COMMENTS

Presidential Impounding of Funds: The Judicial Response

According to a report made in 1971, the Nixon Administration had impounded \$11.5 billion that Congress had appropriated for a wide variety of domestic programs.¹ The total amount withheld over the last two years may be as high as \$25 billion.² Although the administration's actions are not unprecedented,³ they have provoked a major controversy

¹ *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. 4 (1971) [hereinafter cited as *Hearings*] (remarks of Senator Ervin). It is difficult to get accurate information on the exact extent of impounding. First, the sums shift from time to time so that by the time any survey is made, the figures are probably wrong. Second, there are disagreements about what funds are being impounded. The Federal Impoundment and Information Act, Title IV of Public Law 92-599 (1972), which requires the Office of Management and Budget (OMB) to report on the amount of impounding and to give the reasons for the impounding and other information, should have helped to reduce this problem. The first report made pursuant to the Act's requirements failed, however, to include the \$3 billion withheld from authorization under the Water Pollution Control Act. N.Y. Times, Nov. 24, 1972, at 1, col. 4. Thus, as of Jan. 29, 1973, the Administration claimed to be impounding only \$8.723 billion. 119 CONG. REC. S2012-16 (daily ed. Feb. 5, 1973) (reported by the OMB).

² 118 CONG. REC. 9356 (daily ed. Oct. 10, 1972) (remarks of Representative Boggs); Boggs, *Executive Impoundment of Congressionally Appropriated Funds*, 24 U. FLA. L. REV. 221, 225 (1972) (more funds are being impounded today than at any previous time).

³ President Jefferson was the first president to refuse to spend appropriated funds. For a period of time he refused to spend \$50,000 appropriated for gunboats. The Administration places heavy reliance on this act as a precedent for impounding. In fact, the money was spent the next year, after a study had been made of the best kind of gunboat to build. Cooper, *Analysis of Alleged 1803 Precedent For Impoundment Practice in Nixon Administration*, in *Joint Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 676-77 (1973) [hereinafter cited as *Joint Hearings*]. The next major act of impounding seems to have occurred in 1876, when President Grant refused to spend funds appropriated for river and harbor improvements. *Joint Hearings, supra*, at 835-36. When it cited this example, the Justice Department did not show to what extent the failure to spend was specifically authorized by the statute. The next major act of impounding apparently occurred in 1923; most impounding has come since 1940, and every president since Franklin Roosevelt has impounded to some extent. Fisher, *The Politics of Impounded Funds*, 15 AB. SCI. Q. 361 (1970); *Hearings, supra* note 1, at 181-89. The Nixon Administration concedes that its strongest argument for its current impounding practices is history. *Joint Hearings, supra*, at 842. Justice Frankfurter has said that when history is invoked to justify allegedly unconstitutional executive action, it must be "a systematic, unbroken,

over the power of the president to impound funds appropriated by Congress⁴ and have led to both legislation⁵ and lawsuits⁶ intended to force the president to spend the impounded funds. The first part of this comment examines the constitutional and statutory authority for impounding. It classifies statutory appropriations according to the degree of spending discretion that they allow, and concludes that in cases in which impounding exceeds the level of discretion that Congress intended to grant the president, it is contrary both to statute and to the constitutional limitations on the veto power. The second part of this comment concerns the role of the courts in resolving controversies arising from presidential impounding of domestic appropriations. It examines, in particular, the jurisdictional obstacles to judicial intervention and the substantive remedies available when impounding is found to exceed the president's constitutional and statutory authority.⁷

executive practice, long pursued to the knowledge of the Congress and never before questioned." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). It seems clear that the history of impounding fails to satisfy this standard. Letter from Professor Arthur Miller, reprinted in *Joint Hearings, supra*, at 749-50; Arnold & Porter Memorandum, reprinted in *Joint Hearings, supra*, at 612.

⁴ The most exhaustive coverage of the problem is contained in *Hearings, supra* note 1, and *Joint Hearings, supra* note 3. Previous articles on impounding are: Boggs, *supra* note 2; Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 STAN. L. REV. 1240 (1970); Davis, *Congressional Power to Require Defense Expenditures*, 33 FORD. L. REV. 39 (1964); FISHER, *Funds Impounded by the President: the Constitutional Issue*, 38 GEO. WASH. L. REV. 124 (1969); Goostree, *The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-in-Aid to Segregated Activities*, 11 AM. U.L. REV. 32 (1962); Kranz, *A 20th Century Emancipation Proclamation: Presidential Power Permits Withholding of Federal Funds from Segregated Institutions*, 11 AM. L. REV. 48 (1962); Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making* 43 N.C.L. REV. 502 (1965); Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons Systems Appropriations*, 57 GEO. L.J. 1159 (1969).

⁵ See, e.g., The Federal Impoundment and Information Act Title IV of Public Law 92-599 (1972); 119 CONG. REC. S624 (daily ed. Jan. 16, 1973) (S. 373); 119 CONG. REC. H1422 (daily ed. March 6, 1973) (H.R. 5193).

⁶ The many complaints as of February, 1973 are reported in *Joint Hearings, supra* note 3, at 908-1010. Five cases have thus far come to judgment: *New York v. Ruckelshaus*, 41 U.S.L.W. 2602, (D.D.C. May 8, 1973); *Local 2816, Office of Economic Opportunity Employees Union, AFGE, AFL-CIO v. Phillips*, Civil No. 73 C 500 (N.D. Ill. Apr. 11, 1973) (relief denied); *Local 2677, Am. Fed. of Gov't Employees v. Phillips*, 41 U.S.L.W. 2542 (D.D.C. Apr. 11, 1973) (relief granted); *State Highway Comm'n v. Volpe*, 347 F. Supp. 950 (W.D. Mo. 1972), *aff'd*, 41 U.S.L.W. 2539 (8th Cir. Apr. 2, 1973) (relief granted); *Housing Authority v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972) (relief denied).

⁷ This comment deals with impounding of funds for defense or foreign affairs only by implication. Although the courts have traditionally been reluctant to become involved in controversies involving defense and foreign affairs, it is by no means clear that the president is any more free to impound in this area than in domestic affairs. Davis, *supra* note 4; *Hearings, supra* note 1, at 144-45 (remarks of Professor Bickel). Defense

I. CONSTITUTIONAL AND STATUTORY AUTHORITY TO IMPOUND

A. Constitutional Authority

The only references in the Constitution to the power to spend are in article I, which defines the powers of Congress. Article I, section 9 provides that "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law."⁸ It has been argued that the words "shall be drawn" imply some executive power over the spending process.⁹ But this power is clearly limited; it must be exercised in accordance with "appropriations made by law." Under article I, section 8, Congress is given the power to "provide . . . for the general welfare" and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers."¹⁰ Taken together, these provisions imply that Congress has the power to specify the amount of and the conditions under which funds may be spent, and that the president's power over spending is no greater than his power over laws generally.¹¹

Under article I, section 7, when Congress passes a bill, it is submitted to the president for his signature.¹² The president may then veto the bill.¹³ If, however, Congress repasses the bill by a two-thirds vote, it becomes law and the president retains no further veto power. Impounding exceeds this veto power and is most clearly unconstitutional when the president impounds funds that Congress has directed him to spend in a bill that became law over his veto.¹⁴ But impounding also exceeds the constitutional limitations on the veto power when it involves funds that the president has been directed to spend in a bill that he has either signed into law or allowed to become law without his signature. In such cases, the president's refusal to spend is, in effect, a veto; but Congress has no opportunity to override the "veto" without passing separate legislation—an opportunity that the Constitution clearly requires.¹⁵

Article I, section 7 does not allow the president to veto only parts of a bill; he must veto or approve it as a whole. All attempts to give the spending will be mentioned in the comment, however, both as an example and because, previously, the important controversies have been in the defense area.

⁸ U.S. CONST. art. I, § 9.

⁹ E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 127-28 (4th ed. 1957); cf. *Hearings*, *supra* note 1, at 94 (remarks of Mr. Weinberger).

¹⁰ U.S. CONST. art. I, § 8.

¹¹ *Hearings*, *supra* note 1, at 143-44 (remarks of Professor Bickel). Corwin agrees that Congress can set conditions on spending. E. CORWIN, *supra* note 9, at 245-46.

¹² U.S. CONST. art. I, § 7.

¹³ If Congress is adjourned, the president need not formally veto the bill, but may use the "pocket veto." U.S. CONST. art. I, § 7.

¹⁴ Cf. Arnold & Porter Memorandum, *supra* note 3, at 605.

¹⁵ *Hearings*, *supra* note 1, at 3 (remarks of Senator Ervin); Church, *supra* note 4, at 1249-50; cf. D. CURRIE, *FEDERAL COURTS* 34 (1968).

president an item veto power have failed.¹⁶ The refusal to allow an item veto represents a fundamental decision as to the allocation of power between the legislative and executive branches of the government. Had the president been given the item veto, the power of Congress would have been seriously weakened. It would have forced individual congressmen to bargain with the president about items important only to their districts.¹⁷ Furthermore, the provisions of a bill frequently represent compromises that, taken together, secure the support of a majority, while any one of them, taken alone, might have been defeated. If the president were permitted an item veto, he would, therefore, be able to rewrite legislation in ways that Congress, had it been presented with them originally, would not have approved. When the president impounds only a part of an appropriation and not the whole, he is, in effect, exercising an item veto, a power that the Constitution clearly denies.

Despite this conflict between the constitutional provision governing the exercise of the veto and any supposed presidential authority to impound, proponents¹⁸ of the practice have argued that such authority is granted by article II, section 3, which requires the president to "take care that the laws shall be faithfully executed."¹⁹ This requirement cannot be read to augment the president's veto power. If the president could refuse to execute a valid law, he would, in effect, be exercising a veto-in-fact by nonenforcement.²⁰ The use of the "execute the laws" clause to justify impounding comes down to the argument that, since the implementation of laws is, under the clause, an executive responsibility, the president may enforce or not enforce laws as he sees fit.²¹

16 E. CORWIN, *supra* note 9, at 280; R. WALLACE, CONGRESSIONAL CONTROL OF FEDERAL SPENDING 141-42 (1960).

17 C. ROSSITER, THE AMERICAN PRESIDENCY 255 (2d ed. 1960). See also E. CORWIN, *supra* note 9, at 284, which states that giving the president an item veto would require a constitutional amendment. In view of this argument, the current House bill on impounding, H.R. 5193, may be unconstitutional since it provides that the president can impound appropriated funds unless Congress disapproves—a power that might well be interpreted as an attempt to give the president an item veto without obtaining a constitutional amendment.

18 Kranz, *supra* note 4, at 64-67; *Joint Hearings, supra* note 3, at 372 (remarks of Mr. Sneed).

19 U.S. CONST. art. II, § 3.

20 On the general unfairness of selective enforcement of laws, see K. DAVIS, DISCRETIONARY JUSTICE 169-70 (1970); Professor Davis recognizes that some degree of selectivity in enforcement may be necessary.

21 Deputy Attorney General Sneed has argued that the "execute the laws" clause means that the president must harmonize inconsistent statutes and that this requirement gives the President the power to impound. *Joint Hearings, supra* note 3, at 372-73 (remarks of Mr. Sneed). This argument would seem to turn on the powers granted by the statutes. For a discussion of these powers, see text and notes at notes 35-80 *infra*.

But the language of the clause indicates precisely the reverse of this argument: once congressional policy has become law, it is the president's duty to execute it whether he agrees with it or not. The Supreme Court has accepted this interpretation. In *Kendall v. United States ex rel. Stokes*,²² the Court said: "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."²³ It would be "an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them."²⁴

Proponents of impounding have also relied on article II, section 1, which declares that "[t]he executive power shall be vested in a President of the United States . . ."²⁵ They have argued that, on the basis of this provision, the president may take actions necessary to the successful performance of the duties of his office even though such actions are not specifically authorized by the Constitution.²⁶ Thus, it has been argued, the president has an "inherent" power to impound.²⁷

²² 37 U.S. (12 Pet.) 524 (1838).

²³ *Id.* at 613.

²⁴ Memorandum by former Assistant Attorney General (now Justice) Rehnquist to Hon. Edward L. Morgan, Dec. 1, 1969, on Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools, in 116 CONG. REC. 343, 345 (Jan. 3, 1970) [hereinafter cited as Rehnquist]. He further states that there is no constitutional authority for a broad power to impound. *Id.* at 344. See also Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1044, 1111-15 (1965), arguing that the executive cannot disobey statutory requirements: "It is a feat of splendid illogic to wring from a duty faithfully to execute the laws a power to defy them." *Id.* at 1114.

²⁵ U.S. CONST. art. II, § 1.

²⁶ *Joint Hearings*, *supra* note 3, at 836-37 (reply by the Department of Justice to questions posed by the committee). The Nixon Administration's arguments for a presidential power to impound are best set forth in *Joint Hearings*, *supra* note 3, 358-402 (remarks of Mr. Sneed), 833-44. Deputy Attorney General Sneed has gone even further, arguing that the "executive power" clause constitutes a positive grant of comprehensive powers. From this he concludes not only that the president may refrain from spending to prevent "ruinous" inflation, but that Congress has no power to interfere with these actions, since it has proved itself institutionally unable to check inflationary pressures. *Id.* at 838-40. If, however, the president has this power to deal with inflation, there is no logical reason why he does not also have power to deal with other vital problems such as crime or poverty without authority of statute. Furthermore, this theory seems based on the premise that inflation can be prevented only by reducing spending. But Congress apparently prefers an alternative means of dealing with inflation—the wage and price controls that it has empowered the president to impose. Economic Stabilization Act of 1970, 84 Stat. 799 (1970), *as amended*, 84 Stat. 1468 (1970), 85 Stat. 13 (1971), 85 Stat. 38 (1971), Amendments of 1971, 85 Stat. 743 (1971). Since Congress has selected one means of fighting inflation, it seems clear that, under the Supreme Court's decision in the *Steel Seizure Case*, see text and notes at notes 29-32, the president may not constitutionally choose another simply because he believes it preferable. The Constitution nowhere suggests that the president's powers somehow increase if he determines that Congress is

The leading case on inherent executive power²⁸ is the *Steel Seizure Case*,²⁹ in which the Supreme Court affirmed an order enjoining the secretary of commerce from seizing steel mills during a strike. The Court held that the secretary's action was beyond the constitutional power of the executive branch. Congress had regulated the seizure of private property in three different statutes, but the president had neither invoked these statutes nor acted in accordance with their requirements. Even narrowly read, the Court's decision stands for the proposition that the president may not undertake domestic regulation by unilateral action contrary to the policies adopted by Congress.³⁰ Furthermore, the Court said that even though the action had been prompted by a military emergency in time of war, the president could not invoke his powers as commander-in-chief to justify enlarging his control over purely internal affairs.³¹ And Justice Jackson, in a persuasive concurring opinion, argued that while in some areas "congressional inertia, indifference or quiescence may . . . enable, if not invite measures on independent presidential responsibility," when Congress has acted, the president's power is reduced: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can only rely on his own Constitutional power minus any Constitutional powers of Congress over the matter."³²

ineffectual or if the programs it has enacted are inadequate to the task at hand. Indeed, there is no constitutional basis for supposing that, if Congress had decided that a substantial rate of inflation was, on balance, a sign of a healthy economy, the president could take antiinflationary measures on his own motion because he believed Congress wrong. The Constitution does not say that the president's policy decisions must always prevail.

²⁷ Kranz, *supra* note 4, at 67-74; *Joint Hearings*, *supra* note 3, at 401 (remarks of Mr. Sneed), 836-37 (reply by the Department of Justice to questions posed by the committee).

²⁸ There are no cases dealing with a claimed inherent power to impound.

²⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The courts have only dealt with inherent powers of the president on a case by case basis. In some cases the courts have held that the executive must receive authority from Congress to act; in others they have held that some presidential power does exist independent of Congress. See cases collected in Miller, *supra* note 4, at 526.

³⁰ Although the Court was split, there seems to have been a consensus that when Congress has specifically rejected a course of action the president is not free to undertake it anyway, and that if the president could do this, he would be exercising legislative powers forbidden him by the separation of powers established by the Constitution. Goostree, *supra* note 4, at 40; *Joint Hearings*, *supra* note 3, at 401 (remarks of Professor Kurland); see Davis, *supra* note 4, at 48-51. *Contra*, Fisher, *supra* note 4, at 131. Even the dissenting justices seemed to agree that the president could not "defy Congress or act in any way inconsistent with the legislative will." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 703 (1952) (Vinson, C. J., dissenting).

³¹ *Id.* at 587.

³² *Id.* at 637. The president is most likely to have an inherent power to act in the

This reasoning is applicable to impounding. Under the Court's holding in the *Steel Seizure Case*, when Congress has enacted into law an appropriation statute declaring a clear policy that funds be spent, the president retains no power to act contrary to the statutory direction. If he fails to do as the statute directs,³³ he exceeds his inherent powers, just as he exceeds the constitutional limitations on the veto power.³⁴

B. Statutory Authority to Impound

Although the president has no power to impound when by doing so he acts contrary to statutory direction, Congress may—either in a general statute governing federal spending or in a specific appropriations measure—give the executive discretion not to spend.³⁵ In view, however, of the primary allocation of the spending power to Congress under article I, section 8,³⁶ and the fundamental allocation of power reflected in the limitations on the veto, the executive should not be able to justify impounding on the basis of a broad reading of discretionary language contained in appropriations measures. When the statutory language is unclear, its interpretation and the degree of discretion that it grants should be governed by Congress's purposes and policies.

1. *The Anti-deficiency Act*. In the statute regulating federal spend-

areas of defense and foreign affairs. But even if it is conceded that such power exists, it does not necessarily follow that the president has complete freedom to impound funds in those areas or to defy the wishes of Congress. See authorities cited note 7 *supra*; *Hearings, supra* note 1, at 144-45, 243-45 (remarks of Professor Bickel). For a study of impounding of funds during the wartime administration of President Franklin Roosevelt, see M. WILLIAMS, *THE IMPOUNDING OF FUNDS BY THE BUREAU OF THE BUDGET* (Inter-University Case Program No. 28) (1955). On wartime power to impound, see Church, *supra* note 4, at 1242.

33 K. DAVIS, 3 *ADMINISTRATIVE LAW TREATISE* 74 (1958): "Only the courts have the authority to take action which runs counter to the expressed will of the legislative body." On the degrees of permissible executive discretion, see K. DAVIS, *supra* note 20.

34 "Neither reason nor precedent" supports the proposition that "the President has a constitutional power to decline to spend appropriated funds." Rehnquist, *supra* note 24, at 344; see *Hearings, supra* note 1, at 2-3 (remarks of Senator Ervin); *id.* at 28 (remarks of Professor Bickel); *id.* at 153 (remarks of Professor Miller).

35 Congress has done this in the past. Fisher, *supra* note 4, at 124-25. Besides the Anti-deficiency Act, see text and notes at notes 37-54 *infra*, the only such statute still in force is Title VI of the Civil Rights Act of 1964. 42 U.S.C. 2000d-1 (1970). It allows the president to withhold funds from federally financed programs when there is discrimination by race, color, or national origin. This is clearly a narrow power and has never been claimed as the basis for a general power to impound. In fact, President Kennedy and others in his cabinet expressed the opinion that they would be unable to withhold funds from segregated programs, even though the segregation was unconstitutional, without legislation authorizing the withholding. Miller, *supra* note 4, at 533-34 n.109. For a discussion of the accuracy of this statement, see Goostree, *supra* note 4; Kranz, *supra* note 4.

36 See text at notes 10-11 *supra*.

ing generally—the Anti-deficiency Act³⁷ and its amendments³⁸—Congress has given the executive a limited authority to impound. The purposes that Congress intended this authority to serve and, therefore, the extent to which this authority justifies the present administration's actions can be understood only in light of a description of the procedures by which federal funds are normally expended.³⁹

Congress approves expenditures in two parts. First, it passes an authorization describing a specific program or project that may be funded. Second, it passes an appropriation permitting an agency or department to obligate the government to an expenditure, thus giving the agency "new obligational authority." If this authority is not used to obligate the government during the period specified in the appropriation, it usually lapses and is no longer available unless Congress re-appropriates it. If, however, the government has been obligated during the specified period, actual payment may be delayed for a time; for example, an agency has two years to make a payment authorized by a one-year appropriation.⁴⁰

After the appropriation is enacted, an appropriation warrant is drawn by the Treasury, countersigned by the General Accounting Office, and sent to the agency. The agency must then, within fifteen days, request an apportionment from the Office of Management and Budget (OMB), after which checks may be drawn and funds expended.⁴¹ Because of its responsibility for apportioning, the OMB plays a strategic role in the federal spending process. It apportions the appropriation, generally by quarters, over the life of the appropriation so as to restrict the rate at which the appropriation can be spent.⁴² Under the provisions

³⁷ 31 U.S.C. § 665 (1970).

³⁸ 64 Stat. 765 (1950); 34 Stat. 48 (1906).

³⁹ For certain appropriations Congress has, at times, required an even more complex process for expenditures. *See, e.g.*, the explanation of the Water Pollution Control Act in N.Y. Times, Nov. 29, 1972, at 1, col. 4. But the basic outline sketched below covers most federal spending. Because of the variety of authorization and appropriation statutes, spending can sometimes be stopped before the money is appropriated, as was done in the case of the Federal Water Pollution Control Act. *Id.* Sometimes it is impossible to stop spending even if there has been no appropriation because of so-called backdoor spending. *See* note 73 *infra*. In this comment, therefore, impounding means the prevention, by executive action and without congressional authorization, of spending by the federal government, whether or not funds have been appropriated.

⁴⁰ D. OTT & A. OTT, *FEDERAL BUDGET POLICY* 33-34 (rev. ed. 1969); *see* PRESIDENT'S COMMISSION ON BUDGET CONCEPTS, *STAFF PAPERS* 3-14 (1967).

⁴¹ D. OTT & A. OTT, *supra* note 40, at 39-40. *See generally* C. SCHULTZE, *THE POLITICS AND ECONOMIES OF PUBLIC SPENDING* (1968); A. SMITHIES, *THE BUDGETARY PROCESS IN THE UNITED STATES* (1955); R. WALLACE, *supra* note 16; excerpt from *BUDGET FOR FISCAL YEAR 1974*, *reprinted in Joint Hearings*, *supra* note 3, at 811.

⁴² 31 U.S.C. § 665(h) (1970).

of the Anti-deficiency Act new obligational authority granted by an appropriation statute may be used only after it has been apportioned, and an agency may not exceed its apportionment for any given period.⁴³

It is possible for the OMB to impound appropriated funds either by failing to apportion the appropriation altogether or by apportioning all or part of the appropriation to a reserve fund.⁴⁴ To the extent that the Anti-deficiency Act authorizes either of these actions, the OMB has authority to impound. The apportionment provisions of the Act indicate, however, that these actions may be taken only to achieve certain purposes. When an appropriation is to be spent within a fixed period of time, subsection (c)(1) of the Act⁴⁵ requires that it be apportioned in order to prevent any need for a supplemental appropriation. Nonfixed period appropriations and other authorizations must be apportioned in the most "effective" and "economical" way.⁴⁶ Subsection (c)(2) permits the establishment of reserves only to meet contingencies or to effect savings made possible by "changes in requirements, greater efficiency of operations, or other developments subsequent to the date" of the appropriation. Reserves may be rescinded when it is determined that they "will not be required to carry out the purposes of the appropriation concerned."⁴⁷

The provisions of the Act do not, on their face, give the executive unlimited discretion to apportion appropriated funds to reserves.⁴⁸ Although the Act does not define the "subsequent developments" that justify the establishment of reserves, there is no indication that the term was intended to include executive disagreement with a spending policy decision made by Congress.⁴⁹ The House report on the 1951 Omnibus Appropriations Act stated that the purpose of these provisions was to allow for economy cuts; the executive was to render "all necessary service" for the lowest possible price.⁵⁰ The kind of economy cut

⁴³ *Id.*

⁴⁴ A reserve fund of monies which has not been apportioned for obligation may be lawfully created under the Anti-deficiency Act, 31 U.S.C. § 665 (1970), or may be authorized by another statute. See *Joint Hearings*, *supra* note 3, at 271 (remarks of Mr. Ash).

⁴⁵ 31 U.S.C. § 665(c)(1) (1970).

⁴⁶ *Id.*

⁴⁷ 31 U.S.C. § 665(c)(2) (1970). For a general discussion of the history of the Anti-deficiency Act, see M. RAMSEY, *IMPOUNDMENT BY THE EXECUTIVE DEPARTMENT OF FUNDS WHICH CONGRESS HAS AUTHORIZED IT TO SPEND OR OBLIGATE* 1-13 (Congressional Research Service 1968).

⁴⁸ *Id.* at 12. The history of this legislation also supports this view. See excerpts from the forthcoming book, L. FISHER, *PRESIDENTIAL SPENDING POWER*, quoted in *Joint Hearings*, *supra* note 3, at 396-99.

⁴⁹ M. RAMSEY, *supra* note 47, at 13.

⁵⁰ H.R. REP. NO. 1797, 81st Cong., 2d Sess. 9 (1950).

authorized by the Act can be illustrated by the following example. If \$1 million had been appropriated to exterminate the Mediterranean fruit fly and if this goal had been accomplished for only \$500,000, the OMB would be justified in placing in reserve the remaining \$500,000.⁵¹ This action would be unobjectionable because the legislative goal would already have been accomplished at a cost less than had originally been anticipated.⁵² If on the other hand, the OMB placed the entire \$1 million into reserve so that the program could not be carried out, its action would not be authorized by the Act. The House committee that reported the Omnibus Appropriations Act said that: "It is perfectly justifiable and proper for all possible economies to be effected and savings to be made, but there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds."⁵³

The OMB might argue that since the fruit fly cannot be exterminated by the expenditure of \$1 million or even \$10 million, its refusal to apportion or its apportionment of the appropriation to reserves was an economy measure; the money would be wasted if spent. The language and legislative history of the Anti-deficiency Act indicate, however, that the OMB is not authorized to make this sort of determination. It may create reserves only when the congressional purpose has already been accomplished at a cost less than that which Congress had anticipated. If the OMB were permitted to create reserves on the basis of program effectiveness, it would, in effect, be substituting its judgment as to spending policy for a judgment that Congress has already made in enacting the appropriation.

The Anti-deficiency Act cannot, therefore, be taken as granting a general power to impound.⁵⁴ On the contrary, it limits the power to

⁵¹ See M. WILLIAMS, *supra* note 32, at 6.

⁵² See Church, *supra* note 4, at 1245.

⁵³ H.R. REP. NO. 1791, 81st Cong., 2d Sess. 311 (1950).

⁵⁴ Boggs, *supra* note 2, at 224; see Stassen, *supra* note 4, at 1179. Some statutes can lead to a temporary power to impound. For example, the executive may not exceed the debt limitation, 31 U.S.C. § 757b (1970), or any congressionally imposed spending ceiling. As these limits are reached, the executive may be forced to slow down the rate of spending or to stop it altogether. Nevertheless, once the debt ceiling or spending limit is raised, no further authority to impound would exist. The Employment Act of 1946, 60 Stat. 23 (1946) has been cited as allowing impounding to improve the national economy. *Hearings*, *supra* note 1, at 96, 156 (remarks of Mr. Weinberger). The Act, however, does not grant any power to the executive with regard to spending. Instead, it speaks of practicable means to reach certain goals "consistent with . . . essential considerations of national policy." Since appropriations statutes are themselves expressions of national policy, the Employment Act gives the executive no authority to ignore them, and clearly does not grant a general impounding power. *Id.* at 153, 156 (remarks of Professor Miller), 161 (remarks of Professor Cooper); Miller, *The New Constitutional Crisis*, *PROGRESSIVE MAGAZINE*, Mar., 1973, reprinted in *Joint Hearings*, *supra* note 3, at 803. Nor does the requirement of the Federal Impoundment and Information Act, Title IV of Public Law 92-599

impound to the achievement of efficiency and economy in carrying out the spending programs Congress has authorized, without in any way impairing the achievement of the programs' goals. Indeed, the Supreme Court's decision in the *Steel Seizure Case*⁵⁵ suggests that, since Congress has defined the purposes for which impounding is permissible, any impounding not authorized by the Act or by a specific appropriations statute is illegal.⁵⁶

2. *Appropriations Statutes.* The Anti-deficiency Act gives the executive discretion not to spend funds when the objective of an appropriation can be achieved for less money than Congress has authorized. At the same time, the appropriations statutes themselves grant varying degrees of discretionary authority to withhold funds altogether. Although such statutes differ widely, it is possible to identify seven general categories of appropriations measures, distinguished in terms of the discretion they grant to the executive either in the statutory language itself or in the nature of the program for which funds are appropriated.

a. *Private Bills.* Private bills name specific persons as the recipients of specific sums of money. In several cases, the Supreme Court has held that when Congress has passed a private bill, Treasury officials may not refuse to make payments.⁵⁷ Programs like veterans benefits and social security are closely analogous to private bills, except that they grant specific sums to persons described by certain characteristics rather than by name. Despite this distinction, it seems clear that payments under such programs are also nondiscretionary.⁵⁸

b. *Mandated Appropriations.* These appropriations specify that the executive "shall" or "must" spend appropriated funds or that it is "directed" or "required" to do so. This category also includes statutes that contain specific spending formulas making the assignment of funds to recipients merely a bookkeeping act. For example, a bill recommended in 1962 by the House Armed Services Committee would have

(1972) that the OMB report on the amount of impounded funds evidence congressional approval of impounding. On the contrary, it seems clear that, as its title indicates, the Act was simply an attempt to get accurate information concerning the executive's impounding activities—an attempt that has not proved altogether successful. See note 1 *supra*.

⁵⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁵⁶ *Hearings*, *supra* note 1, at 71-73 (remarks of Professor Bickel).

⁵⁷ *United States v. Louisville*, 169 U.S. 249 (1898); *United States v. Price*, 116 U.S. 43 (1885); *United States v. Jordan*, 113 U.S. 418 (1885).

⁵⁸ See *Miguel v. McCarl*, 291 U.S. 442 (1934). In this case a former Philippine scout for the army had been denied pension benefits by the comptroller general and various army officers. The Supreme Court held that since the man had been a member of the army, he was covered by the army pension statute and his benefits could not be denied him.

authorized an appropriation for a B-70 bomber and "directed" the secretary of the Air Force "to utilize [the] authorization in an amount not less than \$491,000,000."⁵⁹ Similarly, Public Law 81-874⁶⁰ requires the commissioner of education to establish "entitlements" for local school districts based on a specified formula; once the entitlements are established, any appropriation must be spent in its entirety.⁶¹

The Supreme Court's decision in *Kendall v. United States ex rel. Stokes*⁶² makes clear that the executive may not refuse to spend mandated appropriations. In *Kendall*, Congress had directed the postmaster general to credit a postal contractor with a sum of money for services rendered in an amount to be determined by the solicitor of the Treasury. The Court ruled that the postmaster had no authority to refuse payment since Congress had given him no discretion or control over the determination of the solicitor. Congress can, according to the Court, "impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."⁶³ Narrowly read, *Kendall* holds that the executive must spend funds if an executive official need only make a bookkeeping entry to comply with the statutory direction of Congress.⁶⁴ But the principal case is much broader; if a statute contains a specific direction to spend or a spending formula or device that, in effect, reduces spending to a bookkeeping act, the executive has no authority to refuse to comply.⁶⁵

c. *Conditional Appropriations.* Some appropriations require the beneficiary to take certain actions as a condition to receiving federal funds. For example, matching grant programs typically promise federal funds to states and municipalities if they undertake certain kinds of programs and public works.⁶⁶

⁵⁹ H.R. REP. No. 1406, 87th Cong., 2d Sess. 1 (1962).

⁶⁰ 20 U.S.C. 236 *et seq.* (1970).

⁶¹ Rehnquist, *supra* note 24, at 343-44.

⁶² 37 U.S. (12 Pet.) 524 (1838).

⁶³ *Id.* at 610.

⁶⁴ *Id.*

⁶⁵ Rehnquist, *supra* note 24, at 344-45; *Hearings, supra* note 1, at 28, 234 (remarks of Professor Bickel and Justice Rehnquist); *see id.* at 137, 143 (remarks of Mr. Weinberger).

⁶⁶ *E.g.*, "For matching grants to States for training and related activities, for expenses of providing technical assistance to State and local governmental or public bodies . . . , and for fellowships for city planning and urban studies as authorized by Title VIII of the Housing Act of 1964, as amended (20 U.S.C. 801-805; 811) \$3,500,000." Department of Housing and Urban Development and Other Agencies—Appropriation, 86 Stat. 540 (1972).

Once the beneficiary of a conditional appropriation has taken the required action, the appropriation should be considered mandatory. When the beneficiary has let a contract in reliance on the promise of funding in an appropriation measure, it can, of course, argue promissory estoppel. But in other cases as well, the appropriation can be considered a kind of contract between Congress, acting for the federal government, and the recipient who has acted in reliance. Once the conditions defined by Congress have been met, the executive need only send out checks for the percentage of the cost authorized by statute.⁶⁷ The executive has no authority to impose additional conditions on such grants or to refuse funding altogether.

d. *Contract Appropriations.* Some appropriations statutes require the letting of contracts in support of federal programs and projects—for example, building a dam or dredging a harbor. If Congress appropriates money to build a dam and specifies the timing and nature of its construction, the executive's discretionary power over the expenditure is correspondingly limited. In the absence of such statutory directions, however, the executive may build the dam as it sees fit. It is, of course, entirely permissible for the executive to complete the project in the most efficient, economical way. Thus, if the project can be completed for a sum less than that appropriated, the surplus may, under the Anti-deficiency Act, be impounded.⁶⁸ But it may often be difficult to determine whether the executive has exercised its discretion in a permissible fashion. The executive may, for example, refuse to let contracts until the appropriation has expired, delay bidding, change contract conditions or engage in other tactics that delay or prevent completion of the project.⁶⁹ Despite the discretion they allow, contract appropriations do not give the executive authority to frustrate Congress's purpose in authorizing the expenditure.

e. *No-year Appropriations.* A no-year appropriation makes funds available for a designated purpose "until expended," rather than requiring that the funds be spent within a specific fiscal year. The Anti-deficiency Act requires that no-year appropriations be apportioned in the most effective and economical way.⁷⁰ While the executive has discretion over the timing of such expenditures, no-year appropriations do not allow the executive to decline altogether to spend the funds.

⁶⁷ *E.g., id.*

⁶⁸ 31 U.S.C. § 665 (1970).

⁶⁹ There is some indication that the Nixon Administration has used this tactic. 118 CONG. REC. 9369 (daily ed. Oct. 10, 1972) (remarks of Representative Vanik).

⁷⁰ 31 U.S.C. § 665(c)(1) (1970).

f. *Presidentially Controlled Appropriations.* Some appropriation statutes make funds available to support a project if it is feasible or desirable, or if appropriate plans are presented.⁷¹ Since terms like these allow the executive to decide whether it is necessary or appropriate to spend funds, it seems clear that the executive may refuse to spend except, perhaps, when its refusal amounts to flagrant abuse of the broad discretion Congress has granted.

g. *Other Appropriations.* Appropriations that do not clearly fall into one of the categories described above include statutes providing that funds are "available" or "may" be spent for particular programs.⁷² The difficulty in determining the executive's obligations under appropriations statutes in this residual category exists, although to a lesser extent, with respect to several of the appropriations categories.⁷³ No one disputes that funds appropriated by private bills or mandated appropriations must be spent or that presidentially controlled appropriations need not be spent. The current controversy over impounding concerns primarily the other categories—appropriations that define with less clarity the executive's power to withhold funds. It has been claimed that since many appropriations are, by their nature, permissive and constitute only a ceiling on expenditures, the executive may spend or not spend as it pleases.⁷⁴ The cases generally cited to support this

⁷¹ *E.g.*, "For an amount to be used primarily for the hire of additional food inspectors together with such drug inspectors and related support staff as may be necessary. . . ." Second Supplemental Appropriation Act, 86 Stat. 163 (1972). "For necessary expenses of the Office of the Secretary of Transportation, including not to exceed \$27,000 for allocation within the Department for official reception and representation expenses as the Secretary may determine." Department of Transportation and Related Agencies Appropriation Act, 1973, 86 Stat. 580 (1972).

⁷² *E.g.*, the secretary of agriculture "is authorized to" subsidize dams, 16 U.S.C. §§ 1003, 1006(a); "The 1972 program of soil-building and soil-and-water-conserving practices . . . may be carried out through June 30, 1973" Supplemental Appropriations Act, 1973, 86 Stat. 1498 (1972).

⁷³ This discussion of discretion to spend appropriations also applies to so-called back-door financing. This consists, first, of "contract authorizations," whereby substantive legislation authorizes agencies to enter into contracts before there are appropriations. Once the contracts are signed, of course, the money must be appropriated to pay a legal debt. Second, there are "authorizations to spend debt receipts," which allow agencies to borrow, obligate, and spend the proceeds. PRESIDENT'S COMMISSION ON BUDGET CONCEPTS, *supra* note 40, at 8. Since any such spending device must fit into one of the seven categories, they have not been dealt with separately. Any one appropriation may, of course, have elements of each category in different sections of the bill. In addition, the examples of wording given in the text are intended only to indicate the effect of the wording in an appropriation that will place it in a particular category. No particular wording is required; instead the total effect of the language in both the authorization and appropriation must be considered before an appropriation can be categorized.

⁷⁴ This position was taken by the Johnson Administration. Letter from Acting Attorney General Ramsey Clark to the Secretary of Transportation, *reprinted in Hearings, supra*

proposition in fact fail to do so.⁷⁵ The better position, in light of the constitutional limitations on the veto power and the "execute the laws" clause, is that taken by the federal district court in *Spaulding v. Douglas Aircraft Co.*,⁷⁶ which, in holding that Congress could constitutionally require that a renegotiation clause be made part of all government contracts, indicated that the executive must attempt to fulfill the purposes of an appropriation, as well as to comply with its specific terms and conditions.⁷⁷

Even though Congress can and does, on occasion, make certain appropriations mandatory, the fact that it has failed to do so in a particular case should not automatically be taken to mean that it intended to grant the executive unlimited discretion to determine when or whether to spend.⁷⁸ Mandatory appropriations are possible only in exceptional circumstances; they indicate that Congress has been able to calculate the precise amount of expenditure necessary to achieve its purpose. In most cases, however, Congress may feel able only to define the objective it wants accomplished and then to supply a ceiling figure, allowing the executive to spend something less if the lesser amount is sufficient. Thus, the permissive language in an appropriation measure may grant to the executive only operational discretion—authority to time the expenditure, to place conditions on its use, and, under the Anti-deficiency Act,⁷⁹ to achieve the purpose of the appropriation in the most efficient and economical way. In such cases, the permissive language does not mean that the president is authorized to determine whether the congressional purpose is wise or unwise or whether that

note 1, at 61-65; *id.* at 94 (remarks of Mr. Weinberger). See also *id.* at 98, where Mr. Weinberger appears to take a more moderate position. The position has been supported by quoting out of context the House Report on the amendments to the Anti-deficiency Act. Letter from Acting Attorney General Ramsey Clark to Secretary of Transportation, reprinted in *id.* at 63; see Ramsey, *supra* note 47, at 15.

⁷⁵ M. RAMSEY, *supra* note 47, at 29-32; Stassen, *supra* note 4, at 1181 n.117; *Hearings, supra* note 1, at 36-38, 53-55 (remarks of Representative Bennett). The cases generally cited are: *McKay v. Central Elec. Power Cooperative*, 223 F.2d 623, 625 (D.C. Cir. 1955); *Lovett v. United States*, 104 Ct. Cl. 557, 583 (1945), *aff'd on other grounds*, 328 U.S. 303 (1946); *Compagna v. United States*, 26 Ct. Cl. 316, 317 (1891); *Hukill v. United States*, 16 Ct. Cl. 562, 565 (1880).

⁷⁶ 60 F. Supp. 985 (S.D. Cal. 1945).

⁷⁷ *Id.* at 988. See also *Rhodes v. Iowa*, 170 U.S. 412, 422 (1898); *Consumers Union, Inc. v. Rogers*, 5 TRADE REG. REP. (1973 Trade Cas.) ¶ 74,301, at 93,401 (D.D.C. Jan. 8, 1973); Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROB. 135, 172 (1972): "The expenditure process is one in which administrators must enjoy substantial discretion in exercising judgment and in taking responsibility for those actions, but those actions ought to be directed toward executing Congressional, not administrative, policy."

⁷⁸ On discretion to spend, see text and notes at notes 57-72.

⁷⁹ 31 U.S.C. § 665 (1970).

purpose should be subordinated to a goal he believes more important—for example, fighting inflation. Policy disagreements of this sort between the president and Congress must be resolved within the constitutional structure of the veto power.

The degree and type of discretion granted the executive must be determined, therefore, by an examination of the language and purpose of each statute. In some few cases, the permissive language of an appropriation measure may mean that Congress was prepared to defer to the president's subsequent judgment as to the wisdom of a particular expenditure—that it intended to give him, in effect, a statutory veto power independent of that granted in the Constitution. In view, however, of the constitutional mandate that the president not have an item veto, that he execute the laws, and that Congress control the spending power, Congress should be deemed to have granted such broad discretion only when, as in presidentially controlled appropriations, it has clearly indicated its intent to do so.⁸⁰ In all other cases, once the purpose of Congress has been expressed in law, the president should be considered obliged to achieve that purpose in the best way and to the fullest extent possible. Impounding that operates to defeat the congressional purpose should be held contrary to statute and constitutionally impermissible.

II. JUDICIAL REVIEW OF IMPOUNDING

A. Jurisdictional Questions

The jurisdiction of the federal courts to intervene in the impounding controversy depends on whether a case challenging the legality of impounding can be brought into the court as a "case or controversy" within the meaning of article III, section 2 of the Constitution.⁸¹ In particular, the case must fall within the limits on justiciability defined by the political question doctrine and standing requirements, as well as the limits on judicial power inherent in the sovereign immunity defense.

1. *Political Question Doctrine.* Only two of the key elements of the political question doctrine identified by the Supreme Court in *Baker v. Carr*⁸² arguably militate against the justiciability of impound-

⁸⁰ See *Hearings*, *supra* note 1, at 272 (remarks of Professor Miller) (Congress does not have to say that it wants a specific appropriation spent; the mere act of passage indicates that). *Contra*, *Hearings*, at 28, 38 (remarks of Professor Bickel) (Congress must say that it means that an appropriation be spent).

⁸¹ U.S. CONST. art. III, § 2.

⁸² 369 U.S. 186, 217 (1962).

ing cases.⁸³ First, impounding would be a nonjusticiable political question if it could be shown that there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department."⁸⁴ The Supreme Court's decision in *Powell v. McCormack*⁸⁵ has made the force of this limitation somewhat unclear. In *Powell*, the Court passed upon the merits of a decision by the House of Representatives to discipline a congressman, even though the Constitution specifies that each house of Congress has authority to judge the qualifications of its members. Quoting from *Baker*,⁸⁶ the Court said that: "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."⁸⁷ Since the Court found, in *Powell*, that the action of the House of Representatives was beyond its constitutional authority, no "textually demonstrable commitment" barred adjudication. Similarly, in the impounding case, the complaint is precisely that the executive has no constitutional power to withhold funds that Congress has appropriated. If, as argued above, this contention is correct, then, as in *Powell*, the "'textual commitment' formulation of the political question doctrine does not bar federal courts from adjudicating petitioner's claims."⁸⁸

It may be argued, however, that if it is true that control over spending is lodged by the Constitution in Congress and that impounding exceeds the president's authority, then any remedy for impounding should come, not from the courts, but from Congress, the coordinate branch to which the power to spend is clearly committed. If this argument were correct, however, it would mean that any violation by the executive of its statutory duty, any extraconstitutional exercise of authority, is a political question, since Congress could, theo-

⁸³ The other elements, on their face, do not apply. Impounding cases do not involve "an initial policy determination of the kind clearly for nonjudicial discretion," since the central issue they concern is precisely whether Congress has made a "policy determination" by which the executive has failed to abide. A decision on the question of impounding would not "express a lack of the respect due a coordinate branch" any more than does declaring a law unconstitutional. There would be no "embarrassment from multifarious pronouncements by various departments on one question." Nor is there an "unusual need for unquestioning adherence to a political decision already made." See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

⁸⁴ *Id.*

⁸⁵ 395 U.S. 486 (1969).

⁸⁶ 369 U.S. at 211.

⁸⁷ 395 U.S. at 521.

⁸⁸ *Id.* at 548.

retically at least, take corrective action. The Supreme Court has by implication rejected such a contention—as to executive action in general in the *Steel Seizure Case*⁸⁹ and as to impounding in particular in *Kendall v. Stokes*.⁹⁰

Furthermore, the weapons Congress has available to force the executive to spend impounded funds are unsatisfactory.⁹¹ An attempt by Congress to impeach the president might create a constitutional crisis more grave than the present one.⁹² If Congress cut off funds for the operation of the executive branch, government services would be impaired and the national interest injured. Congress could refuse to enact programs devised by the president until the impounded funds were spent, but such action might result in the delay of urgently needed programs. Finally, Congress could attempt to pass a bill specifically commanding the expenditure of already appropriated funds. But such a bill would, of course, be subject to veto, and, therefore, a two-thirds vote of each house would be necessary to compel executive compliance with an appropriation previously enacted into law. Nor is it desirable that all appropriations be made mandatory; presidential discretion to time spending, to impose conditions on spending, and to achieve Congress's purpose for something less than the full amount appropriated may be essential to the successful operation of many congressional programs. In light of these considerations and since the impounding controversy centers on the meaning of the Constitution and federal statutes, the courts should not be deemed barred from performing their traditional duty—interpreting and enforcing the law.⁹³

In *Baker*, the Court also said that a case presents a nonjusticiable political question if there is a "lack of judicially discoverable or manageable standards for resolving [the issue]."⁹⁴ As indicated by *Baker* itself, the decision as to whether judicially manageable standards exist may depend in large part on the Court's view of the merits of the case.⁹⁵ Once again, the question presented by impounding cases seems similar to the question that the Court confronted in *Powell*, in which the Court said that: "Petitioners seek a determination that the House was without power to exclude Powell from the 90th Congress, which we

⁸⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see text at notes 28–32.

⁹⁰ 37 U.S. (12 Pet.) 524 (1838); see text and notes at notes 22–24.

⁹¹ Statement of Senator Muskie, in N.Y. Times, Feb. 1, 1973, at 19, col. 1.

⁹² On the undesirability of resorting to impeachment, see R. BERGER, *IMPEACHMENT* 299–300 (1973).

⁹³ *Baker v. Carr*, 369 U.S. 186, 211 (1962) (the Court is the ultimate interpreter of the Constitution); see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁹⁴ 369 U.S. 186, 217 (1962).

⁹⁵ See D. CURRIE, *supra* note 15, at 85.

have seen, requires an interpretation of the Constitution"—a determination for which clearly there are "judicially . . . manageable standards."⁹⁶

As in *Powell*, there is no lack of standards to decide impounding cases.⁹⁷ It has been suggested that the courts are incapable of reviewing the executive's decisions on technical points such as the proper timing of expenditures or the state of necessary research.⁹⁸ But this argument misconceives the nature of the issue that impounding cases present. The issue is not whether the executive's technical decisions are correct, but whether an appropriations statute grants the executive discretion to make those decisions, or whether its discretion has been abused. In short, the courts must decide whether the Constitution or a particular statute empowers the executive to impound appropriated funds. This is precisely the sort of determination that the Supreme Court made in the *Kendall*⁹⁹ and *Miguel*¹⁰⁰ cases. When the language of an appropriation is not itself dispositive of the issue, the court may examine the effect of impounding on the purpose that Congress sought to achieve. When the executive's action clearly thwarts the congressional purpose, the Constitution provides a clear basis for resolving the controversy.¹⁰¹ The differences among the appropriations in the seven categories described above are substantial, and, in many cases, provide a guide for decision. While close cases may turn on a reading of legislative history and may often be difficult of resolution, statutory interpretation and the fathoming of congressional intent that it often entails is an essential and traditional judicial function.

2. *Standing*. It has frequently been assumed that the Supreme Court's decisions in *Massachusetts v. Mellon*¹⁰² and *Frothingham v.*

⁹⁶ 395 U.S. 486, 549 (1969).

⁹⁷ *Contra* Housing Authority v. HUD, 340 F. Supp. 654 (N.D. Cal. 1972), in which the court seemed to hold that it had no jurisdiction because of a lack of judicially manageable standards to decide if the defendant had exceeded its authorized discretion. In attempting to determine whether the suit was allowable under the exception to the sovereign immunity doctrine, see text and note at note 118 *infra*, the court said, first, that the facts failed to support the allegations that the case came within the exception: it then stated that it was impossible to determine whether the defendant's actions were unconstitutional because there did not exist any standards to decide the question. The Supreme Court has indicated, however, that standards for determining whether executive action involves abuse of discretion can be derived from the statutes under the authority of which and within the restrictions of which the action was taken. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

⁹⁸ *Joint Hearings*, *supra* note 3, at 837 (answers supplied by the Department of Justice to questions submitted by the subcommittee).

⁹⁹ 37 U.S. (12 Pet.) 524 (1838).

¹⁰⁰ *Miguel v. McCarl*, 291 U.S. 442 (1934).

¹⁰¹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see text and notes at notes 28-32.

¹⁰² 262 U.S. 447 (1923).

*Mellon*¹⁰³ prevent plaintiffs from having standing to seek judicial review of executive decisions not to spend.¹⁰⁴ In *Massachusetts*, a state was denied standing to challenge, on behalf of its citizens, the constitutionality of a federal spending program.¹⁰⁵ In *Frothingham*, a taxpayer who sought to challenge the same federal program was denied standing because, in part, she had failed to allege a cognizable injury to herself. The Court said that: "[T]he party who invokes the power [of the courts] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."¹⁰⁶

The position of intended beneficiaries of appropriations statutes, whether state or local government agencies or private citizens, who seek to free funds promised them by Congress differs greatly from that of either the state in *Massachusetts* or the taxpayer in *Frothingham*. Their injury is direct and manifest, even though it may be shared by other, and often many, intended beneficiaries. In most cases at least, the beneficiaries of appropriations seem to meet both tests of standing defined by the Supreme Court in *Barlow*¹⁰⁷ and *Data Processing*¹⁰⁸ for plaintiffs seeking review of administrative action: they allege both injury in fact and that the "interest sought to be protected . . . is arguably within the zone of interests to be protected by the statute or constitutional guarantee in question."¹⁰⁹

The beneficiaries of appropriations statutes fall in four general categories, each of which raises somewhat different standing problems. First, *Kendall v. Stokes*¹¹⁰ establishes that persons whom an appropriation specifically names as its beneficiaries have standing to bring an action for payment. Second, some appropriations identify only a class of intended beneficiaries, for example, all hospitals, all scholarship recipients, or all impacted school districts. A recent case has indicated that plaintiffs have standing so long as they are among the beneficiaries ascertainable under the statute.¹¹¹ A more difficult problem is pre-

¹⁰³ *Id.*

¹⁰⁴ *Goostree, supra* note 4, at 36 n.19; *Kranz, supra* note 4, at 76; *Miller, supra* note 4, at 511 n.37.

¹⁰⁵ The state's action in its own behalf was held to raise a nonjusticiable political question. 262 U.S. 447, 483 (1923).

¹⁰⁶ *Id.* at 488.

¹⁰⁷ *Barlow v. Collins*, 397 U.S. 159 (1970).

¹⁰⁸ *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

¹⁰⁹ *Id.* at 153.

¹¹⁰ 37 U.S. (12 Pet.) 524 (1838).

¹¹¹ *State Highway Comm'n v. Volpe*, 347 F. Supp. 950 (W.D. Mo. 1972), *aff'd*, 41 U.S.L.W. 2539 (8th Cir. Apr. 2, 1973).

sented, however, when the party bringing an action is only a potential recipient. For example, a person who may or may not be eligible to receive federal scholarship aid may not have standing to sue to free impounded scholarship funds since he is not yet a beneficiary. Such persons would have to bring a class action, arguing that, while all of them may not qualify for aid, some of them will and that, therefore, they have as a class been deprived of money due them under the statute.¹¹² Third, some plaintiffs in impounding cases—particularly state and local government agencies—would seem clearly to have standing if they could show that they acted in reliance on a statutory promise of funds—for example, that they let contracts relying on the federal government to pay 50 percent of the cost—and that the statute was designed to aid them in carrying out the project.

The only serious standing problem is posed by plaintiffs who fall within the fourth category: persons who are intended or potential beneficiaries of an appropriation but who are not themselves the recipients of the funds—for example, inhabitants of a flood plain who may be injured if a dam for which funds have been appropriated is not built. Such persons would have to sue as a class, since the particular individuals who might be harmed would not be indentifiable. The class as a whole, however, should have standing since its representatives would be able to allege a probability of harm to at least some of its members sufficient to satisfy the injury requirement defined by the Supreme Court in *Sierra Club v. Morton*.¹¹³ Problems of delineation of the class would, of course, have to be dealt with on a case by case basis. But, in view of the apparent willingness of the courts to hear actions by public interest groups that can show only slight injury to its members,¹¹⁴ standing should be allowed as well to a class able to show that its members are the intended beneficiaries of appropriations statutes.

3. *Sovereign Immunity.* The doctrine of sovereign immunity arguably presents a serious bar to suits to free impounded funds, particularly if some judicial formulations of the doctrine are read literally. Many commentators have, however, read the precedents as significantly limiting the sovereign immunity doctrine.¹¹⁵ Moreover, because the scope of the doctrine remains unclear, the courts are to a great extent

¹¹² See *Barlow v. Collins*, 397 U.S. 159 (1970).

¹¹³ 405 U.S. 727 (1972).

¹¹⁴ *SCRAP v. United States*, 346 F. Supp. 189 (D.D.C.) (three judge court), *prob. juris. noted*, 409 U.S. 1073, (1972); cf. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

¹¹⁵ Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); cf. K. DAVIS, *supra* note 33, at 27.01 (1958).

free to decide cases according to their own views of basic policy objectives.¹¹⁶

In *Larson v. Domestic & Foreign Corp.*,¹¹⁷ the Supreme Court ruled that an injunction may be sought against a government officer only if the plaintiff argues either that the officer is acting unconstitutionally or that he is acting beyond the scope of his statutory authority.¹¹⁸ The *Larson* doctrine clearly does not bar an impounding suit, since such a suit would be based on the theory that the act of impounding is contrary to constitutional and statutory limitations on the executive's power. It has been said, however, that if a suit seeks a judgment that "would expend itself on the public Treasury," it is a suit against the sovereign and the courts have no authority to entertain it.¹¹⁹ But this doctrine has not prevented the courts from ordering the payment of claims based upon acts of Congress, even without an explicit waiver of sovereign immunity.¹²⁰ As one court has said, since the Constitution vests the power over the government's property in Congress, any action by Congress to expend that property amounts, pro tanto, to a waiver of sovereign immunity that subsequent administrative actions contrary to congressional policy cannot affect.¹²¹ In other words, if a plaintiff claims funds that Congress has, by statute, directed him to have, the executive may not invoke sovereign immunity to prevent the will of the sovereign from being carried out.

Even if an inference of waiver could not be drawn from appropriations statutes themselves, it seems clear that impounding suits should not be barred by the sovereign immunity doctrine. Congress has specifically waived immunity for any suit cognizable in the Court of Claims,¹²² which has held that it can pass on any claim based on a specific right so long as Congress has not expressly denied judicial

¹¹⁶ *Malone v. Bowdoin*, 369 U.S. 643, 650 (1962) (Douglas, J., dissenting). Other authorities seem to agree. See authorities cited note 115 *supra*.

¹¹⁷ 337 U.S. 682 (1949).

¹¹⁸ *Id.* at 689-90.

¹¹⁹ *Land v. Dollar*, 330 U.S. 731, 738 (1947).

¹²⁰ *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045, 1052 (D.C. Cir. 1971): "There is nothing new about judicial entertainment of suits which charge that federal officials are acting outside of, or in conflict with, the responsibilities laid upon them by Congress or the Constitution." See, e.g., *Miguel v. McCarl*, 291 U.S. 442 (1934); *Roberts v. Valentine*, 176 U.S. 221 (1900); *United States v. Jordan*, 113 U.S. 418 (1885); *Kendall v. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970); *Clackamas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955).

¹²¹ *Clackamas County v. McKay*, 219 F.2d 479, 493 (D.C. Cir. 1954); see *New York v. Ruckelshaus*, 41 U.S.L.W. 2602 (D.D.C. May 8, 1973); *Local 2677, Am. Fed. of Gov't Employees v. Phillips*, 41 U.S.L.W. 2542 (D.D.C. Apr. 11, 1973).

¹²² *Soriano v. United States*, 352 U.S. 270, 273 (1957).

review.¹²³ Furthermore, it has been held that if executive actions may be reviewed under the provisions of the Administrative Procedure Act,¹²⁴ the United States is deemed to have waived immunity.¹²⁵ In recent impounding cases,¹²⁶ the courts have ruled that impounding is reviewable under the Act and have, therefore, rejected sovereign immunity claims.

B. Remedies

There are two avenues of redress open to citizens and to state and local agencies injured by the impounding of appropriated funds. An action for a specific sum of money may be brought in the Court of Claims, and an action for a mandamus order, a mandatory injunction, or a declaratory judgment may be brought in a federal district court.

1. *Court of Claims.* The Court of Claims has jurisdiction over claims founded "either upon the Constitution or any Act of Congress,"¹²⁷ including, as recent cases indicate,¹²⁸ the Administrative Procedure Act.¹²⁹ Since, however, the Court of Claims can grant only money damages and not prospective relief,¹³⁰ it can arrest only the effect of impounding, not the act of impounding itself. In many cases, the Court of Claims may, nonetheless, be able to afford adequate relief to intended beneficiaries of impounded funds. If the funds that have been withheld were to be paid out to the plaintiff in a single, lump sum—for example, 50 percent of the cost of a hospital already completed or a single disability payment—an award of money damages would be sufficient. And even if, under the statute, there were to be continuing payments—for example, a series of payments to aid a state's acquisition of park land—one judgment against the federal agency involved could well result in the cessation of impounding, at least insofar as it affects the plaintiff. Indeed, in some cases, money damages awarded by the Court of Claims may be the only relief available. If an appropriation statute has, by its terms, expired, the executive cannot be ordered to

¹²³ *Chambers v. United States*, 451 F.2d 1045, 1053 (Ct. Cl. 1971).

¹²⁴ 5 U.S.C. §§ 701 *et seq.* (1970).

¹²⁵ *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 873-74 (D.C. Cir. 1970) (Leventhal, J.).

¹²⁶ *New York v. Ruckelshaus*, 41 U.S.L.W. 2602 (D.D.C. May 8, 1973); *Local 2816, OEO Employees Union v. Phillips*, Civil No. 73 C 500 (N.D. Ill. Apr. 11, 1973); *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 41 U.S.L.W. 2542 (D.D.C. Apr. 11, 1973); *State Highway Comm'n v. Volpe*, 347 F. Supp. 950 (W.D. Mo. 1972) *aff'd*, 41 U.S.L.W. 2539 (8th Cir. Apr. 2, 1973).

¹²⁷ 28 U.S.C. § 1491 (1970).

¹²⁸ *E.g.*, *Chambers v. United States*, 451 F.2d 1045, 1053 (Ct. Cl. 1971).

¹²⁹ 5 U.S.C. §§ 701 *et seq.* (1970).

¹³⁰ *United States v. Jones*, 131 U.S. 1, 18 (1889).

obey it.¹³¹ In addition, the relief granted by the Court is not limited by the federal courts' mandamus requirement that the contested executive action be ministerial rather than discretionary.¹³²

In other cases, however, an action in the Court of Claims may be unable to afford sufficient relief. Most importantly, persons who do not themselves have a direct money claim against the government, but are nonetheless the intended beneficiaries of the objectives that appropriations statutes were meant to effect, may not bring an action for money damages in the Court of Claims.

2. *Declaratory Judgments, Mandatory Injunctions and Mandamus.* In cases in which money damages are inadequate or unavailable to remedy the effects of impounding, the federal district courts have the power to grant alternative forms of relief. The Supreme Court has said that, under the provisions of the Administrative Procedure Act, administrative action is presumed subject to judicial review unless Congress has expressly exempted it or it falls within the exceptions to reviewability described in the Act.¹³³ A recent case held that, since impounding is subject to review under the Act, it may be remedied, when appropriate, by either declaratory relief or mandatory injunction.¹³⁴ Declaratory relief is also available under the Declaratory Judgment Act,¹³⁵ which requires only that there be an actual controversy and that the case be within the court's jurisdiction. Finally, it has recently been held that the mandamus statute¹³⁶ itself, which makes available mandatory injunctions and declaratory judgments as well as mandamus orders,¹³⁷ grants federal district courts jurisdiction in impounding cases.¹³⁸

¹³¹ The expiration of the appropriation could present a major problem for suits on this subject, unless the courts are willing to make an exception on the basis of the recurring question doctrine. See *Roe v. Wade*, 41 U.S.L.W. 4213, 4216-17 (U.S. Jan. 22, 1973).

¹³² Rehnquist, *supra* note 24, at 345.

¹³³ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The Court said: "In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." *Id.* at 413-14. Since the Office of Management and Budget does not have any special statutory immunity, it is, like other agencies, subject to judicial review.

¹³⁴ *State Highway Comm'n v. Volpe*, 347 F. Supp. 950, 951-52 (W.D. Mo. 1972), *aff'd*, 41 U.S.L.W. 2539 (8th Cir. Apr. 2, 1973).

¹³⁵ 28 U.S.C. § 2201 (1970).

¹³⁶ 28 U.S.C. § 1361 (1970).

¹³⁷ *Burnett v. Tolson*, No. 72-1545, at 14 (4th Cir. Feb. 21, 1973); K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, 23.09 (Supp. 1965). Mandamus orders and mandatory injunctions are covered by the same rules when issued to an official, however the court obtains jurisdiction. *Miguel v. McCarl*, 291 U.S. 442, 452 (1934); *Ferris v. Wilbur*, 27 F.2d 262, 264 (4th Cir. 1928).

¹³⁸ *State Highway Comm'n v. Volpe*, 347 F. Supp. 950, 951-52 (W.D. Mo. 1972), *aff'd*,

In most cases, perhaps, a declaratory judgment holding that impounding is beyond the constitutional and statutory authority of the executive may afford adequate relief to intended beneficiaries of appropriations; the mere finding that impounding is illegal in a particular case may be sufficient to cause the executive to free the funds. If this is not the case, however, a mandamus order¹³⁹ may be necessary. In *Marbury v. Madison*,¹⁴⁰ Chief Justice Marshall stated that the purpose of mandamus was to provide a remedy when "in justice and good government there ought to be one."¹⁴¹ The rules for mandamus have remained basically unchanged since Marshall's day.¹⁴² Although mandamus is considered a legal remedy, it is controlled by equitable principles and is issued at the discretion of the court when three elements coexist.¹⁴³ First, a mandamus order may issue only if no other remedy is available that is capable of affording full relief.¹⁴⁴ Second, the plaintiff must have a clear right to the relief sought.¹⁴⁵ An action for mandamus cannot be used to establish a legal claim; the order will be denied if the judgment on which the action for mandamus is based is not final,¹⁴⁶ if further suits are necessary to establish the plaintiff's claim,¹⁴⁷ or if the court would have to determine the plaintiff's rights under a contract.¹⁴⁸ If, however, the plaintiff has taken all the steps

41 U.S.L.W. 2539 (8th Cir. Apr. 2, 1973). No action on any jurisdictional basis would, however, lie against the president. *San Francisco Redev. Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971) (mandamus); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (injunction).

¹³⁹ Writs of mandamus are now denominated orders in the nature of a mandamus. Fed. R. Civ. P. 81(b); 28 U.S.C. § 1361 (1970).

¹⁴⁰ 5 U.S. (1 Cranch) 137 (1803).

¹⁴¹ *Id.* at 169. For a history of the origins of mandamus, see E. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW (1963).

¹⁴² There have been, however, some recent signs of change. In *Kelly v. Nashville Bd. of Educ.*, 41 U.S.L.W. 2477 (M.D. Tenn. Feb. 23, 1973), the court held that it had mandamus jurisdiction under 28 U.S.C. § 1361 to entertain a complaint challenging, on constitutional grounds, HEW's policy of refusing to provide available funds for buses needed to implement court-ordered desegregation plans. The court said: "The language of the statute indicates that the power granted to the district courts therein is more broad than the power that previously had existed to issue writs of mandamus, because Congress used the words 'in the nature of mandamus' rather than 'to issue writs of mandamus.' The court drew this conclusion because of the legislative history of the section. Noting that Congress refused to include the word 'ministerial' before the word 'duty', it concluded that Congress desired to avoid the 'ministerial-discretionary' distinction and 'other artificialities that were attendant to common law mandamus.'" See *Burnett v. Tolson*, No. 72-1545, at 5-6 (4th Cir. Feb. 21, 1973).

¹⁴³ *Carter v. Seaman*, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Reeside v. Walker*, 52 U.S. (11 How.) 272 (1850).

¹⁴⁷ *United States v. Helvering*, 301 U.S. 540 (1937).

¹⁴⁸ *Cf. McKay v. Central Elec. Power Cooperative*, 223 F.2d 623, 625-26 (1955).

necessary to establish his claim, the court will decide if the claim entitles him to relief. Finally, only official acts that are ministerial rather than discretionary are subject to mandamus.¹⁴⁹ If an official is charged with making a decision, the court may, by mandamus, order him to do so,¹⁵⁰ but it may not order the official to exercise his discretion or make a decision in a certain way.¹⁵¹ Under many appropriations statutes, Congress has granted the executive discretion to control the particulars or timing of expenditures.¹⁵² Mandamus probably does not lie to control these sorts of operational decisions, since, as noted in *Larson*, the discretion to act includes the discretion to err in performing the act.¹⁵³

The contention in impounding cases is not, however, that the executive has exercised its operational discretion unwisely, but rather that it has, in effect, refused to exercise whatever operational discretion it may have. By refusing to spend, the executive purports to exercise a kind of discretionary authority that the appropriations statute may or may not grant. If the statute allows the executive to decide whether any attempt should be made to achieve Congress's purpose in making an appropriation and, hence, whether the appropriated funds should be spent at all, then it seems clear that mandamus relief is unavailable. The courts may not order spending when Congress has clearly delegated the decision to the executive. But the great majority of appropriations statutes do not grant the executive such complete discretionary power.¹⁵⁴ To the extent that such authority is lacking and the executive has, therefore, acted beyond the scope of its statutory power, mandamus relief is appropriate in the absence of adequate alternative remedies.

a. *Private Bills.* An appropriation for payment to a specific person clearly fulfills the requirements for a mandamus order, at least so long as an action for money damages is for any reason unavailable. Under private bills and appropriations for veterans benefits and the like, the beneficiary has a clear right granted by Congress, and the executive has no discretion to refuse to spend.¹⁵⁵

b. *Mandated Appropriations.* A "mandated" appropriation simi-

149 See *Kendall v. Stokes*, 37 U.S. (12 Pet.) 524 (1838). A recent case has held that this distinction does not apply to cases under 28 U.S.C. § 1361. *Kelly v. Nashville Bd. of Educ.*, 41 U.S.L.W. 2477 (M.D. Tenn. Feb. 23, 1973). See also *Burnett v. Tolson*, No. 72-1545 (4th Cir. Feb. 21, 1973).

150 Cf. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930).

151 *McCarey v. McNamara*, 390 F.2d 601 (3d Cir. 1968).

152 See text and notes at notes 57-72 *supra*.

153 *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949).

154 See text and notes at notes 57-72 *supra*.

155 See 22 OP. ATT'Y GEN. 295 (1900).

larly leaves no discretion not to spend, and, as *Kendall v. Stokes*¹⁵⁶ indicated, indentifiable beneficiaries of the appropriation qualify for mandamus.¹⁵⁷

c. *Conditional Appropriations.* An appropriation that requires action by the beneficiary as a condition of receiving funds gives the beneficiary a clear right once he has fulfilled the statute's requirements. If the required action has been taken, no discretion remains in the executive and mandamus should lie to compel payment of the promised funds.

d. *Contract Appropriations.* An appropriation that requires the letting of federal contracts, an act of operational discretion, does not give the executive discretion to stop the project altogether even though the executive maintains some control over the timing of the expenditures and contracting conditions. In impounding cases that involve this kind of appropriation, the courts must decide whether the executive is experiencing legitimate difficulties in letting contracts and creating specifications or is attempting, instead, to terminate the project. Although the act of letting contracts is ministerial rather than discretionary, it may be difficult to determine whether the executive is failing to perform its ministerial duty. If the court decides that the executive is not in good faith performing that duty and if a proper class of beneficiaries can be identified, a mandamus order should issue to commence letting the contracts.¹⁵⁸

e. *No-year Appropriations.* A no-year appropriation grants no discretion to cancel the program. But the executive has such great discretion over the timing of the expenditure that his duty cannot be considered ministerial unless the court can find in the language or purpose of the appropriation some standard, such as a reasonable time standard,

¹⁵⁶ 37 U.S. (12 Pet.) 524 (1838).

¹⁵⁷ Section 3(c)(2) of the Economic Opportunity Amendments of 1972, 86 Stat. 688, states that the Director of the OEO shall "reserve and make available not less than \$328,900,000 for programs under section 221 of the Economic Opportunity Act of 1964." This statute has been held to require expenditure of these funds. *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 41 U.S.L.W. 2542 (D.D.C. Apr. 11, 1973).

¹⁵⁸ The Federal-Aid Highway Act of 1956, 23 U.S.C. § 101 *et seq.* (1970), is a combination of a mandatory appropriation and a contract appropriation. Authorized funds are apportioned according to statutory formulas to the states, but the states cannot let contracts until their plans are approved by the secretary of transportation. Once the project is approved, the federal government is obligated to pay its share. 23 U.S.C. § 106(a) (1970). It has been held that failing to approve projects in order to control inflation is impermissible. *State Highway Comm'n v. Volpe*, 347 F. Supp. 950 (W.D. Mo. 1972), mandamus action vacated as moot and declaratory judgment *aff'd*, 41 U.S.L.W. 2539 (8th Cir. Apr. 2, 1973).

against which the executive's exercise of discretion can be measured. Mandamus may be granted only if such a determination is possible.

f. *Presidentially Controlled Appropriations.* An appropriation that instructs the executive to decide if the program should be carried out cannot, of course, support a mandamus order, since the executive power is clearly discretionary and no right can exist under the appropriation until the executive has decided to spend.

g. *Other Appropriations.* In cases in which appropriations employ permissive language, placing only a ceiling on permitted expenditures, courts will have to decide the precise limits of the discretion granted the executive. If the executive has been granted only operational discretion, the court must nonetheless decide whether the executive's failure to exercise its operational discretion operates, in effect, to defeat the purpose for which Congress made the appropriation. Only then would identifiable beneficiaries be entitled to the benefits Congress intended them to have and to a mandamus order directing the executive to implement the statutory purpose by making the operational decisions necessary to spend the appropriated funds.

Since, in practice, most impounding is effected by the refusal of the OMB to apportion appropriated funds, in any case in which the court is unwilling to require the executive to spend, whether in the residual category or the other categories, it might go halfway by ordering the OMB to apportion the funds. The apportionment statute provides that "[e]xcept as otherwise provided in this section, *all* appropriations or funds available for obligation for a definite period of time *shall* be so apportioned"¹⁵⁹ This language arguably creates a ministerial duty to apportion all of the appropriation unless the OMB can show that the "except" clause applies. Although an order of the court requiring apportionment would not cut off all means of executive impounding, the order might, by indicating judicial skepticism about impounding, be an effective alternative to an order requiring expenditure.¹⁶⁰

SUMMARY

There is no basis for a general impounding power, by express terms or by implication, either in the Constitution or in any general stat-

¹⁵⁹ 31 U.S.C. § 665(c)(1) (1970) (emphasis added). The discretion granted by subsection (c)(3) should not be a bar to an order of this kind. Since the methods of apportionment mentioned there are exclusive, the court could order the OMB to choose one of the methods and use it.

¹⁶⁰ The Supreme Court has, however, called the suggestion that courts should be influenced by fear of noncompliance with their orders "inadmissible." *Powell v. McCormack*, 395 U.S. 486, 549 n.86 (1969).

ute.¹⁶¹ Authorization and appropriations statutes only rarely allow the president entirely to terminate a program by impounding. The president may end a program only by vetoing it in accordance with the Constitution. He has no authority to use impounding as an absolute, retroactive, or item veto. Congress should be presumed to have passed each appropriation statute with the intent that the monies be spent; in the absence of explicit statutory language to the contrary, the president should be deemed bound by his oath of office to carry out Congress's purpose. In most cases, the courts have power to grant persons who have been injured by unlawful impounding a legal remedy. This power should be exercised to insure that persons receive benefits that Congress intended them to have, to preserve the constitutional separation of powers, and to forestall a serious constitutional crisis.

Warren J. Archer

¹⁶¹ *Hearings*, *supra* note 1, at 153 (remarks of Professor Miller); Letter from Professor Miller, *Joint Hearings*, *supra* note 3, at 749-50.