Notes

Protecting the Fisc: Executive Impoundment and Congressional Power

The power of the purse has long been a keystone of the authority of the legislative branch of government. Recent moves by the President, however, have encroached on this once secure preserve of the legislative domain. Congress retains, to be sure, its negative control over the purse strings, for the Constitution expressly states that "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." By impounding large portions of the funds made available by the Legislature, however, the President has thrown into question Congress' affirmative power to provide that money be spent on programs it enacts.

The practice is not unprecedented, but the impoundments recently ordered constitute a more serious challenge to Congress' role in spending decisions, particularly for domestic programs, than any previous examples. They involve deep cuts and occasional terminations of selected domestic programs, notably programs originally opposed by

1. U.S. Const. art. I, § 9. There have nonetheless been examples of executive transgression of this negative control. See L. Fisher, President & Congress 127-32 (1972).

2. "Impoundment" is used here to mean the failure to spend or obligate budget authority of any type. Federal spending generally involves a two-step process. Funds are first "obligated," generally through some kind of contractual arrangement, permitting the project to get underway. At a later time the funds are actually paid out. Before payment can issue Congress must have passed an appropriation act, which empowers an agency to draw funds from the Treasury. A project can begin—i.e., obligations for it may be entered into up to a certain specified limit—in advance of appropriation if Congress has created "obligational authority" or "contract authority" by express provision in the authorizing legislation. 31 U.S.C. § 627 (1970). Most authorization acts, however, do not create budget authority themselves; they "authorize to be appropriated" a given amount, and the appropriations legislation then becomes the vehicle for creating budget authority. The terms are often not employed with precision, and "appropriation" is often used to mean any kind of budget authority. See, e.g., 31 U.S.C. § 665(c)(1) (1970).

Impoundment usually takes place at the obligating stage, for once the spending has become the subject of a contract, it may generally be enforced through the Court of Claims. 28 U.S.C. § 1491 (1970). Furthermore, appropriations issue as a matter of course for payments to meet such obligations.


Protecting the Fisc

the President or funded at a level beyond his budget recommendations. The impoundments have touched off a flurry of lawsuits and a number of congressional moves toward reasserting control.

This Note will discuss the central legal question in the controversy, namely the determination of the limits of executive discretion to withhold spending under the Constitution and the relevant statutes. It will evaluate the justifications which have been put forward to support the current domestic impoundments, treating in succession the constitutional dimensions of the issue, the import of the particular spending acts involved, and the impact of legislation, such as the debt ceiling, that arguably conflicts with the spending statutes. The picture that emerges is one of broad executive spending discretion created by the


5. For example, in fiscal year 1971, the Administration requested $322 million for the Rural Electrification Administration. When Congress appropriated $337 million, the Executive impounded $15 million. See Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 628 (1971) [hereinafter cited as 1973 Hearings]. The selective impoundments carried out last winter have been expressly described by the Administration as "part of the effort to hold 1973 federal budget outlays to $250 billion," the level in the President's recommended budget, even though Congress passed a budget of $261 billion. Department of Agriculture Release, quoted in id. at 596.

The Office of Management and Budget (OMB), in its first report to the Congress under the Federal Impoundment and Information Act, 31 U.S.C.A. § 581e-1 (1973), showed a total of $8.723 billion impounded as of January 29, 1973. 38 Fed. Reg. 3473, 3496 (1973). A portion of this included fairly routine and noncontroversial impoundments under the Antideficiency Act, see pp. 1642-43 infra. For a large proportion, however, the OMB pointed to no statutory authority, but only referred to "[t]he President's constitutional duty to 'take care that the laws be faithfully executed.' " 38 Fed. Reg. 3473, 3475 (1973). (This claimed justification is treated in Part III infra.) Further, under a technicality in the Information Act, no impoundments of contract authority were listed. The Act itself mentions "appropriated" funds, a term which the OMB narrowly construed. N.Y. Times, Feb. 6, 1973, at 1, col. 1. Thus the total of impoundments, when the Water Pollution money is added (see note 4 supra), reaches at least $14 billion.


Congress, but discretion whose bounds have been exceeded by a number of the current impoundments.

I. Constitutional Sources of Impoundment Power

The executive branch has no authority to engage in spending at all except pursuant to an act of Congress which either appropriates the funds or grants the executive branch authority to enter into obligations. In the course of making funds available, Congress may attach such conditions to the spending as it sees fit, including provisions that allow the executive the discretion to spend less than all of it. Congress rarely defines the limits of that discretion explicitly; thus it may be difficult to ascertain from the ambiguous language generally used what degree of discretion the Congress has imparted. Nonetheless, if the President stays within the bounds of the discretion that Congress intended him to have, no constitutional question arises, for the President is only exercising powers granted by statute. Examination of the constitutional issue therefore requires the assumption that the particular legislation involved mandates spending to a degree the Executive chooses not to implement.

The Constitution itself says nothing about impoundments, but its few brief references to spending matters cast doubt on the executive claim to a constitutional impoundment power. Article I provides that appropriations are to be made by law, and that all legislative powers granted are vested in the Congress. Article II directs the President to "take care that the laws be faithfully executed." Appropriations laws are nowhere excepted from this direction.

An executive power to impound would give the President authority much more extensive than that implicit in an item veto. Where an Executive has an item veto, his determination that particular spending is unwise or unwarranted can be overridden by two-thirds of the legislature. Impoundment permits no override. Since the Constitution

10. See pp. 1645-53 infra.
11. The only possible constitutional question would be whether or not Congress had made an improper delegation of legislative powers, but overdelegation is decidedly not the issue in the current impoundment controversy. Cf. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).
13. Id. § 1.
14. Id. art. II, § 3.
15. Congress was made acutely aware of this when the President impounded $6 billion under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500 (Oct. 18, 1972), for Congress had already overridden his veto of the Act, and had no further way to give the Act effect in the face of the impoundment.
denies the Executive the item veto, a claim to the stronger power must be viewed with some skepticism.

Nonetheless, the structural argument recurs that the President has inherent or implied authority to impound by reason of the vesting of executive power in him and his duty to take care that the laws are faithfully executed. The Supreme Court considered and expressly rejected such an argument for broad inherent executive spending discretion in the 1838 case of Kendall v. United States ex rel. Stokes Postmaster General Kendall had disallowed a claim by Stokes for compensation for carrying the mail. Stokes petitioned Congress for relief, whereupon Congress passed an act which provided for determination of the exact amount due Stokes and directed that it be paid. Kendall paid part of it but impounded the remainder, persisting in his view that a portion of the amount was not a valid claim. The Court held that mandamus would issue to compel payment.

The statute involved in Kendall made the congressional mandate quite specific, naming the recipient and providing for exact determination of the amount to be spent. The current impoundment controversy does not arise under such tightly drawn spending acts, and spokesmen for the executive branch have attempted to distinguish Kendall on that ground. The distinction, however, does not have constitutional significance. If the President has no controlling independent impoundment power when the act is narrowly drawn, it is hard to find a constitutional provision that would bring such power into being once the Congress chooses to give the Executive a greater role in the

17. Id. § 3. Deputy Attorney General Sneed, whose testimony before the 1973 Senate Hearings, 1973 Hearings, supra note 5, at 328-402, constitutes the major Administration statement justifying the latest impoundments, never explicitly put forward a claim to inherent executive power to impound. But he did strongly suggest its existence at several points:

Decisions to impound inevitably involve policy judgments concerning changing national needs and . . . delicate adjustments peculiarly within the competence and constitutional authority of the Executive branch.

Id. at 365 (emphasis added).

The President's constitutional authority as Chief Executive and his statutory authority . . . give him broad discretion to act in the national interest against fiscal instability, including the power to impound in appropriate circumstances. Broad legislative incursions into the area are constitutionally suspect . . . .

Id. at 370 (emphasis added).
19. Id. at 613.
20. E.g., Deputy Attorney General Sneed's testimony, 1973 Hearings, supra note 5, at 368. But cf. Memorandum from then Assistant Attorney General William H. Rehnquist to Edward L. Morgan, Dec. 1, 1969, reprinted in 1973 Hearings 390 [hereinafter cited as the Rehnquist Memorandum]. Rehnquist felt that Kendall applied to funds appropriated for assistance to federally impacted schools, even though the executive branch was granted a definite degree of discretion in setting the standards for entitlement. Id. at 394.
determination of either recipient or amount. Kendall itself strongly suggests the opposite conclusion, i.e., that Congress may impose the spending duty in any manner it sees fit, and the Executive is obliged faithfully to execute the law by its own terms.

There remains another argument for independent, constitutional authority to impound, founded on an implied executive power in situations where Congress has not named the recipient or amount. The argument runs as follows: It is necessarily an executive function to perform the actual spending itself. Implied in this spending function is the power and duty to prevent waste, and occasionally that duty will necessitate impoundment. Congress usually passes spending acts several months before the expenditure is to take place and describes spending categories in general terms. The executive branch pays out the funds, however, only with a specific and detailed knowledge of the conditions prevailing at the appropriate time. The Executive should have discretion to impound if he can thereby accomplish the purposes of the act more efficiently or if conditions change so as to make the spending either superfluous or impossible. Implied in the power to spend, this line of argument concludes, is a power to impound for reasons of economy and efficiency.

Such considerations do not apply when the act is as specific as that in Kendall; hence the Kendall holding does not expressly cover this argument. The Steel Seizure Case, however, casts severe doubt on the notion that the Executive has this limited impoundment power.

21. There may exist some discretion in the latter instance to spend less than the full amount, but that would be a statutory and not a constitutional power.

22. [I]t 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 right secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.

23. This argument for impoundment as part of an inherent power to prevent waste was advanced by Deputy Attorney General Sneed, 1973 Hearings, supra note 5, at 386. But see discussion of the Antideficiency Act, pp. 1650-51 infra.

24. The classic example of this type of impoundment occurred where Congress appropriated one million dollars for the control of the Mediterranean fruit fly, but the Executive was able to accomplish the task for $500,000. Williams, The Impounding of Funds by the Bureau of the Budget, INTER-UNIVERSITY CASE PROGRAM No. 28 (1955), reprinted in 1973 Hearings, supra note 5, at 844, 845.

25. President Jefferson’s often-cited impoundment falls in this category. He failed to spend money for gunboats on the Mississippi River because the Louisiana Purchase intervened, making both banks American territory. 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 360-61 (1897).

26. It is important to note that this argument at its strongest only establishes a limited kind of impoundment power for the Executive, the power to impound when conditions intrinsic to the program indicate that further spending would be wasteful. There is no principle that would indicate that the President must necessarily have all impoundment powers or none at all.

Protecting the Fisc

no matter how sensible it may seem, unless supported by congressional enactment. In the course of holding that executive authority to seize the mills did not exist, Justice Black, writing for the Court, emphasized that Congress has "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or any Department or Officer thereof.'" Executive authority not expressly granted by the Constitution, the Court indicated, can be nothing but the creature of statute, and as such, the power can extend no further than the limits expressed in any statute that creates it.

Although Justice Black's majority opinion does not leave room for any inherent or implied executive powers, there remains the possibility that his statement is not conclusive on the impoundment question. The actual holding of the case may turn instead on the cautious and narrow reasoning found in the concurring opinions, particularly those of Justices Jackson and Frankfurter. Nonetheless, even under the concurrences, the notion of implied executive impoundment power must be rejected.

The concurring justices leave open the question of executive authority in a field wherein Congress has not acted. But when Congress has dealt by statute with the particular matter or power in question, the President has no inherent power to go outside the procedures and powers Congress has provided. The statutes in the Steel Seizure Case were found sufficient to cover the field even though none of them expressly denied the President all other seizure power.

Congress has likewise covered the field of impoundments to effect economies in the Antideficiency Act, as amended in 1951. The meas-

28. Id. at 588-89, quoting U.S. Const. art. I, § 8. Cf. Brandeis, J., dissenting in Myers v. United States, 272 U.S. 52, 246-47 (1926): There is no express grant to the President of incidental powers resembling those conferred upon Congress by clause 18 of Article I, § 8. A power implied on the ground that it is inherent in the executive, must, according to established principles of constitutional construction, be limited to "the least possible power adequate to the end proposed."... The end to which the President's efforts are to be directed is... the faithful execution of the laws consistent with the provisions therefor made by Congress.


30. 343 U.S. 579, 694 (1952).

31. Id. at 593.

32. Id. at 602 (Frankfurter, J., concurring).

33. Id. at 639 (Jackson, J., concurring). Cf. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), relied on by Justice Clark in his concurring opinion in the Steel Seizure Case, 343 U.S. at 660-61.

34. 31 U.S.C. § 665 (1970). Earlier versions of the Antideficiency Act, passed in 1905 and 1906, provided that executive officials were to apportion appropriations to assure that the funds lasted for the full period of time for which they were intended, thus preventing the need for deficiency appropriations. 33 Stat. 1257 (1905); 34 Stat. 49 (1906).
ure resulted from a 1947 recommendation by the Bureau of the Budget\textsuperscript{35} that Congress give the Bureau specific statutory authority to fall short of full spending whenever conditions in the program made savings possible. The Antideficiency Act has been cited by Administration spokesmen in the current debate as the "most explicit authority for withholding appropriated funds."\textsuperscript{36} The statement is true as far as it goes, but a reading of the Act makes clear that it gives no support to the impoundments currently in controversy.

The Antideficiency Act provides, in relevant part, that the executive branch shall so apportion appropriations as to assure that they last for the full period of time for which they were intended by Congress.\textsuperscript{37} It then grants limited impoundment power to provide for contingencies or to effect savings whenever there are changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which the appropriation was made available.\textsuperscript{38}

Read in context, the provision contemplates only the savings made possible by changes and developments intrinsic to the program itself,\textsuperscript{39} not to broader changes in executive policy.\textsuperscript{40} The test of any impoundment under the Act remains the capacity to carry out the purposes of the appropriation, not the purposes the Executive might have in mind with regard to the appropriation.\textsuperscript{41}

The legislative history of the Act bolsters this narrow reading of the impoundment power therein granted. The Bureau of the Budget report from which the section derived had pointed out that the authority "must be exercised with considerable care in order to avoid usurping the powers of Congress."\textsuperscript{42} The committee report that accompanied

\textsuperscript{35.} Report and Recommendations by the Director of the Bureau of the Budget and the Comptroller General of the United States with respect to the Antideficiency Act and Related Legislation and Procedures, June 5, 1947, quoted in 1973 Hearings, supra note 5, at 398.

\textsuperscript{36.} Caspar W. Weinberger, Deputy Director, Office of Management and Budget, in Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 95 (1971) [hereinafter cited as 1971 Hearings].


\textsuperscript{39.} See statement of the Comptroller General, 1973 Hearings, supra note 5, at 110.

\textsuperscript{40.} If impoundments are based (as the current ones evidently are) on executive policy that has not changed, they cannot draw support from the Antideficiency Act, for its provisions apply only to developments subsequent to the date of passage of the spending act. 31 U.S.C. § 665(c)(2) (1970). Conditions or presidential objections in existence at the time of passage were presumptively before the Congress when it made its determination.

\textsuperscript{41.} Whenever it is determined by [the apportioning officer] . . . that any amount will not be required to carry out the purposes of the appropriation concerned, he shall recommend the rescission of such amount . . . .


\textsuperscript{42.} Cited in 1973 Hearings, supra note 5, at 110.
the Act echoed that admonition: “There is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds.” 43 Many of the current impoundments thus fall outside the scope of the Antideficiency Act. 44

If Justice Black’s statement of inherent powers doctrine is controlling, then the power to impound to effect economies exists only because of the Antideficiency Act. On the other hand, if the concurrences control, the Executive’s impoundment authority is still delimited, because the Act covers the impoundment field and provides the Executive all the impoundment power necessary for his execution of spending without being wasteful. 45

This limiting role for the Antideficiency Act must still be tested, however, against two possible qualifications of the Steel Seizure holding: 46 there may be greater latitude for presidential action in emergency conditions, or when a pattern of congressional acquiescence indicates that a certain power is widely considered inherent in the Executive.

Some of the concurring opinions suggest the possibility of powers inherent in the Executive to cope with a pressing emergency. 47 The emergency that calls such powers into play, however, would have to be greater than that found wanting in the Steel Seizure Case. There the Korean War was underway, and there was a direct link between the war effort and the threatened halt in steel production.

There are suggestions that the current use of the impoundment power rests on a kind of fiscal emergency: the threat of runaway inflation. 48 There is, however, ample time to recommend to Congress meas-

44. The 1975 OMB report to Congress on impoundments makes this point quite plainly, for the Act is not cited as authority for fully one-fourth the listed reserves. 38 Fed. Reg. at 9474-94 (1973).
45. Cf. Michaelson v. United States, 266 U.S. 42, 65-66 (1924). The Court found that Congress had the authority to regulate a power indisputably inherent in a coordinate branch of the government—the power of the federal courts to punish contempts—so long as the power was not rendered inoperative nor any of its essential attributes abrogated. Thus even if we assume the power to impound in order to spend economically were inherent in the Executive, the Antideficiency Act is still, by analogy to Michaelson, a valid exercise by Congress of its authority to regulate and channel the impoundment-for-efficiency power, since the Act abrogates none of its essential attributes. Impoundments outside the limited scope of the Act would still be unwarranted.
46. These qualifications reflect the concurring Justices’ efforts, see notes 47 and 31 infra, to bring coherence to the doctrine of inherent and implied powers. Prior cases often cited in support of a broad view of inherent executive power include Myers v. United States, 272 U.S. 52 (1926); United States v. Midwest Oil Co., 236 U.S. 459 (1915); In re Debs, 158 U.S. 564 (1895); In re Neagle, 135 U.S. 1 (1890); United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); Prize Cases, 67 U.S. (2 Black) 635 (1869).
47. See 343 U.S. at 597 (Frankfurter, J., concurring); id. at 609 (Burton, J., concurring); id. at 662 (Clark, J., concurring). But cf. id. at 632 (Jackson, J., concurring).
ures for dealing with whatever emergency exists, measures such as rescission of the appropriations that exacerbate the crisis. Given these possibilities, an emergency that would call for executive action against the will of Congress exists only if one assumes some inherent disability on the part of Congress to deal with this type of crisis.40 The assumption is hardly a tenable foundation for executive power. The Executive may well not like the way Congress chooses to deal with what it views as an emergency, but the result, even if it means a higher rate of inflation, must rest squarely on the shoulders of Congress. The Constitution nowhere suggests that fiscal emergencies have constitutional significance.59

If Congress has consistently acquiesced in impoundments, and if impoundment constitutes a systematic, unbroken executive practice, then perhaps its action would suggest that the power is inherent in the Executive.51 This doctrine traces to United States v. Midwest Oil Co.,52 a case in which the Supreme Court upheld the action of the President in withdrawing mineral-rich lands from possible staking of claims, despite an act of Congress stating that they should remain available to the public.53 The Court found 282 examples of similar unprotested withdrawals over the previous fifty years, and concluded that the Executive thus had inherent power to do so.

There are examples of presidential impoundments tracing back to the presidency of Thomas Jefferson.54 The bulk of them were minor or temporary, carried out for reasons of economy and efficiency, and now are expressly covered by the Antideficiency Act.55 Most of the remainder were impoundments of military spending, wherein the President arguably draws on his powers as Commander-in-Chief.56

49. Some Administration statements seem to put forward such a claim. Id. at 369.
50. There is at least a suggestion in the Constitution that a military emergency does have such status. See, e.g., U.S. Const. art I, § 10. The impoundments of domestic funds carried out during World War II thus would have a stronger claim to a constitutional justification than the current impoundments. See p. 1645 infra.
51. See 343 U.S. at 610-11 (Frankfurter, J., concurring).
52. 236 U.S. 459 (1915).
53. There was a decided element of emergency in the Midwest Oil case as well, for the lands were being claimed at such a pace that the President felt he could not remain inactive while waiting for Congress to change the law. He expressly issued his order "in aid of proposed legislation." Id. at 467.
54. See note 25 supra. See also Memorandum by Joseph Cooper, Analysis of Alleged 1803 Precedent for Impoundment Practice in Nixon Administration, reprinted in 1973 Hearings, supra note 5, at 676-77.
Occasionally impoundments have occurred under express direction of Congress that a given amount of cuts be made.\textsuperscript{57} Perhaps the closest parallel to the current impoundments was the action taken by President Roosevelt during World War II in halting numerous domestic projects for which Congress had provided funding.\textsuperscript{58} That action was hotly disputed by several congressmen, but it was always closely linked to the emergency needs of the nation during a declared war. Past impoundments are thus distinguishable from the current round of domestic impoundments; there has been no unbroken executive practice of that character.

Even if one were to treat all past impoundments as a single undivided category,\textsuperscript{59} another element of the argument fails. Impoundments have rarely passed without considerable congressional questioning and protest.\textsuperscript{60} Nor have all Presidents systematically claimed the authority. President Kennedy expressly denied that he had such power.\textsuperscript{61} President Nixon himself has taken actions inconsistent with a claim to inherent impoundment power. For example, he vetoed a spending bill in 1970 giving as his reason that it would have prevented him from impounding any of the funds,\textsuperscript{62} thus intimating that impoundment is a statutory and not a constitutional power. He also continues to seek congressional rescission of some appropriated amounts,\textsuperscript{63} an obviously superfluous action if the President has inherent power to refuse to follow a congressional spending mandate. Thus no widely accepted and continuing practice has established impoundment as a power inherent in the Executive.

II. Construing the Spending Statutes

After Congress mandates spending, the President has no independent power to refuse to spend. But Congress has not always made its intent

\textsuperscript{57} Fisher, supra note 56, at 370.
\textsuperscript{58} See Williams, supra note 24.
\textsuperscript{59} There appear to be no clear guidelines for how large or small one makes the relevant categories. The Midwest Oil decision itself provoked a dissent which differed from the Court's opinion primarily in finding the 282 prior examples to be in distinguishable categories and hence no precedent for the President's action. 236 U.S. 459, 492 (1915) (Day, J., dissenting).
\textsuperscript{60} M. Ramsey, Impoundment by the Executive Department of Funds Which Congress Has Authorized It to Spend or Obligate, May 10, 1968 (Library of Congress, Legislative Reference Service), in 1971 Hearings, supra note 36, at 291, 292-95.
\textsuperscript{61} In response to a proposal by the Civil Rights Commission that he impound government money that would go to institutions practicing racial discrimination, President Kennedy said: "I don't have the power to cut off the aid in a general way, . . . and I think it would probably be unwise to give the President of the United States that kind of power . . . ." N.Y. Times, Apr. 20, 1963, at 11, col. 5.
\textsuperscript{63} As of February, 1973, rescissions currently being sought totalled over $382 million. 5 Nat'l J. 237 (1973).
clear with respect to the extent of spending it mandates, and thus the
degree of impoundment it intends to permit. The spending acts charac-
teristically employ ambiguous language, words like "authorize" and
"appropriate," rather than the language of clear mandate such as "re-
quire" or "direct." The Executive is bound faithfully to execute these
laws; to do so he must construe the ambiguous language.

The courts have evolved a body of doctrine to aid in statutory con-
struction, the cardinal rule of which is "to give effect to the intent
of Congress." These judicially-developed standards should guide con-
struction by the Executive, but two complementary theories have been
put forward which challenge their relevance. The theories suggest
that the standards either do not control the executive or that they do
not apply to spending legislation. Both have been advanced in the
current debate, and under either the President would be to some extent
exempt from the duty of carefully effectuating the legislative intent
when he executes the laws.

A. Different Standards Control the Executive: The Loophole Theory

Some observers and participants in the current impoundment debate
have urged that the Executive has broad discretion to construe the
applicable statute in any fashion as long as he does not clearly and
obviously contradict the specific language employed. As long as the
President has a "colorable argument" that the statute does not man-
date the spending, he is free to exercise his discretion as to whether
to impound or not. If Congress thus wishes to make particular spend-
ing mandatory, it must do so in absolutely unambiguous terms. Ambi-
guity is, in effect, a loophole.

This theory received striking expression in the government brief in
the recent case of State Highway Commission v. Volpe, but the Court
of Appeals for the Eighth Circuit rejected it and held the impound-
ment invalid. The Department of Transportation impounded High-
way Trust Fund moneys as part of the Administration's fight against
inflation, despite a provision in the authorization act stating the sense
of the Congress that no sums be impounded. Because Congress did

65. See, e.g., Kranz, A 20th Century Emancipation Proclamation: Presidential Powers
Permit Witholding of Funds from Segregated Institutions, 11 AM. U.L. REV. 48, 60
(1962); Deputy Attorney General Joseph Snecd, 1973 Hearings, supra note 5, at 367; Pro-
fessor Ralph Winter, 1971 Hearings, supra note 36, at 273; Secretary Caspar Weinberger,
id. at 143.
66. The phrase is Professor Winter's, 1971 Hearings, supra note 36, at 273.
not say baldly that "no funds shall be impounded," the Assistant Attorney General asserted that there was no mandate to spend. The court itself might not have construed the spending act as a grant of such broad discretion if it had the issue before it de novo; rather the Government's position was that the Executive's construction should be allowed to stand because it was not outside the bounds of all possible constructions of the Act.

This kind of argument hardly betokens faithful execution of the laws. But even if it is meant as a call for judicial restraint—that is, for upholding executive construction in all cases except where there is clear contravention of express language—it still misstates the usual role the courts have played. Provided that the case is justiciable, construction of a statute remains a decidedly judicial function, and the reviewing court's construction will prevail over the administrative interpretation. When the sense of the Congress is described in a section of the statute itself, that section provides a solid indication of the congressional intent the courts will uphold. The courts do not view ambiguous words as loopholes or restrict the search for the congressional intent to the single phrase or provision involved.

The "loophole theory" actually amounts to an overly broad application of a rationality standard employed in judicial review of executive actions. The 1971 case of Citizens to Preserve Overton Park, Inc. v. Volpe illustrates the standard's proper use. The plaintiffs sued to enjoin the building of an expressway through Overton Park in Memphis, Tennessee, relying on a provision in the Highway Act that expressways could be routed through parkland only if the Secretary of Transportation found that there was no "feasible" alternative route. The Government urged a possible construction of the statute under

70. Asserted nonjusticiability of impoundment issues receives heavy reliance by the Administration. See Testimony of Deputy Attorney General Sneed, 1973 Hearings, supra note 5, at 383.
73. 401 U.S. 402 (1971).
which the Secretary’s contested action was entirely valid, but the Supreme Court did not accept it and instead remanded the case, directing that the reviewing court consider whether the Secretary properly construed his authority and properly interpreted the congressional standards for “feasibility.”75 After the correct construction has been established, “the Secretary’s decision is entitled to a presumption of regularity,”76 and the court need only find that he “could have reasonably believed that in this case there are no feasible alternatives.”77 The Secretary of Transportation’s construction of the key statutory term, “feasible,” however, is not entitled to be judged by this rationality standard; only his application of the statute, once it has been fairly construed to determine the actual legislative intent, is to be so judged.78

**B. Different Standards Apply to Spending Acts: The Presumptively Permissive Theory**

The statement that an appropriation is permissive rather than mandatory has commonly been made during the course of the current debate.80 The assertion is accurate when used in a general descriptive sense, for historically nearly all spending acts have been cast in language that would permit the spending of less than the maximum amount made available. But frequently executive branch spokesmen have elevated the statement to a presumption that appropriations are permissive in the broadest sense, permitting full executive discretion—a presumption which is then applied to the construction of spending acts.81 If such a presumption exists, then the task of statutory construction is relatively simple. One need only look to see if the statute

75. *Id.* at 416.
76. *Id.*
77. *Id.*
78. Cf. *Barlow v. Collins*, 397 U.S. 159 (1970), where the Court undertook close review of an administrative construction of the applicable statute even though the statute also granted the official involved, the Secretary of Agriculture, broad discretionary authority to “prescribe such regulations, as he may deem proper.”

81. “This history compels the conclusion that if the Congress wishes to mandate full spending for a particular program, it must do so in unmistakably clear terms.” *Id.* When the presumption is thus directly stated, it is usually qualified, as it is by the word “full” here. As stated, it means nothing more than a presumption that the Executive could not be faulted for spending less than every dollar in the appropriation. But as applied by executive branch spokesmen, the presumption generally shifts toward permissiveness in the broader sense, that the Executive cannot be faulted for spending at whatever level he chooses below the prescribed ceiling. See, e.g., the use of the presumption in Attorney General Clark’s opinion, note 82 *infra*. There is only a subtle difference in the two senses of “permissive,” but it is a highly significant one.
Protecting the Fisc

contains unmistakably clear mandatory language. If not, then the President's impoundment action cannot be said to be a violation of the statute; Congress presumptively intended him to have full discretion. The act would then carry no mandatory force at all, except to set a ceiling on such spending as the Executive chooses to exercise.

This view was first developed at length in an opinion rendered by then Attorney General Ramsey Clark on impoundments of highway funds. A commentator recently examined closely the judicial and congressional support asserted in the opinion and found that it rested largely on dicta in cases where the result would suggest an opposite conclusion or on statements quoted out of context from congressional sources. Furthermore, its conclusion—that the highway fund impoundments were valid—was repudiated in State Highway Commission v. Volpe.

If the legal foundations for the presumption are shaky, its practical consequences for future congressional action must provide a final indication of its invalidity. Congress ordinarily uses ambiguous or permissive language, language less than strictly mandatory, because it wants to encourage economy. "Permissive" language grants the Executive a degree of flexibility in order to cope with circumstances that may change significantly between the time of congressional enactment and actual spending. To establish a presumption that such language carries no mandatory force whatsoever is to assume, in effect, that the congressional intent with respect to any particular program was never stronger than a mere desire to enable the program up to a certain man-

85. Id. at 1182 n.118.
86. 41 U.S.L.W. 2539 (8th Cir. Apr. 2, 1973). Congress had added its sense-of-the-Congress provision after the Clark opinion was rendered, 23 U.S.C. § 101(c) (1970), see p. 1646 supra; thus the court did not have before it exactly the same statute to construe. Nonetheless, it placed its main emphasis in construction on 23 U.S.C. § 101(b), the provision the Attorney General had found inadequate to overcome the presumed permissiveness.
87. This is not to suggest that economy is always the conscious objective which underlies, for example, the choice of the word "authorize" instead of "direct" or "require." Rather, in ordinary times when programs receive reasonably full implementation without the stricter language, there is simply little merit in risking a reduction in flexibility by language that might seem to require the spending of every dollar in the appropriation.
88. See the interchange between Senator Muskie and William Ruckelshaus, Administrator of the Environmental Protection Agency, with regard to the $6 billion in contract authority impounded under the 1972 Water Pollution Control Act Amendments, in 1973 Hearings, supra note 5, at 405-09. Efforts to write flexibility into the language of the appropriations bill itself are not entirely necessary. A good deal of administrative flexibility attaches to all spending acts by virtue of the Antideficiency Act. See pp. 1650-51 infra.
datory ceiling. Put another way, Congress' desire to promote flexibility in administration became a trap for it, disabling Congress from carrying out its true intent. Further, if that intent remains a desire to mandate even the bare existence of a particular program, Congress can do so only at the cost of all flexibility of administration, by imposing language that requires the spending of every dollar and eliminates executive discretion.

Spending acts are permissive rather than mandatory, then, only in the sense that they commonly do not mandate the spending of every dollar made available. To determine whether they permit such a sweeping exercise of executive discretion as that embodied in the current round of impoundments, however, requires careful construction of the particular statutes involved. It cannot be answered by presumption.

C. Fairly Construing the Spending Statutes

There is little indication that the current impoundments have been animated by the guiding principle of statutory construction—the ascertainment of legislative intent. In seeking more detailed guidance for the construction of individual spending acts, a useful starting point is the Antideficiency Act. Under the familiar principle that statutes in pari materia are to be construed together, that Act, written to apply generally to all appropriations, may properly be viewed as setting the context for construction.

It directs that economies are to be made whenever possible. It is not sufficient, however, that the Executive simply declare that a certain impoundment provides for savings, for in one sense, all impoundments result in savings; rather, the savings must grow out of conditions inherent to the program itself. The Act makes clear that the Executive remains responsible for carrying out the purposes of the appropria-

89. See Stassen, supra note 84, at 1182 n.119.
90. Craig v. Finch, 425 F.2d 1005, 1008 (5th Cir. 1970).
93. Congressional passage of Senator Ervin's S. 373 as modified, supra note 7, would create a more precisely defined context for construction of spending statutes. Under S. 373 Congress gets a second chance to clarify its intent in light of circumstances as they have developed since the time of enactment, with the presumption against the validity of the impoundment. The bill requires that all impoundments be reported to the Comptroller General, who is to determine whether an impoundment falls within the terms of the Antideficiency Act. Routine withholdings covered by the Act are not made subject to congressional review. 119 Cong. Rec. S. 6664 (daily ed. Apr. 4, 1973).
95. See note 39 supra.
tion, not his own purposes for the program. The task of construction, seen in this light, is simply to ascertain the purposes of the spending act and whether they are being fulfilled.

In practice the application of these standards for construction obviously will not result in a precise lower limit to executive spending, the way a precise upper limit appears. The mandatory force of the spending act will take shape only in the course of litigation challenging a given impoundment. The court need not seek to derive some lower figure but need simply test the contested impoundment against the legislative intent as expressed in the act to determine whether the impoundment was an abuse of discretion. It will derive its own construction of the statute, then test the administrative action to see whether it could rationally be a carrying out of the Act’s mandate. This will be a case-by-case process, but a few generalizations can be made which indicate that a number of the current impoundments are indeed violations of a statutory mandate.

Impoundments that result in the termination of a program should rarely be upheld, since the legislature, in passing appropriations or creating contract authority, mandates at least the existence of the program. The termination of the Rural Environmental Assistance Program, the cancelling of the Cross-Florida Barge Canal, and the failure to build a national aquarium have thus all been invalid impoundments.

Partial impoundments are more difficult to judge, because appropriations acts rarely mandate spending of every dollar and because executive action will be tested by the relatively generous rationality standard. The more an act uses language of a strongly permissive character, such as “not to exceed” or “may” rather than “shall,” the more likely it is that the executive action falls within the discretion granted.

On the other hand, the Antideficiency Act may be taken to mean

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98. See pp. 1647-48 supra on the application of the rationality standard.
100. This impoundment is currently being challenged in Canal Authority v. Resor, No. 71-92-CIV-J (M.D. Fla., filed Feb. 12, 1971). Pleadings reprinted in 1973 Hearings, supra note 5, at 912.
101. 1971 Hearings, supra note 36, at 211-17.
102. Housing Authority v. Dept of H.U.D., 340 F. Supp. 654 (N.D. Cal. 1972), see note 5 supra, was dismissed largely because the authorization act used highly permissive language. It read in part: “The Secretary may, with the approval of the President, contract to make grants under this subchapter aggregating not to exceed $7,600,000,000” (emphasis added). 42 U.S.C. § 1453(b) (1970).

1651
that Congress generally expects that the program will be fully imple-
mented unless some good reason, intrinsic to the program and arising
after appropriation is made, dictates otherwise. Furthermore, there are
in many acts other affirmative indications of congressional intent that
would place a heavier burden on the Executive to show that he is ful-
filling the legislative will. These include:

Congressional assignment of high priority to the program. In the
Federal Highway Act of 1956 Congress declared that "It is . . . in the
national interest to accelerate the construction of the Federal-aid high-
way systems." Since impoundments of highway funds slow construc-
tion, they are generally invalid.

Sense-of-the-Congress provisions that no impoundment take place.
Although such provisions are often classed as merely hortatory, in
the context of a spending act they provide a clear indication of the con-
gressional intent which the executive branch must carry out. By this
standard also, the highway fund impoundments are invalid.

Specific mandatory language. Portions of an act may be undeniably
mandatory. For example, § 205 of the Federal Water Pollution Con-
trol Act Amendments of 1972 states in relevant part: "(a) Sums author-
ized to be appropriated . . . shall be allotted by the Administrator [by a
given date] . . . (b)(1) Any sums allotted to a State under subsection
(a) shall be available for obligation . . . on and after the date of such
allotment." The impoundment of $6 billion in contract authority
provided by the Act has resulted in the Administrator's standing in
direct violation of these provisions. For that reason, a federal district
court recently held the impoundment unwarranted, and ordered allot-
ment.

Formula grant programs. When Congress grants the executive branch
only a minimum of discretion in judging whether proposed projects
meet standards defined by statute for entitlement to a grant, it becomes
the Executive's duty to make the funds available to those that qualify.
Impoundment under such circumstances would be an unwarranted
extension of the discretion narrowly circumscribed. Note that ex-
penditure might still fall well below the ceiling authorized if fewer

106. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500
(Oct. 18, 1972).
108. The Rehnquist Memorandum, supra note 20, expressed a similar view. 1973 Hear-
ings, supra note 5, at 390-95.
projects than anticipated meet the standards, but the Executive is not empowered to decree that result beforehand.

Other sources. Various other indicators might aid a court in determining the congressional intent under the given spending act. The legislative history and the relevant committee reports often indicate the sense of priority Congress attaches to the project. The fact that the act passed over a presidential veto, or that Congress in recent years had reappropriated to the project all sums previously impounded would also be relevant data in assessing that priority.

Congress plainly intends that some "lower limit" mandates exist. The usual standards of statutory construction provide sufficient grounds for executive derivation of them in order to see that the spending laws are faithfully executed, and also enable the judicial system to hear and decide impoundment cases.

III. Construing All the Statutes

There remains one other asserted justification for the current impoundments. The claim derives from the President's duty to "take care that the laws be faithfully executed"; its proponents argue that regardless of the mandate that may appear from a particular spending act, the Constitution vests responsibility in the President to faithfully execute all the laws. Some other statutes Congress has passed, they argue, especially the Employment Act of 1946, the Economic Stabilization Act, and the statutory debt ceiling, conflict with the duty to spend that would appear from the spending act alone. Congress has sent out contradictory signals, and in order to harmonize them, the President is empowered to impound funds. Closer examination reveals,
however, that the conflict is more apparent than real, and provides no support for the impoundments that have been carried out.

It is important to note this claim is not fundamentally constitutional although it rests on a clause of the Constitution. The argument, rather, is based on construction of the statutes. It would be within the power of Congress to take away the executive power asserted either through outright repeal of the conflicting acts or amendment of the acts so that they no longer clash with the signals Congress sends through spending legislation. Further, since this remains an issue of statutory construction, the President still must apply the judicially-developed standards for construction. Numerous cases have dealt with the assertion that a conflict in the statutes makes for implied amendment or repeal of one of them.\textsuperscript{116} The courts, however, have emphasized that implied repeal of a statute is not favored,\textsuperscript{117} and the governing criterion remains the legislative intent.\textsuperscript{118} Effect should be given to both statutes if at all possible.\textsuperscript{119} Only if the conflict between the two acts is unavoidable can the power to refuse to execute the one be inferred,\textsuperscript{120} and that power exists only with respect to the precise point of conflict.\textsuperscript{121} Even an unavoidable conflict does not give the President unbounded authority to choose which of the acts he will execute, for it is established that the later act will take precedence.\textsuperscript{122} By the light of these standards the arguably conflicting acts themselves may be examined.

A. \textit{The Employment Act of 1946}

The portion of the Employment Act cited as a foundation for impoundment power reads:

The Congress declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy ... to promote maximum employment, production, and purchasing power.\textsuperscript{123}

\textsuperscript{116} See, e.g., Posadas v. National City Bank, 296 U.S. 497 (1936); United States v. 24 Cans Containing Butter, 148 F.2d 365 (5th Cir. 1945).
\textsuperscript{117} Posadas v. National City Bank, 296 U.S. 497, 503 (1936).
\textsuperscript{118} Id.
\textsuperscript{119} Id. See also Sevin v. Inland Waterways Corp., 88 F.2d 988, 990 (5th Cir. 1937).
\textsuperscript{120} Posadas v. National City Bank, 296 U.S. 497 (1936).
\textsuperscript{121} Id.
\textsuperscript{122} Id. See also United States v. Wrightwood Dairy, 127 F.2d 907, 912 (7th Cir. 1942).
The reference to purchasing power permits the Administration to assert that it is only giving effect through impoundment to a congressionally declared policy of fighting inflation. But if Congress meant in the Employment Act to direct the President to achieve that goal by impounding whatever funds he felt were unessential, it seems likely that it would have made the empowerment explicit. Even as a policy statement, this section can hardly be read to declare that the fight against inflation is to take precedence over any other aim of national policy, much less over other specific legislation.

Perhaps more importantly, this section is only the preamble. The body of the Act creates the Council of Economic Advisers and provides that the President is to make an annual economic report. Under these operative sections of the Act, the President is explicitly given the far more limited role of making "such recommendations for legislation as he may deem necessary or desirable" to give effect to the policy. In sum, nothing in the Employment Act necessarily conflicts with any given spending act. And even if by some construction the conflict were found inescapable, the more recent spending act would have to control.

B. The Economic Stabilization Act

The Economic Stabilization Act seems at first glance to take up where the Employment Act left off. It states more directly the national policy of fighting inflation, and specifically gives broad powers to the President to achieve that goal by "issu[ing] such orders as he deems appropriate . . . [to] stabilize prices, rents, wages, and salaries." The President obviously believes his impoundment orders serve that end by means of reducing the overall level of federal expenditures, and the text of the Act itself does not state that impoundment orders cannot be among those he deems appropriate. However, the very breadth of the language led to a serious challenge against the Act in *Amalgamated Meat Cutters v. Connally*, where the plaintiff union charged that it amounted to an unconstitutional delegation of legislative powers. In order to uphold its constitutionality, the court was forced to construe the language narrowly, leaning heavily for its derivation of standards on the nation's past experience with wage-price stabilization programs

124. *Id.* at 366-67.
128. *Id.* at § 203(a).
and on the legislative history of the Act. Without defining precisely
the outer limits of the power therein granted, the opinion strongly
suggests that the Act is only a grant to the President of authority to
impose wage-price controls. If the President were to use the Act as
explicit authority as well for impoundment of all manner of federal
expenditures, it is unlikely that the Act as then applied could survive
a similar challenge. There is nothing either in the historical experi-
ence or the legislative history to suggest that such a power lies within
the bounds of the congressional intent.

Thus construed, the Act does not conflict with spending legislation,
except perhaps in the limited circumstance where a control order coin-
cides with an act that provides for government pay raises. Such a con-

cflict led to an impoundment in 1971 because Congress had passed a
military pay raise just before the President implemented the wage-
price freeze. Since his impoundment there was only incidental to
the establishment of across-the-board controls, and since Congress did
intend for the President to have authority for a freeze that would affect
equitably all sectors of the economy, there was some justification for
this action. Whatever the propriety of that particular impoundment, it
establishes no principle broad enough to justify those currently in con-
troversy. The Economic Stabilization Act only supports impoundments
of pay raise spending and only when the action is incidental to the
imposition of broader wage-price controls. The Act is not a license to
make budget cuts whenever they are deemed desirable.

C. The Debt Ceiling

The debt ceiling is a potentially stronger foundation for impound-
ments of a broader scope, for the debt ceiling is a precise and specific
figure which may not be traversed. Thus, conflict with spending acts
might be unavoidable. At the time of the current round of impound-
ments, the debt ceiling was temporarily pegged at $465 billion. Its
temporary nature, however, must soften one’s view of any presumed
unavoidable conflict between spending acts and the ceiling. If Con-
gress had not passed new debt limit legislation by June 30, 1973,
Protecting the Fisc

the ceiling would have reverted to its permanent level of $400 billion.\textsuperscript{136} The history of such legislation\textsuperscript{137} makes it highly unlikely that the Congress would permit an irreconcilable conflict between mandated spending and the ceiling to develop, for new higher ceilings have regularly been enacted as the old ones were approached.

But one need not make any such assumptions about possible future congressional action to recognize that the debt ceiling provides no support for the current impoundments. The mere existence of a ceiling clearly provokes no unavoidable statutory conflict; there is only conflict when spending causes the debt to approach the absolute limit. The impoundments currently in controversy took place while the debt level was at least $16 billion below the ceiling,\textsuperscript{138} and thus derive no support from the ceiling law. If Congress at some point allowed the conflict to become pressing the President probably could not be faulted for impounding to stay within the ceiling; still, faithful execution of the laws suggests that the President first seek out the spending acts which themselves are written in the most permissive terms and make the needed cuts there, or perhaps order an across-the-board percentage cut from all programs sufficient to meet the crisis. The debt ceiling cannot be read as a grant of power to impound whatever monies the President chooses.\textsuperscript{159}

IV. Conclusion

Whatever inherent constitutional power the President might have to order impoundments is limited to those circumstances defined in the Antideficiency Act where economies can be realized. He may impound other funds only if he may rationally claim to be carrying out the congressional will as it is fairly construed from the spending acts involved. He is not entitled to use ambiguous language in the act as a loophole for imposing his own intent, nor do spending acts by nature inevitably permit a broad exercise of executive spending discretion. The apparently conflicting congressional enactments invoked in support of the practice prove on closer examination not to conflict at all,

\begin{itemize}
  \item 138. See testimony of Deputy Attorney General Sneed, 1973 Hearings, supra note 5, at 366.
  \item 139. See the 1969 Rehnquist Memorandum, supra note 20, in 1973 Hearings, supra note 5, at 390, 395.
\end{itemize}

1657
or at least not in such a fashion as to justify the current selective impoundments. The President may be acting from the best of motives, believing that these impoundments are the best way to deal with the problem of inflation. His sincerity, however, does not empower him to carry them out alone. Congress retains the power of the purse, and to the degree that it states its spending intent with some clarity, it may rely on the courts to enforce its will.

140. "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting).