutes establishing federal spending programs are cast in discretionary language. For example, the Secretary of Agriculture "is authorized to" subsidize dams, and the President "is authorized to" grant various kinds of foreign aid. Similarly, typical appropriation acts for the funding of previously authorized programs simply "appropriate" sums "out of money in the Treasury not otherwise appropriated" in very general terms. Absent an obviously deliberate departure from the usual statutory language, it has been traditionally assumed that such statutes do not require spending the full amounts appropriated. 2 Hearings at 366.

This point was expanded in Mr. Sneed's answers as follows:

As noted in my prepared statement, the typical federal spending program statute "authorizes" expenditures by the executive branch, and implementing appropriation acts merely establish a spending ceiling, not a floor. Literally read, therefore, the President could spend as little as he deems appropriate under such statutes, or nothing at all. Id. at 841.

The essence of this positoin is that such statutes in effect carry with them authority to impound, apart from any additional authority provided elsewhere.

We would agree with the general proposition that appropriations are normally cast in permissive rather than mandatory language. On the other hand, we do not believe it follows that by employing permissive language the Congress envisions the bulk of appropriation acts as carrying with them the seeds of their own destruction in the form of an unrestricted license to impound. In other words, any meaningful conclusion as to the effect of permissive language in appropriation acts must be found beyond the superficial observation that the executive need not obligate every penny of an appropriation or the extreme position htat the executive discretion under appropriation acts is limited only by concepts of "vested rights" and "political realities," Cf., 2 Hearings 836-37.

We believe that the most useful consideration in construing the effect of customary appropriatioin language is the essential nature of the appropriation process itself. The significance of this process goes far beyond the matter of spending money as such, but to the heart of decisionmaking in terms of the general policies, objectives and directions of the Federal Government. While the

principle source for Federal program policies is found in substantive program legislation, funding measures provide the primary vehicle for the implementation of Federal programs and thus constitute in effect an implementation of such substantive legislation. This conclusion has been aptly expressed with reference to the initial stage in the appropriation process--formulation of the unified Fedral budget--as follows:

* * * At first glance, writing a book about the federal budget might seem a little like writing about the Chicago telephone directory.

But the federal budget is far more than a collective of numbers proposing how much should be spent on the vast array of federal activities and how the money should be raised.

--The size of the budget and the way it is financed strongly influence national output, employment, and the rate of inflation.

--The budget is a means of determining how national resources should be allocated--the relative importance to be accorded public and private needs, defence and domestic spending, highways and health care.

--The choice of taxes to provide federal revenues determine how the burden of paying for government services is shared among various groups in the population.

--The budget is the most comprehensive single vehicle for examinating practically every aspect of public policy. The defense budget, for example, involves for more than an answer to the question "How important is national security!" It reflects a wide range of judgments about the importance of various areas of the world to U.S. security, the survivability of our nuclear missiles in an attack, the ability of our conventional forces to deal with various contingencies, and the chances that U.S. arms programs will deter aggression or provoke additional arms spending by potential adversaries. Similarly, the budget for antipoverty programs reflects far more than a decision as to how much should be spent for this objective. It reflects judgments about the feasibility and desirability of alternative methods of reducing poverty, such as each benefits, job creation, education, training, or community action programs. Neither the administration nor the Congress reevaluates all of these judgments each year. But the budget does provide an important opportunity to examine how well the policies and programs of the government are working and to consider alternative approaches.

Charles L. Schultz, et al., Setting National priorities--The 1973 Budget (The Brookings Institute: 1972), 1-2.

While title II of the Budget and Accounting Act, 1921, as amended, assigns to the President the function of preparing a unified budget (see 31 U.S.C. 11-16); The Congress, of course, retains ultimate constitutional responsibility and authority for budgetary determinations. The legislative history of the Budget and accounting Act makes clear that the Congress did not intend to delegate any of its ultimate responsibilities to the President:

It will doubtless be claimed by some that this is an Executive budget and that the duty of making appropriations is a legislative rather than Executive prerogative. The plan outlined does provide for an Executive initiation of the budget, but the President's responsibility ends when he has prepared the Budget

and transmitted it to Congress. To that extent and to that extent alone does the plan provide for an Executive budget, but the proposed law does not change in the slightest degree the duty of Congress to make the minutest examination of the budget and to adopt the budget only to the extent that it is found to be economical. If the estimates contained in the President's budget are too large, it will be the duty of Congress to reduce them. If in the opinion of Congress the estimates of expenditure are not sufficient, it will be within the power of Congress to increase them. The bill does not in the slightest degree give the executive any greater power than he now has over the consideration of appropriations by Congress.

H. Report No. 362, 66th Cong., 1st sess., at 7 (emphasis supplied), see also H. Rept. No. 14, 67th Cong., 1st sess. 5. An appropriation act represents the culmination of an extended and deliberate process of executive recommendation--and congressional consideration and determination-- as to the levels of funding necessary to carry out substantive program and policy objectives. To construe the permissive language of authorization and appropriation acts as affording the executive general discretion to spend or not spend within an established ceiling--and thereby to alter at will the substantive determinations underlying such legislation--is, in effect, to conclude that an appropriation act is essentially nothing more than a technical device necessary to satisfy the requirement of Article I, section 9, that "No money shall be drawn from the Treasury,but in consequence of appropriations made by law." Obviously the Congress does not take such a narrow view of its appropriations functions under Article I, section 9, much less its general constitutional responsibilities in terms of establishing national policies and priorities which are reflected in appropriations measures.

What, then, is the effect of permissive appropriations language? In our opinion, the discretion afforded by such language is essentially co- extensive with that provided in the Antideficiency Act, i.e., generally, to take measures designed to enhance the efficient and effective application of obligation authority to the purposes and objectives for which it si provided. It is notable that the classic congressional statement on the permissive nature of appropriations language was made in connection with section 1211 of the General Appropriation Act, 1951, approved September 4, 1950, ch. 896, 64 Stat. 595, 765, which amended the Anti-deficiency Act to include for the first time provision for establishing reserves. The House report on the amendment, H. Rept. No. 1797, 81st Cong., 2d sess. 9, reads:

RESPONSIBILITY OF THE EXECUTIVE BRANCH

Economy neither begins nor ends in the Halls of Congress. Under the Budget and Accounting Act, it is the responsibility of the executive branch of the Bovernment to submit annually to the Congress the estimates of the amounts which officials in the executive branch feel are required to support the necessary activities of the Government. The Congress reviews these esxtimates and decides the maximum amoungt which must be appropriated for these various activities, and the annual appropriation bill provides the sums so determined by the Congress.

Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which hsould be expended for that activity. The administrative officials responsible for administration of an activity for which appropriation is made bear the final burden for rendering all necessary services with the smallest amount possible within the celing fugure fixed by the

Congress. every official of the Government who has responsibility for administration of a program must assume a portion of the burden fro the deficit in the Federal Treasury. In the first place, he must take into account the condition of the Federal finances when he recommends to the Bureau of the Budget the amount which, in his judgment, is necessary for supporting his activity. In the second pa=lace, it is his responsibility to so control and administer the activities under his jurisdiction as to expend as little as possible out of the funds appropriated.

The so-called Antideficiency Act has been a part of the law for many years but the present statute is antiquated and was written at a time when the fiscal operations of the Government were far more simple. Current laws are so complex and the structure of the Government has become so involved as to render the current law inoperative in many cases. On that account the committee has included as [then] section 1111 in chapter II a redraft of the Antideficiency Act. The purpose is to require careful apportionment of all types of funds expended by Federal Agencies and efficient administration of the Government's business.

The thrust of the quoted language, and the fact that doubt existed prior to the 1950 amendment as to the existence of any authority to impound, suggests that this amendment served to confirm the permissive nature of appropriations language--but only in the context and for the purposes thereof. In other words, it is probable that the permissive nature of appropriations would itself contemplate Antideficiency Act-type impoundments even absent specific statutory authority. President Jefferson's deferral of the gunboat appropriation in 1803, referred to previously, indicates in effect such an approach.

It remains to consider the effect of the distinction between "permissive" and "mandatory" appropriation acts. Is the conclusion that permissive appropriations language merely confers Antideficiency Act-type discretion affected by the fact that some appropriation acts are "mandatory." We do not believe that it is. The ultimate conclusion that an appropriation or authorization is mandatory generally follows from consideration of its overall program and funding nature, rather than the effect of any particular statutory language or expression of congressional intent to preclude impoundment. Thus the mandatory construction will usually apply in the context of a formula-type pregram in shich Federal assistance is allotted or apportioned to particular recipients or classes of recipiennts, and in which program discretion is minimal. For example, the Rehnquist memorandum concluded that the federally impacted school aid program is mandatory not on the basis of any specific indication of congressional intent to preclude impoundment, but because the program is essentially mechanical in its operations. The Court of Appeals in State Highway Commission v. Volpe, supra, reached the same conclusion as to the Federal-aid highway program, which also operates on a formula basis (although some program discretion is afforded gy requirement for approval of plans and projects). It is true that the Federal-aid Highway Act has been amended to include anti-impoundment language. See discussion infra. However, we do not feel that the court considered this language crucial; but instead treated it as a confirmation of the original operation of the act. On the other hand, most Federal assistance schemes accord broad program discretion in terms of establishing eligibility criteria and otherwise channeling the flow of Federal assistance. In view of the necessity of considerable discretion, such Federal programs are not amendable to "mandatory" funding systems. /6/

It is true that the distinction between "permissive" and "mandatory" appropriations programs may be significant to the availability of a judicial remedy against impoundment actions at least in terms of justiciablility issues such as standing to sue and the formulation of appropriate relief. See Housing Authority of San Francisco v. Department of Housing and Urban Development, 340 Fed. Supp. 854 (N.D. Cal. 1972) and Berends et al. v. Buts, Secretary of Agriculture et al., infra. However, we doubt that this distinction provides any direct support for the argument that permissive appropriations carry general authority for impoundment. In other words we do not believe that the funding approach employed with rewpect to programs such as impacted school assistance or Federal highway assistance suggests that the Congress considers full implementation of these programs more important than full implementation of other programs which are funded by "permissive" appropriations.

With further regard to the distinction between "permissive" and "mandatory" appropriations and with respect to the issue of justiciability it is our view that use of mandatory language would form a bisei fro more ready accountability by individuals in the executive branch. see 2 Hearings at 101, 115.

In summary, the use of "mandatory" or "permissive" appropriation language is a legitimate choice in the legislative process depending upon whether administration is to be ministerial and the type funding chosen to support the program. The choice made shoud not--standing alone--be viewed by the executive branch as a congressional means of stating priorities, much less as a basis to impound. The one exception that we would recognize is where the impoundment issue is addressed in the legislative history of the enactment. On occasion the legislative history may indicate that specific consideration was given to impoundment, and that the statutory language was developed with this problem in mind. Dr. Fisher describes one such instance, occurring in 1961, when the House Armed Services Committee acceded to President Kennedy's request and deleted mandatory language from a bill to fund construction of the B-70 bombers. 1 Hearing 111. In such special circumstances the legislative history would support an argument that the Congress has condoned some degree of impoundment.

Implied statutory authority to impound.

It has been argued that the President has implicit authority to impound on the basis of the statutory debt limit, see 31 U.S.C. 757b (most recently amended by Public Law 93-53, approved July 1, 1973, 87 Stat. 134), and his statutory obligation to promote purchasing power and prevent inflation under section 2 of the Employment Act of 1946, 15 U.S.C. 1021, and the Economic Stabilization Act Amendments of 1971, Public Law 92-210, as amended. The basic thrust of this argument is that full application of appropriations legislation would be inconsistent with the foregoing statutory pro visions, and that the Presidnet must reconcile this inconsistency. In view of the observations set forth previously herein, this argument does not require extended discussion. Obviously obligations cannot be incurred in excess of the debt limit; and we do not question the president's power to control inflation. However, we do not believe that these statutes provide implicit general authority for the current executive impoundment program. The president can always submit specific legislative proposals to the Congress. apart from any other considerations which might be mentioned here, it seems clear to us (1) that the problems of controlling spending and determining priorities are inextricably combined in this argument, and (2) that the alternative of achieving spending reductions at the price of reordering congressionally determined priorities is at present specifically

foreclosed by the failure of the President and the Congress to arrive at a mutually acceptable budget-cutting formula during consideration of a spending ceiling for fiscal year 1973.

IV. CONSTITUTIONAL CONSIDERATIONS

It has been argued that the President may claim a constitutional right to impound on the basis of the general effect of the executive power under Article II, but with particular reference to the provision of Article II, section 3 that the President "shall take care that the laws be faithfully executed." /7/

Several authorities are relevant to this constitutional argument, although none appears to be dispositive. The judicial precedent most often cited in relation to the constitutional issues arising from impoundment is Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838). Taht case concerned a mandamus action to compel the Postmaster General to pay the petitionsr's claim directed for payment in a private relief act. In sustaining the writ of manamus, the Supreme Court stated:

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

To contend, that the obligation imposed on the president to see the laws faithfully executed, impoies a power to forbid theif execution, is a novel construction of the constitution, and entirely inadmissible.

37 U.S. at 611. See also, United States v. Louisville, 169 U.S. 249 (1898); United States v. Price, 116 U.S. 43 (1885); United States v. Jordan, 113 U.S. 418 (1885). Also relevant to the present issues is Youngstown Sheet & Tube Co. v. Sawyer, supra, wherein the Supreme Court invalidated President Truman's attempt to seize and operate most of the nation's steel mills. While this case did not involve a direct conflict with the Congress, the Court held that the President's action saw essentially legislative and, therefore, beyond the scope of executive powers. Mr. Justice Black, speaking for the majority, observed, 343 U.S. at 587-589:

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the etoing of laws he thinks bad. And the Constitution is neither silent or equivocal about who shall make laws which the president is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States." After granting many powers to the Congress, Article I goes on to provide that Congress may "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, of in any Department or Officer thereof."

We would also refer to the following passage from the 1969 Rehnquist memorandom, discussed previously, which seems particularly relevant to the present issues:

"It is in our view extermely difficult to formulate a constitutional theory to justify a fefusal by the President to comply with a Congressional derictive to spend. 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 Branch is bound to execute the laws, it is free to decline to execute them." 1 Hearings at 283.

On the basis of the foregoing authorities, as well as the language of Article II, section 3, three observations may be made. First, it is clear that an appropriation act is a "law" within the meaning of Article II, section 3. Secondly, this constitutional provision imposes a duty upon the President. Although this duty necessarily requires authority and discretion for its implementation, it does not constitute a grant of executive power separate from and independent of the laws themselves. Thirdly, Article II, section 3, does not by its terms require the President to enforce the laws, but to see to their faighful execution. This is not to deny the Preisdent's general constitutional status and powers. Compare Article II, section 1. However, it does suggest that the President may not intervene to defeat the execution of statutory duties vested in other Federal Officials. this conclusion is reflected in the language of the Kendall opinion quoted above, and was also specifically emphasized earlier therein as follows:

The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer is every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grew out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character. 37 U.S. at 609.

See also Bereads, et al. v. Buts, Secretary of Agricultrue, et al., infra.

The foregoing general observations seem a sufficient response to the constitutional argument is support of general impoundment authority at least with respect to "mandatory" appropriations. even the Justice Deparetment appears to virtually concede the power of Congress to mandate expenditures in the domestic area. Mr. Sneed refused to surrender on this point, suggesting that the President has some form of constitutional commitment to control inflation which overrides even a mandatory statute. 2 Hearings 369. However, this position is apparently not being advanced in litigation. The Court of Appeals noted in state

Highway Commission v. Volpe, supra, slip. op., at 7:

* * * The only issue before the district court and this court is the question of statutory construction, i.e., whether the Secretary of Transportation, pursuant to his delegated duties under the Federal-Aid Highway Act, can withhold from the State of Missouri, for the reasons he stated, the authority to obligate funds duly apportioned to the state under the Act.

* * * * *

* * * Resolution of the issue before us does not involve analysis of the Executive's constitutional powers. Nothing in the present record demonstrates that the Secretary of Transportation will continue to exercise controls beyond that which judicial construction finds permissible within the statute. To the contrary, at oral argument counsel for the government stated, "I suppose our brief comes as close as it can to conceding that were Congress to make this mandatory, that would be the end of the case. I would say almost certainly that without tending to give away what the White House might decide in any particular statute, that where it is mandated clearly, the Executive would have to spend that money or would spend the money."

While the constitutional issue is least substantial in the case of a mandatory appropriation, we do not believe that the distinction between mandatory and permissive appropriations is dispositive in a constitutional sense any more than it is as a matter of statutory construction. The President's duty to take care that the laws be faithfully executed obviously requires reference to what the lasw are. Accordingly, the application and effect of this duty in the present context is essentially a matter of statutory construction. It is, of course, true that the President must exercise discretion in interpreting statutes and that such discretion includes consideration of all the laws. However, statutory interpretation generally requires more than rigid reliance upon particular words; and in view of the overall nature of the appropriation process, discussed previously, we belive this conclusion is particularly applicable to interpretation of appropriation legislation. We believe a broad approach to statutory construction is also particularly applicable to the President's role under Article II, section 3. The essential thrust of this provision--and, in essence, Article II generally--is to require of the President and other executive branch officers a good faith effort to carry out both the letter and spirit of the laws.

Apart from the dffect of constitutional provisions relating specifically to the President, consideration must also be given to the doctrine of separation of powers. As noted in the preceding section, the appropriation process embraces fundamental determinations of national policies and priorities. It is essentially a legislative process not only in the sense that appropriation acts are statutes, but also in view of the fundamental legislative nature of these determinations. This does not, of course, mean that the President has no role in the appropriation process, or--as Mr. Sneed has suggested--that generally full application of appropriation acts would place the President in the position of a "Chief Clerk," 2 Hearings 369. Early in the development of the Federal Government the mere observation might have been essentially valid. However, this observation has little meaning now. By title II of the Budget and Accounting Act, 1921, as amended, 31 U.S.C. 11 et seq., the President is assigned the extremely important function of formulating a budget. During congressional consideration of appropriations the President is able to elaborate upon and

defend his budget views through his control over executive branch witnesses and spokesmen. Ultimately, the President may exercise his veto power. In sum, up to the point at which appropriation legislation is enacted--either by his approval or over his veto--the President is free to pursue his views as to the merits of any and all substantive considerations underlying funding levels; and the means available to him in this regard are substantial. On the other hand, we think it is clear that the President's role in the formulation of funding levels, objectives and priorities ends with the enactment of an appropriation. Thereafter arises the fundamental executive function of faithfully executing the law, which involves (in most cases) considerable discretion in the development of programs to implement the policies and objectives reflected in the law in the most effective and efficient manner, but not to reverse or modify them.

The basic defect in the current approach to impoundment is, in our opinion, that it seeks to redirect the executive power and discretion to enforce the law into an essentially legislative function after the formal legislative process has ended. we believe that this result in some situations may properly be described as the exercise of "item veto" authority not provided in the Constitution. /8/

V. SPECIFIC IMPOUNDMENT ACTIONS

In accordance with your request we will consider applications of the foregoing observation to sepcific impoundments of obligational authority with respect to highway trust funds, the Rural Environmental Assistance Program, and the Federal Water Pollution Control Act Amendments of 1972.

Highway trust funds.

The Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. 101 et seq., provides for Federal funding of highway construction projects undertaken by the States. Amounts authorized by the act are apportioned to the States on a formula basis. Under this apportionment the States submit for approval by the Secretary of Transportation programs and specific project proposals. Project proposals become contractual obligations when approved by the Secretary. See generally 23 U.S.C. 104-106. Obligations thus incurred are liquidated by subsequent appropriations from the Highway Trust Fund. The act declares that it is in the nationla interest to accelerate construction of the Federal-aid highway system; and that the system was to be completed over a period of twenty years on an expedited basis. 23 U.S.C. 101(b).

An impoundment of highway trust fund obligational authority under the administration of President Johnson (in the form of a directive to boigate less than the full authorized amounts allotted to the States) was approved in an 1967 opinion by Acting Attorney General Ramsey Clark. 42 Op. Atty. Gen. No. 32. This opinion concluded, inter alia, that appropriations generally (including those of the Highway Trust Fund) are permissive rather than mandatory, and that the declaration of interest under section 101(b)m was merely precatory. Subsequently Congress added to the act language stating the sense of Congress that under existing law amount approtioned under the Federal-aid highway program could not be impounded as an anti-inflation measure.

The legality of such impoundments is the subject of State Highway Commission of Missouri v. Volpe, 347 F. Supp. 950 (W.D. No. 1972), recently affirmed (as to the declaratory judgment) by the United States Court of Appeals for the 8th Circuit, No. 72-1512, filed April 2, 1973. The majority and dissenting opinions

of the Court of Appeals are printed in the Congressional Record for April 5, 1973, at S6791 et. seq. Both the District Court and the Court of Appeals held, in essence, that the Federal-Aid Highway Act mandates full application of obligational authority provided therein and, accordingly, that impoundment of such authority is invalid. The opinion of the Court of Appeals stated, slip op. at 18-19, 24:

Under the Federal-Aid Highway Act Congres has provided for a coherent scheme of statutory duties relating to the Secretary of Transportation. While the Secretary is given the discretion to approve or disapprove a state highway program under the statute, nevertheless he must act within specific derections relating to efficiency, safety and overall compliance with the Act itself. * * *

* * * * *

* * * To reason that there is implicit ajtuority within the Act to defer approval for reasons totally collateral and remote to the Act itself requires a strained construction which we refuse to make. It is impossible to find from these specific grants of authority descretion in the Secretary to withhold approval on projects Congress has specifically directed because of projects Congress has specifically directed because of a system of priorities the Executive chooses to impose on all expenditures. The Congressional intent is that the Secretary may exercise his discretion to insure that the roads are well constructed and safely built at the lowest possible cost, all in furtherance of the Act, but when the impoundment of funds impedes the orderly progress of the federal highway program, this hardly can be said to be favoralbe to such a program. In fact, it is in derogation of it. It is difficult to perceive that Congress intended such a result.

We have nothing of substance to add to this Court of Appeals opinion. However, two observations might be made. First the District Judge and all three circuit judges apparently viewed the issues solely as a matter of statutory construction rather than constitutional law. Secondly, as indicated by the language quoted above, the majority opinion in the Court of Appeals approached its statutory interpretation in terms of the act as a whole, including its underlying purposes and policies. The court thus rejected the arguments that the act merely "authorized" obligations to the maximum level provided, and that Congress could have adopted stronger language in evidencing its intent that obligational authority not be impounded. It is notable in this connection that the court considered the anti-impoundment language of section 101(c) relevant but not crucial in determining the overall effect of the act for it merely corroborates what the statute as a whole provides.

Of course the Court of Appeals decision in Volpe overrules the 1967 Attorney General Opinion, at least for the moment.

The Rural Environmental Assistance Program (REAP).

REAP, fomerly known as the Agricultural Conservation Program, is founded upon sections 7 through 17 of the Soil Conservation and Domestic Allotment Act, as amended, 16 U.S.C.A. 590g-590o, 590p(a) and 590q. (The United States Code Annotated is used because it is the only code source which currently includes all amendments.) Section 7 of the set, as amended, 16 U.S.C.A. 590g, provides in part (here and hereafter quoting from the Code Annotated):

(a) It is declared to be the policy of this chapter also to secure, and the purposes of this chapter shall also include, (1) preservation and improvement of soil fertility; (2) promotion of the economic use and conservation of land; (3) diminution of exploitation and wastefu and unscientific use of national soil resources; (4) the protection of rivers and harbors against the results of soil erosion in aid of maintaning the navigability of waters and water courses and in aid of flood control ;(5) reestablishment, at as rapid a rate as the Secretary of Agriculture determines to be practicable and in the general public interest, of the ratio between the purchasing power of the net income per person on farms and that of the income per person not on farms that prevail during the five-year period August 1909-July 1914, inclusive, as determined from statistics available in the United States Department of Agriculture, and the maintenance of such ratio; and (6) prevention and abatement of agricultural-related pollution. * * *

Section 8(b), as amended, 16 U.S.C.A. 590(b) provides in part:

(b) The Secretary shall have power to carry out the purposes specified in clauses (1), (2), (3), (4), (5), and (6) of section 590g(a) of this title [section 7(a) of the act] by making payments or grants of other aid to agricultural producers, including tenants and sharecroppers, in amounts determined by the Secretary to be fair and reasonable in connection with the effectuation of such purposes during the year with respect to which such payments or grants are made."

The remaining statutory provisions spell out in detail various program and administrative requirements applicable to REAP. Essentially, REAP is designed to provide partial reimbursement (generally at 50 percent) for the cost of approved projects implementing the purposes specified in section 7(a). See 16 U.S.C. 590h(b).

Section 15 of the act, 16 U.S.C.A. 590o, provides: "To enable the Secretary to carry out the purposes of sections 590g and 590h of this title there is authorized to be appropriated for any fiscal year not exceeding $500,000,000." The Agriculture-Environmental and Consumer Protection Programs Appropriation Act, 1973, approved August 22, 1972, Pub. L. 92-399, 86 Stat. 591, 608, Provided REAP with $225.5 million in new obligational authority as follows:

* * * necessary amounts shall be available for administrative expenses in connection with the formulation and administration of the 1973 [REAP] program amounting to $225,500,000, excluding administration.

The REAP program has been terminated rather than simply cut back, and all obligational authority for the program has been impounded except to the extent necessary in meeting existing commitments. A Department of Agriculture press release dated December 26, 1972, announced the termination of REAP. The press release described REAP as one of two programs:

* * * among those selected after a review of Federal programs to identify those of low priority that can be reduced or eliminated without serious economic consequences. This review was initiated as part of the effort to hold 1973 Federal budget outlays to $250 million.

See H. Rept. No. 93-6, at 10. The basis for elimination of REAP was explained in a Department of Agriculture "fact sheet," dated January 11, 1973, as follows:

Farmers are better able to pay for conservation practices than ever before. Farm income for 1972 set an all-time record of nearly $19 billion, up about $3 billion from 1971.

REAP, begun in the 1930's, was conceived as an incentive program to help farmers discover the benefits of conservation farming and encourage them to install soil and water conservation practices on their land.

Today soil and water conservation practices are an accepted part of sound, efficient farm operations. The cost-share incentive is no longer needed as it was in earlier years.

Only about 20 percent of the total U.S. farms participate in any given year. The average annual payment per participant is only $239.

Nearly half of the 1971 cost-sharing was for practices related to livestock production, a sector of agriculture in relatively solid economic condition.

About 30 percent of cost sharing was for practices directly related to crop production: drainage, irrigation and lining. Such practices pay for themselves in increased production and land value.

Critical, local conservation needs can be met through Revenue Sharing funds provided to States for use according to locally determined priorities.

Funds for Emergency Conservation Measures will contunue to be available for farmers when natural disasters cause severe erosion problems. 2 Hearings 585.

The legal justification for termination of the program was set forth in a memorandum by the Agriculture Department's former general counsel dated January 5, 1973. See 2 Hearings 581-83. This opinion points to the statutory language--that the Secretary "shall have power" to carry out the program purposes; that funds "are authorized" to "enable" the Secretary to carry out its purposes; and that the appropriation provides that "necessary amount shall be available"--and concludes:

* * * There are no provisions in the Act which direct the expenditure of funds in carrying out the program. The declaration of Congressional policy in the Act does not constitute a mandate to the Department to approve all qualifying projects for which funds are available. Producers have no right to funds prior to the actual approval of an application and the carrying out by the producer of a project in accordance with his agreement with the Department.

* * * * *

Since it is clear that neither the substantive legislation nor the appropriation act compels the obligation and expenditure of the full amount authorized but merely authorizes a program to be carried out, it is our opinion that the program may legally be terminated. 2 Hearings 582, 853.

One could take exception to this purported literal construction of the applicable statutes. For example, the provision that the amount appropriated "shall be available" could literally be considered significant compared to more common language simply providing that the appropriation "note exceed" a specific amount. It is also interesting to note that the general counsel's opinion does

not refer to that portion of section 15 of the act, as amended, 16 U.S.C.A. 590o, which wtates that the program:

* * * shall be based on a distribution of the funds available for payments and grants among the several States in accordance with their conservation needs, as determined by the Secretary, except that the proportion allocated to any State shall not be reduced by more than 15 per centum from the distribution of such funds for the next preceding program year. (Emphasis supplied.)

At the very least the latter provisions, given a literal and technical effect, clearly require that some program exist. However, in our opinion it is entirely unnecessary and inappropriate to dwell upon the effect of these isolated provisions. Rather, we believe the mandate for continuation of REAP derives from the fact that Congress saw fit to enact a detailed statutory program and broad policy in this regard, and determined that funding at the level of $225.5 million was necessary and appropriate for its implementation during fiscal year 1973. It is notable that the Congress very recently expanded the substantive scpoe of the program by sections 605 and 606 of the Rural Developemnt Act of 1972 approved August 30, 1972, Pub. L. 92-419, 86 Stat. 657, 676-77. Also, the fiscal year 1973 appropriation increased the executive branch request for new obligational authority by $85.5 million. The Committee reports in both Houses emphasized the value of REAP.

Grants for waste treatment facilities.

The Federal Water Pollution Control Act Ammendmets of 1972, Pub. L. 92- 500, 86 Stat. 816, was enacted on October 18, 1972, over the President's veto. Section 101(a) of the act, as amended, 86 Stat. 816, states in part "it is the national goal that the discharge of pollutants into the navigable waters be emiminated by 1985," and "it is the national policy that area-wide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each state."

In order to "require and assist the development and implementation of waste treatment management plans and practices which will achieve the goals of th[e] Act." title II, 86 Stat. 833 et seq., provides a program of 75 percent Federal matching grants for the construction and reconstruction of sewage and waste treatmtne facilities upon palns and project specifications approved by the Administrator of the Environmental Protection Agency. Obligations under the program are incurred on the basis of contract authority provided in the act. Section 205(a), 86 Stat. 837, provides in part:

Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the 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 the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. * * *

Section 207, 86 Stat. 839, provides:

There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed

$7,000,000,000.

The President's veto message, dated Octobrer 17, 1972, appears in the Congressional Record of that date at S.18534-35. The veto message stated in part:

I am concerned that we attack pollution in a way that does not ignore other very real threats to the quality of life, such as spiraling prices and increasingly onerous taxes. Legislation which would continue our efforts to raise water quality, but which would do so through extreme and needless overspending, does not serve the public interest. There is a much better way to get this job done.

For this reason, I am compelled to withhold my approval from S.2770, the Federal Water Pollution Controll Act Ammendments of 1972--a bill whose laudable intent is outweighed by its unconscionable $24 billion price tag. My proposed legislation, as reflected in my budget, provided sufficient funds to fulfill that same intent in a fiscally responsible manner. Unfortunately the Congress ignored our other vital national concerns and broke the budget with this legislation.

It was noted that the original executive branch proposal was for commitment of $6 billion in Federal funds over a three-year period, and $2 billion for fiscal year 1973. The President added:

if this veto is not sustained 1st the issue be clearly drawn. As with the spending ceiling, so with this bill, a vote to sustain the veto is a vote against a tax increase. A vote to override the veto is a vote to increase the likelihood of higher taxes.

Even if this bill is made into law over the better judgment of the Executive--even if the Congress defaults its obligation to the taxpayers-- I shall not default mine. Certain provisions of S. 2770 confer 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 as much as possible.

In a letter dated November 22, 1972, the President directed the Administrator of EPA not to allot among the States the maximum amounts provided by section 207 of the act. The President's letter reads in part:

I stated that even if the Congress were to default ist obligation to the taxpayers through enactment of this legislation, I would not default mine. No more than $2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974 should be allotted. These amount will provide for improving water quality and yet give proper recognition to competing national priorities for our tax dollars, the resources now applicable for this program and the prjected condition of the Federal treasury under existing tax lasw and the statutory limit on the national debt.

If we were to look solely to the foregoing considerations, we would conclude that the President's direction provides a classic illustration of defeating the exercise of legislative judgment as to levels of program implementation in derogation of congressional prerogatives. This conclusion would be reenforced by the fact that the President ultimately acted upon the same justification set

forth in his veto message and specifically rejected by the Congress. It could also be observed that the act is on its face essentially similar to the funding system under the Federal-aid highway program, and might thus be considered "mandatory" under the judicial approach taken in Volpe.

However, the legislative history of the act seems to give rise to special circumstances of the nature discussed in part III herein. The Conference report on the bill eventually enacted, S. 2770, 92d Congress, sets forth the language of the Senate, House, and Conference revisions of the allotment and authorization provisions as follows:

ALLOTMENT

Senate bill

Section 205 provides that allocations for sewage tratment construction grants be made on the basis of population. Reallocation of any sums not obligated shall be made on a priority basis to States qualifying for 70 percent Federal Assistance. Also, in fiscal 1972 and 1973 up to $200 million is authorized for allotment to projects using advanced waste treatment on a regional scale. The $200 million is not available if the amount left for reallocaation from the previous fiscal year exceeded $200 million.

House amendment

Section 205 authorizes the Administrator to allot construction funds on the basis of States' needs. Funds not obligated by a State shall be reallocated on the basis of need.

Conference substitute

This the same as the House amendment, except that the initial phrase "All sums authorized to be appropriated" has been revised to read "Sums authorized to be appropriated" and the initial ratio is to be based on Table III of House Public Works Committee Print No. 90-50.

* * * * *

AUTHORIZATION

Senate bill

Section 207 authorizes $14 billion for construction grants, not to exceed $2 billion of which would be authorized for fiscal 1972, $3 billion for fiscal 1973, $4 billion for fiscal 1974, and $5 billion for fiscal 1975. Up to 5 percent of the fiscal 1972-74 funds are authorized for expenditures on waste treatment management.

House amendment

Section 207 authorizes for construction grants and to carry out title II, except sections 208 and 29=09, $5 billion for fiscal 1973, %6 billion for fiscal 1974, and $7 billion for fiscal 1975.

Conference substitute

Section 207 of the conference substitute authorized not to exceed $5,000,000,000 for fiscal 1973, not to exceed $6,000,000,000 for fiscal 1974, and not to exceed $7,000,000,000 for fiscal 1975. Funds for waste treatment management are authorized in section 208.

See H. Rept. No. 92-1465, 113, 115.

It is clear that the conferees adopted their revisions to sections 205 and 207 to head off a veto of S. 2770. In explaining the Conference action Senator Muskie advised the Senate:

Mr. President, the conferees attempted also to reduce the possibility that this legislation would be vetoed. In our last conference, the able and distinguished ranking minority memger of the House Committee on Public Works offered two ammendments which he indicated would reduce opposition to the bill from the White House and the Office of Management and Budget. these two amendments were accepted by your conferees and by other House conferees in order to remove the question of a veto on the basis of the money authorized by the legislation.

Under the amendments proposed by Congressman William Harsha and others, the authorizations for obligational authority are "not to exceed" $18 billion over the next 3 years. Also, "all" sums authorized to be obligated need not be committed, though they must be allocated. These two provisions were suggested to give the administration some flexibility concerning the obligation of construction grant funds.

The conferees do not expect these provisions to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the act. at the same time, there may be instances in which the obligation of funds to a particular project in a particular State may be contrary to other public policies such as the National Environmental Policy Act. In these cases the conferees would, of course, expect the administration to refuse to enter into contracts for construction.

And Congressman Harsha advised the House:

* * * I belive the committee has accurately assessed the need for such a large sum of money. Furthermore, I want to point out that the elimination of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended by the managers of the bill to emphasize the President's flexibility to control the rate of spending.

I might add, while this legislation does provide for contract authority, the present administration recommended contract authority in H.R. 18779, the bill I introduced in behalf of the administration some time ago,

Furthermore, let me point out, the Committee on Public Works is acutely aware that moneys from the highway trust fund have been impounded by the Executive. Expenditures from the highway trust fund are made to accordance with similar contract authority provisions to these in this bill. Obviously expenditures and appropriations in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have added "not to exceed" in section 207, as I indicated before.

Surely, if the administration can impound monies from the highway trust fund

which does not have the flexibility of the language of the water pollution control bill, it can just as rightly control expenditures from the contract authority produced in this legislation by that same means.

Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. This is the pacing item in the expenditures of funds. It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures.

See Congressional Record of October 4, 1972, pages S16871, H9122. In addition, these same legislators used almost identical explanations in attacking the President's veto. See the Congressioinal Record of October 17, 1972, for Senator Muskie's comments, page S18549, and the Congressional Record of October 18, 1972, for Congressman Harsha's comments, page H10268.

While it si clear from the foregoing legislative history that the Congress intended to confer some spending discretion upon the President, the nature and extent of discretion is uncertain. Under Senator Muskie's explanation, such discretion would apparently be limited to occasional program-related actions not embracing general fiscal or policy considerations. On the other hand, Congressman Harsh apparently viewed the President's discretion under this language as authorizing impoundments in the nature of, if not to the extent indicated in, the President's directive of November 22. Further ambiguity arises from the fact of the President's veto, in that it might be considered to reflect some doubt on his part as to the degree of impoundment authority conferred by the act.

We have no basis on which to attempt to resolve the extent of spending discretion conferred. However, we believe it can be observed that such discretion does not extend to impoundment of all obligational authority in excess of the President's original budget request for fiscal years 1973 and 1974 as directed by the President.

Emergency Loans by the Department of Agriculture.

A further specific impoundment action, one which has been the subject of judicial decision, is worthy of note. While the decision turned on the failure of the Secretary of Agriculture to follow appropriate procedures in the termination of program benefits to certain eligible beneficiaries, it is discussed here because it involved a program which the court found was mandated by statue and, presumably, the impoundment was occasioined solely by the fact that projected expenditures exceeded the administration's original approtionment for the program. The impoundment action was the termination to eligible recipients of loan assistance available to them under section 321 of the Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. 1961, and section 232 of the Diaster Relief Act of 1970, Pub. L. 91-606 and was the subject of the recent decision in the United States District Court for the District of Minnesota, Berends, et al. v. Butz, Secretary of Agriculture, et al., No. 4-73, Civ. 41. The court's decision is printed in the Congressional Record of March 28, 1973, pp. S5973-S5977.

The facts giving rise to this matter were as follows:

In the fall of 1971 and the spring or 1972 a large part of western and central

Minnesota suffered excessive and prolonged rainfall to the extent that farmers were unable to plant their crops. As a result of these weather conditions, on June 26, 1972, the secretary declared that 14 (later to be increased to 15) counties in western and central Minnesota had experienced natural disasters and he designated those counties as emergency loan areas. This designation was published in the Federal Register and provided that for the purpose of making emergency loans pursuant to 7 U.S.C. 1961 and Pub. L. 91-606 it had been determined that natural disasters in the named counties of Minnesota had caused a general need for agricultrual credit. After this publication and pursuant to the designation of emergency loan areas the Emergency Loan Division of the Farmers Home Administration (FHA) sent appropriate telegrams to the Minnesota State Director of FHA indicating that the counties had been designated emergency loan areas and appropriate bulletins were sent to the county FHA offices in each of the designated counties on June 28, 1972.

A substantial portion of emergency loan applications were not submitted until after the harvest season which ended in late November and December 1972. Between that time and December 27, 1972, many farmers in the emergency loan area contacted local FHA officials for appointments to submit emergency loan applications. Because of the large number of applicants that sought to apply after harvest, the county FHA officials were forced to make appointments with many applicants to review their applications before formal acceptance in January, February, and March 1973.

However, on December 27, 1972, without notice of any kind, the Secretary of Agriculture, by teletyped message to the Minnesota State FHA ofice, directed the cessation of acceptance of emergency loan applications in the designated counties. The message read in part as follows:

Revised government policy requires that emergency and rural housing disaster loans will be handled as follows: Cease receiving applications, processing, or approving E.M. [emergency] and R. H. D. loans in all secretarial designation areas sixty days after designation. Hurricane Agnes and Rapic City, South Dakota, areas. Presidential only, will terminate January 15. All other Presidential designations terminate June 30, 1973. No added Secretarrial designations are expected for the balance of 1973. Loan dockets approved and postmarked or in St. Louis by close of business December 27 will be honored. Notify county offices by telephone. Bulletin follows.

As can be seen the only terminations immediately affected by the Secretary's order were loans to be made to beneficiaries made eligible for the loan program by secretarial, as opposed to presidential, delegation.

In justification for the termination of the loan program in Minnesota the Government argued that there was a shortage of available funds. The court addressed this issue as follows:

* * * The emergency loan program is funded by a "revolving fund" refferred to as the Agriculture Credit Insurance Fund. Moneys received in connection with loans procured under the fund are credited to the fund and are used for making additional loans. In order to obtain additional miney for the fund the Secretary of Agriculture is authorized to make and issue notes to the Secretary of Treasury. 7 U.S.C. Section 1928. to draw upon the fund, the Secretary of Agriculture must procure an apportionment from the Office of Management and Budget pursuant to the Anti-Deficiency Act, 31 U.S.C. Section 665. The original

apportionment for Emergency Loans was $135 million. The government argues that agency estimates indicated that the total commitment of emergency loans would be approximately $800 million.

It is the opinion of the Court that the government's contentions are not justified. It is true that the Secretary is prohibited from spending funds in excess of the approtionment. However, there is nothing magic in an apportionment: that is, an original apportionment by the Office of Management and Budget is subject to change. In fact, the Office of Management and Budget is required by law to review each approtionment at least four times each year in order to make "effective use of the appropriation concerned." 31 U.S.C. Section 665(4).

In appropriating funds for the emergency loan program, Congress set no monetary limit on the funds that may be apportioned for emergency loans. The appropriation reads as follows:

The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for Agriculture-Environmental and Consumer Protection programs for the fiscal year ending June 30, 1973, and for other purposes namely: * * *

AGRICULTURAL CREDIT INSURANCE FUND

* * * For loans to be insured, or made to be sold and insured, under this fund in accordnace with and subject to the provisions of 7 U.S.C. 1928- 1929, as follows: real estate loans, $370,000,000, including not less than $350,000,000 for farm ownership loans; water and waste disposal loans, $300,000,000; and emergency loans in amounts necessary to meet the needs resulting from natural disaster.

In January and again in February of 1973, the Secretary did request and receive additional approtionments of funds for emergency loans bringing the total approtionment of funds to $500 million. The government offers no explanation as to why the secretary could not request an apportionment that would be sufficient to cover the claims of the plaintiffs in this case. The Secretary has made the determination that there were needs for agricultural credit in the fifteen Minnesota counties involved, yet the Secretary is apparently unwilling to take the necessary procedural steps to insure that the financial needs of the farmers involved are fulfilled in the manner contemplated by Congress. Congress has appropriated sufficient funds to carry out the emergency loan program. It is the Office of Management and Budget, that would carry out the directives of Congress.

In addition, the court addressed the matter of priority judgments by the executive branch in the administration of duly enacted laws as follows:

It may be that the Secretary questions the efficacy of the emergency loan program. It is not the rule of duly-promulgated law; likewise, an administrator should not engage in such a pratice. It is the duty of the Courts to interpret the law and it is the function of the Administrator to enforce and effectuate the laws passed by Congress.

Furthermore, although the emergency loan program was terminated in Minnesota without notice on December 17, 1972, the program was continued in the areas

declared as sisaster areas by the President. Since December 27, 1972, $270 million has been obligated for emergency loans and the Department anticipates that another $150 million in emergency loans will be approved. If the government were correct in its claims that there was a shortage of funds for the program, it is not at all clear as to why this shortage of funds is evident only in areas designated by the Secretary. The government offers no rational explanation to this grossly inequitable result. There is absolutely no basis in the law to give preference in the administration of emergency loans to Presidentially declared disaster areas.

The bill that eventually became P.L. 92-385 was originally proposed by the Administration, solely to benefit victims of Hurricane Agnes in areas disignated by the President. However, while the bill was being considered in Senate Committee, word was received of the disastrous weather conditions in West Central Minnesota. The report states:

The Committee notes that there have been thirty-seven Presidentially designated disasters and eighty-four administratively declared disasters since January 1, 1971, including the disasters associated with Agnes and the Rapid City flood. The Committee agrees that victims of all these disasters should be treated in the same manner insofar as disastor relief is concerned, and that it would be wrong and unfair to accord victims of particular disasters special treatment.

Moreover, the Committee notes that in the future other disasters may occur. For example, while this legislation is being discussed in the Committee, a serious now flood occurred in Central Minnesota devastating as many as ten counties and the same number of large towns. The Committee agreed that victims of future disasters, like this one in Minnesota, should receive the same measure of relief under disaster relief legislation which is accorded to victims of disasters which have already been declared. In no case should people sustaining comparable injury be afforded lesser relief because of their location in different disaster areas. Senate Report No. 91-1008. * * *

The court went on to rule that the Secretary's actions in giving a preference to presidentially designated areas was not in keeping with the congressional intent in promulgating the emergency loan program and that (1) it was the opinion of the court that the defendants had a ministerial duty to implement the emergency loan program as directed by the Congress, (2) that the unilateral termination of the program without notice to the plaintiffs was in violation of the statutes, the agency's regulations, and due process of law, and (3) that further, to the extent that the administrators may have some discretion under the applicable statutes in terminating the emergency loan program without prior notice, the administrator acted in an arbitrary and capricious manner.

We trust that the discussion here presented will assist the Committee in its consideration of this vital issue.

Sincerely yours,

(Signed) Elmer B. Staats Comptroller General of the United States

1. A second OMB report was forwarded to our Office on May 1, 1973. While this version indicates some changes--including a $267 million decrease in the total of reported impoundments--the two reports are essentially similar for present purposes.

2. 343 U.S. at 611. Hovever, Justice Frankfurter concluded in Youngstown that historical evidence did not support a presidential power to seize steel mills. It should also be noted that the Pocket Veto case, supra, cited in Mr. Sneed's answers, involved the construction of specific constitutional language relating to the process of enactment of legislation. There is, of course, no constitutional "phraseology," ambiguous or otherwise, relating to impoundment.

3. It msut be noted that the quoted conclusion was limited to impoundment of "mandatory" appropriations in the domestic area. Mr. Rehnquist apparently accepted the view that impoundment of "permissive" appropriations is justified as a matter of statutory construction. He also took the position that the President may impound in the exercise of his constitutional powers as commander-in-chief and in the conduct of foreign relations. These matters are discussed infra.

4. Actually title II of Pub. L. 92-599, 86 Stat. 1324, contains an inoperative $250 billion "spending ceiling" required for technical parliamentary reasons.

5. See 2 Hearings at 105-110 for more detailed discussion of the legislative history of the act.

6. Mr. Sneed appears to recognize the basis for this distinction: "Congress appropriates Federal funds not to particular beneficiaries of Federal programs, but for the benefit of broad classes of persons." 2 Hearings 839. However, he goes on to confuse program discretion with spending discretion.

7. It is also argued that apart from the general executive powers of Article II, the constitutional roles of the President as commander-in- chief and in the conduct of foreign affairs provide authority for impoundment. Since it appears that no current impoundment action is based in whole or in part upon either of these justifications, they have no relevance at present. see the OMB report, supra. It might, however, be observed that these presidential powers are at least not entirely independent of the congressional appropriations power since in no event could the President spend in the absence of legislative authority. See Article i, Section 9, Clause 7. Consideration must also be given to other constitutional functions vested in Congress such as the power to "provide for the common Defense." Article I, section 8. In short, we would be reuctant to accept in the abstract an assertion of pervasive authority is impound on the basis of these presidential ppowers, i.e., absent some context providing a specific names between an impoundment action and the effectuation of one or the other of these executive functions.

8. In response to the suggestion that the current use of impoundment constitutes an item veto, it is stated that, unlike a veto, impoundment actions may not be "arbitrary." 2 Hearings 841. Leaving aside several observations which could be offered concerning the general validity of this response, it is sufficient to note that if--as it appears to us--the current approach to impoundment is essentially the assertion of legislative authority by the executive branch, it makes no difference whether or not its execise is "arbitrary." It might also be noted that impoundments are actually more severe than item vetos since in impoundments the legislative is deprived of the opportunity to override.