

IMPOUNDMENT OF FUNDS APPROPRIATED BY CONGRESS

In December 1972 the United States Department of Agriculture announced an impoundment of congressionally appropriated funds that would effectively terminate the Rural Environment Assistance Program and the Water Bank Program.¹ This action by the Nixon Administration was one of a series which have resulted in the curtailment or elimination of selected domestic spending programs. The anticipated impoundment of approximately \$10 billion of appropriated funds² will severely impact several programs of substantial public interest including rural electrification,³ federal water pollution control (as part of the Federal Water Pollution Control Act Amendment of 1972 which passed over presidential veto),⁴ federal highway funds to the states,⁵ and the water bank.⁶ This article will investigate the nature of the impoundment problem, analyze the constitutionality of such action by the executive branch, and suggest possible courses of action that could be employed successfully in avoiding future confrontations between Congress and the President.

I. THE NATURE OF THE IMPOUNDMENT CONTROVERSY

First and foremost it should be recognized that the controversy over impoundment of funds by the executive department arises in the context of the political party system. As a result, questions of separation of powers will probably be raised only to the extent opposing ideologies are in control of the two political branches of government. In the immediate dispute, the President's partisan supporters justify impoundment as a proper tool in the effective management of the executive branch.⁷ On the other hand those individuals of differing political sympathies⁸ decry each new announcement of a presidential cutback in spending as a serious inroad into the fabric of American government. The arguments on both sides are embedded in partisan politics, and in a different administration the same men might each be speaking the words of the present opposition.

A. *Pro-impoundment Contentions*

The advocates of executive impoundment argue that "[s]ince the President lacks an item veto, he must impound the unwanted funds to preserve

¹ See 31 CONG. Q. WKLY. REP. 4 (1973).

² *Id.*

³ Rural Electrification Act, 7 U.S.C. §§ 901-15 (1970).

⁴ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-376 (1970).

⁵ The Wash. Post, Jan. 11, 1973, § A, at 7, col. 4.

⁶ N.Y. Times, Dec. 27, 1972, § 1, at 6, col. 1.

⁷ *E.g.*, 31 CONG. Q. 291 (1973) (summarizing testimony of Deputy Attorney General Joseph T. Sneed before the Senate Judiciary Subcommittee on Separation of Powers, February 6, 1973).

⁸ *E.g.*, N.Y. Times, Jan. 5, 1973, § 1, at 1, col. 5.

his budgetary objectives and maintain control over his own executive officials.”⁹ Thus it is an essential power in order that the President may carry out his duties in the nation’s best interests.¹⁰ Included within these presidential duties is one to manage the national economy—derived from the language of the Full Employment Act of 1946.¹¹ That statute requires the President to include in his annual economic report¹² a plan “to coordinate and utilize all . . . [the federal government’s] plans, functions, and resources for the purpose of creating and maintaining . . . [full employment].”¹³

On the basis of this economic management duty it is argued that impoundment is a necessary presidential tool if the policies of Congress, as reflected in the Full Employment Act, are to be carried out.¹⁴ Implicit in this argument is the assumption that the congressional process for controlling the budget is helplessly inefficient, and, therefore, the President must act. This assumption, however, may not be unrealistic since Congress operates through three separate and uncoordinated committees: one to propose legislation, another to recommend spending, and a third to consider taxes. Only the executive branch is capable, through rapid uniform response, of effectively managing the nation’s fiscal policy.

Impoundment proponents further argue that although the Constitution may not expressly provide for executive impoundment, neither does it mention such practices as the filibuster¹⁵ and judicial review of legislation. Indeed, when Chief Justice Marshall established judicial review he provided precedent for the recognition of constitutional power through refusal to act. That is, in *Marbury v. Madison*,¹⁶ Marshall refused to exercise the power given the courts by Congress when he declared a jurisdictional grant to be unconstitutional. By establishing judicial review in relation to a non-exercise of a power, the Chief Justice left the other branches of government the difficult task of challenging inaction in order to attack this newly recognized power. In the same way, when impounding funds, the President is refusing to exercise a power—the power to spend—in order to establish his power to impound. The other branches of government can challenge the impoundment of funds only by questioning his inaction.

⁹ Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124, 136 (1969).

¹⁰ 31 CONG. Q. WKLY. REP. 291 (1973).

¹¹ 15 U.S.C. §§ 1021-1025 (1970).

¹² *Id.* § 1022.

¹³ *Id.* § 1021.

¹⁴ Statement by Caspar Weinberger, Secretary of H.E.W., *The Advocates* (PBS) transcript p. 14 (originally broadcast Feb. 15, 1973).

¹⁵ Fisher, *supra* note 9, at 137.

¹⁶ 5 U.S. 137 (1803).

B. *Anti-impoundment Contentions*

The opposition to the executive power to impound funds focuses on Congress as the branch of government most responsive to the will of the people. The argument runs as follows. The Constitution gives Congress total control over spending because the House can best "finger the pulse of the populace," whereas the President is inherently more remote from the constituents.¹⁷ Also, from a practical standpoint, Congress holds lengthy committee hearings to evaluate proposed legislation, whereas the President resorts to his comparatively limited staff.¹⁸ Therefore, it is reasoned, Congress is the most appropriate branch to have total control over the spending power.

For some rather undeveloped arguments the constitutional language in article II is also pointed to as evidence of congressional hegemony over spending. The fact that the President swears he will "faithfully execute the laws" may be interpreted to mean that he must spend all that Congress appropriates. Thus appropriations are not just ceilings for spending, except in certain circumstances, which are not included in the type of impoundment of funds now being practiced.¹⁹

At no time has Congress extended the President's power to include a deliberate frustration of its will through termination of programs by executive order. The legislative history of the Full Employment Act of 1946 shows that Congress only intended that the President submit a plan for national economic management and not that he take on sole responsibility for achieving the Act's purpose.²⁰ Furthermore, each new enactment of legislation should be read to supercede any older policy which is contradictory. Appropriations passed after the 1946 Act must be taken as the latest expression of congressional will.

Thus far few advocates have delved into the relevant constitutional history and case law to support their claims. This article will now consider this less normative aspect of impoundment.

II. THE UNCONSTITUTIONALITY OF IMPOUNDMENT

The Constitution provides in four different clauses the basis for the impoundment conflict:

- (1) Art. I, §1. All legislative Powers herein granted shall be vested in a Congress of the United States

¹⁷ Statement by Congressman Morris Udall (D. Ariz.), *The Advocates* (PBS) transcript p. 2 (originally broadcast Feb. 15, 1973).

¹⁸ Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 STAN. L. R. 1240 (1970).

¹⁹ Under the Anti-Deficiency Acts of 1905-06, Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257 and Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48-49, impoundment was to be used as a means of timing the release of funds or of saving money when the legislative objective had been accomplished with less than the total funds appropriated. *Id.* at 1241-42.

²⁰ U.S. CODE CONG. SERV. 1068 (1946).

- (2) Art. I, § 8. The Congress shall have Power . . . to pay the Debts and provide for the common Defense and general Welfare of the United States
- (3) Art. II, § 1. The executive Power shall be vested in a President of the United States of America
- (4) Art. II, § 3. [The President] shall take Care that the Laws be faithfully executed

These sections raise two immediate questions. (1) Is the power over appropriations exclusive to the legislature and thus expressly denied to the President since he has only executive power? (2) If the President may in some way share the power over appropriations, is he faithfully executing the laws when he impounds appropriated funds in order to manage the economy?

A. *Historical Basis*

As to whether appropriations are exclusively within the power of Congress, the words of Benjamin Franklin at the Constitutional Convention are particularly appropriate. During a discussion of which House of Congress should be able to originate money bills, Franklin said, "those who feel, can best judge,"²¹ meaning that the House of Representatives with the closest contact to the electorate, should have the power to originate money bills. The spirit of the discussion on this point, taken as a whole, indicates that Congress, through the House, should alone be answerable to the people for money affairs.²² This would be true not only for initial appropriation but also for ultimate disposition.

Another indication that appropriations were meant to be solely within the legislature's province is a little noted clause of the Constitution requiring that Congress publish "a regular statement and account of the receipts and expenditures of all public money . . ." ²³ The convention, in agreeing on this clause must have assumed that Congress would have knowledge of what expenditures had been made, and presumably this would occur through congressional control over disposition of appropriated funds. Although it could be argued that the Congress could get this information from the executive branch, if that were the procedure the framers intended, they more likely than not would have included the report requirement in article II as a duty of the President. It is indeed significant that the *Congress* is required to disseminate the information.

Even if it can be established that the President is able to participate in the "appropriation" process, is it within his power to impound appropriated funds in order to faithfully execute the law? In order to answer this question, inquiry must be made into the nature of the executive power

²¹ J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 306 (spec. ed. 1893).

²² *Id.* at 303-07.

²³ U.S. CONST., art. I, § 9.

bestowed upon the President. In their discussion of how to describe the executive's powers, the framers of the Constitution decided to delete a phrase that said the President's powers were to be "not legislative nor judicial in their nature."²⁴ Their rationale was that such a phrase was unnecessary since they intended the remainder of the clause to imply exactly that meaning and that to include the phrase would be redundant. Thus the authors of the Constitution made clear that the power to execute the laws was not to include the legislative function of changing a statute from the form in which it was enacted. The framers did, however, provide the President with a limited power in legislative affairs.

The President was given the power to veto legislation in its entirety after it had passed both houses. In the discussion concerning this power the convention also considered an absolute veto.²⁵ The fact that this idea was ultimately rejected in favor of the present system can be attributed to the intended purpose of the veto. Primarily the veto was to assure that Congress would not exceed its authority, and it was not to serve as a check on congressional wisdom.²⁶ The President was refused an absolute veto so that he would not become overly powerful.²⁷ Although an absolute negative power for the executive branch would have best served the purpose of controlling Congress, the limited veto was considered sufficient because

if a proper porportion of each branch should be required to overrule the objections of the Executive, it would answer the same purpose as an absolute negative. It would rarely, if ever, happen that the Executive . . . would have firmness enough to resist the Legislature, unless backed by a certain part of the body itself.²⁸

Thus it was the widely-held feeling in 1789 that absolute veto would be dangerous to the separation of powers as would be the absence of any veto power. Therefore, to insure that neither Congress nor the President would exceed its authority, the present system requiring a two-thirds majority vote to override a veto, was agreed upon.

It is interesting that at no time did the discussion at the Constitutional Convention include an item veto, that is, the power to negate only parts of a bill. This power must have been considered unnecessary since the main purpose of providing for a veto was not to enable the executive's preference to prevail over that of Congress, but rather to enable him to protect himself in power clashes with the Congress.²⁹

²⁴ *Madison, supra* note 23, at 87.

²⁵ *Id.* at 398-409.

²⁶ *Id.* at 716.

²⁷ *Id.* at 107.

²⁸ *Id.* at 103.

²⁹ During the first several presidential terms, the veto was used sparingly and then usually for the purpose of preventing the passage of "unconstitutional" legislation. R. EGGER & J. HARRIS, *THE PRESIDENT AND CONGRESS* 51 (1963).

In view of the fact that an absolute veto was rejected by the convention it is relevant to consider whether, in fact, that is the ultimate effect of presidential impoundment of funds. When the President can refuse to spend funds appropriated by Congress over his veto, he has, in effect, claimed an absolute veto power. The legislation is then virtually a nullity despite the fact that Congress voted to override the veto. Such conduct negates the limitation of the veto power as its creators conceived it. The President should not be able to use impoundment as a means of vetoing bills absolutely—a power which has been expressly denied him.

Further illumination on the nature of presidential power is provided in a series of articles by James Madison and Alexander Hamilton—*The Federalist*.³⁰ In Number 48, Madison explained the need for overlap of the branches of government so that each may help preserve the separation of powers, especially against usurpation by the legislature.³¹ He singles out the strength of the legislature over the executive because of the latter's "narrower compass" and simple nature. Thus Madison recognized that the President had very limited power to assert his will over Congress.

In Number 73, Hamilton discussed the veto, the chosen method by which the President can maintain the separation of powers and stated that the situation for which the veto is "chiefly designed [is] that of an immediate attack upon the constitutional rights of the Executive."³² Hamilton did recognize, however, as did the framers, that occasionally the veto would be used to submit a law for revision which seemed to "evidently and palpably sacrifice" the public good. But as far as impoundment is concerned, the relevancy of Hamilton's discussion is that he clearly indicates that the President was not meant to replace the will of Congress with his own. Perhaps paper Number 69 by Hamilton, is the most enlightening in respect to the President's power to impound. He stated that under the Constitution the President "can prescribe no rules concerning the commerce or currency of the nation."³³ This prohibition presumably would include the power to impound funds that have been appropriated by Congress pursuant to the exercise of the commerce and currency powers.

B. *The Case Law Relevant to Impoundment*

There have been relatively few cases which deal with the President's duty to faithfully execute the laws, although the question arose in an early case, *Kendall v. United States ex rel. Stokes*.³⁴ In that case Stokes contracted with the Postmaster General to transport the mail, and in return

³⁰ A. HAMILTON, J. MADISON & J. JAY, *THE FEDERALIST* (edited by B. Wright, 1961).

³¹ *Id.* at 344-45.

³² *Id.* at 471.

³³ *Id.* at 450.

³⁴ 37 U.S. 524 (1838).

he received certain credits and allowances. A new Postmaster General, Kendall, then took office and re-charged Stokes for the amount of the credits, claiming that they were void. To settle the dispute, Congress passed an act directing the Solicitor of the Treasury to determine the proper amount to be credited. Kendall, however, still refused to credit the entire amount determined by the Solicitor and his action was finally reviewed by the Supreme Court. In finding that the Postmaster General was not acting under an extension of presidential power when he refused to grant the credit, the Court said:

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, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.³⁵

The situation in *Kendall* is directly analogous to the problem of impoundment; both involve congressional enactments requiring a sum of money be paid out and refusal by the executive branch to carry out the will of the legislature. Both situations would allow an executive official some degree of discretion, but as the Court pointed out the President does not have the power to forbid the law's execution.

A case which might be read to suggest the opposite conclusion about the general power to impound is *In re Neagle*.³⁶ There, the President had ordered that a federal deputy act as bodyguard for a Justice of the Supreme Court whose life had been threatened. In carrying out his duties he killed an attacker and was arrested and charged by local officials. The Supreme Court issued a writ of *habeas corpus* on the grounds that he had been performing a duty within the President's power and was, therefore, protected by the aegis of the federal government. As a source for this power, the Supreme Court credited the duty to take care that the laws be faithfully executed. Thus, the Court pointed out that the President has some inherent powers to do certain acts upon his own initiative, and presumably some advocates of impoundment would build upon this to support their own cause. But *Neagle* is distinguishable from the impoundment situa-

³⁵ *Id.* at 612-13.

³⁶ 135 U.S. 1 (1890).

tion, for as the *Neagle* court pointed out, in that case there was no action by Congress, and it was this void which parented the needed presidential power.³⁷ In the case of impounding appropriated funds, the entire conflict is focused upon the fact that there is a contrary congressional enactment. So although *Neagle* established that the President had powers beyond "the enforcement of acts of Congress," it carries no weight in a case where Congress has acted.

A third case exploring the limits of presidential power is *United States v. Midwest Oil Co.*,³⁸ which stands for the proposition that a combination of a long-standing practice and congressional silence gives rise to a presidential power. In deciding that the President could halt the sale of public land despite congressional authorization for the transactions, the Court said:

Both [sic] officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice.³⁹

The precise meaning of "long-continued action" is not clear, but the type of practice occurring in *Midwest Oil* whereby the executive branch sought to control the rapid loss of public land to oil speculators, is said to date "from an early period in the history of the government."⁴⁰ It is safe to estimate that the practice was at least 100 years old,⁴¹ whereas the period over which the impoundment of funds has been practiced is substantially less. Commentators report that "[e]xecutive impoundment lost its character as an economy measure and became a full-fledged policy tool early in the administration of Franklin Delano Roosevelt."⁴² That was only forty years ago; possibly not enough to merit status as a long standing practice. But even if forty years is sufficient to create a *Midwest Oil* type power, such a power cannot survive congressional attack. Congressional silence does not serve to create a constitutional presidential power, but at most a power bestowed by the authority of Congress. Granting, *arguendo*, that congressional silence can be so read, the Congress can certainly retract a power which it has granted. Therefore, as soon as congressional silence on the subject of impoundment is broken, the President will have lost this acquired power to accomplish political objectives through limitations on spending.

³⁷ See *id.* at 64-66.

³⁸ 236 U.S. 459 (1915).

³⁹ *Id.* at 472-73.

⁴⁰ *Id.* at 469 (footnote omitted).

⁴¹ The exact age of the practice is not essential to this discussion. It is only important to know that the practice in *Midwest Oil* had a history more than twice as long as that of impoundment.

⁴² Church, *supra* note 18, at 1242.

Perhaps the most famous case involving an adjudication of presidential power is *Youngstown Sheet & Tube Co. v. Sawyer*,⁴³ the steel seizure case. Faced with the threat of a steel strike damaging to the national defense, President Truman ordered that the mills be seized and operated by the Secretary of Commerce. The only basis of authority claimed for such action was the general constitutional powers of the President. Justice Black, speaking for the Court, held the seizure to be an unconstitutional act. His opinion makes it clear that the seizure power was found to be legislative and thus denied to the President.⁴⁴ Furthermore, the activity challenged there not only invaded the legislative realm, but also violated the intent of Congress. During consideration of the Taft-Hartley Act, Congress rejected an amendment which would have authorized government seizures in such cases of emergency.⁴⁵

Under the precedent of *Youngstown Sheet & Tube*, if the impoundment power were vested exclusively in the legislature, presidential action in this regard would be unconstitutional. The key question thus becomes whether that action is exclusive. The Constitution specifically directs Congress to provide for the general welfare, presumably through spending programs; other than the veto power, the Constitution grants no check, or other control over spending to the executive branch, unless it is shown to be an implicit power. Although the precedent of *Youngstown Sheet & Tube* is not determinative as to this type of implicit power, it does serve to show that the executive's inherent powers are limited to those flowing directly from the powers expressed in the Constitution.

Viewed collectively, the four cases cited above establish the propositions that (1) the President may intervene in what might be considered the legislative domain if Congress has ignored or failed to respond to an immediate problem, and (2) he may similarly act when Congress has allowed him to do so as part of a long standing practice; however (3) the President may not interfere with the legislature when it has been granted exclusive power and has acted, and (4) his duty to execute the laws does not include the power to deny execution, lest he interfere with congressional intent. Therefore, presidential impoundment of funds is an infringement upon a congressional power, and unless some paramount independent executive power exists to justify this conduct the President is acting unconstitutionally.⁴⁶

⁴³ 343 U.S. 579 (1952).

⁴⁴ *Id.* at 587-88.

⁴⁵ *Id.* at 586.

⁴⁶ Note that in the area of domestic affairs, the President has few independent substantive powers. Wallace, *The President's Exclusive Foreign Affairs Power Over Foreign Aid: Part I*, 1970 DUKE L.J. 293, 296 (1970).

III. THE GRAY AREA OF LEGITIMATE IMPOUNDMENT

The clash of power between governmental branches may arise in three possible situations: (1) the President may be acting without an independent constitutional power over a given subject matter; (2) the President may possess an exclusive constitutional power over a given subject matter; or (3) the powers of the President and Congress may be concurrent. The first situation and its assessment were discussed above; it is the latter two situations that represent gray areas of the law in which impoundment by the executive may be permissible.

The situation-two type of conflict would occur whenever Congress attempted to affect matters solely within the control of the executive. If Congress were to attempt to force recognition of a foreign government, which would result should Congress appropriate funds to establish an embassy in Cuba, it would be usurping a power traditionally reserved to the President. That is, the recognition of foreign governments has generally been considered an area over which the President has exclusive control.⁴⁷ The President would be forced to defend his powers, and the question becomes what means are available to him. As earlier noted the veto power was the tool designed by the framers of the Constitution to enable the President to protect his office. But if the veto is overridden, the President should be allowed to impound funds pending a judicial resolution. He is in effect refusing to execute a statute which he finds to be unconstitutional. Whether this refusal manifests itself in impoundment of funds or some other form of executive action is irrelevant. The President is bound by the very terms of his oath of office to preserve and protect the Constitution;⁴⁸ therefore he would violate his oath by enforcing an unconstitutional statute.

The situation in which Congress and the President have independent concurrent powers is the hardest to resolve: for example, if Congress were to declare war against a country and yet the President as commander-in-chief refused to order the military to begin fighting. Both branches would be acting under a specific and equally valid grant of power. Whether the President could properly impound funds in this situation is outside the scope of this article. The most that can be said about such clashes of power is that a case by case evaluation is required. For purposes of this article it is only necessary to point out that, in the case of the impoundment of congressionally appropriated funds to eliminate a domestic program, the President is without the authority necessary to put him on an equal footing with Congress.

⁴⁷ *Id.* at 315.

⁴⁸ U.S. CONST. art. II, § 1.

IV. POSSIBLE METHODS TO END IMPOUNDMENT

An inherent problem in relying on litigation to solve the impoundment issue is that a decision may be so long delayed that the President's term may end prior to the court's resolution.⁴⁹ As an alternative, the Congress has considered other means to force the expenditure of impounded appropriations. Typical of proposed legislation is Senator Ervin's "Impoundment Control Bill" (S. 373), "which would require the President to notify Congress by special message whenever he intends to withhold appropriated funds, and would prevent him from continuing the action after 60 days unless Congress approved it by concurrent resolution."⁵⁰ However, the same problems would still be at hand to hinder any attempts to fight impoundment after the fact. If the President felt called upon to ignore the first appropriation, there is no reason to believe he would alter his attitude as to future efforts to reappropriate the same measure.⁵¹ Therefore, the bills such as Ervin's may well prove ineffective, since the President could repeatedly use the 60-day "grace period" to curtail spending or use other tactics to circumvent the legislative intent. For example, by not disclosing his intent to direct the impoundment of appropriations, the President could continue the practice with only after-the-fact challenge. And, if questioned about the absence of recent spending, the executive branch could simply respond by claiming administrative hold-ups and indicating anticipated future release.

An amended Ervin Bill,⁵² which has now passed the Senate, tacitly recognizes that Congress is inept at controlling the expenditure of the total appropriations. The President is, therefore, allowed to cut spending to a

⁴⁹ There are two types of judicial remedies which might be available in an action to force the expenditure of funds. For one, a writ of mandamus could be granted directing a cabinet officer to order the release of the funds. Whether such an action would succeed would hinge upon whether the court perceived the expenditure as a ministerial or discretionary act. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), recognizes that mandamus is only proper to command performance of a ministerial act.

The other cause of action which might be successful is a suit for injunctive relief. The problem with such a suit is that the injunction must be couched in prohibitory terms. That is, a mandatory injunction may not be used when it is merely a substitute for a writ of mandamus. See *Miguel v. McCarl*, 291 U.S. 442 (1934). Faced with this very situation, Eighth Circuit in *State Highway Comm'n v. Volpe*, No. 72-1512 (8th Cir., filed Apr. 2, 1973), hurdled the word choice difficulty by enjoining the Secretary of Transportation from continuing to withhold funds.

⁵⁰ 31 CONG. Q. WKLY. REP. 247 (1973).

⁵¹ *Id.* at 668. The substance of remarks made by Eric Thor, Administrator of the Farm Cooperative Service, according to Rep. John Melcher (D. Mont.):

If Congress passes mandatory legislation, the President will veto it. If Congress overrides the veto, the President will refuse to spend money for it. In that event Congress has no recourse except to take the matter to the courts. If it goes to the courts, the litigation will be so prolonged that no final decision will be reached until there is a new President.

Id.

⁵² *Id.* at 821.

given ceiling provided he reduces each program proportionately. Besides the fact that it too can be ignored by the executive department, this bill, fails to recognize that some programs are more important than others and that some can better withstand a budget cut.

From an academic viewpoint, a more basic problem with the bills proposed to date is their implicit recognition of the validity of impoundment.⁵³ Through attempts to regulate, rather than attack outright, Congress concedes propriety. As this article has shown, such a concession is unnecessary in view of the strong constitutional arguments against impoundment.

Ideally Congress should require the President to request cuts in funding in the same manner as he now requests supplemental appropriations. In this way each cut could be considered on its merits. However, such a plan would not avoid the problems of presidential disregard or circumvention.

Congress has begun the program which may best solve the impoundment question—committee reform in the budget process.⁵⁴ A proposal submitted by a special 32-member committee calls for a new plan of budget procedures. Accordingly, Congress would pass an overall spending ceiling, divided into annual and non-annual appropriations. Tentative individual appropriations would be passed, and, if at the end of the process the total of the individual amounts exceeds the ceiling, a wrap-up bill would be passed to make the necessary cuts in the earlier bills. The wrap-up bill is the key to this plan of controlling the budget process in Congress and out of the hands of the President.

By successfully holding spending to the level it decides is optimum, Congress can dissolve the political leverage traditionally used by the President to justify impoundment. Also with a more manageable procedure, chances are better that the President and Congress will be able to agree upon an appropriate spending limit and the means to stay within it.

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⁵³ See *id.* at 247-48 (comments by Ralph Nader).

⁵⁴ N.Y. Times, Dec. 18, 1972, § 1, at 1, col. 4.