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PRESIDENTIAL IMPOUNDMENT OF CONGRESSIONALLY APPROPRIATED FUNDS: AN ANALYSIS OF RECENT FEDERAL COURT DECISIONS

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COMMITTEE ON GOVERNMENT OPERATIONS

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FOREWORD BY CHAIRMAN HOLIFIELD

In recent years, the term "impoundment," used in relation to appropriations, has become important in the political vocabulary. However, it has no precise definition. Although occurring in certain statutes, it is not actually defined in them. It has come to mean the process of the executive branch's withholding certain appropriated amounts, or "reserving" them, from expenditure or obligation. The result is ordinarily the retardation of specific projects or activities. From the viewpoint of the Congress, impoundments usually have been considered to be without legal authority. The executive branch, on the other hand, has regarded such withholding as having both constitutional and statutory bases. Consequently, impoundment actually refers to a classic constitutional conflict involving assertion of duties and authority by the Congress and the executive relating to establishment of spending priorities.

The Antideficiency Act recognizes that withholding for some purposes is proper. It gives the President a mandate to apportion appropriated funds and thereby minimize the need for deficiency or supplemental appropriations, to establish reserves for contingencies, and to effect savings associated with changes in requirements and more efficient operations.

Controversies have arisen when the President has attempted to justify the withholding of expenditures on some "fiscal policy" ground such as inflation control. The Congress, in an effort to regulate more closely the impounding process and to limit the President's latitude for withholding, recently enacted Public Law 93–344, title X of which is the Impoundment Control Act of 1974. The President, on signing the measure, indicated his concern that some provisions might work against prompt and effective governmental response to changing conditions. The issue of impoundment, it is clear, will not be put to rest by the 1974 legislation.

It is likely also that litigation over impoundment will continue in the courts. The Impoundment Control Act of 1974 empowers the Comptroller General to bring civil actions in the U.S. District Court for the District of Columbia whenever he determines that any officer or employee of the United States has failed to expend or obligate funds ("budget authority") required to be made available in accordance with the requirements of the act.

Before the act, State or local units of government, and other entities or individuals affected by Presidential withholding decisions, sought recourse in the courts, challenging the legality of specific impoundments. The opinions in more than 50 judicial decisions throw light on the complexities of impoundment and the variations in law and policy that make the difference between proper and improper withholding.

The Committee on Government Operations, which has jurisdiction over budget and accounting matters other than appropriations, and which is vitally interested in the economy and efficiency of public

expenditures, has received numerous inquiries about the meaning and content of the judicial decisions on impoundment.

The Congressional Research Service of the Library of Congress has made a scholarly and timely analysis of the holdings in these court cases, which we are now issuing as a committee print for its reference value to the committee and to Members of Congress, as well as to the general public.

The study was prepared by Mr. Stuart Glass, a legislative attorney in the American Law Division of the Congressional Research Service, Library of Congress. It should contribute to a better understanding of congressional-executive relationships and the exercise of responsibilities in the spending of public monies. Also, it will assist the Congress in considerations which may arise under the Impoundment Control Act of 1974.

The analysis, conclusions, and questions raised in the study do not necessarily reflect the views of the committee or of its individual members.

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PRESIDENTIAL IMPOUNDMENT OF CONGRESSIONALLY APPROPRIATED FUNDS: AN ANALYSIS OF RECENT FEDERAL COURT DECISIONS

Introduction

The purpose of this report is to analyze the great number of Federal court decisions touching upon the ability of the executive branch to impound funds which Congress has appropriated through Federal statutes. The period of time covered by these cases is between 1971 and 1974, during which nearly all of the important decisions were handed down.

Although there has as yet been no definitive ruling by the Supreme Court, and there will not be until the decisions in *Train* v. *Campaign Clean Water, Inc.* and *Train* v. *City of New York*, scheduled for argument in October 1974, a few generalities may be distilled from the well over 50 cases decided so far.

First, there is no commonly accepted definition of the word "impoundment" by the Congress, the executive branch, or the courts. However, the courts seem willing to try any case in which there has been an apparent retardation of a congressionally enacted program by an executive branch officer, whether through failure of that officer to obligate congressionally appropriated funds; to allot congressionally appropriated funds; or to accept, process, or approve applications for funds under congressionally enacted spending programs.

Second, there has been little judicial acceptance of the theory propounded by the President that he has implied constitutional authority as the Chief Executive Officer to superimpose his own spending priorities over those of the Congress in order to control inflation, regulate the economy, or pursue any other national objectives. In all except a half dozen cases, the courts have focused upon each statutory program under litigation for the purpose of determining the exact scope of statutory discretion granted the Executive Officer charged with the execution of that program, and they have found that discretion to be limited. Generally, it may be said that where the word "shall" appears in a statutory provision delineating the dimensions of Executive discretion under a Federal spending program, that provision mandates the execution of the program, including allotment of funds, spending of funds, or properly processing applications for funds under the program.

Finally, since the Supreme Court may decide that the crucial issue in any impoundment litigation turns upon the language of the statute in question, it is important for the Congress, in protecting its legislative priorities in the future, to make itself aware of the full legal effect of the statutory language that it uses in appropriations acts.

I. Background

Since President Nixon announced his policy of withholding funds appropriated by the Congress for various welfare, antipollution, education, housing, and highway programs, for the stated purpose of holding down Federal spending and relieving inflationary pressures on the economy of the United States, the question of the President's power to do so has been the subject of more than 50 Federal court decisions. This paper will attempt to analyze these decisions, both in terms of their present effect upon the President's announced policy, and their implications with regard to future decisions and congressional enactments.

Although these cases have been classified under the rubric "impoundment" cases, this classification is for many reasons inappropriate, in that the term "impoundment" has conjured up a babel of definitions and heated rhetoric, but little coherent or constructive discussion. For example, the executive branch, in complying with the requirements of impoundment reporting legislation in the Humphrey amendment to the Public Debt Limitation Act of 1972 [1] and Congress in proposing other "impoundment" control legislation, have each adopted their own differing definitions of the term. To compound this dilemma, one cannot define impoundment as the improper withholding of congressionally appropriated funds because such a definition prejudges the issue.

Further, not every withholding of money may be considered improper: funds may properly be withheld from an ineligible applicant or from programs which have become unnecessary; and fund may be allocated to reserves to effect savings, pursuant to the Antideficiency Act. [2] Occasionally, the President or an executive agency may be directed by statute to withhold funds, as when the Department of Health, Education, and Welfare withholds Federal money from school districts which fail to desegregate.[3] Actually few of the so-called impoundment cases directly involve the withholding of funds; most concern the cessation or reduction of congressionally enacted programs at a point well before the actual disbursement of money. For instance, reduction of the allotments to the States under the Federal-Aid Highway Act or the Water Pollution Control Act, the issue in numerous cases, merely reduces the amount of Federal funds on which States may base their highway or antipollution planning. These acts do not allow obligation of these funds until detailed specifications are approved by the appropriate executive department administrator. Likewise, refusal to accept or process applications for grants or loans under the Economic Opportunity Act, the Disaster Relief Act, or various housing acts has also been the subject of substantial litigation, yet the actions questioned occur quite early in the

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[1] P.L. 92-599, 86 Stat. 1324.
[2] 31 U.S.C. § 665 (1970).
[3] Civil Rights Act of 1964, title VI, 42 U.S.C. § 2000d-1 et seq. (1970).

statutorily specified chain of events preceding the writing of checks against the Federal Treasury.

The writer would suggest at this point that the "impoundment" cases do not directly concern the issues of withholding by the executive branch of money appropriated by the Congress. Nor do the cases attempt to resolve a conflict between Presidential and congressional priorities, although such a conflict comprises a major aspect of the political context in which the impoundment controversy has arisen. Neither have the cases resulted directly in a determination of the scope of the President's alleged constitutional power implicit in article II, sections 1 and 3, designating him Chief Executive Officer and mandating him to "take care that the laws be faithfully executed." Rather, the thread running through all the cases is that each deals with an issue of statutory construction; that is, within the statute under litigation, how much discretion and how many duties does the statute confer on the executive officer, and has he overstepped that discretion or violated those duties in the administration or retardation of the relevant program? Because the cases largely construe the "law of the land"—statutes enacted by the Congress and signed by the President, or passed over his veto—for the purposes of this report we will define the term "impoundment" to mean any executive retardation of a Federal program created and funded by statute.

It is difficult to provide an up-to-date statistical summary of the holdings of the cases because the list grows daily. Suffice it to say that of the more than 50 cases that have been decided as of this date, less than half a dozen have upheld the President in any way, either in his claim that he possesses the implied constitutional power to control Federal spending for reasons related to the status of the national economy and the need to control inflation, or that the statute in question grants him or his officers the requisite discretion. The vast majority of the cases thus far hold that the Congress has mandated the execution of programs: the allotment of funds to the States on which to base highway and water pollution control programs; the acceptance and processing of applications for OEO community action agencies, low income housing mortgage loan interest subsidies and rent subsidies, and agricultural emergency loans; and finally, the obligation of moneys to applicants who have met the prescribed statutory criteria for such funds. When litigation begins so close to the end of the fiscal year that the appropriated funds are in danger of lapsing into the general fund, courts have ordered appropriate executive officers to record appropriated funds as an obligation of the United States before the end of the fiscal year so that the money will not so lapse, pending final resolution of the litigation on the merits. In short, the President has an obligation to execute the law of the land as the courts construe it.

The remainder of this paper will deal with the holdings of the recent cases, briefly discussing the constitutional issues involved, and concentrating upon the manner in which the courts have construed the statutes. Following that will be an examination of certain crucial constitutional and statutory limits to Federal court jurisdiction, viz., the issue of standing to bring suit, the doctrine of sovereign immunity and the political question doctrine—which arguably would prevent the courts from accepting cases challenging acts by the executive branch.

Appendixes to this report contain a chronological summary of each of the cases and an alphabetical index to the cases cited. Attention is also invited to a recent publication which complements this report. It is a special report of the Joint Committee on Congressional Operations identifying court proceedings and actions of vital interest to Congress and is entitled "Court Challenges to Executive Branch Impoundments of Appropriated Funds—Cumulative to March 15, 1974."

The special report includes the text of many of the court decisions analyzed in the instant report.

As a caveat, neither these cases, nor this report, may be taken as the final word on the issues discussed. All except a handful of the cases discussed were decided at the district court level; only a few have reached the court of appeals level. Several others are being appealed at this moment, and major conclusions distilled from a collection of district court decisions could change overnight. Most of the crucial issues will not be decided until the U.S. Supreme Court has spoken.

II. Analysis of the Cases on the Merits

The discussion of the holdings in the recent cases will begin with an analysis of the constitutional argument urged by the President in support of his power to restrain the operation of congressionally enacted programs. We will see that this argument has been rejected, and that the cases have instead turned upon a construction of the extent of the mandate contained in each congressional enactment. Then, we will analyze how the courts have construed these statutes.

A. The President's Argument of Implied Constitutional Power to Control the Rate of Spending of Congressionally Appropriated Funds

In urging the courts to uphold his refusal to spend congressionally appropriated funds, or implement statutory programs, the President has alleged numerous theories in support of this power, including authority both express and implied in the Constitution, and various statutory grants of power.

Regarding express constitutional provisions, those concerning the President as Commander in Chief of the Army and Navy [4] and as initiator of foreign policy [5] arguably empower the President to decline to spend funds to manufacture or deploy weapons systems, to wage war or to release foreign aid. For example, President Truman succeeded in rescinding billions of dollars in excess military appropriations at the end of World War II.[6]

The Constitution provides that, "The executive power shall be vested in a President of the United States of America . . ." [7] and that the President ". . . shall take care that the laws be faithfully executed. . . ." [8] From these provisions, it has been suggested, emerges an implied power in the President, as Chief Executive Officer of the United States, to carry out his duties in the Nation's best interests. If he is to manage the budget effectively, and inferentially, the Nation's economy, the President argues that he must possess the power to impound unwanted funds.

Supporters of this argument suggest that, ". . . since the President lacks an item veto, he must impound the unwanted funds to preserve his budgetary objectives and maintain control over his own executive officials." [9] Further, even though the Constitution does not expressly provide for the power of impoundment, neither does it provide for the filibuster [10] or judicial review of legislation.[11] Just as

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[4] Article II, section 2.
[5] See Article II, section 1. See also *United States* v. *Curtiss Wright Export Corp.*, 299 U.S. 304, (1936); *United States* v. *Pink*, 315 U.S. 203, 229 (1942).
[6] Fisher, "Funds Appropriated by the President, the Constitutional View," 38 Geo. Washington L.R. 124, 125 (1969).
[7] Article II, section 1.
[8] Article II, section 3.
[9] Fisher, supra, at 136.
[10] *Id.*, n. 9, at 137.
[11] Cohn, M., "Impoundment of Funds Appropriated by Congress," 34 Ohio St. L.J. 416, at 417 (1973).

Chief Justice Marshall established the precedent for judicial review by refusing to exercise an unconstitutional grant of jurisdiction, the President is hoping to establish the power of impoundment by refusing to expend funds unwisely (in his opinion) appropriated by Congress.[12]

Detractors of this view urge that impoundment represents an unconstitutional veto power in excess of the limited veto which Congress is empowered to override. Moreover, because the Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States . . ." [13] and that "The Congress shall have power . . . to pay the debts and provide for the common defense and general welfare of the United States . . ." [14] the President is merely interjecting his own will and his own priorities into a function exclusively delegated to the Congress.[15]

Case law construing the inherent powers of the President is scant. In *In re Neagle*,[16] the Supreme Court indicated that the constitutional mandate upon the President to "take care that the laws be faithfully executed" provides the basis for certain duties of Federal officers not specified in the Constitution. A Federal marshal charged with the protection of a Supreme Court justice had, in the performance of his duties, killed a man who had attacked the justice. The Supreme Court issued a writ of habeas corpus to release the marshal, held on murder charges in a California jail, on the grounds that the President had the inherent power to appoint deputy marshals for the protection of Federal judges, and such appointment would impose upon the marshals the duty of doing whatever may be necessary for that purpose, even to the taking of human life.

The case of *United States* v. *Midwest Oil Company*,[17] seemingly stands for the proposition that a long-standing executive practice, combined with congressional silence, gives rise to a Presidential power.[18] However, this case, wherein the executive branch sought to control the rapid loss of public land to oil speculators, involved a practice of an estimated 100 years standing. It is questionable whether impoundment, a judicial controversy of relatively recent vintage and hardly characterized by congressional silence, is of sufficiently long standing to meet the *Midwest Oil Company* criterion.[19]

The case most damaging to the doctrine of inherent Presidential powers is the so-called *Steel Seizure* case, *Youngstown Sheet & Tube Company* v. *Sawyer*,[20] wherein the Supreme Court denied that President Truman had an implied constitutional power to authorize the Secretary of Commerce to operate steel plants during the Korean war to prevent a threatened steel strike damaging to national defense. This power was held, in the opinion of Justice Black, to lie in the Congress as part of its legislative role.[21] Indeed, the Congress rejected an amendment to the Taft-Hartley Act which would have authorized the President to seize the mills during such an emergency.[22]

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[12] *Ibid.*
[13] Article I, section 1.
[14] Article I, section 8.
[15] Cohn, supra, at 418–419.
[16] 135 U.S. 1 (1899).
[17] 236 U.S. 459 (1915).
[18] Cohn, *supra*, at 423.
[19] *Ibid.*
[20] 343 U.S. 579 (1952).
[21] 343 U.S. at 587–8.
[22] 343 U.S. at 586.

None of the above cases involved the appropriations process, nor did any mandate the spending of funds. Perhaps the only holding of the Supreme Court directing an executive officer to spend congressionally appropriated funds is *Kendall* v. *United States ex rel. Stokes.*[23] The Court held that an act of Congress directing the Solicitor of the Treasury to adjust and settle the accounts of S. & S. Co., under contract to carry U.S. mail, did not vest in the Postmaster General discretion or control as to whether or not the whole amount of the congressionally determined settlement should be paid:

> 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.[24]

It has been pointed out that *Kendall* involved a claim for services rendered, whereas in most recent holdings, the issues concern unfulfilled legislative programs rather than actions on the part of plaintiffs for which recompense is sought.[25] Nevertheless, as will be seen, numerous impoundment cases do in fact concern substantial acts by State agencies in reliance upon federally enacted appropriations schemes, such as commissioning highway and water pollution control plans, and submitting complicated funding applications.[26] In *Kendall*, the issue was narrowly drawn, involving legislation regarding recovery on a specific contract, rather than a broadly based statutory program. Therefore, the holding that the legislation mandating a specific disbursement requires a wholly ministerial act, thus warranting a writ of mandamus for the performance of that act, does not truly speak to the broader issue of whether the President may properly restrain the execution of whole legislative programs.

Although only tangentially at issue in the recent impoundment controversy, certain statutory enactments have permitted the President to withhold the spending of congressionally appropriated funds. For example, the Economy Acts of 1932 and 1933[27] enabled the President to achieve economies during the depression by reorganizing the executive branch, making layoffs, and reducing the pay of public

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[23] 37 U.S. 524 (1838).
[24] 37 U.S. at 612–3.
[25] Fisher, *supra*, at 127.
[26] See, e.g., *State Highway Commission of Missouri* v. *Volpe, infra; New York* v. *Ruckelshaus, infra.*
[27] Act of June 30, 1932, ch. 314, §§ 101, 105, 110, 403, 47 Stat. 399, 401, 403, 413; Act of March 3, 1933, ch. 212, §§ 403, 408, 47 Stat. 1518, 1519.

officials. The War Appropriation Act of 1933 [28] authorized the President to engage in an economic survey and withhold unneeded funds. These acts, of course, are now obsolete. On the other hand, the Antideficiency Act of 1906 [29] presently authorizes the Director of the Budget, at the direction of the President, to apportion appropriations in such a way as to "provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available." [30]

[A more detailed examination of the Antideficiency Act as it applies to these cases appears later in this report.]

Generally, the courts have disagreed, without saying so directly, with the President's contention that he possesses an implied constitutional power to restrain congressionally legislated programs. Clearly, accepting the President's argument obviates the necessity to determine whether a particular act of Congress mandates the operation of a program, because the Congress cannot act to negate a constitutional power. Conversely, judicial construction of the extent of a statutory mandate effectively denies the existence of a constitutional power to refuse such a mandate. The courts have almost universally employed the latter technique in recent opinions.

In *Campaign Clean Water, Inc.* v. *Ruckelshaus*,[31] the district court voided the President's announced policy of withholding part of the allotment enacted for water pollution control. The opinion stated:

> The Court recognizes that this conclusion impliedly makes short shrift of the defendant's underlying contention that spending of funds legislatively appropriated is solely within the province of executive discretion. Nevertheless, to support defendant's contention would require the Court to postulate a broad reading of executive power which includes the proposition that the Congress may make funds available for spending or mandate the manner in which they are spent, but may not mandate that they, in fact, be spent. That contention has in essence been firmly rejected in a well-reasoned opinion by Judge Jones in *Local 2677* v. *Phillips* (D.D.C. 4–11–73). As Judge Jones noted in language appropriate here, "[t]he defendant really argues that the Constitution confers the discretionary power upon the President to refuse to execute laws passed by Congress with which he disagrees."

More than a century ago the United States Supreme Court laid to rest any contention that the President has the power suggested. See *Kendall* v. *United States*, 37 U.S. 524 (1838) where the Court stated:

> 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. [37 U.S. at 611].[32]

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[28] Act of March 4, 1933, ch. 281, § 4, 47 Stat. 1602.
[29] Now codified at 31 U.S.C. § 665 (1970).
[30] 31 U.S.C. § 665 (c)(2).
[31] *Infra.*
[32] 361 F. Supp. 689, 696 (E. D. Va. 1973).

Other courts make even shorter shrift of the President's constitutional argument, not even mentioning it while construing the relevant statute. Indeed, the President may even have given up on the contention of implied constitutional power. The Government's brief on the appeal of *New York* v. *Ruckelshaus* [33] before the United States Court of Appeals for the District of Columbia [34] made not the merest mention of the argument.

That the courts have not faced the constitutional issue head-on is not surprising. The issue has not been raised in such a way as to compel the court to decide it, although in one case it was considered that an abuse of statutory discretion in such a way as to frustrate the congressional purpose presents an issue of "constitutional dimensions." [35] Courts will always refrain from deciding a case on constitutional grounds when there are other adequate grounds for the decision,[36] and in each of the impoundment cases, adequate statutory grounds have existed upon which to base a decision.

This is not to say that the constitutional argument has not been raised in the cases; it has been raised and discussed often. However, it has not been raised as a legal defense by administration officials, in justifying their retardation of Federal programs. Statutory language has historically been drawn under the assumption that programs would be executed. If anything, language has been more carefully crafted by the Congress for the purpose of preventing execution of Federal programs in excess of congressionally enacted limitations. Only recently has a massive resistance to execution of programs become an issue in the courts, and existing precedents have broadly construed executive discretion. On the other hand, the theory of implied constitutional powers, in this context, has achieved negligible support in the Supreme Court. Therefore, administrative officers, sued to mandate the execution of Federal programs, have apparently adopted the strategy of arguing that they possess broad statutory discretion, rather than trusting their fate in consequence of their actions to a constitutional theory of doubtful validity.

B. THE COURT'S CONSTRUCTION OF STATUTORY MANDATE IN EACH CASE

The holdings on the merits of these cases may best be analyzed in terms of the nature of the actions taken by various executive branch officials to impede congressionally enacted programs. These fall into four general categories.

1. *Allotment of Funds Among the States Pursuant to a Two-Stage Appropriations Process.*—Several Federal programs heavily litigated prescribed a two-stage process for expending congressionally appropriated funds. Under the Federal Aid Highway Act of 1956, as amended,[37] the Federal Water Pollution Control Act Amendments of 1972,[38] the Rural Environmental Assistance Program (REAP),[39] and parts A and C of title V of the Elementary and Secondary Education Act of 1965,[40] money is first allotted among the States according to a formula

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[33] *Infra.*
[34] No. 71-1705.
[35] *Campaign Clean Water, Inc., Train, Infra.*
[36] Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1935).
[37] 23 U.S.C. §§ 101 *et seq.* (1970).
[38] 86 Stat. 816.
[39] 16 U.S.C. §§ 590g–590o, 590p(a), and 590q (1970).
[40] 20 U.S.C. §§ 861–64 and 867 (1970).

set forth in the statute, on which the States base their program plans, and then the money is obligated upon final approval of these plans by the Secretary of Transportation and the Administrator of the Environmental Protection Agency, officials of the Department of Agriculture, and the Commissioner of Education, respectively.

A closer look at the Water Pollution Control Act will clarify the allotment stage of the spending process. Section 207 of the act authorizes the appropriation of sums "not to exceed" $5 billion in fiscal year 1973, $6 billion in fiscal year 1974, and $7 billion in fiscal year 1975, to be made available to the States for obligation for sewage treatment works construction approved by the Administrator of the Environmental Protection Agency. The pro rata formula by which the Administrator is to allocate the funds among the States is prescribed in section 205. Based upon the allocations, each State submits grant applications—plans, specifications, and estimates for projects—and only final approval of these applications by the Administrator gives rise to a contractual obligation on the part of the United States to expend the Federal share of the construction costs, as bills come due. Thus, it is clear that allotment is not tantamount to either commitment or expenditure of funds.

Allocation provisions of the act have been held, by the U.S. Court of Appeals for the District of Columbia, to mandate the allocation among the States of the full amount of the authorization.[41] The opinion of Judge Oliver Gasch, in the district court, which was affirmed by the circuit court of appeals, reasoned that the language of the act providing that "[s]ums authorized to be appropriated . . . *shall be allotted* by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized. . . ." mandated the allotment because of the use of "shall" instead of "may."

The Administrator had argued that the words "not to exceed" permitted him to decrease, upon the instructions by the President, the amount of the allotment by $6 billion for 1973 and 1974.[42] Judge Gasch ruled, however, that whatever discretion the Administrator had to refuse to spend water pollution control funds came at the obligation stage, rather than the allotment stage, of the appropriations process. Although the legislative history of the act reveals that the words "not to exceed" were added by amendment, and another amendment deleted the word "all" from the phrase "[s]ums authorized to be appropriated . . ." the court instead relied upon colloquy on the floor of the House between the manager of the amendments, Rep. William Harsha (R-Ohio) and others, as demonstrating that the express purpose of the amendments was to grant the Administrator discretion only in obligating and expending funds. The holding in this case was echoed in *Minnesota* v. *Fri*[43] and *Martin-Trigona* v. *Ruckelshaus*.[44]

Judge Robert R. Merhige, in *Campaign Clean Water, Inc.* v. *Ruckelshaus*,[45] regarding the same act, could not agree with Judge Gasch's interpretation, but Judge Merhige's decision has been remanded by

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[41] *City of New York* v. *Train*, No. 73-1705 (D.C. Cir., Jan. 23, 1974); affirming *City of New York* v. *Ruckelshaus*, 41 U.S.L.W. 2602 (D.D.C., May 8, 1973).
[42] 37 Fed. Reg. 26282, § 35, 910-1(2) (1972).
[43] No. 4-73 Civ. 133 (D. Minn., June 26, 1973).
[44] No. 72C 3044 (N.D. Ill., June 29, 1973).
[45] 361 F. Supp. 689 (E.D. Va. 1973).

the Court of Appeals for the Fourth Circuit.[46] He found Judge Gasch, the plaintiff and the defendant in agreement that the legislative history was ". . . in the main, unclear, politically charged, and in the Court's view, to some degree based upon suspect constitutional interpretation of the powers of the President." Consequently, he concluded that ". . . Congress did intend for the executive branch to exercise some discretion with respect to allotments . . ." but agreed with the plaintiff's contention that ". . . the Congress could not have intended to give the Administrator the discretion to gut the Act." Judge Merhige thus declared that the announced policy of the Administrator to refuse to allot $6 billion of the designated $11 billion under § 205 of the Federal Water Pollution Act Amendments of 1972 constituted an abuse of discretion under the authority and powers conferred by the act, and accordingly, were null and void. It is not clear whether Judge Merhige would have reached the same conclusion had the President withheld part of the funds, but substantially less than $6 billion.

The Fourth Circuit Court of Appeals remanded the case to the district court for further findings on the issue of whether the refusal to allot 55 percent of the authorized funds did indeed constitute such an abuse of discretion as to frustrate the congressional intent. The circuit court found that the mere fact of withholding of 55 percent of the authorized funds, without more, did not overcome the presumption of legality which attaches to administrative action.

Judge Merhige's opinion raised another important issue; namely, whether the allegation that the Administrator had abused his discretion was subject to judicial review. Unlike the courts in *City of New York* v. *Train*,[47] and other holdings, Judge Merhige did not declare that the Administrator had no discretion to refuse to allot the full amount authorized; nor did he order full allotment. Rather, he held that the allotment of only 45 percent of the authorized funds constituted an abuse of discretion, reasoning that the "syntactical history" of the act would probably require full obligation of the funds.[48] The Administrator argued on appeal that a finding of "abuse of discretion" conferred discretion upon him; therefore, the court had no power to review an exercise of executive discretion because section 10 of the Administrative Procedure Act [49] provides that administrative action, the exercise of which is "committed to agency discretion," is not judicially reviewable. The court of appeals nevertheless agreed with Gasch that the issue of whether the Administrator had abused his discretion was judicially reviewable in this instance:

> . . . When the executive exercises its responsibility under appropriation legislation in such a manner as to frustrate the congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review. And it was this issue and this issue alone to which the District Court

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[46] *Campaign Clean Water, Inc.* v. *Train*, 489 F. 2d 492 (4th Cir. 1973).
[47] *Supra.*
[48] 361 F. Supp. at 698, 699.
[49] 5 U.S.C. § 701 (1970).

> carefully restricted itself in this case. It specifically denied any power on its part to review or supervise the defendant's discretion so far as it was exercised in a manner that was not so arbitrary or drastic as to represent a nullification of legislative purposes.[50]

At least one district court would take issue with all the above holdings. In *Brown* v. *Ruckelshaus*,[51] Judge A. Andrew Hauk dismissed plaintiffs' actions for lack of standing. Whereas plaintiffs in the other cases had submitted affidavits averring that the action of the EPA in withholding funds was causing applications to be held in abeyance, retarding projects underway, or adversely affecting future plans for water treatment facilities, plaintiffs in *Brown* failed to demonstrate an injury resulting from the EPA's action. The court found this omission "fatal." [52] However, the court went on in *dictum* to assert that, even with standing to sue, the plaintiffs were not entitled to relief on the merits. The court stated:

> Frankly, these words [the Act, secs. 207, 205(a)] are clear in their intent. Authorized sums must be allotted, and the sums may not exceed the maximum that Congress authorized. The statute requires no more than that, nor does the law . . .
>
> The legislative history of the Act supports our conclusion that the statute simply does not require that the EPA allot every authorized dollar.[53]

The courts noted the opposite decisions around the country:

> With all due respect to the judges who wrote those opinions, we believe that they are not correct. Neither the amendments nor the sponsors' statements received proper attention in any of the decisions. No one has convinced us that when a legislature removes the word "all" from the phrase, "All sums authorized to be appropriated shall be allotted," they mean that every penny must be spent. Nor has anybody argued successfully that adding a phrase "not to exceed" before a sum means anything more than that an upper limit must be imposed. Even an appropriation act, which this is not, is not tantamount to a mandate to spend. [5 E.R.C. at 1810].

Other acts requiring full allotment or apportionment of congressionally appropriated funds are parts A and C of title V of the Elementary and Secondary Education Act of 1965,[54] and the REAP program.[55]

2. *The Expenditure Stage of the Two-Stage Appropriations Process.*—Subsequent to the submission by the States of specific plans based upon allotments, the appropriate Cabinet official possesses discretion to approve or disapprove the plans, or certain aspects thereof. Courts have held that this discretion is limited by the language of relevant statute. The leading case in this area is *State Highway Comm. of Missouri* v. *Volpe*,[56] in which the U.S. Court of Appeals for the Eighth Circuit held that the Federal Aid Highway Act of 1956 does not grant the Secretary of Transportation discretion to defer authority to obligate highway funds previously apportioned to the State of

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[50] Slip opinion at 16, 17.
[51] Consolidated with *City of Los Angeles* v. *Ruckelshaus*, 364 F. Supp. 258 (C.D. Cal. 1973).
[52] 5 E.R.C. at 1806.
[53] 5 E.R.C. at 1808.
[54] *Pennsylvania* v. *Weinberger*, 367 F. Supp. 1378 (D.D.C., 1973).
[55] *Guadamuz* v. *Ash*, C.A. No. 155–73 (D.D.C., Dec. 28, 1973).
[56] 479 F. 2d 1099 (8th Cir. 1973).

Missouri, when the reasons given for the deferment by the Secretary and the Director of the Budget are the status of the economy and the need to control inflationary pressures.

In the case of the Federal Aid Highway Act, there are two stages at which approval is required by the Secretary. The first stage is approval of broadly proposed projects submitted by the States,[57] based upon considerations of the adequacy of the interconnected system of interstate highways, importance to national defense, improved standards of safety benefits, and public access to airports and public ports, etc.

The second stage of approval involves specific "[s]urveys, plans, specifications, and estimates for each proposed project," previously approved at the first stage.[58] Criteria for approval or disapproval (contract controls) at the second stage are embodied in 23 U.S.C. § 109 (1970), and contemplate considerations of ". . . existing and probably future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance," reasonableness of cost, etc. Nowhere does the statute grant the Secretary the discretion to base contract controls upon considerations of the status of the national economy; and the court held that the Secretary's only discretion is that expressly set forth in the act. The court found that the State of Missouri had met every statutory condition imposed by either the statute or the Secretary in formulating its specifications and plans, arranging for contractors, legislating the State's share, obtaining the land, and arranging contracts at the most reasonable cost. Because the State had incurred costs by this procedure, and would incur additional costs by further delay, the court would not allow the Secretary to withhold final approval by adding, in effect, an additional criterion neither expressed nor implied within the act. Accordingly, the Secretary was ordered to revoke contract controls with regard to the Missouri highway plans, and contractually obligate the Federal Government for the payment of its full proportional contribution. The court adhered to its construction of the scope of the Secretary's discretion even when conceding, *arguendo*, each of the Secretary's arguments; i.e, the general appropriations acts are permissive, not mandatory; that the States have no vested rights in the funds until final approval by the Secretary; and that specific language in the act regarding impoundment of funds was merely precatory, rather than mandatory.

Regarding the first argument, the court cited an Attorney General opinion of February 15, 1967, in which Attorney General Ramsey Clark concluded that:

> . . . the Secretary has the power to defer the availability to the states of those funds authorized and apportioned for highway construction which have not, by the approval of a project, become the subject of a contractual obligation on the part of the federal government in favor of a state.[59]

While agreeing that this opinion supported the proposition that a general appropriation act does not mandate the expenditure of funds, the court could not concur that such a proposition would *a fortiori* endow the Secretary with the authority to use unfettered discretion

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[57] 23 U.S.C. § 105 (a) (1970).
[58] 23 U.S.C. § 106 (a) (1970).
[59] 42 Op. Atty. Gen. No. 32 (1967).

as to when and how the moneys may be used. "The Act circumscribes that discretion and only an analysis of the statute itself can dictate the latitude of the questioned discretion." [60]

The Secretary based his second argument, that the States have no vested right in the funds appropriated by the Congress, upon a construction of section 106(a) of the act, providing that approval of the Secretary is a prerequisite to the contractual obligation of the United States, and section 118(b), providing for lapsing and reapportionment among the other States, of all funds made available to a State which remain unexpended at the end of 2 years from the close of the fiscal year for which the sums are authorized. The Secretary claimed that each of these provisions granted him the power to defer approval of expenditures for a period of up to 2 years. The court failed to agree that the power of ultimate approval in the Secretary, from section 106 (a), implied power to withhold approval for reasons not contemplated in the rest of the act. Concerning section 118(b), the court referred to legislative history indicating that the purpose of that provision was to prevent the funds from being turned back into the Treasury at the end of each fiscal year, and thereby to alleviate undue haste in the expenditure of the funds.

The Secretary finally argued—and this argument was accepted by Judge Stephenson in his dissenting opinion—that section 101(c) of the act did not suffice to prevent impoundment of funds because the language is precatory, not mandatory. The section provides that "[i]t is the sense of Congress that . . . no part of any sums authorized to be appropriated for expenditure upon any Federal-Aid system . . . shall be impounded. . . ." Since the Congress could have made this language mandatory, but had declined to do so, the Congress clearly did not have the intent to preclude altogether the power of the Secretary to withhold funds. To meet this contention, the court first cited the lack of any legislative history recording why the Congress had declined to include mandatory language in its "sense of the Congress" provision. The court reasoned that it might be true that the Congress did not want to proscribe the Secretary's alleged authority to withhold obligational authority.

> But it is equally plausible that Congress felt that the bills were unnecessary—that it was their understanding that the Federal-Aid Highway Act as then existing already precluded any deferral of obligational authority.[61]

In this light, the court found legislative history of no assistance in construing the act. Ultimately, the court interpreted section 191(c) as merely corroborating its view that the Secretary could not withhold funds for purposes wholly unrelated to the highway program.

Significantly, *State Highway Comm. of Missouri* v. *Volpe* is the only decision of the 50-odd decided so far which actually mandates the obligation of money, as opposed to the release of money for obligation, should the appropriate execution officer find sufficient eligible grantees. The court found that the State highway commission had met every statutory criterion for eligibility for its grant and had committed numerous acts and large amounts of money in reliance upon previously

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[60] *Civil Aeronautics Board* v. *Delta Airlines, Inc.*, 367 U.S. 316, 322 (1961); *Federal Trade Comm.* v. *Nat'l Lead Co.*, 352 U.S. 419 (1957); *Stark* v. *Wickard*, 321 U.S. 288, 309 (1944).

[61] 479 F. 2d at 1117.

granted approvals by the Department of Transportation. Consequently, the court ordered the obligation of the full amount of the apportionment to that State.

In *Campaign Clean Water, Inc.* v. *Ruckelshaus*,[62] the district court indicated that it would be predisposed to order the obligation of the full amounts authorized to be allotted for water pollution control, but this can only be regarded as *dictum*, since the actual holding of the case concerned only the allotment stage.

In *Pennsylvania* v. *Weinberger*,[63] it was held that while the apportionment stage was mandatory, a certain degree of discretion was implicit at the obligation stage; however, the court cautioned that the Commissioner of Education could not suspend or severely limit the program by denying application for grant awards for reasons unrelated to the education program.

3. *Processing of Grantee Applications Under Federal Programs.*—By far the most numerous of the decisions concern the refusal of various administrative officials to accept and process grantee applications for funds pursuant to Federal spending programs. The majority of courts have held that an administrative official might turn down an application that fails to meet prescribed statutory criteria, but his refusal to accept or process such applications at all violates a statutory mandate to administer the program,[64] with one narrower exception: An administrative official does have discretion to withhold exercise of contract authority, given by Congress for a specific purpose, in order to determine whether that purpose would be achieved or frustrated by its continued exercise under existing circumstances.[65]

In *Commonwealth of Pennsylvania* v. *Lynn* (footnote 65, supra), the U.S. Circuit Court for the District of Columbia Circuit reversed an order of Judge Charles R. Richey of the U.S. District Court for the District of Columbia enjoining the Secretary of Housing and Urban Development from suspending the implementation of sections 235, 236, and 101 of the Housing and Urban Development Acts[66] providing for mortgage insurance and periodic assistance payments to mortgages who are low income persons buying homes, subsidizing rental housing opportunities to lower income families in newly constructed or renovated buildings, and assisting tenants of privately owned federally assisted projects whose income would otherwise qualify them for low-rent public housing. The Secretary had "suspended" the acceptance and processing of applications under these programs on January 8, 1973, effectively withholding in excess of $431,000 appropriated by the Congress.

The reasons cited for the suspension were allegedly "program related"; referring to an asserted difficulty in administering the programs in a manner consistent with congressional intent as to the income groups to be served by the programs and the availability of program benefits in all parts of the United States, which engendered the need for suspension pending further re-evaluation.

The district court had based its holding upon specific language in the relevant housing acts as supporting its finding that the Congress

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[62] *Supra.*
[63] *Supra.*
[64] See, e.g., *Berends* v. *Butz*, 357 F. Supp. 143 (D. Minn. 1973); *Local 2677, A.F.G.E.* v. *Phillips*, 358 F. Supp. 60 (D.D.C. 1973).
[65] *Commonwealth of Pennsylvania* v. *Lynn*, No. 73-1835 (D.C. Cir., July 19, 1974), reversing 362 F. Supp. 1363 (D.D.C. 1973).
[66] 12 U.S.C. §§ 1715z, 1715z-1, and 1701(d) (1970).

had mandated operation of these programs on a continuing basis in order to move the country closer to its housing goals. The Housing Act of 1949,[67] the foundation for all later Federal housing assistance, called for ". . . the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family," and provided that the Department of Housing and Urban Development—

> shall exercise [its] powers, functions, or duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established.

As the Congress recognized that the stated goals were not being reached, it enacted additional legislation establishing new programs, including those presently involved in cases in litigation, stating in 12 U.S.C. § 1701t (1970) that ". . . the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality; . . ." by using the preferred means of private enterprise. The Congress has increased the appropriation available for sections 235, 236, and 101 programs every year since 1968.

While acknowledging this specific language, the court of appeals stated that

> * * * The real question here is whether the Secretary has the discretion, or indeed the obligation, to suspend the programs' operation when he has adequate reason to believe that they are not serving Congress's purpose of aiding specific groups in specific ways, or are frustating the national housing policies applicable to all housing programs. We think he has this limited discretion.[68]

The court of appeals thereby reversed the judgment of the district court that only the Congress, and not the executive branch, could evaluate and alter the housing programs.

This holding that an administrative officer possesses statutory discretion to terminate or suspend the acceptance or processing of applications under Federal programs for "program related" reasons was emphatically not intended to imply that such an officer likewise could terminate a Federal program for reasons unrelated to that program.[69] This theory is exemplified by the holding in *Berends* v. *Butz*, in which Judge Lord of the Federal district court in Minnesota ordered the Secretary of Agriculture to accept and process loan applications for emergency loan funds pursuant to the Consolidated Farmers Home Administration Act of 1961[70] and the Disaster Relief Act of 1970.[71]

The facts of the *Berends* case are as follows: In mid-1972, the Secretary of Agriculture declared 15 counties in Minnesota to be "emergency loan areas," because of their having experienced "natural disasters" resulting from excessive and prolonged rainfall to such

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[67] 42 U.S.C. §§ 1441, *et seq.* (1970).
[68] *Commonwealth of Pennsylvania* v. *Lynn*, *supra.*, slip opinion at 15.
[69] Id., at 8.
[70] 7 U.S.C. § 1961 (1970).
[71] P.L. 91-606, § 232, 42 U.S.C. §§ 4451, 4485, (Supp. II 1972).

an extent as to seriously and injuriously interfere with and delay the planting of crops in the spring of 1972.[72]

This designation entitled farmers residing in those counties to apply for emergency loans pursuant to the above-cited statutes. In reliance upon official notification by FHA officials that loan applications would be accepted until June 30, 1973, and upon suggestions that interested farmers not file applications until after their harvest so as to ascertain all possible losses, most applications were not submitted until late 1972. However, on December 27, 1972, without notice or warning of any kind, the Secretary ordered FHA officials to cease accepting, processing, or approving emergency loan applications as of that date.

The court held that the limit of discretion granted the Secretary under the Consolidated Farmers Home Administration Act extends to the designation of emergency loan areas,[73] and that once such designation is made, the statute mandates his accepting, processing, and approving qualifying applications.[74] A 1972 amendment to the act[75] providing that, ". . . the benefits provided under this section shall be applicable to all loans qualifying hereunder, whether before or after the date of enactment of this section . . ." and certain passages from the Senate report accompanying the Agriculture Act of 1961, were said to mandate the application of loan benefits to all loans qualifying under the provisions.

Parenthetically, in a similar case under the Disaster Relief Act of 1972,[76] it was held that "while it may be true that an individual has no right to receive a loan under the disaster loan program, he does have the right to file an application and to have his application reviewed."[77]

The argument raised by the Secretary of Agriculture that the termination of the emergency loan program was justified on the grounds that the loans could exceed the amount apportioned to the Agriculture credit insurance fund by the Office of Management and Budget, pursuant to the Antideficiency Act [31 U.S.C. sec. 665 (1970)], was unavailing. The Secretary had the right, and indeed the duty, under that law, to review and supplement the apportionment, ". . . as may be necessary to further the effective use of the appropriation concerned." A more detailed analysis of the applicability of the Antideficiency Act appears later herein.

Among other cases ordering administrative officers to accept and process pending applications for funding are *Hayes* v. *Arnett*,[78] regarding funding of community action agencies created by the Economic Opportunity Act of 1964, as amended;[79] *Nat'l Council of Community Health Centers* v. *Weinberger*,[80] pursuant to the Community Mental Health Centers Act, as amended;[81] *Minnesota Chippewa Tribe, et al.* v. *Carlucci*, [82] brought under the Indian Education Act;[83] and *Guadamuz* v. *Ash*,[84] involving the REAP program and the federally assisted code enforcement program.[85]

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[72] 37 Fed. Reg. No. 126 (June 26, 1972) at 12854; 37 Fed. Reg. No. 187 (Sept. 20, 1972) at 21022.
[73] 7 U.S.C. § 1971 (1970).
[74] 7 U.S.C. § 1961(b) (1970).
[75] Pub. L. 92-385, § 51.
[76] 42 U.S.C. § 1451.
[77] *Dubrow* v. *Small Business Adm.*, 345 F. Supp. 4 (C.D. Cal. 1972).
[78] C.A. No. 614-73 (D.D.C., June 27, 1973).
[79] 42 U.S.C. §§ 2790 and 2808 (1970).
[80] C.A. No. 1233-73 (D.D.C., June 28, 1973).
[81] 42 U.S.C. §§ 2681 *et seq.* (Supp. 1972).
[82] C.A. No. 175-73 (D.D.C., May 8, 1973).
[83] Pub. L. 92-318, title IV, 86 Stat. 334 (June 23, 1972), 20 U.S.C. §§ 240, et seq. (Supp. II, 1972).
[84] *Supra.*
[85] 42 U.S.C. § 1452 (1970).

4. *General Administration of Federal Programs, and Various Miscellaneous Holdings.*—In one significant decision, Judge Jones of the U.S. District Court for the District of Columbia enjoined, and declared null and void, illegal, unauthorized by law, and in excess of statutory authority, all actions by the Acting Director of OEO, Howard Phillips, and his agents, intended to accomplish the termination, dissolution, or abolition of the Office of Economic Opportunity, or the termination of funding or functioning of community action agencies designated in accordance with the provisions of the Economic Opportunity Act of 1964.[86] The Economic Opportunity Amendments of 1972 provide that:

> Not withstanding any other provision or law, unless expressly in limitation of the provisions of this section of the amounts appropriated . . . for the fiscal year ending June 30, 1973, and for the succeeding fiscal year, the Director of the Office of Economic Opportunity *shall* for each such fiscal year reserve and make available not less than $328,900,000 for programs under section 221 of the Economic Opportunity Act of 1964. [Emphasis added].

The court found a statutory mandate to disburse the appropriated funds so as to effectuate the goals of the program.[87]

Defendant Phillips had instructed all grantees of section 221 (community action agencies) to begin phasing out their programs pursuant to President Nixon's 1974 budget message, in which he requested that no funds be appropriated for OEO in fiscal year 1974, and that CAA functions be transferred to local agencies through special revenue sharing. However, insofar as the Acting Director was using the funds to effectuate the dismantling of the program, he was held to be acting in excess of the statutorily granted discretion.[88] The court ruled that the President's budget message is no more than a proposal to Congress for the Congress to act upon it as it pleases. Moreover, the termination of the CAA functions because no appropriation bill had yet been passed was held not in keeping with the obligations to maintain fiscal responsibility as defined by 42 U.S.C. § 2835 (a) and (d) (1970). The funding of OEO programs frequently occurs after the close of the fiscal year, but the Congress, by enacting a multiyear authorization, had expressed its intention of continuing to fund the OEO programs each year.

In an almost identical case, Judge Parsons of the northern district of Illinois declined to issue a temporary injunction against the actions of the Acting Director.[89] The court found that the appropriation for fiscal year 1973 had been duly disbursed to the existing community action agencies, although the agencies were to use the moneys in accordance with the budget message of the President; i.e., orderly dissolution. Because the Congress had not yet appropriated funds for 1974, the court declined to rule as to whether the CAA's were to be unlawfully dissolved in that year. Partially as a result of this conflict, this issue is being appealed.

In other related cases, Judge Jones has ruled that Howard Phillips was holding his office as Acting Director illegally, since his name was not submitted to the Senate by the President in accordance with the

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[86] *Local 2677, A.F.G.E.* v. *Phillips, supra.*
[87] 42 U.S.C. § 2808 (1970).
[88] See, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 411 (1971).
[89] *Local 2816, A.F.G.E.* v. *Phillips*, No. 73–C–500 (N.D. Ill., May 21, 1973).

OEO Act.[90] Subsequently, when the name of Alvin J. Arnett was submitted to the Senate for confirmation, Judge Jones fashioned an emergency remedy ordering Arnett to carry on the functions of OEO as mandated by statute, including the acceptance and processing of all applications for CAA funding, pending his confirmation as Director of OEO. The court further ruled that the Congress intended by a continuing resolution which extended funding of OEO programs into fiscal year 1974 at 1973 levels, to fund OEO programs in the future despite the budget message of the President asking that no funds be appropriated for certain OEO programs.[91]

Another technique utilized by the administration to dismantle OEO has been the delegation of OEO functions to other agencies. Judge Jones found that the abolition, by transfer of functions, of the Community Action Agency, community economic development, and legal services programs of the Economic Opportunity Act was violative of the provisions of that act; [92] on the other hand, Judge Thomas A. Flannery upheld the transfer of three programs to the Departments of Health, Education, and Welfare, Housing and Urban Development, and Labor.[93]

The Reorganization Act of 1949 [94] delegates the authority to the President to initiate and propose changes in the organization and functions of the executive branch. The purposes of the act are to promote more efficient management of executive branch functions, economy, or the elimination of duplication of effort.[95] The act provides that:

> (a) When the President, after investigation finds that—
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> (2) the abolition of all or a part of the functions of an agency; or
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> (6) the abolition of the whole or a part of an agency which agency or part does not have, or on the taking effect of the reorganization will not have, any functions;
>
> is necessary to accomplish one or more of the purposes of section 901(a) . . ., he shall prepare a reorganization plan for the making of the reorganizations as to which he has made findings and which he includes in the plan, and transmit the plan . . . to Congress . . .[96]

A reorganization plan takes effect without further action unless either House of Congress passes a resolution within 60 days of transmittal stating in substance that that House does not favor the reorganization plan.[97]

Judge Jones found that the abolition of the CAA functions constituted a reorganization under the provisions of the Reorganization Act, and hence was unlawful because of failure of the President to submit the required plan to Congress. The Economic Opportunity Act does expressly grant statutory authority to transfer many OEO

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[90] 42 U.S.C. § 2941(a) (1970). *Williams, et al.* v. *Phillips*, C.A. No. 490–73 (June 27, 1973).
[91] *Id.*
[92] *Local 2677 A.F.G.E.* v. *Phillips, supra.*, at 81–3.
[93] *Local 2677 A.F.G.E.* v. *Arnett*, C.A. No. 1469–73 (D.D.C., Aug. 3, 1973).
[94] 5 U.S.C. §§ 901–913 (1970).
[95] § 901(a).
[96] § 903(a).
[97] § 906(a).

functions to other agencies, without requiring compliance with the procedures of the Reorganization Act, but not the CAA, CED, or legal services programs.[98]

Local 2677 A.F.G.E. v. *Arnett*,[99] involved transfer of numerous other programs pursuant to section 602 of the Economic Opportunity Act, authorizing the Director of OEO to:

> [W]ith the approval of the President, arrange with and reimburse the heads of other federal agencies for the performance of any of the functions under this Act and, as necessary or appropriate, delegate any of his powers under this Act and authorize the redelegation thereof subject to provisions to assure the maximum possible liaison between the Office of Economic Opportunity and such other agencies at all operating levels, which shall include the furnishing of complete operational information by such other agencies to the Office of Economic Opportunity and the furnishing of such information by such Office to such other agencies.

Judge Flannery found that under current appropriations[100] funds for the administration of the delegated programs had not been included in the appropriations for OEO, but rather in parallel existing programs in the agencies to which they had been delegated, and that, therefore, transfer is necessary to assure the continued existence of the functions. Moreover, the court found the delegations to be fully supportable on a rational basis:

> The achievement of maximum economy and efficiency in the administration of federal programs, the enhancement of the statutory missions of the receiving agencies, and the assurance of continued program operation under current Congressional appropriations.[101]

Finally, numerous cases have resulted in orders directing administrative officers to record certain appropriated funds as an obligation of the United States so as to prevent their reversion to the general fund at the end of the fiscal year for which appropriated, pending final adjudication of the substantive issues of whether such funds must in fact be expended. 31 U.S.C. § 200(d) provides that—

> No appropriation or fund which is limited for obligation purposes to a definite period of time shall be available for expenditure after the expiration of such period except for liquidation of amounts obligated in accord with subsection (a) of this section; but no such appropriation or fund shall remain available for expenditure for any period beyond that otherwise authorized by law.

According to sections 200(a) (6) and (8), of title 31, amounts may be recorded as an obligation of the United States when supported by documentary evidence of ". . . a liability which may result from pending litigation brought under authority of law . . ." or ". . . any other legal liability of the United States against an appropriation or fund legally available therefor."

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[98] 42 U.S.C. § 2809 (a)(3) (1970), as amended, Pub. L. 92–424 (1968); Pub. L. 91–177, title I, § 114. (1970).
[99] *Supra.*
[100] H.J. Res. 636, P. L. 93–52.
[101] Slip opinion at 6.

A flurry of cases on or immediately before June 30, 1973, the last day of fiscal year 1973, "held over" funds pending further litigation on the merits. As a procedural matter, plaintiffs in such cases must demonstrate irreparable injury if the requested injunctive relief is not granted; clearly, the reversion of the funds to the general fund after June 30 would make the money unavailable to the plaintiff even if he were to succeed on the merits after that date. Hence, the courts have found the requisite irreparable injury. Further, plaintiff must demonstrate a substantial likelihood of success on the merits, and frequently must post bond for the payment of such costs and damages as may be suffered by any party wrongfully restrained. Among these cases are *Community Action Programs Executive Directors Ass'n* v. *Ash*,[102] ordering release of $239,143,000 appropriated by the Congress pursuant to the Elementary and Secondary Education Act of 1965, Vocational Educational Act of 1963, and Adult Education Act of 1966; *State of Alabama* v. *Weinberger*,[103] concerning $9,920,425 in various library services funds allocated to Alabama; and *American Ass'n of Colleges of Podiatric Medicine, et al.* v. *Ash*,[104] regarding $27.4 million in grants to schools of veterinary medicine, optometry, podiatry, and pharmacy.

C. IMPLIED STATUTORY AUTHORITY—THE ANTIDEFICIENCY ACT

An act of Congress which has traditionally been viewed as granting authority for the executive branch to take many of the actions which have resulted in the retardation of Federal funding programs is the Antideficiency Act.[105] The act provides, in pertinent part, that no officer or employee of the United States shall expend or obligate any funds under any appropriation or fund in excess of the amount available therein,[106] that to prevent such overexpenditure or overobligation, appropriations are to be apportioned,[107] and that an apportionment may be made to reserves, "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available."[108] Further, such apportionments may be distributed by months, calendar quarters, operating seasons, or other time periods, ". . . as may be deemed appropriate by the officers designated" to make apportionments.[109]

These provisions have been used to retard Federal spending programs in two major ways: First, by allocating a substantial portion of the appropriation to "reserves," preventing their use as operating funds, and second, by apportioning the appropriation such that nearly all the funds are to be held until the last calendar quarter of a fiscal year, so that a program may not realistically be started until the funds are about to lapse into the general Treasury.

In actual practice, this act has found no favor in the courts as statutory justification for withholding Federal funds to the point of

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[102] No. 899–73 (D.N.J., June 29, 1973).
[103] C.A. Nos. 4101–N, 4103–N and 4104–N, (M.D. Ala., June 30, 1973).
[104] C.A. No. 1139–73 consolidated with *American Ass'n of Colleges of Pharmacy* v. *Ash*, C.A. No. 1244–73 (D.D.C., June 29, 1973).
[105] 31 U.S.C. § 665 (1970).
[106] § 665(a).
[107] § 665(c)(1).
[108] § 665(c)(2).
[109] § 665(3).

halting a program. The Court of Appeals for the Eighth Circuit, in *State Highway Comm. of Missouri* v. *Volpe*,[110] spoke in *dictum* about the Antideficiency Act, observing that the legislative history of the act is ". . . emphatic in noting that this power to withhold funds cannot be used if it would jeopardize the policy of the statute." [111] The act itself provides that an appropriation may be apportioned to reserves only ". . . whenever it is determined . . . that any amount so reserved will not be required to carry out the purposes of the appropriation concerned. . . ." [112] Further, the report of the House of Representatives on amendments to the act states 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. If this principle of thwarting the will of Congress by the impounding of funds should be accepted as correct, then Congress would be totally incapable of carrying out its constitutional mandate of providing for the defense of the Nation.[113]

The court found that any withholding to "effect savings" or due to "subsequent events" must be considered in context of not violating the purposes and objectives of the particular program. "Such purposes and objectives are necessarily violated when one charged with implementing the statute acts beyond his delegated authority." [114]

The only other impoundment opinion to make mention of the Antideficiency Act was *Berends* v. *Butz*,[115] in which the Secretary of Agriculture defended his termination of the emergency loan program for agricultural disaster victims on the grounds that the loans could exceed the amount apportioned to the Agriculture credit insurance fund, pursuant to the act, by the Office of Management and Budget. However, the court in that case found that the Congress had set no limits upon the amounts which could be apportioned to meet natural disaster emergencies, and the Antideficiency Act further provides for review of apportionments at least four times a year, ". . . as may be necessary to further the effective use of the appropriation concerned." [116] Therefore, reasoned the court, the Secretary could have requested an additional apportionment to meet the necessary emergency loans, and, indeed, had a duty to do so.

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[110] *Supra.*
[111] 479 F. 2d at 1118.
[112] 31 U.S.C. § 665(2) (1970).
[113] H. Rept. No. 1797, 81st Cong., 2d Sess. 311 (1950).
[114] 479 F. 2d at 1118.
[115] *Supra.*
[116] 31 U.S.C. § 665(4) (1870).

III. Analysis of Procedural Aspects of the Holdings

Among the most frequently quoted axioms regarding access to the Federal court system is that ". . . federal courts are courts of limited jurisdiction." [117] Since all so-called impoundment suits have been brought in the Federal courts, it is important to see how the application of this axiom has affected the ability of plaintiffs challenging acts by the executive branch to retard Federal programs to bring these acts to trial.

A. CONSTITUTIONAL LIMITS OF FEDERAL COURT JURISDICTION

The most fundamental limitations upon the jurisdiction of the Federal courts are derived from the Constitution, article III, section 2, enumerating nine classes of "cases and controversies" to which the Federal judicial power shall extend. These nine classes of cases and controversies fall into two general categories, described by Chief Justice John Marshall in *Cohens* v. *Virginia*: [118]

> In the first, jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This cause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more states, between a state and citizens of another state," and "between a state and foreign states, citizens, and subjects". If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

Although the term "cases and controversies" has defied accurate definition, the complicated body of law surrounding the term reflects the intention of the framers of the Constitution that Federal courts be restricted to settling questions ". . . presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." [119] Thus the Federal courts must refrain from issuing advisory opinions to either House of Congress or the President,[120] and must refuse to decide suits brought solely because authorized by Congress to "test" a statutory enactment,[121] suits

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[117] Wright, *Law of Federal Courts*, 2d ed., § 7 (West, 1970) at 15.
[118] 19 U.S. (6 Wheat.) 264, 378 (1821).
[119] *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968).
[120] *Constitution of the United States of America, Annotated*, Sen. Doc. No. 92-82 (1972) at 630.
[121] *Muskrat* v. *United States*, 219 U.S. 346 (1911).

which are "feigned" or collusive,[122] or any other dispute which is hypothetical, academic, or moot.

The dual requirements of adverse litigants and appropriateness for resolution, placed by the "case" and "controversy" requirements, have been embodied in the judicial term of art, "justiciability." The term "justiciability" itself encompasses numerous other judicial doctrines affecting the ability of parties to involve the Federal courts to settle their differences, and the power or appropriateness of Federal courts to accept and decide issues. Among these doctrines are the following:

1. Standing—whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." [123]

2. Real interest—the requirement that a real issue be presented, as contrasted with speculative, abstract, hypothetical, or moot issues. Closely related is the requirement of "ripeness"—the doctrine that the injury complained of must have already occurred, or must be fairly certain.

3. Sovereign immunity—the doctrine that bars unconsented suits against the government.

4. Political question—the doctrine whereby the courts abstain from deciding questions more appropriately dealt with by the "political" branches of government: the Congress and the executive.

1. *Standing To Bring Suit*

The doctrine of "standing to bring suit" is a complex one, but it may generally be stated that,

> the fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.[124]

In theory, the issue of standing comes up every time a litigant comes into court. But while in most cases a litigant's standing to sue is self-evident, because only the person harmed by the supposed wrong will bring suit—as in a suit for damages for breach of contract or tort—the issue of standing is most crucial where an interested bystander brings suit on a question of a public nature.[125] Therefore, in practice, the doctrine of standing as most often litigated:

> . . . is almost exclusively concerned with such public law questions as determination of constitutionality and review of administrative or other governmental action.[126]

A person challenging the constitutionality of a statute or any other governmental act generally must demonstrate that he has been injured or that he will be certainly injured, in order to show the requisite interest. Moreover, his "interest must be of a personal and not of an official nature," [127] or "some specialized interest of his own to vindicate, apart from a political concern which belongs to us all." [128] This is an

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[122] *Lord* v. *Veazie*, 49 U.S. (8 How.) 251 (1850).
[123] *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).
[124] *Flast* v. *Cohen*, *supra*, at 99.
[125] Wright, *supra.*, § 13, at 39.
[126] *Constitution, Annotated*, *supra*, at 636.
[127] *Braxton County Court* v. *West Virginia*, 208 U.S. 192, 197 (1908).
[128] *Coleman* v. *Miller*, 307 U.S. 433, 464 (1939).

expression of the rationale in *Massachusetts* v. *Mellon*,[129] denying standing to a taxpayer suing generally to restrain certain disbursements of Federal money on the grounds that the Congress lacked power to appropriate funds for such purposes and that the appropriation would increase her taxes in future years in an unconstitutional manner.

In this case, it was the relatively "minute and indeterminate" interest in the moneys in the Federal Treasury and the "remote, fluctuating and uncertain" effect upon future taxation that prevented the plaintiff from alleging the type of "direct injury" necessary to confer standing.[130] [This holding has been modified by that in *Flast* v. *Cohen*,[131] wherein the Supreme Court granted standing to a taxpayer to challenge an enactment when the taxpayer adequately demonstrated the "requisite personal stake in the outcome" by establishing a logical nexus between his status as a taxpayer and the type of legislation attacked, and the precise nature of the constitutional infringement alleged.]

Besides requiring a litigant to show a substantial interest in the outcome of the litigation to establish standing, the courts further require the litigant to show that he has been injured, or that he will certainly be injured. Until only recently the traditional view of the courts was to require the injury to be "a wrong which directly results in the violation of a legal right." [132] Requiring the injury to be a "legal right" gave rise to a circular dilemma:

> . . . if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected.[133]

The recent holding in *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*,[134] broadened the law of standing and effectively eliminated the circularity problem by rejecting the "legal interest" test because it went to the merits, and by replacing it with a two-fold test for standing: the plaintiff must allege "that the challenged action has caused him injury in fact, economic or otherwise," [135] and that "the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." [136]

The case of *Sierra Club* v. *Morton*,[137] further liberalized the law of standing to sue in Federal courts, requiring "injury in fact" to a "cognizable interest," [138] and that the plaintiff be himself among the aggrieved.[139] Moreover, the *Sierra Club* case has reinforced the proposition that an organization whose members are injured may represent those members in a proceeding for judicial review.[140]

The practical application of the law of standing in the recent impoundment cases has been liberal. In the some 50 cases so far reviewed, only one has denied plaintiff standing to sue, and that for failure to aver facts tending to demonstrate actual damages resulting

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[129] 262 U.S. 447 (1923).
[130] *Id.*, at 487, 488.
[131] *Supra.*
[132] *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479 (1938).
[133] Wright, *supra*, § 13, at 43.
[134] 397 U.S. 150 (1970).
[135] *Id.*, 152.
[136] *Id.*, 153.
[137] 405 U.S. 727 (1972).
[138] *Id.*, 734, 735.
[139] *Id.*, at 739.
[140] See, e.g., *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 428 (1962).

from the action complained of.[141] Examples of holdings where plaintiffs have been found to have standing follow:

Where a Federal funding program is designed to disburse either funds or loans upon final approval of applications from statutory beneficiaries, it has been generally held that all such statutory beneficiaries have standing to sue when the program has been retarded through failure of the administrative agency with statutory responsibility for administering the program to accept or process applications for funds or loans.[142]

Of such statutory beneficiaries, standing has been granted to those who have applied for funds or loans and whose applications have been approved,[143] persons or associations whose members have been found by the court to meet statutory criteria for approval of their applications,[144] persons or associations of persons appearing qualified for payments under the program but haven't for failure of the administration to issue the required regulations,[145] persons or associations of members whose applications have not or will not be processed because of suspension or cancellation of the program,[146] and persons who have been precluded or deterred from filing applications because of the suspension or cancellation of the program.[147]

Standing to sue has been found on the part of persons or associations of persons who have merely submitted applications for grants,[148] and on the part of persons or associations of persons merely alleged to be potential beneficiaries.[149]

Local agencies established and qualified under a Federal act to administer a Federal program established by the act have been given standing to challenge failure to release funds appropriated for the implementation of the program.[150]

Issues of standing are slightly different when a State, or political subdivision or agency thereof, is the plaintiff. A State may sue as *parens patriae*, in behalf of its citizens [151] except "as against the Federal Government." [152] However, suit has been allowed in the impoundment area by a State in its own behalf as a political subdivision as well as *parens patriae* for its citizens to enforce rights and benefits conferred on them by provisions of the Library Services and Construction Act of 1956.[153]

Where States are authorized by statute to apply for and administer funds under Federal programs, the States have been granted standing upon allegations that they are in full compliance with all requirements for receipt of funds for which they are eligible and entitled under the act,[154] and upon findings that they are eligible for funds under the act having submitted plans and applications which were approved in the

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141 *Brown* v. *Ruckelshaus, supra.*

142 See, e.g., *Pealo* v. *Farmers Home Adm.*, 361 F. Supp 1320 (D.D.C. 1973); *Dotson* v. *Butz*, C.A. No. 1210–73 (D.D.C., Aug. 3, 1973); *Guadamuz* v. *Ash*, C.A. No. 155–73 (D.D.C., June 29, 1973); *Minnesota Chippewa Tribe* v. *Carlucci*, C.A. No. 175–73 (D.D.C. May 8, 1973).

143 *Pealo* v. *Farmers Home Adm., supra.*

144 *Nat'l League of Nursing* v. *Ash*, C.A. No. 1316–73 (D.D.C., Nov. 19, 1973).

145 *Nat'l Ass'n of Collegiate Veterans* v. *Ottina*, C.A. No. 349–73 (D.D.C., May 24, 1973).

146 *Pennsylvania* v. *Lynn, supra.*

147 *Pennsylvania* v. *Lynn, supra.*; *Berends* v. *Butz*, 357 F. Supp. 143 (D. Minn. 1973).

148 *American Ass'n of Colleges of Podiatric Medicine* v. *Ash*, C.A. No. 1139–73 (D.D.C., Oct. 26, 1973); *Ass'n of American Medical Colleges* v. *Weinberger*, C.A. Nos. 1830–73 and 1794–73 (D.D.C., Oct. 26, 1973).

149 *Dotson* v. *Butz, supra.*

150 *Community Action Programs Executive Directors Ass'n of N.J.* v. *Ash*, C.A. No. 899–73 (D.N.J., June 29, 1973).

151 *Louisiana* v. *Texas*, 176 U.S. 1 (1900).

152 *Massachusetts* v. *Mellon*, 262 U.S. 447, 485–486 (1923).

153 *Oklahoma* v. *Weinberger*, No. C–73–425C (W.D. Okla., July 31, 1973).

154 *Texas* v. *Weinberger*, C.A. No. A–73–CA–162 (W.D. Tex., Sept. 28, 1973).

manner required by the act.[155] States and cities therein have been granted standing to challenge refusal to allot funds to the States pursuant to the Water Pollution Control Act Amendments of 1972.[156] An agency of a State has been granted standing upon a showing that under Federal law, the State constitution and Federal Constitution, and State statutes, the agency is vested with exclusive and plenary powers and duties to receive and administer, on behalf of the State, all funds and apportionments under the Federal act.[157]

A union of Government employees whose jobs were threatened by the impending dismantlement of OEO functions was given standing to challenge that dismantlement, even though the union was not a statutory beneficiary of OEO grants.[158] Under the holding in *Sierra Club* v. *Morton*,[159] a union has standing to bring an action on behalf of its members who actually suffer the alleged injury.[160]

Under certain circumstances, a Member of the Congress may have standing to sue for the implementation of a Federal program for which he has voted. In *Mitchell* v. *Laird*,[161] Members of the House of Representatives were held to have standing to ask for a declaratory judgment with regard to the Indochina war on the grounds that if the war were declared illegal, the further conduct of the war would ". . . unlawfully impair and defeat plaintiffs' Constitutional right, as members of the Congress of the United States, to decide whether the United States should fight a war." Moreover, a declaration that the war was illegal would bear upon the duties of plaintiffs as Members of the House to impeach defendants, as well as their duties to act on appropriations bills, or other legislative matters, such as raising an army, or enacting civil or criminal legislation.[162]

This holding was followed in one case, tangentially related to the impoundment area. In *Williams* v. *Phillips*,[163] the court acknowledged standing on the part of members of the Senate Labor and Public Welfare Committee, which committee has legislative jurisdiction over OEO matters, to sue to prevent the dismantling of OEO functions by seeking a declaration injunction to the effect that the Acting Director of OEO, Howard Phillips, chief architect of the dismantling operation, was holding office illegally. The court held that a declaration that defendant was unlawfully serving in office would bear upon plaintiffs' duties to consider appropriations for OEO, or other legislative matters affecting OEO or the position of OEO Director. Further, the service by defendant as Acting Director of OEO rather than Director does not remove the direct injury to plaintiffs' statutory responsibility to pass upon the qualifications of the individual nominated to be Director.

Besides these cases, there is scant other authority for allowing a Member of Congress to sue in his official capacity.[164] These cases were dismissed for lack of standing as to plaintiffs who were Members of Congress suing in their official capacity, and were generally dismissed on the merits as to Members suing as private individuals.

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[155] *Louisiana* v. *Weinberger*, C.A. No. 73–1763 (E.D. La., Nov. 30, 1973).
[156] *City of New York* v. *Train*, No. 73–1705 (D.C. Cir., Jan. 23, 1973); aff'g *City of New York* v. *Ruckelshaus* 41 U.S.L.W. 2602 (D.D.C., May 8, 1973); *Texas* v. *Fri*, C.A. No. A–73–CA–38 (W.D. Tex., Oct. 2, 1973).
[157] *State Hwy. Comm. of Missouri* v. *Volpe*, 479 F. 2d 1099 (8th Cir. 1973).
[158] *Local 2677, A.F.G.E.* v. *Phillips*, 358 F. Supp. 60 (D.D.C. 1973); *Local 2816, A.F.G.E.* v. *Phillips*, No. 73 C 500 (N.D. Ill., May 21, 1973).
[159] *Supra.*
[160] *Lodge 1858, A.F.G.E.* v. *Paine*, 436 F. 2d 882 (D.C. Cir. 1970).
[161] 488 F. 2d 611 (D.C. Cir., Mar. 20, 1973).
[162] See also, *Holtzman* v. *Richardson*, 361 F. Supp. 544 (E. D.N.Y. 1973); Rev'd on other grounds, 484 F., 2d 1307 (2nd Cir. 1973).
[163] C.A. No. 490–73 (D.D.C., June 11, 1973).
[164] See, e.g., *Diggs* v. *Schultz*, 470 F. 2d 461 (D.C. Cir. 1972).

In *Kennedy* v. *Sampson*,[165] Senator Edward F. Kennedy successfully sued for a declaratory injunction to the effect that a particular act of Congress was validly enacted into law without the signature of the President, in accordance with article I, section 7, clause 2 of the Constitution. The purpose of the suit was to clarify the efficacy of the so-called pocket veto. Arguing that *Kennedy* v. *Sampson* generally enables a Member of Congress to sue to "protect his vote" from nullification by unlawful executive action, Representative Fred B. Rooney has filed suit to compel full spending of funds for "grants for basic water and sewer facilities program." [166] The court has accepted the case for hearing, but it is not clear whether the court has accepted Mr. Rooney's argument that he has standing in his official capacity as a Member of Congress, or rather that his co-plaintiffs have standing as political subdivisions of the Commonwealth of Pennsylvania which are statutory beneficiaries of the act in question.

Representative George R. Brown, Jr., was denied standing to sue to enforce allotment provisions of the Water Pollution Control Act Amendments of 1972.[167] Although Representative Brown was suing as a private citizen, the court noted "parenthetically" that his ". . . status as a Congressman does not place him in any better position than the rest of the general public." [168]

An act of Congress which has inspired substantial litigation to compel the executive branch to allot moneys authorized by the act—the Water Pollution Control Act Amendments of 1972 [169]—expressly confers standing upon "any citizen" to commence a civil action on his own behalf against the United States, or "against the Administrator [or the Environmental Protection Agency] where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." [170] A "citizen" is defined as a ". . . person or persons having an interest which is or may be affected." [171] The courts are granted jurisdiction without regard to amount in controversy ". . . to order the Administrator to perform such act or duty, as the case may be." [172]

In this act, the finding of standing of a private citizen bringing suit hinges upon the finding of duty to the citizen on the part of the Administrator, and an adversely affected interest of the citizen because of the Administrator's failure to perform that duty. Both were found in *Martin-Trigona* v. *Ruckelshaus*,[173] wherein the plaintiff was a private citizen alleging that he uses Lake Michigan for personal recreational purposes and also uses the lake insofar as the lake is used by the city in providing city services to plaintiff. In most cases brought under this act, however, plaintiffs do not rely upon section 505 for standing.

The case of *City of New York* v. *Ruckelshaus*, was[174] brought by political subdivisions of New York State and other States. *Texas* v. *Fri* [175] was brought by a State alleging injury to its ability to enter into long-range

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[165] C.A. No. 1583–72 (D.D.C., Aug. 15, 1973).
[166] 42 U.S.C. § 3102 (1970). *Rooney* v. *Lynn*, C.A. No. 2010–73 (D.D.C.).
[167] *Brown* v. *Ruckelshaus*, *supra*.
[168] 5 E.R.C. at 1806.
[169] Pub. L. 92–500, 86 Stat. 816.
[170] Pub. L. 92–500, § 505(a), 86 Stat. 888.
[171] § 505(g), 86 Stat. 889.
[172] § 505(a), 86 Stat. 888.
[173] No. 72 C 3044 (N.D. Ill., June 29, 1973).
[174] *Supra*.
[175] C.A. No. A–73–CA–38 (W.D. Tex., Oct. 2, 1973).

plans because of failure of the Administrator to allot. And in *Campaign Clear Water, Inc.* v. *Train*,[176] suit was brought by a corporation presenting claims particular to certain of its members pursuant to *Sierra Club* v. *Morton*.[177] The corporation is ". . . organized to promote ecological and environmental advancement in Virginia. Its officers, directors, and financial contributors include Virginia residents who use the nation's waters for both sport and commercial fishing and for other recreational purposes." They alleged that their interests are impaired by discharge of untreated waste treatment plants into Virginia waters. They allegedly have suffered economic injury from contaminated waters from plants operated by certain sanitation districts, which have ruined shellfish beds. Finally they alleged that the withholding of funds would have a disastrous effect upon future plans for water treatment facilities, and would allow injuries to plaintiffs to continue. The court found that the injuries alleged were to interests protected by legal rights assertedly violated by defendant's acts.

The case of *Brown* v. *Ruckelshaus* [178] was brought by a private citizen on behalf of himself and all other California citizens and residents. However, section 505 was held not to authorize class actions.

2. *Real Interest, and Ripeness of Injury*

Closely related to the requirements of adverse litigants and substantial interest for standing in Federal court is the requirement that the interest in litigation be "real," as opposed to speculative, abstract, hypothetical, or moot. It is the Federal courts' "considered practice not to decide abstract, hypothetical or contingent questions." [179]

Numerous cases affecting the right of plaintiffs to full implementation of statutory programs have come to a decision over objections by defendant that plaintiffs have not been directly aggrieved by defendant's actions and that damages are merely speculative. Some cases have been dismissed as moot because the funds in question were either allocated or released.[180] But nearly all others have found plaintiff's alleged damages to be real. For example, defendants argued in *Pennsylvania* v. *Lynn*,[181] that damages to plaintiff arising out of retardation of housing subsidy, mortgage loan insurance, and rent supplement programs were merely speculative because the Department of Housing and Urban Development had not made any final commitment of funds to any plaintiff, and because the programs were merely being suspended, rather than terminated.

The court found, however, that plaintiffs had a direct stake in the outcome of the litigation. Plaintiffs had expended time, money, and effort in submitting or preparing applications for subsidies under the programs, and under the status quo, would receive no assistance at all, so all preparations and money would be wasted. Plaintiffs therefore had a real interest in seeing that applications were received, processed, and evaluated as the act required.[182]

The refusal of the Administrator of the Environmental Protection Agency to allocate funds under the Water Pollution Control Act

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[176] *Supra.*
[177] *Supra.*
[178] *Supra.*
[179] *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945).
[180] *Nat's Ass'n of State Universities and Land Grant Colleges* v. *Weinberger*, C.A. No. 1014–73 (D.D.C., June 29, 1973); *Ohio* v. *Weinberger*, C.A. No. 73–343 (S.D. Ohio, Jan. 31, 1974).
[181] *Supra.*
[182] See also, *State Highway Comm. of Missouri* v. *Volpe, supra.*

Amendments of 1972 has been held to present legal issues of "sufficient immediacy and reality" to invoke the jurisdiction of the court,[183] but plaintiffs have been denied standing for failure to submit affidavits averring that refusal to allot has injured or would injure plaintiffs. Such failure defeats the plaintiffs' allegation of a ". . . personal stake in the outcome of the controversy."[184]

Whether the injury complained of is "ripe" for adjudication is a question of jurisdication of the court almost indistinguishable from whether the injury is "real," except that "ripeness" is an issue that concerns the maturity of an alleged injury rather than the genuineness.[185]

The issue of ripeness arose in the impoundment context in *State Highway Comm. of Missouri* v. *Volpe*,[186] wherein it was questioned whether the plaintiff was entitled to a declaratory judgment regarding future withholdings of obligational authority by defendant when such authority had been granted for the current fiscal year. The court held that when the actions questioned are those of the Government, a declaratory judgment is appropriate if it would have significant consequences in determining the extent of any further relief deemed necessary, if the illegal conduct should be expected to resume in the future, and if there is a certainty that the impact will fall on the same objecting litigants. A similar question was raised in *Local 2677, A.F.G.E.* v. *Phillips*,[187] in which defendants alleged that because funds appropriated under OEO authorizations for community action agencies were not to be terminated until June 30, 1973, any suit prior to that time would not be ripe for determination. However, the court found that there was sufficient injury, ripe for determination, from a finding that notices of termination had sufficiently disrupted the day-to-day operation of the agencies because of unwillingness of third parties to deal with them.

Finally, the issue of ripeness appeared often in suits concerning the Water Pollution Control Act funds. The Administrator of the EPA contended that the cases were not ripe for determination because plaintiffs seeking full allotment of authorized funds under the act had no guarantee that projects for which they seek funding will be approved. Because specific proposals had been neither submitted by plaintiffs nor rejected by defendants, it was argued that refusal to allot full amounts authorized does not constitute action adverse to any real or immediate interests of plaintiffs.

The court found from the legislative history of the act that the major purpose of the appropriations scheme enacted was to facilitate long-range planning and discourage hurried wasteful spending. Moreover, the act provides that funds not allotted could not be obligated, and funds not obligated in the fiscal year for which allotted would be forever lost to the States at the end of the fiscal year during which they should have been obligated.[188] The court consistently held that the disruption of long-range planning and the permanent

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[183] *Martin-Trigona* v. *Ruckelshaus, supra.*
[184] *Brown* v. *Ruckelshaus, supra.*
[185] See, e.g., *Adler* v. *Board of Education*, 342 U.S. 485 (1952); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); but see, e.g., *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *Poe* v. *Ullman*, 367 U.S. 497 (1961).
[186] *Supra.*
[187] *Supra.*
[188] Pub. L. 92–500, § 205(b)(1).

loss of funds not allotted gave rise to an injury sufficiently ripe for judicial determinations of the issues.[189]

3. *The Doctrine of Sovereign Immunity*

The doctrine of sovereign immunity, barring unconsented suits against the Government, first emerged as a viable doctrine in the United States in the case of *Chisolm* v. *Georgia*,[190] in which Chief Justice Jay opined that a suit would not lie against the United States because "there is no power which the courts can call to their aid." As presently viewed by the courts, any suit in which the judgment sought would "expend itself on the public treasury or domain, or interfere with the public administration," is brought against the sovereign.[191] Such a suit would be barred by the doctrine of sovereign immunity unless specifically permitted by an act of Congress, or certain other common law exceptions.

Most well-known examples of statutory exceptions to sovereign immunity include the Mandamus Act,[192] the Federal Tort Claims Act,[193] and the Administrative Procedure Act.[194] A fuller discussion of the latter is included below. At this time, suffice it to mention that only a few of the cases presently under discussion came to a decision over the bar of sovereign immunity on the grounds that they concerned violations of the procedures enumerated in the Administrative Procedure Act.[195]

Nearly every one of the so-called impoundment suits is regarded as a suit against the United States, because they were brought against officers, agencies, or corporations of the United States, even though the United States has not been named as party defendant.[196] It has been suggested by one judge that a decision mandating the execution of a congressionally legislated program would not "expend itself upon the public treasury" because the money had already been appropriated by Congress.[197] Even so, any decision which mandates activity on the part of an officer or agency of the United States must be considered as an interference with the public administration. The first two "impoundment" cases were dismissed as being unconsented suits against the sovereign,[198] but the remainder of the decisions have found the doctrine of sovereign immunity no bar, largely because of the Mandamus Act and partly because of two commonly accepted common law exceptions to the doctrine.

The Mandamus Act has been the basis of a great number of suits in the impoundment area. The act gives the district courts original jurisdiction over any action to compel an officer or employee of the United States to perform any duty owed to the plaintiff.

Two common law exceptions to sovereign immunity have found currency following the case of *Dugan* v. *Rank*,[199] which has been accepted by many of the district courts as holding that (1) actions by officers in excess of statutory authority, or (2) actions performed

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[189] See, e.g., *City of New York* v. *Ruckelshaus, supra; Texas* v. *Fri, supra; Campaign Clean Water* v. *Ruckelshaus, supra.*

[190] 2 Dall. 419, 478 (1793).

[191] *Land* v. *Dollar*, 330 U.S. 731, 738 (1947).

[192] 28 U.S.C. § 1361 (1970).

[193] 28 U.S.C. § § 2617–2680 (1970).

[194] 5 U.S.C. § § 551–559, 701–706 (1970).

[195] See, e.g., *Berends* v. *Butz, supra; Local 2677, A.F.G.E.* v. *Phillips, supra.*

[196] See *Louisiana* v. *McAdoo*, 234 U.S. 627, 628 (1914).

[197] See *Minnesota* v. *Fri, supra.*

[198] *San Francisco Redevelopment Agency* v. *Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971); *Housing Auth. of City and County of San Francisco* v. *H.U.D.*, 340 F. Supp. 654 (N.D. Cal. 1972).

[199] 372 U.S. 609, 620–22 (1963).

pursuant to an unconstitutional power may be made subject to suit. Therefore, before making a determination as to whether a particular suit is barred, the court may at least look to the act which is the subject of the litigation to see whether that act is in excess of statutory authority or pursuant to an unconstitutional power.[200] A decision that the actions by an administrative official in withholding appropriated funds or retarding a congressionally mandated program exceed statutory authority would arguably move the court around the question of sovereign immunity.[201] On the other hand, a decision that the action was neither in excess of statutory authority nor unconstitutional could be expressed simply by a determination that a suit challenging such action was barred by sovereign immunity.[202]

Nevertheless, having the court decide merely that it will not shut the door in the plaintiff's face does not answer some critical questions concerning whether the remedy would lie against the United States, through the officer in his official capacity, or against the officer alone as a private individual. The case of *Malone* v. *Bowdoin*,[203] seems to stand for the proposition that when action by an officer goes beyond his statutory authority, or his powers or the manner in which they are exercised are constitutionally void, the officer's action "can be made the basis of a suit for specific relief against the officer as an individual."[204] But where the remedy against the officer would expend itself upon the public treasury or interfere with the public administration, the suit is in fact against the sovereign.[205] The courts have stated that requiring the Administrator of the Environmental Protection Agency to allot the full amount appropriated for water pollution control—the first stage of the two-stage appropriations process—would not create a drain on the public treasury, because allotment is not the same as obligation.[206] But it has been argued, on the other hand, that the ultimate effect of allotment is the expenditure of the funds.[207]

The unanswered question regarding sovereign immunity, whether the remedy available is real—requiring a Federal officer to act in his official capacity to effectuate a congressionally mandated program—or illusory—against the officer personally as a private individual—remains to be decided by the Supreme Court. It may be generally stated, however, that because nearly every recent impoundment case has sought a statutory construction of the amount of discretion granted a Federal officer or employee, such litigation is not barred by sovereign immunity.

4. *The Political Question Doctrine*

Another bar to court consideration of these cases is the "political question" doctrine, whereby the judicial branch abstains from deciding issues more appropriately dealt with by the "political" branches of the U.S. Government: The Congress and the executive.

For example, the President enjoys a constitutional grant of power in the conduct of foreign relations.[208] Elaborating on the necessity for

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[200] See e.g., *New York* v. *Ruckelshaus, supra; Campaign Clean Water, Inc.* v. *Ruckelshaus, supra.*
[201] *Id.*
[202] See, e.g., *San Francisco Redevelopment Agency* v. *Nixon, supra; Housing Auth. of City and County of San Francisco* v. *H.U.D., supra.*
[203] 369 U.S. 643 (1962).
[204] 369 U.S. at 647.
[205] *Land* v. *Dollar, supra.*
[206] See, *New York* v. *Ruckelshaus, supra.*
[207] See Brief of Appellant Acting Administrator of the United States Environmental Protection Agency, *New York* v. *Ruckelshaus*, No. 71-1705 (D.C. Cir.) at 31.
[208] Art. II, §§ 2, 3.

judicial abstinence in the conduct of foreign relations, the Supreme Court has said:

> The president, both as Commander in Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution on the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[209]

The Court has likewise abstained from intruding upon powers properly exercised by the Congress, e.g., the decision as to what government is the established one in a State and whether or not it is republican in form,[210] and the control over the promulgation and adoption of constitutional amendments.[211]

The case of *Baker* v. *Carr*,[212] in which the Supreme Court held that the equal protection clause of the 14th amendment grants the Court the power to compel reapportionment in State legislatures, sets forth the modern criteria for determining what is, or is not, a "political question":

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[213]

Judge Oliver J. Carter of the U.S. District Court for the Northern District of California has held that a suit against the President to compel him to go forward with a congressionally mandated housing program may not be brought because it is an "intragovernmental confrontation." [214] He referred to the proposition that a U.S. district

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[209] *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 111 (1948).
[210] *Luther* v. *Borden*, 7 How. 1, 42 (1849).
[211] *Coleman* v. *Miller*, 307 U.S. 433, 456 (1938).
[212] 369 U.S. 186 (1962).
[213] *Id.*, at 217.
[214] *San Francisco Redevelopment Agency* v. *Nixon, supra.*

court may compel the head of the executive branch of government to take any action whatsoever and then "declared, No decided cases since *Marbury* v. *Madison*, 1 Cranch 137 . . . 5 U.S. 137 . . . (1803) have even contemplated this question." [215] Nor could that court decide whether by impounding part of the funds appropriated by Congress and signed into law by the President, that the President has made an unconstitutional item veto. Judge Carter viewed such an issue as one without justiciable standards or guidelines, there being no means by which the court could determine whether a breach of executive duty has occurred:

> Given the legislature's intention of allowing spending discretion in the executive, it would appear to be left to the legislature to decide when such discretion is abused. The legislature appears to have created much of the executive's discretion to withhold funds and would also appear to be able to limit that discretion if it so desired.[216]

Other courts have found no such problem in making judicial determinations of the scope of discretion granted executive officers by statute. In *Commonwealth of Pennsylvania* v. *Lynn*,[217] the court mandated the operation of certain sections of the Housing Acts over an argument that the suit was barred by the political question doctrine. Defendant argued that the court was being asked to supervise and direct the actions of the legislative and executive branches of the Government, that the issue of the Executive's power to determine the manner in which funds are expended is a question "essentially political in nature," and that there is a lack of judicially discoverable and manageable standards for resolving the dispute. Speaking for the court, Judge Charles R. Richey held:

> The issues in this case, however, concern the power of the Secretary to act under statutory programs already passed by Congress, and his power to act under the Constitution. The moneys in question have already been appropriated and the relief which Plaintiffs seek would only require Defendants to accept and process applications for such moneys, rather than the immediate disbursement of funds. Clearly it is within the province of the Judicial branch to determine the nature of the Congressional mandate and whether the Defendants have refused to comply with that mandate. This case does not present a nonjusticiable political question.[218]

In response to allegations of a "textually demonstrable" commitment of power to control spending in the grant of executive power in article II of the Constitution, courts are declining to view cases as involving the power to control expenditures. Rather, the cases merely concern a construction of acts regarding the purely ministerial duty of executive officers to allot authorized funds to States or administer programs.[219] While a case may have contemporary political overtones, they are not political questions in the legal sense.[220] In *Campaign*

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[215] 329 F. Supp. at 672.
[216] *Housing Authority of City and County of San Francisco* v. *Dept. of Housing and Urban Development*, 340 F. Supp. at 656.
[217] *Supra.*
[218] *Id.*
[219] *City of New York* v. *Ruckelshaus, supra.*
[220] *Campaign Clean Water, Inc.* v. *Ruckelshaus, supra.*

Clean Water the court observed that it was not being asked to supervise the operations of the Environmental Protection Agency, but rather to construe a statute with regard to the discretion granted an administrative officer.

In overruling defendants' motion to dismiss a suit to compel the Secretary of Transportation to grant to the State of Kansas full use of its apportionments from the highway trust fund, Judge George Templar of the U.S. District Court for Kansas stated:

> Although the issue now before the Court may have been a political question at its inception and throughout the debates in Congress, and although the decision reached by this Court may ultimately affect a relationship between the executive and legislative branches of the Government, for these reasons, standing alone, do not justify a refusal to hear the case. As the situation now exists there is an actual controversy, touching the legal relations of parties having adverse legal interests, and there are judically discoverable and manageable standards for resolving that controversy.[221]

Unless later courts, either the U.S. courts of appeals or the U.S. Supreme Court, rule otherwise, it would seem that neither the political question doctrine nor the doctrine of sovereign immunity will pose a serious bar to having cases heard in court which touch upon the power of executive officers to retard the implementation of congressionally enacted spending programs.

B. STATUTORY LIMITS ON FEDERAL COURT JURISDICTION

The Constitution not only contains language limiting the justiciability of controversies in the Federal courts, but also provides Congress with the power to further limit Federal court jurisdiction. Congress is empowered "[t]o constitute tribunals inferior to the Supreme Court,"[222] and to make exceptions to, and regulate, the appellate jurisdiction of the Supreme Court.[223] Pursuant to these powers, Congress has enacted statutes further regulating the jurisdiction of the Federal courts. To bring suit in Federal court, a plaintiff must meet the requirements specified in one of these statutes.

Plaintiffs in impoundment suits have used two such jurisdictional statutes almost exclusively to gain access to Federal courts: the Mandamus Act and the Federal question statute.

Most suits brought to compel executive officers and agents to perform acts mandated by Congress for the execution of statutorily enacted programs have been brought under the Mandamus Act,[224] providing that:

> The district courts shall have original jurisdiction of any action in the nature of a mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Where a suit is brought under this statute, the duty allegedly owed the plaintiff must be specific, unequivocal and plainly described.

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[221] *State Highway Comm. of Kansas* v. *Volpe*, C.A. No. T-5273 (D. Kan., Oct. 1, 1973).
[222] Art. I, § 8, cl. 9.
[223] Art. III, § 2.
[224] 28 U.S.C. § 1361 (1970).

The Supreme Court has stated that, ". . . where the duty . . . depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."[225] However, merely to invoke the court's jurisdiction requires only allegations that a statutory or constitutional duty owed plaintiffs is clear and unambiguous, rather than a strong showing of proof which will subsequently be required for a favorable decision on the merits.

Cases in the impoundment area filed under the jurisdiction of the Mandamus Act are too numerous to mention. Moreover, after the initial cases established court jurisdiction over the particular type of controversy, subsequent similar cases contained scant further mention of the jurisdiction issue.

The second most frequently used jurisdictional statute is the Federal question statute,[226] which provides that:

> . . . The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

In *State Highway Comm. of Missouri* v. *Volpe*,[227] the court held that the releasing of funds for obligation for fiscal year 1973 by the Secretary of Transportation had mooted the action brought under the Mandamus Act; however, the action could still be brought under the Federal question statute, in that it sought a construction of the Federal Aid Highway Act. Moreover, the action could be brought under that section despite its not having been specifically alleged in the complaint, because of the allegation of sufficient operative facts to bring the action within the scope of the statute.[228]

The jurisdictional monetary limit, an unwaivable prerequisite,[229] was an issue in *Williams* v. *Phillips*,[230] brought by Members of the U.S. Senate for a declaratory judgment that the Acting Director of OEO was holding office illegally. The court observed that the amount in controversy may be measured either by the value of the relief sought by the plaintiff or the cost of enforcing the right to the defendant.[231] Plaintiffs had standing in *Williams* because they were challenging the legal right of the defendant to administer a program with an appropriation of over $790 million for fiscal year 1973.

Few other cases have found the jurisdiction limit a point in controversy. The amount is clearly met by a State challenging the impoundment of a multimillion dollar program; an individual bringing suit regarding the effect of the impoundment upon himself normally seeks an action under the Mandamus Act for his smaller portion of the appropriation.

Additionally, one case was brought under 28 U.S.C. § 1337 (1970), giving the district courts original jurisdiction of any civil action or

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[225] *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 219 (1930).
[226] 28 U.S.C. 1331 (1970).
[227] *Supra.*
[228] See, *Sikora* v. *Brenner*, 379 F. 2d 134 (D.C. Cir. 1967).
[229] *Holt* v. *Indiana Mfg. Co.*, 176 U.S. 68 (1900); *United States* v. *Sayward*, 160 U.S. 493 (1895).
[230] *Supra.*
[231] *Tatum* v. *Laird*, 444 F. 2d 947 (D.C. Cir. 1971), rev'd on other grounds, 408 U.S. 1 (1972) (dictum); *Hedberg* v. *State Farm Mutual Automobile Insurance Co.*, 350 F. 2d 924 (8th Cir. 1965) (dictum).

proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.[232]

Two additional statutes, neither of which confer jurisdiction standing alone, are used in conjunction with jurisdictional statutes: the Declaratory Judgment Act,[233] and the Administrative Procedure Act.[234]

The Declaratory Judgment Act provides that:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Numerous impoundment cases sought a declaratory judgment to the effect that actions taken by executive branch officials in retarding Federal programs or withholding funds are illegal, and in excess of statutorily granted discretion.[235]

The Administrative Procedure Act provides, in relevant part, that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.[236]
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> * * * * *
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> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of terms of an agency action. The reviewing court shall—
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance or procedure required by law; . . .[237]

Like the Declaratory Judgment Act, the Administrative Procedure Act does not by itself confer jurisdiction,[238] but rather confers standing to sue for particular remedies for particular types of unlawful acts.

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[232] *Bennett* v. *Butz*, No. 4-73 Civ. 258 (D. Minn., June 25, 1973), concerning the Food Stamp Program.
[233] 28 U.S.C. § 2201 (1970).
[234] 5 U.S.C. §§ 701–706 (1970).
[235] See, e.g., *Local 2677, A.F.G.E.* v. *Phillips, supra; Minnesota* v. *Fri, supra; Pennsylvania* v. *Lynn, supra*.
[236] 5 U.S.C. § 702 (1970).
[237] 5 U.S.C. § 706 (1970).
[238] See, e.g., *Minnesota* v. *Weinberger*, 359 F. Supp. 789 (D. Minn.) (1973).

Plaintiffs have brought actions for withholding of funds by administrative agencies through actions in violation of their own regulations,[239] for failure of an executive officer to prescribe any regulations for filing applications for funds, as required by an act,[240] and generally for actions by administrative officers in excess of statutory authority.[241]

The major value of the Administrative Procedure Act in the "impoundment" context is that the act is widely regarded as constituting a waiver of sovereign immunity.[242]

Finally, a statute which has aided plaintiffs who are individuals in their attempts to compel the execution of Federal funding programs is that authorizing class actions suits. The use of class action suits enables questions to be litigated by aggregates of individuals which might not be litigable by an individual alone. Rule 23(a) of the Federal Rules of Civil Procedures prescribes the prerequisites to a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> In addition, the following must be met for the class action to be maintainable:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of—
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> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent

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239 *Berends* v. *Butz, supra.*
240 *Nat'l Ass'n of Collegiate Veterans, Inc.* v. *Ottina, supra.*
241 See, e.g., *Texas* v. *Weinberger, supra.*
242 *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F. 2d 859, 873 (D.C. Cir. 1970); *Constructores Civiles de Centroamerica, S.A.* v. *Hannah*, 159 F. 2d 1183 (D.C. Cir. 1972).

> and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[243]

In the impoundment context, class actions have been certified of all persons who are statutory beneficiaries under a program,[244] all those who have participated in efforts to obtain benefits under a program,[245] persons and agencies who have applied for grants under an act,[246] agencies and individuals eligible, designated, and qualified to participate in a program,[247] and persons who have been precluded from applying for benefits under a program because of unlawful agency action.[248] A class has been certified of plaintiff cities suing on behalf of all other similarly situated municipalities in a State,[249] and a class has been certified of all States which have applied for and are eligible for funds under a program.[250]

The ability of plaintiffs to file class actions has been severely limited, however, by two recent decisions in the Supreme Court, holding that where plaintiffs allege Federal court jurisdiction under the Federal question statute, which prescribes a minimum jurisdictional monetary amount of $10,000, every member of the class must meet that amount, and claims may not be aggregated to meet the jurisdictional amount.[251]

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[243] F.R. Civ. P., Rule 23(b).
[244] *Pealo* v. *Farmers Home Administration, supra.*
[245] *Pennsylvania* v. *Lynn, supra.*
[246] *Nat'l Council of Community Mental Health Centers* v. *Weinberger, supra.*
[247] *Community Action Programs Executive Directors Ass'n* v. *Ash, supra.*
[248] *Berends* v. *Butz, supra.*
[249] *New York* v. *Ruckelshaus, supra.*
[250] *Louisiana* v. *Weinberger, supra.*
[251] *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Zahn* v. *Internat'l Paper Co.*, 414 U.S. 291 (1973).

IV. Conclusion

Although the controversy over impoundment of funds appropriated by Congress is not new in the American political system, the heavy reliance upon the courts to decide the issue is a modern, and still evolving, development. The crucial questions remain unanswered: Will the money be spent? How will the cases be decided upon appeal? How will future legislation be affected?

While the controversy still continues, four conclusions emerge: (1) Retarded statutory programs have generally been ordered implemented, although the money, saved by the courts from lapsing into the general fund, may not necessarily be spent through grant awards, or obligated, for some time; (2) the final answer therefore will likely lie in the Congress; and (3) the recent court actions have encouraged a closer scrutiny of the constitutional relationships between the executive and legislative branches of the Federal Government.

As the text of this report has revealed, in nearly every instance where the refusal by an executive department to execute a Federal program has been challenged, the court has ruled such refusal to be unlawful or in excess of statutory authority, and has usually ordered full implementation of the program. Data on compliance is sketchy, but in one instance a court was moved to find the Secretary of Agriculture in contempt for his continued refusal to comply with a court order enjoining the Secretary of Agriculture from refusing to process and approve applications for funding under the special supplemental food program of the Child Nutrition Act of 1966, as amended.[252] As a result of this motion, apparently the Department began implementing the program, because on December 3, 1973, the court denied the motion, while expressing an intent that defendants commit the full sum authorized by Congress to eligible applicants. In a few other cases comments are on record indicating compliance.[253] Even given full implementation of the programs, however reluctantly executed, the actual spending of money will not occur for a substantial period of time. Grant awards or obligation of funds is the last step in any appropriations process, after submission and approval of applications, or after allotment of funds to States, and submission and approval of plans based upon allotments. Moreover, not every court order requires implementation of programs.

For instance, in *Campaign Clean Water, Inc.* v. *Ruckelshaus*,[254] the court merely ruled that a policy of withholding 55 percent of the allotment for water pollution control was illegal, rather than requiring that the full authorized amount be allotted. Therefore, the full effect of the holdings analyzed in this memorandum upon the eventual implementation or retardation of the effected statutory programs cannot be determined at this time.

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[252] 86 Stat. 729, § 17, 42 U.S.C. § 1786 (Supp. II, 1972). *Dotson* v. *Butz*, C.A. No. 1210–73 (D.D.C., Aug. 3, 1973).

[253] See e.g., *State Highway Comm. of Missouri* v. *Volpe, supra; Maine* v. *Weinberger*, Civ. Docket No. 14–52 (I). Me., June 29, 1973).

[254] Supra.

Substantial doubt surrounds the outcome of future litigation. On the one hand, a winning pattern of cases has been established by plaintiffs at the district court level to the point that many of the cases are now redundant. On the other hand, the administration has not been appealing all adverse decisions. Cases decided by the courts of appeals have not been reviewed by the Supreme Court, however, certiorari has been granted by the Supreme Court in two cases—*Train* v. *City of New York*,[255] and *Train* v. *Campaign Clean Water, Inc.*[256] Argument is scheduled in October 1974. Until certiorari was granted in these cases, there was considerable doubt as to whether the Supreme Court would ever hear the impoundment issue. The Court had previously denied a motion for leave to file a bill of complaint, filed by the State of Georgia, challenging Presidential impoundments on a number of fronts,[257] even though both the State of Georgia and the Department of Justice had filed briefs urging the Court to take the case on its original docket.

Regardless of any ultimate judicial resolution, the profoundest effect of the impoundment controversy may well be on legislation emerging from the Congress. By this is not necessarily meant legislation purporting to control the Executive practice of impoundment. Of this type, the most comprehensive is the Impoundment Control Act of 1974,[258] enacted into law on July 12, 1974. This act gives the Congress power to control executive branch fiscal policies in two ways. First, the act requires congressional approval of all "rescissions," by enactment by both Houses of Congress of a "rescission bill" within 45 days after transmittal by the President of a special message to the Congress stating that (1) all or part of any budget authority will not be required to carry out the full objectives or scope of programs, or (2) budget authority should be rescinded for fiscal policy or other reasons, or (3) all or part of any budget authority limited to a fiscal year is to be reserved for the entire fiscal year. If both Houses do not pass the rescission bill within 45 days, the funds must be made available for obligation.[259] Second, in response to a special message from the President announcing a "deferral of budget authority," as defined in the act, either House may pass an "impoundment resolution" disapproving the deferral and requiring that the funds be made available for obligation.[260]

The grounds for rescission correspond to those enumerated in the Antideficiency Act [261] with the exception of the grounds of "other developments subsequent to the date on which such appropriation was made available . . .", which was deleted by the act.[262] There are no grounds specified in the act for deferrals, and the act expressly disclaims that such exist:

> SEC. 1001. Nothing contained in this Act, or in any amendments made by this Act, shall be construed as—
>
> (1) asserting or conceding the constitutional powers or limitations of either the Congress or the President;. . .[263]

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255 No. 73-1377 (U.S. April 29, 1974).
256 No. 73-1378 (U.S. April 29, 1974).
257 *Georgia* v. *Nixon*, 414 U.S. 810 (1973).
258 Pub. L. 93-344, title X, 88 Stat. 297 (July 12, 1974).
259 Pub. L. 93-344, § 1012.
260 Sec. 1013.
261 31 U.S.C. Sec. 665(c)(2) (1970).
262 Pub. L. 93-344, Sec. 1002.
263 Sec. 1001.

In addition, the act repeals the Federal Impoundment and Information Act of 1972, the so-called "Humphrey Amendment" to the Public Debt Limitation Act.[264] That act had required "prompt" reporting by the Office of Management and the Budget of the amount of funds impounded, the programs affected, the reasons for the impoundment, and the period of time during which the impoundment would be operative; the act had sustained criticism, however, generally for falling far short of its express purpose of keeping the Congress and the public informed about the extent to which the executive branch had impounded funds. The OMB had adopted such a narrow definition of impoundment that the report of September 30, 1973, did not include the withholding of $6 billion under the Federal Water Pollution Control Act Amendments of 1972, $441 million in contract authority under various HUD programs, and some $1.9 billion in HEW and Labor Department funds.

The problem of definition of the term impoundment is largely avoided in the Impoundment Control Act of 1974. The act carefully avoids using the term "impoundment" as an operative term, using "rescission" and "deferral" instead. Rescission is connected by the act to grounds specified in the Antideficiency Act, and deferral is defined in the act in such a way as to include nearly every action possible on the part of the executive branch to impede the execution of a federally enacted spending program, including all actions subject to recent impoundment litigation.[265]

A final important provision in the Impoundment Control Act of 1974 is that empowering the Comptroller General of the United States to bring suit to compel the executive branch to make funds available for obligation pursuant to congressional action or inaction which mandates their release.[266]

A more important effect of the impoundment controversy on future legislation will likely be a marked increase in the care with which future acts delineate the discretion and responsibility of executive officers. The use of the word "shall" in legislation affecting executive agencies will no longer be a matter of legislative "grammar," but will become a political matter which must be negotiated over or fought for in committees and on the floors of the Houses of Congress.

Finally, extensive litigation over the issue of impoundment has resulted in a judicial reanalysis of the constitutional relationships between the legislative and executive branches of government. A judge in 1971 could dismiss a suit against the President challenging his failure to allot money appropriated by amendments to the Housing Act of 1937, on the grounds that there was no authority for the proposition ". . . that a United States District Court may compel the head of the Executive Branch of government to take any action whatsoever."[267] A later court decision would refuse to dismiss an action against the President challenging his failure to appoint members of the National Advisory Council on Indian Education pursuant to the Indian Education Act, on the grounds that plaintiff's only remedy is to sue the President directly, the President being the only officer empowered by Congress to appoint.[268] And based at least partially on this latter holding, the U.S. Court of Appeals for the District of

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[264] Pub. L. 92-599, 86 Stat. 1324.
[265] Pub. L. 93-344, sec. 1011(1).
[266] Sec. 1016.
[267] *San Francisco Redevelopment Agency* v. *Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971).
[268] *Minnesota Chippewa Tribe* v. *Carlucci*, C.A. No. 175-73 (D.D.C., Apr. 25, 1973).

Columbia Circuit affirmed a district court order requiring the President to implement a congressional policy with regard to pay for Federal employees under the Federal Pay Comparability Act.[269] Such holdings could encourage both the legislative and judicial branches to assert themselves more forcefully against the executive branch.

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[269] 5 U.S.C. §§ 5031, *et seq.* (1970). *Nat'l Treasury Employees Union* v. *Nixon*, No. 72-1929 (D.C. Cir., Jan. 25, 1974).

APPENDIXES

APPENDIX A.—SUMMARIES OF IMPOUNDMENT CASES IN CHRONOLOGICAL ORDER

The following is a chronological listing of cases, through January 31, 1974, concerning Federal programs which the executive branch has retarded, either by refusal to release congressionally appropriated funds, by failure to accept or process applications for program grants, or by any other refusal to execute a statutory program.

Because of the difficulty in obtaining information about, and copies of, all relevant cases in the several Federal district courts, this listing does not purport to be complete.

The status of appeal in each case is designated only where positively known at this time.

San Francisco Redevelopment Agency v. *Nixon; Housing Authority of City and County of San Francisco* v. *Nixon*, 329 F. Supp. 672 (N.D. Cal. 1917).

Suit was filed by city redevelopment agency and city and county housing authority for mandamus to compel the President of the United States and others to allot money appropriated by amendments to the Housing Act of 1937.[1] It was alleged that allotment was merely a ministerial duty, for which mandamus was the appropriate remedy.

Court (Chief Judge Oliver J. Carter) granted defendant's motion to quash, finding no authority for the proposition that a U.S. district court can compel the executive branch of government to take any action whatsoever. No appeal.

Housing Authority of City and County of San Francisco v. *Dept. of Housing and Urban Development*, 340 F. Supp. 654 (N.D. Cal. 1972).

In an action to compel the release of housing funds impounded by the President,[2] the court held that where the Housing Act contained no language requiring the executive branch to spend designated funds, and when the executive was expected to make economies when possible in the housing program, the President's action in impounding funds was not in excess of statutory authority and did not constitute unconstitutional action so as to permit suit to compel release of such funds without waiver of sovereign immunity. Where the Housing Act provided no standards by which the court could determine whether the President's impoundment of funds was a breach of executive discretion, action seeking to compel release of such funds involved a political question over which the court lacked jurisdiction.

The section of the act in question, 42 U.S.C. § 1453(b), provides that the Secretary ". . . *may* contract to make grants for the preparation or completion of community renewal programs . . ." [emphasis added].

The court stated that, "Given the nonmandatory language of this statutory scheme, the Court finds that the plaintiffs cannot show that the executive exceeded his statutory discretion in not spending all the appropriated funds."[3] Accordingly the court (Chief Judge Oliver J. Carter) granted defendant's motion to dismiss. No appeal.

Berends v. *Butz*, 357 F. Supp. 143 (D. Minn. 1973).

Suit was brought as a class action by four farmers residing in a 15-county area in Minnesota, designated as "emergency loan areas" by the Secretary of Agriculture, against the Secretary and certain subordinate officials of the Department of Agriculture. The action sought injunctive and declaratory relief, and mandamus, for

[1] P.L. 91-609.
[2] P.L. 91-609, appropriating $150 million in funds for the operation of the Housing Act of 1937, 42 U.S.C. § 1401 *et seq.* (1970).
[3] 340 F. Supp. at 656.

the purpose of having the emergency loan program reinstated. The court (Judge Miles W. Lord) held that unilateral termination by the Secretary of the emergency loan program without notice to the plaintiffs, who were in need of agricultural credit as a result of natural disasters and who were precluded from applying for emergency loans by the Secretary's directive terminating the program, was in violation of applicable statutes, the Department's own regulations, and due process of law. The court ordered the Secretary to reinstate the program, and to accept and file emergency loan applications of plaintiffs and others similarly situated, process such applications as expeditiously as possible, and pay loan proceeds to eligible applicants without delay.

The Secretary had authority and discretion under the Consolidated Farmers Home Administration Act of 1961 [4] and the Disaster Relief Act of 1970 [5] according to the court, to declare certain counties "emergency loan areas" when they have experienced "natural disasters."

After declaring the 15 counties in Minnesota emergency loan areas [6] the Secretary was required by the acts to administer the loan programs and forbidden from terminating the program without notice.

"While it may be true that an individual has no right to receive a loan under the disaster loan program, he does have the right to file an application and have his application reviewed." [7]

The Government has filed motion to vacate order as moot (Aug. 2, 1973).

State Highway Comm. of Missouri v. *Volpe*, 479 F. 2d 1099 (8th Cir. 1973).

In an action by the Missouri State Highway Commission against the Secretary of Transportation and Director of OMB, seeking injunctive, declaratory and mandamus relief against the withholding of contract authority to obligate Missouri's apportionment of the highway trust fund, the U.S. District Court for the Western District of Missouri (Chief Judge William H. Becker) ordered the Secretary to revoke by official act any directive withholding from Missouri the authority to obligate its apportionment from the fund for fiscal year 1973. It further declared that any actions by the Secretary in withholding authority from Missouri to obligate any apportionment from the fund for reasons related to the prevention or control of inflation in the national, regional or local economies, or in wages and prices in the Nation, or any region or locality therein, is unauthorized by law, illegal, in excess of lawful discretion, and in violation of the Federal-Aid Highway Act. The court finally enjoined the Secretary from withholding funds for such reasons during fiscal year 1973.

[*State Highway Comm. of Missouri* v. *Volpe*, 347 F. Supp. 950 (W.D. Mo. 1972).]

On appeal, the Court of Appeals for the Eighth Circuit affirmed in part and modified in part the district court order. Because the Secretary released highway funds to the State of Missouri for fiscal year 1973, the action for mandamus was ruled moot; however, the court of appeals affirmed the declaratory judgment and injunction. Actions for declaratory and injunctive relief are not mooted where they satisfy requirements of a "case or controversy." It was conceded by the Secretary that further contract controls would be imposed and that Missouri would most certainly be affected, which assured that the impact of the activity in question would fall on the same objecting litigants; hence, the case was justiciable.

The Highway Act, 23 U.S.C. § 101(c) (1970), provides that "It is the sense of Congress that . . . no part of any sums authorized to be appropriated for expenditure upon any Federal-Aid system . . . shall be impounded. . . ." Assuming that this language is precatory, rather than mandatory, the court held that such an assumption would not be controlling on the issue of whether the Secretary of Transportation possesses direct or implied authority to exercise contract controls over highway funds. The general proposition that appropriations acts are permissive in nature does not provide a bottom for the premise that the Secretary would have such authority to administer contract controls. Even if a general appropriation act may be viewed as not providing a specific mandate to spend all funds appropriated, the court stated, this does not *a fortiori* endow the Secretary with authority to use unfettered discretion as to when and how the monies may be used. The Secretary has no lawful discretion to withhold his approval of projects for reasons not contemplated within the Federal-Aid Highway

[4] 7 U.S.C. § 1961 (1970).
[5] P.L. 91-606, § 232, 42 U.S.C. §§ 4451, 4485 (Supp. II, 1972).
[6] 37 Fed. Reg. No. 126 (June 26, 1972) at 12854; 37 Fed. Reg. No. 187 (Sept. 20, 1972) at 20122.
[7] *Dubrow* v. *Small Business Adm.*, 345 F. Supp. 4 (D. Cal. 1972).

Act, embodied at 23 U.S.C. 106(a) (1970). The Secretary may exercise his discretion to insure that roads are well constructed and safely built at the lowest possible cost, all in furtherance of the objects of the act, but when impoundment of funds impedes the orderly progress of the Federal highway program, impoundment cannot be deemed favorable to such program.[8]

Rehearing denied May 18, 1973.

Local 2677, A.F.G.E. v. *Phillips,* 358 F. Supp. 60 (D.D.C. 1973).

The court granted a declaratory judgment for the plaintiffs to the effect that the acts or omissions, or both, including all rules, regulations, guidelines, instructions, and other communications, written or oral, heretofore published, promulgated or otherwise communicated, directing, providing for, or intending to accomplish the termination, dissolution, or abolition of the Office of Economic Opportunity, or the termination of funding or functioning of community action agencies, designated in accordance with the provisions of sections 210 and 221 of the Economic Opportunity Act of 1964, as amended,[9] except those CAA's found not to be qualified for refunding pursuant to regulations as set forth in 45 CFR §§ 1067.1, 1067.2 (1972), are unauthorized by law, illegal, and in excess of statutory authority, as well as null and void, whether such rules, regulations, guidelines, instructions, or other communications were those of defendant Howard Phillips [Acting Director of OEO], or any agent, servant, employee, or other person acting in concert with defendant Phillips, or otherwise employed by or purportedly acting for or on behalf of OEO. Further, the court enjoined defendant Phillips, and all such servants and employees, from implementing or enforcing any such rules, regulations, guidelines, instructions, or communications.

The Acting Director had issued directives to CAA's to begin phase-out operations on the grounds that no funds were requested in the budget for fiscal year 1973 for community action agencies. The court (Judge William B. Jones) found that the President's budget message is no more than a proposal to the Congress for the Congress to act upon as it pleases. The act provided that the Director of OEO "shall" make funds available (not less than $328,900,000) for each fiscal year after 1973, for the operation of section 221 programs, and the court found such language to be mandatory, unless the Congress fails to appropriate further funding after June 30, 1973. Insofar as the Acting Director was using funds to effectuate the dismantling of the programs, he was acting in excess of statutorily granted discretion.

Moreover, the court also held, as an independent ground for its decision, that the actions of the Acting Director in dismantling the OEO agencies was a violation of the Reorganization Act,[10] a broad delegation of authority by the Congress to the President to initiate and propose changes in the organization and functions of the executive branch. When a program is to be abolished to accomplish one of the purposes of the act, the President is to submit a reorganization plan to Congress which will be valid unless acted upon unfavorably by either House, within 60 days of submission.[11] The defendant did not comply with these procedures.

The Acting Director was also found to have failed to comply with the notice requirements regarding regulations and guidelines to be published in the Federal Register, as required by the Economic Opportunity Act.[12]

Minnesota Chippewa Tribe v. *Carlucci,* C.A. No. 175–73 [Consolidated with *Redman* v. *Ottina,* C.A. No. 628–73] (D.D.C., May 8, 1973).

The court (Judge June L. Green) ordered the Secretary of HEW to promulgate regulations and receive and process program applications pursuant to the Indian Education Act[13] before June 30, 1973. The Secretary was further ordered to report to the court all steps taken in furtherance of the order, and steps taken by the defendant to constitute the Office of Indian Education in the Office of Education, including the appointment of the Deputy Commissioner of Indian Education.

Certain aspects of the action were ruled moot, because of acts of the defendant in appointing 15 individuals to the National Advisory Council on Indian Education, 3 days prior to the order. The court had previously denied a motion by defendants to dismiss the suit as to the President, because the President was the

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[8] 23 U.S.C. §§ 101(c), 112, 113, 120 note (1970).
[9] 42 U.S.C. §§ 2790 and 2808 (1970).
[10] 5 U.S.C. §§ 901–13 (1970).
[11] 5 U.S.C. § 906(a) (1970).
[12] 42 U.S.C. § 2971(b) (1970).
[13] 20 U.S.C. §§ 240 et seq. (Supp. II 1972).

officer charged with the duty (appointment of the Council), by statute, with which the plaintiffs prayed compliance [April 25, 1973].

No appeal.

Local 2816, A.F.G.D. v. *Phillips*, No. 73 C. 500 (N.D. Ill., May 21, 1973).

The court (Judge James M. Parsons) denied plaintiffs motion for preliminary injunction against action by defendant Howard Phillips in attempting to phase out operation of the Community Action Agency functions of OEO before June 30, 1973.

Judge Parsons found that affidavits supported the argument that the CAA program was continuing to be funded through June 30, 1973 [albeit for the purpose of dissolution of the community action agencies], and that no funds had as yet been appropriated for the fiscal year beginning July 1, 1973. ". . . [T]he actions of the defendants do not constitute actions that go beyond the law. The evidence supports a finding that presumably the function of the Office of Economic Opportunity will continue as provided by law unless Congress acts to discontinue it or fails to act to cause its continuance and that the community action agencies will be funded for their programs at least through fiscal year 1973." [14]

Nat'l Ass'n of Collegiate Veterans, Inc. v. *Ottina*, C.A. No. 349–73 (D.D.C., May 24, 1973).

Judge Gerhard A. Gesell issued a declaratory order to the effect that the processing of applications in a diligent manner, for funds in the amount of $25 million appropriated for the Higher Education Act of 1965 as amended, sec. 420 [15] whereby institutions of higher education which enroll prescribed levels of veterans as undergraduate students and which meet certain program requirements are entitled to receive federal payments, is in the public interest.

The court further found that the Commissioner of Education had abused his discretion under the act by declining to issue regulations regarding the form, content, manner and time of filing applications.

Subsequently, such regulations were issued, and the case was dismissed without prejudice.

Minnesota v. *Weinberger*, 359 F. Supp. 789 (D. Minn. 1973).

In an action by the State of Minnesota against the Secretary of HEW, the Acting Regional Commissioner of Social Security and the Secretary of the Treasury to recover $41,875,000 allegedly due the State pursuant to the Social Security Act [16] the court [Judge Phillip Neville] held that it had jurisdiction under the mandamus statute [17] to order the spending of the money. The court accordingly denied the motion of the United States to dismiss.

The act in question provides that the Secretary of the Treasury, ". . . [f]rom the sums appropriated therefor . . ." *shall* pay to each State which has an approved plan for aid and services to needy families with children . . . 75 percent of so much . . ." as the state expends therefor.[18] Further, 42 U.S.C. § 1383 directs that the Secretary ". . . From the sum appropriated therefor . . . shall pay to each State which has a plan approved under this subchapter . . . 75 percent of such of [a state's, expenditures [as] are for . . ." certain social services. [Emphasis added.] The court held that this language was mandatory, and falls squarely within the mandamus statute "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

> . . . Under 42 U.S.C. §§ 604 and 1384 the power of the Secretary to reduce or withhold granted funds (read in conjunction with 42 CFR 201.6) may be exercised only after notice to the State involved and opportunity to be heard. The statement of counsel is that no such notice or hearing was attempted or effected in this case. [*359 F. Supp. at 791*].

The court noted that it did not have jurisdiction under 28 U.S.C. § 1346(a)(2) [Tucker Act] conferring jurisdiction on the U.S. district courts concurrent with that of the U.S. Court of Claims over ". . . any other civil action or claim against the United States not exceeding $10,000 in amount . . . upon any express or implied contract with the United States . . ." Since the Court of

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[14] Slip opinion at 12.
[15] 20 U.S.C. § 1070e–1 (1970).
[16] 42 U.S.C. §§ 601 *et seq.*
[17] 28 U.S.C. § 1361 (1970).
[18] 42 U.S.C. § 603.

Claims is a legislative court rather than a constitutional court, a litigant must bring himself strictly within the reaches of the statute, which the case at bar clearly does not since it exceeds the statutory limit of $10,000.

The court further indicated that it had no jurisdiction under the Administrative Procedure Act [19] granting a right of review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . ." The Administrative Procedure Act continues to provide:

> Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review . . ." [20]
>
> . . . final agency action for which there is no other adequate remedy in a court are subject to judicial review." [21]

The court noted here the lack of any suggestion that the State could not properly sue in the U.S. Court of Claims which would have jurisdiction irrespective of the size of the amount involved.

Finally, the court noted that it has:

> . . . for the purposes of this motion assumed the truth of the facts pleaded in the complaint but does not by this ruling attempt to opine on the ultimate merit of the position of the parties nor negate the right of defendants to traverse the allegations thereof.[22]

Bennett v. *Butz*, No. 4–73 Civ. 258 (D. Minn., June 25, 1973).

Pursuant to a finding that the budget message submitted to Congress in January, 1973, predicted an unobligated balance in the food stamp program appropriation for fiscal year 1973 of $302 million, and that the current estimated unobligated balance which would lapse for fiscal year 1973 was $250 million, the court (Judge Miles W. Lord) ordered defendants to record, no later than June 29, 1973, as an obligation of the United States all sums appropriated for the food stamp program for the fiscal year ending June 30, 1973,[23] including the contingency reserve specified therein, which are not otherwise obligated as of that date or to become duly obligated thereafter. The court further ordered defendants to refrain from withdrawing any unobligated balance from said appropriation in any manner which would cause or permit the reversion of said unobligated balance to the general fund, and to retain all such sums obligated as a result of this order as an obligated balance against the appropriation until further order of the court.

The court concluded that the plaintiffs had demonstrated a substantial likelihood of success on the merits of future litigation on the allegation that defendants were not carrying out the food stamp program [24] in all ways consistent with the stated purposes and goals as set forth by the Congress.

Minnesota v. *Fri*, No. 4–73 Civ. 133 (D. Minn., June 26, 1973).

Based upon holdings in *State Highway Comm. of Missouri* v. *Volpe*,[25] *New York* v. *Ruckelshaus*,[26] and *Campaign Clean Water, Inc.* v. *Ruckelshaus*,[27] the court (Judge Miles W. Lord) determined that the actions of the Administrator of the Environmental Protection Agency in refusing to allot $6 billion in funds authorized to be allotted in fiscal years 1973 and 1974 to the Federal Water Pollution Control Act Amendments of 1972, were not in keeping with the dictates of the act and as such were illegal and outside of his authority.

> . . . To the extent that the Administrator is given some discretion in determining how the funds should be allotted, such discretion is circumscribed by the provisions of the Act itself. Inasmuch as the determination was made on the basis of matters outside of the scope and purposes of the Act, and, in fact, were contrary to the stated purposes and goals of the Act, such exercise of the discretion was abusive.[28]

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[19] 5 U.S.C. § 702 (1970).
[20] 5 U.S.C. § 703 (1970).
[21] 5 U.S.C. § 705 (1970).
[22] 359 F. Supp. at 792.
[23] P.L. 92–399.
[24] 7 U.S.C. §§ 2011, et seq. (1970).
[25] *Supra.*
[26] *Infra.*
[27] *Infra.*
[28] Slip opinion at 14.

Therefore, the court ordered defendants to rescind the reduction in the allotment of all funds authorized by the Congress, and allot the full sums of $100.6 million for fiscal year 1973 and $121.9 million for fiscal year 1974 to the State of Minnesota, for construction grants. Appeal pending. Notice of appeal filed July 10, 1973.

Williams v. *Phillips*, C. A. No. 490–73 (D.D.C., June 27, 1973).

Judge William B. Jones fashioned an emergency order authorizing Alvin J. Arnett, who had been nominated by the President to serve as Director of OEO, but whose confirmation by the Senate was still pending, to act as Director of OEO. He further ordered Arnett and his agents to consider all pending applications for grants under the Economic Opportunity Act of 1964, as amended, to be made from fiscal year 1973 funds, by 12 noon, June 30, 1973.

The emergency arose from a previous ruling of June 11, in the same court, that Howard Phillips, Acting Director of OEO, was exercising the powers of Director of that Office, but was not appointed Director by the President and that such service was unlawful and illegal since January 29, 1973. Phillips was enjoined from continuing as Acting Director of OEO.

The Economic Opportunity Act of 1964 requires that the OEO ". . . [s]hall be headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate." [29] Five Assistant Directors are also to be appointed in the same way. Defendant was appointed Acting Director on January 31, 1973, and powers were delegated to him by the Director at the time, who then resigned. Defendant's name was never presented to the Senate for confirmation. There is no provision in the act for the appointment of an Acting Director. The Vacancies Act, providing for the filling of vacancies in offices of the United States by appointment of acting officers, limits such appointments to 30 days.[30] Therefore, Judge Jones ruled, defendant Phillips was serving illegally at the expiration of 30 days after his appointment, on March 3, 1973.

Minnesota v. *Weinberger*, C.A. No. 4–73 Civ. 313 (D. Minn., June 27, 1973).

The court (Judge Earl R. Larson) granted plaintiffs' motion for preliminary injunction and ordered defendants to allot to the State of Minnesota (1) its portion of the $50 million appropriation created by P.L. 92–334, [86 Stat. 402], as amended, for funding the National Defense Education Act, title III [31] for fiscal year 1973, in accordance with the formula contained in 20 U.S.C. § 442(a) (1970); (2) the portion of funds appropriated for which the State of Minnesota is eligible from $1,810 million appropriated by Congress in P.L. 92–334, as amended, for Elementary and Secondary Education Act, title I programs,[32] along with an additional sum pursuant to 20 U.S.C. § 241(g) for administration expenses.

The court further ordered defendants to issue letters of credit for the sums ordered to be allotted in favor of the State of Minnesota, before June 30, 1973, and to take any other administrative action necessary to preserve said sums pending ultimate disposition of this case, but enjoined plaintiffs from drawing on the letters of credit pending further order of the court.

Hayes v. *Arnett*, C.A. No. 613–73 [Consolidated with *Migrant Legal Action Program* v. *Arnett*, C.A. No. 614–73; *Urban Planning Aid, Inc.* v. *Arnett*, C.A. No. 972–73; *Rural Housing Alliance* v. *Arnett*, C.A. No. 976–73; *United Migrants for Opportunity, Inc.* v. *Arnett*, C.A. No. 1141–73; *La Raza Unida de Ohio* v. *Arnett*, C.A. No. 1294–73; *Colorado Migrant Council, Inc.* v. *Arnett*, C.A. No. 1295–73] (D.D.C., June 27, 1973).

The court (Judge William B. Jones) ordered the Acting Director of OEO, Alvin J. Arnett (who was appointed but not confirmed by the Senate) to consider all applications for grants under OEO programs submitted by plaintiffs, and to act upon them by 5 p.m. of the date of the order. He further ordered defendant to serve full notice of facts and conclusions of law to counsel of plaintiffs whose applications are denied by 5 p.m. of the date of the order. Defendant was to hold full hearings for those whose applications were denied, pursuant to 45 CFR § 1067.1, on June 28, 1973. Notifications of denials upheld were to be submitted to counsel of plaintiffs by 3 p.m., July 28.

Maine v. *Weinberger*, Civ. Docket No. 14–52 (D. Maine, June 29, 1973).

The court (Judge Edward T. Gignoux) issued a temporary restraining order instructing the Secretary of HEW to allot the sum of $265,000 for fiscal year 1973,

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[29] 42 U.S.C. § 2941(a) (1970).
[30] 5 U.S.C. § 3345–49 (1970).
[31] 20 U.S.C. §§ 441 *et seq.* (Supp. 1972).
[32] 20 U.S.C. §§ 241(a) *et seq.* (1970).

pursuant to the National Defense Education Act, before the expiration of the fiscal year, and to issue a letter of credit to the plaintiffs evidencing that the same has been done. Plaintiffs were enjoined from expending or obligating the funds covered by this order until final disposition of the merits.

Maine has received notification of grant award.

Martin-Trigona v. *Ruckelshaus*, No. 72 C 3044 (N.D. Ill., June 29, 1973).

In a suit brought by a private citizen who "uses Lake Michigan for personal recreational purposes and also uses the lake insofar as the lake is used by the city in providing city services to plaintiff," to compel the Administrator of EPA to allot funds under the Federal Water Pollution Control Act Amendments of 1972, the District Court for the Northern District of Illinois (Judge William J. Lynch) granted a declaratory judgment to the effect that the act requires the defendant to allot the full $5 billion and $6 billion authorized for fiscal years 1973 and 1974 respectively. The court further ordered the defendant and subordinates to annul and revoke by official act in writing any extant orders, etc., allotting less than the full amount authorized.

Notice of appeal has been filed.

Nat'l Ass'n of State Universities and Land Grant Colleges v. *Weinberger*, C.A. No. 1014–73 (D.D.C., June 29, 1973).

Suit filed to compel defendants to release $10 million in funds authorized and appropriated by Congress pursuant to 7 U.S.C. § 329 (1970). The court (Judge William B. Jones) found that funds had indeed been obligated and were being disbursed, and dismissed case as moot, over plaintiffs' objections that declaratory order was needed to prevent future impoundments.

Community Action Programs Executive Directors Ass'n of New Jersey v. *Ash*, C.A. No. 899–73 (D.N.J., June 29, 1973).

The court (Judge Leonard I. Garth) preliminarily and permanently enjoined the Director of the Office of Management and Budget from taking any action or failing to take any action which would cause or permit the reversion to the general fund, withholding, nonobligation or loss of at least $239,143,000 in unobligated funds for the purposes of the Summer Neighborhood Youth Corps program [33] for fiscal year 1973 [Supplemental Appropriations Act of 1973, Pub. L. 92–607, 86 Stat. 493]. The court further charged defendants with responsibility to release and obligate the funds to record the sum of at least $239,143,000 appropriated for the Summer Neighborhood Youth Corps for fiscal year 1973 as an obligation of the United States, no later than 10 p.m. on June 30, 1973, and to release and expend that sum for the Summer Neighborhood Youth Corps for fiscal year 1973. Appeal pending.

West Central Missouri Rural Development Corp. v. *Shultz*, C.A. No. 1237–73; *Colorado Migrant Council, Inc.* v. *Arnett*, C.A. No. 1295–73 (Consolidated) (D.D.C., June 29, 1973).

On behalf of plaintiffs and the class of all other parties who have submitted applications for grants for fiscal year 1973 funds under Sections 221, 222, 226, 232, and 312 of the Economic Opportunity Act of 1964, as amended [34] the court (Judge William B. Jones) granted plaintiff's motion for temporary restraining order and ordered defendants to record as an obligation of the United States, not later than June 30, 1973, all fiscal year 1973 funds appropriated for grant programs, under above cited provisions, which are not otherwise obligated, and to retain said funds as an obligated balance against the fiscal year 1973 appropriation for the Office of Economic Opportunity in a manner that they will not revert to the general fund of the United States.

State of Kansas ex rel. Miller v. *Weinberger*, No. T–5364 (D. Kan., June 30, 1973).

The court granted plaintiffs' motion for preliminary injunction, and ordered defendant to hold National Defense Education Act, title III funds allocable to the State of Kansas for fiscal year 1973, available for possible distribution, pending hearing on the merits. (Judge George Templar).

Arkansas v. *Weinberger*, Civil No. (LR–73–C–120) (E.D. Ark., July 3, 1973).

On motion of plaintiff, Judge J. Smith Henley dissolved his preliminary injunction which had ordered defendants to allot to the State of Arkansas its portion of

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[33] P.L. 92–424, 86 Stat. 638, 42 U.S.C. § 2771 (Supp. II, 1972).
[34] 42 U.S.C. §§ 2808, 2809, 2813, 2825, and 2826 (1970).

$50 million appropriated under P. L. 92–334, 86 Stat. 42, as amended, in accordance with the formula contained in 20 U.S.C. § 442(a) (1970).

State of Alabama ex rel. Baxley v. *Weinberger*, Nos. 4101–N, 4103–N, and 4104–N (M.D. Ala., July 18, 1973).

The court (Judge R. E. Varner) issued a preliminary injunction restraining the defendants Weinberger and Ottina from refusing to allocate a total of $9,920,425 appropriated by the Congress by P.L. 92–334 for fiscal year 1973, pursuant to 20 U.S.C. §§ 401 *et seq.* (1970), as amended [35] 20 U.S.C. §§ 1001 (1970), *et seq.*, as amended [36] 20 U.S.C. §§ 1241 (1970), *et seq.*, as amended [37] 20 U.S.C. §§ 1201 (1970), *et seq.*, as amended [38] 20 U.S.C. §§ 241(a) (1970), *et seq.*, as amended [39] and 20 U.S.C. §§ 351 (1970), *et seq.*, as amended.[40] Defendants were further ordered to retain such funds on record as an obligation of the United States, pursuant to 31 U.S.C. §§ 200A(6) and (8), and to retain the funds as an obligated balance against the appropriations in such manner that they will not revert to the general fund of the United States.

Also, defendants were ordered to continue to allocate and set aside such funds as plaintiffs may ultimately be entitled to recover under the above statutory provisions.

The court, by order of June 30, 1973, had previously granted a temporary restraining order against such refusal to allocate the funds, pending further determination of the court on the matter of a temporary injunction.

Commonwealth of Pennsylvania v. *Lynn*, No. 73–1835 (D.C. Cir., July 19, 1974, reversing 362 F. Supp. 1363 (D.D.C. 1973).

In the court below, Judge Charles R. Richey, of the U.S. District Court for the District of Columbia, granted a declaratory judgment that the actions by the Secretary of HUD in suspending the administration of §§ 235, 236, and 101 of the Housing and Urban Development Acts [41] and refusing to accept new applications or process applications pending on that date are unlawful. He further enjoined the Secretary from refusing to accept applications for housing subsidies under the acts and ordered the Secretary to process existing and new applications in accordance with Department regulations and to approve and complete the processing of those projects found to be qualified under such regulations.

The suit was in response to orders by the Secretary of January 8, 1973, suspending programs which would have had the effect of withholding $431,040 in funds from plaintiffs. The Secretary argued that he was empowered to suspend the programs, providing for mortgage insurance and periodic assistance payments to mortgagees having low incomes, subsidizing rental housing opportunities to lower income families in newly constructed or renovated buildings, and assisting tenants of privately owned federally assisted projects whose income would otherwise qualify them for low-rent public housing, so that he might reevaluate unsuccessful programs. The court held that the Congress had enacted a statutory mandate that the programs operate on a continuing basis to move the country closer to stated housing goals.[42] Only the Congress could reevaluate statutory programs; the duty of the executive branch was to operate the programs established by Congress.

On appeal, this case was reversed by the U.S. Court of Appeals for the District of Columbia Circuit on July 19, 1974 (No. 73–1835). In an important decision regarding the power of executive branch officers to withhold Federal funds for reasons related to the operation of the program in question, the Court of Appeals held that the Secretary has the limited discretion—indeed the obligation—to suspend the programs' operation when he has adequate reason to believe that they are not serving Congress's purpose of aiding specific groups in specific ways, or are frustrating the national housing policies applicable to all housing programs. [Editor's note: The appeal was handed down too late for this analysis to be placed in its proper chronological order.]

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[35] National Defense Education Act.
[36] Higher Education Act.
[37] Veterans' Education Act.
[38] Adult Education Act.
[39] Elementary and Secondary Education Act.
[40] Library Services Construction Act.
[41] 12 U.S.C. §§ 1715z, 1715z–1, and 1701s (1970).
[42] 42 U.S.C. § 1441 (1970).

Massachusetts v. *Weinberger*, C.A. No. 1308–73; *District of Columbia* v. *Weinberger*, C.A. No. 1322–73 (Consolidated) (D.D.C. July 26, 1973).

The court granted a declaratory judgment for plaintiffs to the effect that section 442(a)(1) of the National Defense Education Act of 1958, as amended,[43] requires the Commissioner of Education to allot among the States for fiscal year 1973 the amount of $50 million appropriated by Congress,[44] minus any amounts heretofore reserved pursuant to § 442(a)(1) for the purpose specifically designated therein, and not in excess of the percentage allowances specified therein. Judge Oliver I. Gasch further ordered that the funds allotted to plaintiffs pursuant to this order be made available for obligation and expenditure in accordance with 20 U.S.C. § 444 [payments to States under the national defense education program] and remain available until totally expended, or June 30, 1973, whichever occurs first.

Defendants' motion to amend judgment and for stay pending appeal denied [August 20, 1973].

Seafarers International Union of North America, AFL–CIO v. *Weinberger*, C.A. No. 1077–73 (D.D.C., July 30, 1973).

Congress has provided that the Secretary of HEW may not close or transfer control of any Public Health Service facility unless he transmits to each House of Congress a detailed explanation for the proposed closing or transfer, which explanation contains assurances of continued equivalent care and treatment for affected PHS beneficiaries, an estimate of the cost of providing such care and treatment after the proposed closing or transfer, and the comments made by each State or local areawide health planning agency with respect to the proposal, after each such agency has been provided with a reasonable opportunity to review and comment on the proposed closing or transfer. Additionally, the Secretary is required to wait a period of 90 days of continuous session of the Congress, from the date of transmission of the explanation to the Congress, before taking any steps to effectuate the proposed plan, to allow Congress to review and study the proposal, and take action with respect to it.[45]

Pursuant to P.L. 92–585, on March 28, 1973, the Secretary submitted to each House a detailed explanation for the proposed closure of in-patient and related research services at six of the eight PHS hospitals, as of July 21, 1973, the date when the 90-day period expires. The court concluded that by various legislative acts both Houses had rejected the proposed plan as failing to satisfy the requirements of P.L. 92–585, § 3, in that it did not assure competent care to PHS beneficiaries.[46]

Therefore, the court ruled that the Secretary may not effectuate the plan either directly or indirectly unless and until he submits a new plan for closure or transfer of PHS facilities and the Congress has acted favorably thereon, or taken no action to indicate its disapproval thereof. Judge Pratt preliminarily enjoined and restrained defendants from going forward with the plan, or otherwise limiting or diminishing in any way the medical care and treatment as presently afforded at PHS hospitals to PHS beneficiaries.

Wall v. *Weinberger*, C.A. No. 1437–73 (D.D.C., July 30, 1973).

The court (Judge H. H. Pratt) preliminarily enjoined the Secretary of HEW, the Surgeon General of the United States, and the Director of the U.S. Public Health Service Hospital of Staten Island, N.Y., from taking any action which would directly or indirectly limit, inhibit, impair, or in any way deny medical care and treatment or hospitalization, as presently afforded at certain U.S. Public Health Service hospitals, to any persons authorized or entitled to receive such care and treatment. Judge Pratt further restrained the giving of effect to the plan submitted to the Congress on March 28, 1973, to terminate in-patient and related services and functions at such Public Health Service hospitals by providing in-patient service to Public Health Service beneficiaries by contract with community hospitals.

Pealo v. *Farmers Home Adm.*, 361 F. Supp. 1320 (D.D.C. 1973).

Judge Charles B. Richey granted plaintiff's motion for preliminary injunction and declaratory relief, declaring that the defendants' refusal, as of January 8,

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[43] 72 Stat. 1588, 20 U.S.C. § 441 *et seq.*, (1970).
[44] P.L. 92–334, § 101(d), as amended by P.L. 92–390, P.L. 92–446, P.L. 92–571, and P.L. 93–9.
[45] P.L. 92–585, § 3, 86 Stat. 1292 (1972).
[46] Conference committee on the Emergency Services Systems Act of 1973 report, Rept. No. 93–370 (July 10, 1973) at 29.

1973, to further process, approve, and implement applications for Farmers Home Administration interest credit loans[47] is unlawful. The court further enjoined defendants from refusing to process, approve, and implement applications for Farmers Home Administration interest credit loans consistent with the requirements of the statutes and the payment ability of the applicants.

The FmHA interest credit loan program was devised to make housing in rural areas available to those whose incomes would otherwise be inadequate to secure decent housing. Section 502 of the act[48] authorizes the FmHA to make direct loans at not more than four percent interest per year, amortized for 33 years, to owners of adequate farms who are unable to obtain credit on terms which they can reasonably fulfill, and to any low-or moderate-income person who desires to live in a rural area, who is unable to otherwise secure decent housing, and who can reasonably be expected to repay the loan. Section 515[49] authorizes the FmHA to make direct loans to nonprofit and consumer cooperatives at below-market interest rates to provide rental housing for any low- or moderate-income person or family. Section 521[50] creates the interest credit program, whereby the Secretary of Agriculture may credit the interest rate on loans made under section 502 and 505 programs such that the actual amount of interest paid may be as low as one percent.

The court ruled that the relevant statutes do not vest in the defendants the discretion and authority to suspend the rural housing interest credit programs, and that defendants' actions in doing so violate their duties under article II of the Constitution. While the Secretary has limited discretion to determine the interest rates on section 502 and 505 loans, this discretion must be viewed in terms of the operation of the rural housing programs and federal housing programs in general. ". . . As amply demonstrated by two of the Plaintiffs herein, qualification for a Section 502 (or a 515) loan is a cruel joke if decent housing cannot be obtained in absence of interest credit for the loan."

The court did not view the construction of the statutes as a question of looking for the word "shall" instead of "may", but rather one of determining a "reasonable basis" for finding what intent the Congress manifested. In this light, the court found that the interest credit program was intended by the Congress to be carried out, and that the defendants have frustrated that intent.

Defendants' motion for stay pending appeal denied. [Aug 10, 1973].

Oklahoma v. *Weinberger*, No. C–73–425C (W.D. Okla., July 31, 1973).

The court (Judge Stephen S. Chandler) permanently enjoined defendants from continuing to fail and refuse to allot, distribute and disburse the full amount of $51,770,000 appropriated by the Congress for titles I, II, and III of the Library Services and Construction Act of 1956 [51]

> By use of the word "shall" in Section 351c with respect to the minimum allotment to each State as well as to allotment of the remainder of the sums appropriated, it is clear that Congress intended that such allotment be mandatory. Such allotment is conditioned only upon the States' meeting the requirements with respect to state plans and programs, provided by 20 U.S.C. § 351d.[52]

By order of August 3, 1973, the court granted leave to intervene, and granted full relief to any such intervening State with respect to such State's share of the LSCA funds appropriated by the Congress for fiscal year 1973 but not heretofore allotted by defendants.

National Council of Community Mental Health Centers, Inc. v. *Weinberger*, C.A. No. 1223–73 (D.D.C., August 3, 1973).

Suit was filed to require the Secretary of HEW to review, approve, and obligate to the plaintiffs funds in the amount of $52,050,000 for first-year grants for staffing of community mental health centers and for construction and staffing of mental health treatment centers for children, under the Community Mental Health Act, as amended.[53] Pursuant to a continuing resolution, funds were appropriated for the purposes of the act in the amounts of $165,100,000 for Com-

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[47] Housing Act of 1949, as amended. §§ 502, 505, and 524.
[48] 42 U.S.C. § 1472 (1970).
[49] 42 U.S.C. § 1485 (1970).
[50] 42 U.S.C. § 1490a (1970).
[51] 20 U.S.C. §§ 351, *et seq.* (1970).
[52] Slip opinion at 2.
[53] 42 U.S.C. §§ 2688–2688d, 2688u (1970).

munity Mental Health Center staffing and $20 million for Mental Health for Childrens' programs.[54] The act operates such that once initial general staffing grants or childrens' service grants are made, diminished grants are authorized for an additional 7 years to the recipient of the initial grant in order to meet the continuing costs of the program.[55] Grants to meet continuing costs cannot be made under parts B or F of the act after June 30, 1973, unless the applicant received a grant under the relevant part prior to July 1, 1973.

The court found that action of the defendants, charged under the act with the operation of the program, have caused the cessation of the processing of applications for new grants (starting funds) under the act for staffing of community mental health centers and childrens' programs, as well as funding for approved applications. Generally, the defendants' actions have prevented all funds appropriated under the act from being obligated for new grants in fiscal year 1973, and therefore all such funds were subject to being withdrawn from HEW and returned to the general Treasury fund pursuant to 31 U.S.C. § 701(a)(2). The act, in pertinent part, reads as follows:

> Notwithstanding any other provision of law, unless enacted after the enactment of this Act expressly in limitation of the provisions of this section, funds appropriated for any fiscal year ending prior to July 1, 1973, to carry out any program for which appropriations are authorized by . . . or the Mental Retardation Facilities and Community Health Centers Construction Act of 1963 (Public Law 88–164, as amended) *shall remain available for obligation and expenditure until the end of such fiscal year.*[56]

The court concluded that this provision makes mandatory the spending of funds appropriated under the act for fiscal year 1973. [Slip opinion at 8.] Accordingly, Judge Gerhard A. Gesell ordered defendants to take all actions necessary to review and process all applications pending for community mental health center staffing and children's services grants, and, without delay, award grants by notice of grant of other lawful means to all applicants found to be qualified pursuant to the same lawful eligibility requirements on the same basis as they were applied by defendants prior to February 23, 1973. Defendants were further ordered to take all actions necessary to obligate funds under the act for community mental health center staffing and children's services grants no later than June 30, 1973, for all duly approved pending applications. Funds were to be recorded as an obligation of the United States in amounts representing the difference between the $165,100,000 appropriated for community mental health center staffing grants under the act and the sum obligated by June 30, 1973, for continuing staffing costs, and the difference between the $20 million appropriated for children's services grants under the act and sum obligated by June 30, 1973 for continuation of children's services costs.

Appeal docketed.

Local 2677, A.F.G.E. v. *Arnett*, C.A. No. 1469–73 (D.D.C., Aug. 3, 1973).

Judge Thomas A. Flannery denied plaintiffs' motion for preliminary injunction against the delegations of certain OEO programs to the Departments of HEW, HUD, and Labor. The court held that the particular programs were being transferred according to the provisions of the Economic Opportunity Act of 1964, as amended,[57] and that such a delegation was not prohibited by any provision of law. Powers of delegation are restricted in only three instances, regarding community action agencies.[58] Community Economic Development,[59] and Legal Services,[60] none of which were at issue here.

Moreover, because the delegated programs were found to parallel existing programs in the agencies to which they were delegated, and because such programs were found to be funded in the appropriations for the agencies to which they were delegated, rather than in OEO, the delegations were required if the programs were

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[54] H.R. 15417, 92d Cong., 2d Sess. (passed June 15, 1973).
[55] Part B of the Act, 42 U.S.C. § 2688 et seq., and Part F of the Act, 42 U.S.C. § 2688 et seq., respectively.
[56] Medical Facilities Construction and Modernization Amendments of 1970, P.L. 91–296: title VI, § 601, 84 Stat. 353, 42 U.S.C. §§ 201 note and 2661 note. (Emphasis added.)
[57] 42 U.S.C. 2942(d) 1970.
[58] P.L. 92–424, 86 Stat. 688, § 221.
[59] Title VII of the Act.
[60] P.L. 91–177, § 114, 83 Stat. 827.

to continue in existence. The court held that the delegations were fully supportable on a rational basis:

> . . . the achievement of maximum economy and efficiency in the administration of federal programs, the enhancement of the statutory of continued program operation under current Congressional appropriations.[61]

Dotson v. *Butz*, C.A. No. 1210–73 (D.D.C., Aug. 3, 1973).

The court (Judge Oliver Gasch) enjoined the Secretary of Agriculture, and his agents and employees, from refusing to process and approve applications for funding under the special supplemental food program, Section 17 of the Child Nutrition Act of 1966, as amended [62] which qualify for funding under that section and under defendants' own regulations, published at 38 Fed. Reg. 18447 *et seq.* (July 11, 1973), until the sum of $40 million is expended for these purposes, or until June 30, 1974, whichever occurs first. The court also ordered that funds expended for the purposes of the section 17 program be taken entirely from funds appropriated pursuant to 7 U.S.C. § 612c [appropriation to encourage exportation and domestic consumption of agricultural products], unless an amount has been specifically appropriated prior to August 1, 1973, for the purposes of the section 17 program, in which event the amount taken from funds appropriated pursuant to 7 U.S.C. § 612c be reduced in an amount equal to the said specific appropriation for section 17 purposes.

The special supplemental food program provides for a 2-year pilot program of cash grants to States "for the purpose of providing funds to local health or welfare agencies or private nonprofit agencies . . . serving local health or welfare needs to enable such agencies to carry out a program under which supplemental foods will be made available to pregnant or lactating women and to infants determined by competent professionals to be nutritional risks because of inadequate nutrition and inadequate income." [63] Funding for the program is provided for in 42 U.S.C. § 1786(b):

> In order to carry out the program provided for under subsection (a) of this section during the fiscal year ending June 30, 1973, the Secretary *shall* use $20,000,000 out of funds appropriated by section 32 of the Act of August 24, 1935 (7 U.S.C. 612(c)). In order to carry out such program during the fiscal year ending June 30, 1974, there is authorized to be appropriated the sum of $20,000,000, but in the event that such sum has not been appropriated for such purposes by August 1, 1973, the Secretary shall use $20,000,000, or if any amount has been appropriated for such program, the difference, if any, between the amount directly appropriated for such purpose and $20,000,000, out of funds appropriated by section 32 of the Act of August 24, 1973 (7 U.S.C. 612(c)). [Emphasis added.]

The court ruled that the Congress had a twofold purpose in enacting section 17: To help those malnourished persons for whom the program was enacted and to secure medical data to provide a basis for determining whether the program should be continued. The Congress was found to have directed the Secretary to use $20 million in each of fiscal years 1973 and 1974 to achieve these purposes. [". . . the Secretary *shall* use. . . ."].

An amount less than the full $40 million could be spent only in the event that the number of applicants meeting statutory criteria, applied in good faith by defendants, is so small that the $40 million cannot be expanded even by full funding of programs proposed by all successful applicants.[64]

Judge Gasch issued a further order on December 3, 1973, denying a motion to hold defendants in contempt of court for failure to process applications and obligate funds under the act. The court, in denying the motion, found that the defendants apparently would comply with prior orders, but expressed an intent that defendants commit the full sum authorized by the Congress to eligible applicants.

No appeal filed.

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[61] Slip opinion at 6.
[62] 86 Stat. 729, 42 U.S.C. § 1786 (Supp. II, 1972).
[63] [Pub. L. 92–433, § 17(a), 42 U.S.C. § 1786(a) (Supp. II, 1972)].
[64] Slip opinion at 13.

Brown v. *Ruckelshaus, City of Los Angeles* v. *Ruckelshaus* (Consolidated) 364 F. Supp. 258 (C.D. Cal. 1973).

In suits similar in subject matter with *New York* v. *Ruckelshaus*,[65] *Campaign Clean Water, Inc.* v. *Ruckelshaus*,[66] and *Minnesota* v. *Fri*,[67] Congressman George E. Brown, Jr., on behalf of himself and all other California citizens and residents, and the city of Los Angeles filed actions against the Administrator of the U.S. Environmental Protection Agency to compel full allotment of funds authorized to be allotted by the Federal Water Pollution Control Act Amendments of 1972.

The cases were both dismissed (Judge A. Andrew Hauk) for lack of standing because of the failure of either plaintiff to offer evidence demonstrating that the EPA's refusal to allot the full authorized sums had injured them, or would injure them in the future.

In *dictum*, the court went on to hold that even if plaintiffs could show standing to sue, they would lose on the merits because neither the Federal Water Pollution Control Act Amendments of 1972, nor the legislative history of that Act, required by their terms the full allotment of the amounts authorized to be allotted.

Notice of appeal filed by city of Los Angeles on November 5, 1973.

Texas v. *Weinberger*, C.A. No. A–73–CA–162 (W.D. Tex., Sept. 28, 1973).

The court (Judge Jack Roberts) preliminarily enjoined defendants, during pendancy of the action, from continuing to fail and refuse to allot the sum of $26,300,000 appropriated by the Congress in P.L. 92–334 and P.L. 93–50, as amended and extended, for fiscal year 1973 and for the purposes of title VI–B of the Education of the Handicapped Act.[68]

The funds were to be retained as an obligated balance against the appropriations in such manner that they would not revert to the general fund of the United States during the pendency of the action. No appeal filed.

State Highway Comm. of Kansas v. *Volpe*, C. A. No. T–5275 (D. Kan., Oct. 1, 1973).

In a suit by the State Highway Commission of Kansas against the Secretary of Transportation and the Director of the Office of Management and Budget to compel apportionment and obligation of funds to the States for the construction of a system of Interstate and Defense Highways, pursuant to the Federal Aid Highway Act of 1956,[69] Judge George Templar issued an order overruling defendants' motions for dismissal, or, in the alternative, for summary judgment.

The court held that the case was barred neither by the doctrine of sovereign immunity nor the political question doctrine. Moreover, because plaintiffs have alleged that defendants owe the duty of apportioning to it certain sums authorized to be apportioned and made available for expenditure, plaintiffs have stated a claim upon which relief could be granted. The court ruled that the issues of whether defendants have apportioned and distributed to plaintiff all funds they are required to distribute, and whether they have properly withheld distribution by actions within the limits of the discretion as authorized by statute or the Constitution, can only be decided at trial.

The case of *State Highway Comm. of Missouri* v. *Volpe, supra*, satisfied the court that it had jurisdiction over the controversy.

Texas v. *Fri*, C.A. No. A–73–CA–38 (W.D. Tex., Oct 2, 1973).

In an action by the State of Texas, joined by Oklahoma, Missouri, and Wisconsin, as intervenors, as representing the class of all States entitled to allotment under the Federal Water Pollution Control Act Amendments of 1972, to compel defendant to allot the entire sum of money appropriated by Congress in that Act for the construction of waste treatment plants for fiscal years 1973 and 1974, the court (Judge Jack Roberts) declared that the acts of defendant in allotting less than the full amounts authorized by the act were unlawful, and ordered defendant to revise the allotments he has already made for fiscal years 1973 and 1974 to comply with the act.

Judge Roberts rule that the case was ripe for judicial review because Texas had submitted sworn affidavits to the effect that the Texas Water Quality Board has approved and submitted plans to the EPA for grants totalling $146,823,228,

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[65] *Supra.*
[66] *Infra.*
[67] *Supra.*
[68] 20 U.S.C. §§ 1411–1414 (1970).
[69] P.L. 84-627.

which exceeds the reduced total federal allotment of $55,338,000 to Texas in fiscal year 1973, that 34 applications have been turned down by the EPA, and that 63 additional applications are in the offing. Further, the court found that reduced allotments were hampering long-range planning, which was a primary concern of the Congress in enacting the particular appropriations scheme for water pollution control, and that the funds would lapse if not allotted in the appropriate fiscal year.

The court ruled that the case was not barred either by the doctrine of sovereign immunity or the political question doctrine, inasmuch as it concerned a matter of statutory construction regarding the amount of discretion granted the Administrator to allot or withhold funds under the act. According to the language of the act, the court found that the Congress had enacted a statutory mandate for the Administrator to allot the full amount authorized.

In an order of October 19, 1973, the court ruled that the motions to intervene by the States of Oklahoma, Missouri, and Wisconsin were not ripe for consideration because the 60 days allowed by Fed. R. Civ. Proc. 12(a) for defendant to answer had not elapsed at the time of the October 2 order. Accordingly, the relief granted in the October 2 order was restricted to the State of Texas.

Notice of appeal filed.

Washington v. *Weinberger*, C.A. No. 410–73C2 (W.D. Wash., Oct. 5, 1973).

The court (Judge Morell E. Sharp) issued a declaratory order to the effect that the impounding and withholding of $48 million appropriated by Congress for fiscal year 1973 for title III of the National Defense Education Act of 1958, as amended, are unlawful, and ordered defendants to take all actions necessary to allot to the State of Washington its distributive share of the funds, and issue a notification of grant award authorizing plaintiff to draw upon these funds, no later than December 10, 1973.

The court also rescinded a portion of a previous preliminary injunction issued by Judge Marshall O. Neill on July 13, 1973, enjoining plaintiffs from exercising a letter of credit for the funds.

Notice of appeal filed December 4, 1973.

Georgia v. *Nixon*, 414 U.S. 810 (1973)

The State of Georgia filed a motion for leave to file a bill of complaint in the U.S. Supreme Court, challenging presidential impoundments on a number of fronts,[70] including the National Defense Education Act, the Federal-Aid Highway Act of 1956, and Federal Water Pollution Control Act Amendments of 1972.

Both the State of Georgia and the Department of Justice submitted briefs asking the Supreme Court to take the case on its original docket.

The Supreme Court denied the motion on October 9, 1973.

Illinois ex rel. Bakalis v. *Weinberger*, 368 F. Supp. 721 (N.D. Ill. 1973).

Judge William L. Lynch, ruled that the National Defense Education Act of 1958, as amended,[71] requires defendant to allot among the States the amount of $50 million for fiscal year 1973, appropriated by the Congress in P.L. 92–334, § 101(d), as amended by P.L. 92–390, P.L. 92–446, P.L. 92–571, and P.L. 93–9, and that plaintiffs were permitted to forthwith obligate and expend funds previously allotted and released to them pursuant to orders of the court on June 27, 1973, June 29, 1973, June 30, 1973. The funds released by these orders were to remain available until totally expended. The previous orders had consisted of temporary restraining orders to prevent the funds from lapsing into the treasury at the end of fiscal year 1973, but plaintiffs were ordered not to draw upon letters of credit until a decision upon a hearing scheduled for July 20, 1973.

American Ass'n of Colleges of Podiatric Medicine v. *Ash*, Civ. Act. No. 1139–73, Consolidated with *American Ass'n of Colleges of Pharmacy* and *Ass'n of Schools and Colleges of Optometry* v. *Ash*, Civ Act. No. 1244–73 (D.D.C., Oct. 26, 1973).

The court (Judge George L. Hart, Jr.) permanently enjoined and restrained defendants from failing to obligate and expend to qualified schools of podiatry, pharmacy, and optometry, such schools' portion of the full amounts of fiscal year 1973 funds appropriated by the Congress for capitation grants to such schools pursuant to 42 U.S.C. § 295f, such funds not being less than the sum of $19,828,-610, and from failing to expend and release said funds to the grantee institutions during the 1973–1974 academic year.

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[70] No. 63 U.S. Orig. (May 10, 1973).
[71] 20 U.S.C. § 441 *et seq.*

On June 27, 1973, in response to the position of the defendants that they would not obligate, for fiscal year 1973, more than 50 percent of $27,400,000 appropriated by the Congress [72] for annual capitation grants to schools of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, and podiatry, pursuant to the Comprehensive Health Manpower Act of 1971,[73] the court ordered the Director of the Office of Management and Budget to make available to the Secretary of HEW, before June 30, 1973, the amount of funds at issue in the present suits. The court ordered the Secretary of HEW to send out to plaintiff colleges "revised notices of grant award" in the amounts that they would be entitled to under law if they ultimately prevail on the merits.

One half of the funds obligated to each plaintiff under the revised notices of grant award was not to be made available for expenditure by the grantee institutions unless and until there was a final disposition on the merits in favor of plaintiffs.

Judgment stayed for 20 days pending appeal.

Association of American Medical Colleges v. *Weinberger*, C.A. Nos. 0830–73 and 1794–73 (D.D.C., Oct. 26, 1973).

The Association of American Medical Colleges brought two simultaneous actions, which were consolidated on October 25, 1973, against the Secretary of HEW to determine the duties of defendant under section 772 of the Public Health Service Act,[74] and under sections 301 and 308 of the Public Health Service Act,[75] and to compel the performance thereof by approving qualified applications, by obligating for expenditure, and by expending the full amount appropriated for the fiscal year ending June 30, 1973 by Congress for special project grants to schools of medicine represented by plaintiff, and for research grants, research training grants and fellowships administered by the National Institutes of Health to schools of medicine and affiliated teaching hospitals represented by plaintiff.

The court (Judge George L. Hart, Jr.) found that by means of continuing H.J. Res. 345, P.L. 93–9,[76] signed into law by the President, Congress has appropriated for fiscal year 1973 $63 million for special project grants under section 772 and at least $879,113,000 for NIH research grants, $146,095,000 for research training grants, and $49,186,000 for fellowships under sections 301 and 308. As each of the schools of medicine and teaching hospitals represented by plaintiff have timely filed applications for one or more of such grants, and defendants have failed and refused to obligate the full amounts appropriated to eligible schools, the court permanently enjoined defendants from failing to obligate the full amounts. The schools' and hospitals' portion of unobligated balances, as defined in 31 U.S.C. § 701(c) was estimated to be at least $28,600,000 for special project grants and at least $112,519,000 for NIH research grants, and research training grants and fellowships.

Appeal pending.

Maine v. *Fri*, No. 73–1254 (1st Cir., Nov. 2, 1973), affirming Civ. No. 14–51 (D. Me., June 29, 1973).

On June 29, 1973, Judge Edward T. Gignoux of the U.S. District Court for Maine issued a preliminary injunction against the Acting Administrator of the Environmental Protection Agency, ordering him to allot to the State of Maine its proportionate share of the full sums authorized to be appropriated under section 207 of the Federal Water Pollution Control Act Amendments of 1972, which share amounted to $29,025,000 (except that sums in excess of sums previously allotted to Maine were not to be available for obligations under section 205(b) of the act until further order of the court). The order was issued because of the court's perception of section 205(a) of the act, which might have provided for permanent loss to Maine of those funds not obligated by the end of the fiscal year for which allotted, causing immediate and irreparable injury to the State.

The U.S. Court of Appeals for the First Circuit (Judge Levin H. Campbell) affirmed, finding that the district court had not abused its discretion in issuing its order. The circuit court observed that the issue had not been decided on the merits whether the Administrator, under orders from the President, had the authority to reduce the 1973 and 1974 allotments below the sums authorized to be

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[72] P.L. 93–9 (March 8, 1973); P.L. 92–334 (July 1, 1973).
[73] P.L. 92–157, § 770, 85 Stat. 774, 42 U.S.C. § 295f (1972).
[74] 42 U.S.C. § 201, *et seq.*, as amended by the Comprehensive Health Manpower Training Act of 1971, P.L. 92–157, 85 Stat. 444, 42 U.S.C. § 295f–2.
[75] 42 U.S.C. §§ 241 and 242f.
[76] 93d Cong., 1st sess. (1973).

appropriated by the act. Further, a reading of the act was found arguably to infer that sums not allotted to the States could not be carried forward to the next fiscal year. Therefore, faced with the possibility of irretrievably losing unallotted funds, the State of Maine "prudently"—in the words of the court—took the position it did.

> . . . Maine was faced with a possible loss of millions if a timely allotment turned out to be mandatory. On the other hand, if the allotment turned out not to be mandatory, entry of an interim order would do no harm.[77]

Nat'l League for Nursing v. *Ash*, C.A. No. 1316–73 (D.D.C., Nov. 19, 1973).

Plaintiff, representing some 790 of 948 schools of nursing in the United States, brought suit to compel the Director of the Office of Management and Budget, and the Secretary of HEW, to make available the full amount of funds appropriated for capitation grants to qualified schools of nursing pursuant to section 806(a) of the Nurse Training Act of 1971.[78]

The court (Judge Thomas A. Flannery) found that the provision in question, 42 U.S.C. § 296e, provides for mandatory grants to schools of nursing and leaves to neither the Secretary of HEW nor the Director of OMB any discretion as to the amount each such institution receives thereunder, and that the conduct of defendants in failing and refusing to obligate to the schools of nursing the full amount of fiscal year 1973 funds appropriated by Congress is illegal and unauthorized by the Constitution. Accordingly, the court permanently enjoined defendants from failing to obligate and expend to qualified schools of nursing, members of plaintiff organization, such schools' portion of the full amounts appropriated for fiscal year 1973, and during the 1973–74 academic year. The amount appropriated by the act was $38.5 million, and the amount unobligated prior to the commencement of the action was $16.8 million.

In earlier rulings, the court granted a temporary restraining order requiring the defendants to obligate to the schools of nursing the then unobligated portion ($21.7 million) of the full amount of funds appropriated by Congress as fiscal year 1973 capitation grants. [June 27.] On July 10, 1973, the temporary restraining order was replaced by a preliminary injunction requiring that the funds covered thereby continue to be recorded as obligated, but providing that the said funds should not be available for expenditure until the court had disposed of the case on the merits and entered a final order pursuant thereto.

Pennsylvania v. *Weinberger*, C.A. No. 1125–73 (D.D.C., Nov. 21, 1973).

Judge Joseph C. Waddy ruled that the actions of defendants complained of, namely, the impounding and withholding of $380,409,211 appropriated by Congress for fiscal year 1973 [79] for titles I, II, and III of the Elementary and Secondary Education Act of 1965 [80] and Parts B, F, and H of the Vocational Education Act of 1966 [81] are unlawful and unconstitutional. He further enjoined defendants and mandated them immediately (a) to take all actions necessary to allot the impounded sum to the named and class plaintiffs in accordance with the provisions of the acts; and (b) to issue notifications of grant awards to the named and class plaintiffs under the Office of Education letter of credit system, which grant awards will reflect such supplemental allotments and will authorize the named and class plaintiffs to draw upon these funds in accordance with the provisions of the acts.

In an order of June 28, 1973, Judge Waddy had previously ordered defendants to record the impounded funds as an obligation of the United States to prevent their lapsing into the general fund, and to allot to the Commonwealth of Pennsylvania, and other intervening States, such funds as they might be entitled to under the provisions of the aforementioned statutes.

Notice of appeal filed.

Louisiana v. *Weinberger*, No. 73–1763 (E.D. La., Nov. 30, 1973).

The State of Louisiana brought a class action for declaratory judgment seeking to have defendants' impoundment of appropriated funds under the Library Services and Construction Act of 1956 [82] and title III of the National Defense

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[77] Slip opinion at 4.
[78] P.L. 92–158, 85 Stat. 465, U.S.C. § 296e(a) (Supp. II, 1972).
[79] P.L. 93–334.
[80] 20 U.S.C. §§ 241(a) *et seq.* (1970), sec. 102(b).
[81] 20 U.S.C. §§ 1201 *et seq.*
[82] 20 U.S.C. §§ 351, et seq. (1970).

Education Act of 1958 [83] declared illegal, and for injunctive relief and relief in the nature of mandamus to compel defendants to comply with the congressional mandates expressed in both acts.

The court (Chief Judge Frederick J. R. Heebe) found that plaintiff was entitled to funds under both acts.

Campaign Clean Water, Inc. v. *Train*, 489 F. 2d 492 (4th Cir. 1973); remanding *Campaign Clean Water, Inc.* v. *Ruckelshaus*, 361 F. Supp. 689 (E.D. Va. 1973).

Campaign Clean Water, Inc., an environmental group organized to "promote the ecological and environmental advancement of Virginia," brought suit against the Administrator of the Environmental Protection Agency to compel him to allot among the states the full sums authorized to be appropriated by the Federal Water Pollution Control Act Amendments of 1972. The facts accepted by the district court were identical with those in *City of New York* v. *Ruckelshaus*,[84] except that the plaintiff is a corporation of private interests rather than a governmental unit.

Judge Robert R. Merhige, Jr., in the eastern district of Virginia, granted plaintiff's motion for summary judgment with a declaratory judgment that the announced policy of the Administrator to refuse to allot $6 billion of the designated $11 billion in water pollution control funds constitutes an abuse of discretion under the authority and powers conferred by the act, and that such a policy is null and void. [June 5, 1973.] Unlike *City of New York* v. *Ruckelshaus* and numerous other decisions on the water pollution control act funds, Judge Merhige did not declare that the Administrator had no discretion to refuse to allot the full amount authorized; nor did he order full allotment. Rather, he held that the allotment of only 45 percent of the authorized funds constituted an abuse of discretion, arguing that the "syntactical history" of the act would probably require full obligation of the funds.[85]

However, defendant argued on appeal to the Fourth Circuit Court of Appeals that the finding of the district court that the withholding of 55 percent of the authorized allotment was an abuse of the Administrator's discretion constituted a concession that the act conferred a degree of discretion upon the Administrator; therefore, the court had no power to review an exercise of executive discretion, since the section 10 of the Administrative Procedure Act[86] provides that administrative action, the exercise of which is "committed to agency discretion," is not judicially reviewable. The court of appeals (Judge Donald Russell) nevertheless agreed with the district court that the issue of whether the Administrator had abused his discretion was judicially reviewable in this instance:

> . . . When the executive exercises its responsibility under appropriation legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review. And it was this issue and this issue alone to which the District Court carefully restricted itself in this case. It specifically denied any power on its part to review or supervise the defendant's discretion so far as it was exercised in a manner that was not so arbitrary or drastic as to represent a nullification of legislative purpose.[87]

The court of appeals remanded the case to the district court for further findings on the issue of whether the refusal to allot 55 percent of the authorized funds did indeed constitute such an abuse of discretion as to frustrate the congressional intent. The court found that the mere fact of withholding of 55 percent of the authorized funds, without more, did not overcome the presumption of legality which attaches to administrative action.

> . . . We accordingly remand to the District Court for further proceedings in order to determine, on the basis of such evidence as may be sub-

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[83] 20 U.S.C. §§ 401, et seq. (1970).
[84] *Infra.*
[85] 361 F. Supp. at 698, 699.
[86] 5 U.S.C. § 701 (1970).
[87] 489 F. 2d at 498–9.

> mitted by the parties, whether as a fact the amount of allotments made by the Administrator under Section 205 were a "violation of the spirit, intent, and letter of the Act and a flagrant abuse of executive discretion," or involved irrelevant or improper standards in fixing such amount. In connection with that inquiry, it will be appropriate for the District Court to consider whether the factors used by the defendant in fixing the allotments were the ones that were "relevant" under a proper construction of the discretionary power found to exist in the executive.[88]

Petition for certiorari granted, No. 73–1378 (U.S. April 29, 1974).

Pennsylvania v. *Weinberger*, 367 F. Supp. 1378 (D.D.C., 1973).

In a case brought by the Commonwealth of Pennsylvania, on behalf of all other States similarly situated and the District of Columbia, to compel the executive branch to apportion, obligate, and disburse to the States their share of $15.1 million appropriated by the Congress, and withheld by the Executive, for the operation of State educational programs under title V of the Elementary and Secondary Education Act of 1965, parts A and C,[89] Judge Aubrey E. Robinson ordered defendants to apportion to the States the full sums appropriated for fiscal year 1973, and to promptly accept, review, and approve or disapprove for program-related reasons, applications from the States for grant-awards of these funds.

The financing scheme of the act contemplates apportionment to the States of amounts appropriated by the Congress, followed by obligation of the funds upon approval of formal applications from the States for grant-awards to operate programs of a magnitude based upon the apportionment figure. The act provides that the Commissioner of Education ". . . shall apportion" the appropriated funds among the States and territories according to a prescribed formula.[90] The court held that the word "shall" is mandatory and deprives the official of discretion, making the commanded act a duty or ministerial act.

Although the apportionment stage of the funding process was held to be mandatory because of the use of the word "shall," the authority of the Commissioner to make grant awards was expressed in discretionary language: "may" and "is authorized to." [91] However, the court found it implicit in the legislative scheme that providing the Commissioner with some discretion as to grant awards, the Congress did not intend to allow him the opportunity

> . . . to completely suspend or severely limit, for reasons unrelated to the program, the operations of an ongoing program reviewed, approved and fully funded by the Congress with Presidential approval. Such an approach would place administrative fiat above the law.[92]

Further, the court found statutory language tending to express a general congressional intent to mandate full funding of ongoing education programs:

> Notwithstanding any other provision of law, unless expressly in limitation of the provisions of this chapter, funds appropriated for any fiscal year to carry out any of the programs to which this chapter is applicable shall remain available for obligation and expenditure until the end of such fiscal year.[93]

In light of the legislative history of this provision, the court found that the Congress intended it as a prohibition on impoundment of funds for education programs covered by these provisions.

Defendants argued that because the funds were appropriated for the fiscal year ending June 30, 1973, the funds lapsed into the general fund at the end of the fiscal year, and are unavailable for expenditure. The court overruled this argument, finding that the funds were to be made available for an additional year by operation of a 1970 amendment to the General Education Provisions Act:

> Notwithstanding any other provision of law, unless enacted in specific limitation of the provisions of this subsection, any funds from appropriations to carry out any programs to which this chapter is applicable during any fiscal year, ending prior to July 1, 1973, which are not obligated

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[88] *Id.* at 501.
[89] 20 U.S.C. §§ 861–64, and 867 (1970).
[90] 20 U.S.C. §§ 862(a)(1)(A) and (B) and 867(c)(1)(A) (1970).
[91] 20 U.S.C. §§ 863, 867 (1970).
[92] 367 F. Supp. at 1381.
[93] The General Education Provisions Act, § 415, 20 U.S.C. § 1226 (1970).

> and expended prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation and expenditure during such succeeding fiscal year.[94]

Even without this section, the court would have found the funds still available despite their lapsing into the general fund. Relevant provisions of the Budgeting and Accounting Act, relied upon by defendants, are as follows:

> Upon expiration of the period of availability for obligation the unobligated balance shall be withdrawn and, if the appropriation was derived in whole or in part from the general fund, shall revert to such fund . . . provided, that when it is determined necessary by the head of the agency concerned that a portion of the unobligated balance withdrawn is required to liquidate obligations and effect adjustments, such portions of the unobligated balance may be restored to the appropriate accounts.[94a]

The court held that the proviso in the above-quoted act, to the effect that an agency head may direct restoration of reverted funds to appropriate accounts upon determination that such action is necessary "to liquidate obligations and effect adjustments . . .", demonstrates that reversion is not absolute. Defendant's argument that the provision means that an agency head can reach and restore reverted funds but that the Federal judiciary cannot was unacceptable to the court. According to the court, the provision gives the agency head the power to restore lapsed appropriations to correct errors, and in the present case, the Commissioner of Education made an error or law as to the extent of discretion in limiting funding for nonprogram reasons. That error was likewise subject to correction by adjustment.

By order of October 17, 1973, the court had previously preliminarily enjoined the refusal to allot the sum of $20 million appropriated by the Congress for the operation of the act and ordered the recording of that amount as an obligation of the United States to prevent its lapsing into the general fund.

Guadamuz v. *Ash*, C.A. No. 155–73 (D.D.C., Dec. 28, 1973).

On December 28, 1973, Judge Thomas A. Flannery declared unlawful and in excess of statutory authority all acts intended to accomplish the termination of funding or functioning of the rural environmental assistance program (REAP) [16 U.S.C. §§ 590g–590o, 590p(a), and 590q (1970)] and the federally assisted code enforcement program (FACE) pursuant to section 312 of the Housing Act of 1949 [95] and ordered defendants to process, approve and implement all applications for funding under these programs according to the requirements of applicable statutes and regulations.

The REAP program, basically designed to promote the economic use and conservation of land and waters, and to reestablish the purchasing power of persons on farms, is administered by the Agricultural Stabilization and Conservation Service (ASCS). The ASCS formulates long-range plans of national environmental needs, upon which appropriated funds are allotted among the States for cost-sharing. Upon approval of State and county plans by the Department of Agriculture, individual farmers may submit proposals to their county committees. Approval of the farmer's plan allows the Federal Government to share in the costs of such plan, up to a maximum of $2,500. Congress fixes in advance an upward dollar limit on the amount of funds the Secretary of Agriculture may obligate for the REAP program for the upcoming year, and at the close of the program, Congress appropriates sufficient funds to liquidate the cost-sharing obligations entered during that year. For fiscal year 1973, Congress enacted obligational authority of $225.5 million. On September 29, 1972, the Department of Agriculture limited obligational authority to $140 million, and in December, 1972, terminated the program entirely, as part of an administrative goal to limit total Federal expenditures in fiscal year 1973 to $250 billion. The court found that the total amount withheld for the program was $210.5 million.

The court held that the Secretary of Agriculture did not have discretionary authority to terminate or limit the REAP program for nonprogram related reasons. Provisions setting funding limits were found to set limits on the amount Congress could later appropriate to meet obligations. These provisions did not clearly impart discretion to the Secretary.[96] The only discretion granted to the Secretary

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[94] 20 U.S.C. § 1225(b) (1970).
[94a] 31 U.S.C § 701(a)(2) (1970).
[95] 42 U.S.C. § 1452 (1970).
[96] 16 U.S.C. §§ 590o and 590p(a) (1970).

in the operation of the program is to determine which farmers shall receive REAP benefits, in what amount, and for which practices.

The FACE program is designed to prevent establishment of slums by enforcement of local housing codes and rehabilitation of declining neighborhoods. The part of the FACE program involved in this litigation, § 312 of the Housing Act, makes low-cost, long-term housing rehabilitation loans available to property owners and tenants in FACE-designated areas. The program funds and certain other costs are paid out of a revolving fund which consists of both congressional appropriations and loan repayments. The court determined the amount of funds withheld by the administration to be $50 million.

The Act, in relevant portion, provides that—

> Notwithstanding any other provision of this subchapter . . . not less than 10 per centum of the aggregate amount of (i) grants authorized to be contracted for under this subchapter. . . and (ii) loans authorized to be made under section 1452b [section 312] of this title, shall be available for projects assisted with such grants or loans which involve primarily code enforcement and rehabilitation.[97]

The court held that while the meaning of this provision is not free from doubt, it is satisfied that defendant possesses discretion to determine which applicants are qualified to receive rehabilitation loans, but no authority to decline to exercise this discretion.

Defendants generally claimed "inherent power" to impound congressionally appropriated funds to achieve goals set by the Congress and "at the same time protect the economic stability of the Nation, the national position in foreign affairs and the needs of the National Defense.[98] The court noted that this argument was previously struck down in *Youngstown Sheet and Tube* v. *Sawyer*.[99]

> . . . nowhere does our Constitution extol the virtue of efficiency and nowhere does it command that all our laws be fiscally wise. It does most clearly, however, state that laws, good or bad, be enacted by the Congress and enforced by the President.

By order of June 29, 1973, the court had previously granted a preliminary injunction requiring defendants to ensure that impounded funds appropriated for the FACE program would not revert to the general fund of the treasury. No injunction issued as to the funds appropriated for REAP since such funds remained available beyond the close of fiscal year 1973.

City of New York v. *Train*, No. 73–1705 (D.C. Cir., Jan. 23, 1974)

The U.S. Court of Appeals for the District of Columbia, in an opinion written by Judge Edward A. Tamm, affirmed the decision of the District Court for the District of Columbia in *City of New York* v. *Ruckelshaus*,[100] in which Judge Oliver Gasch granted a declaratory judgment for plaintiffs to the effect that the Federal Water Pollution Control Act Amendments of 1972, P.L. 92–500, 86 Stat. 816, require the Administrator of the Environmental Protection Agency to allot the full $5 billion and $6 billion for fiscal years 1973 and 1974, respectively, as authorized by the Congress. At the express direction of the President, the Administrator had promulgated a regulation, effective December 8, 1971, lowering the allotment figure to the States by $3 billion for each of fiscal years 1973 and 1974.[101] The city of New York, and the city of Detroit, intervening, had brought suit to compel the Administrator to allot the full amount authorized under the act, and Judge Gasch ordered the Administrator to allot the full amounts, and to revoke any directives allotting less than the full amounts. The Administrator appealed.

In relevant part, the act authorizes the appropriation of sums "not to exceed" $5 billion in fiscal year 1973, $6 billion in fiscal 1974, and $7 billion in fiscal year 1975, to be made available to the States for obligation on sewage treatment works construction approved by the Administrator.[102] Section 205(a) of the act provides that "Sums authorized to be appropriated . . . shall be allotted by the Administrator not later than January 1st immediately preceding the beginning of the fiscal year for which authorized. . . ." Sums allotted to each State are used as a

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[97] 42 U.S.C. 1460(c) (1970).
[98] Defendants' Memorandum, at 45.
[99] 343 U.S. 579 (1952).
[100] 358 F. Supp. 669 (D.D.C. 1973).
[101] 37 Fed. Reg. 26282. § 35, 910–1 (12) (1972).
[102] Sec. 207.

planning figure on which to base grant applications for sewage treatment facilities submitted for approval to the Administrator. Federal funds are not obligated for expenditure until final approval of plans by the Administrator, and allotment is not tantamount to either expenditure or obligation of funds. The purpose of the appropriations scheme enacted was to insure that ultimate grantees could rely in advance on the amounts available for expenditure, and thus promote efficient long-range planning.

The district court ruled that the use of the term "shall" instead of "may" in the act, as well as certain debate on the floor of the Houses of Congress during enactment, made clear the mandatory nature of the allotment authorization. On appeal, the court of appeals was unable to find the "plain meaning" of the statute on the issue of whether the Administrator was required to allot the full amounts authorized or whether he had statutory discretion to allot less than the full amount. However, the court found that:

> After a careful reading of the relevant legislative materials, we believe that throughout the lengthy legislative process, Congress manifested an intent to specifically commit federal funds.[103]

It was argued that certain amendments to the act were meant to give the Administrator discretion to control the rate of spending at the allotment stage. The words "not to exceed" were inserted before each of the sums specified in section 207; before the words, "Sums authorized to be appropriated . . ." in section 205(a), the word "All" was deleted. However, the court was convinced by colloquy between the manager of the amendments on the floor of the House and author of the amendments, Rep. William Harsha, and others, that whatever discretion the Administrator was granted to control the rate of spending under the act was meant to be exercised at the obligation and expenditure stage of the process, and not the allotment stage:

> . . . we find it clear that the Congressional intent, both before and after the Harsha amendments, was to make allotment mandatory.[104]

On the issue of whether the suit was barred against the Administrator by the doctrine of sovereign immunity, or by the political question doctrine, the district court held that neither doctrine barred suit. The court of appeals summarily affirmed. Petition for certiorari granted April 29, 1974 (No. 73–1377 U.S.).

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[103] Slip opinon at 14i.
[104] Slip opinion at 20.

APPENDIX B.—INDEX TO CASES CITED

The following is an alphabetical index to all cases cited in the foregoing report. An asterisk (*) denotes a reference to the page at which the case is summarized in appendix A—summaries of impoundment cases in chronological order.

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APPENDIX C.—ANTIDEFICIENCY ACT

(P.L. 759, 81st Congress; act of September 6, 1950; 64 Stat. 765) (Shown below is codification under 31 U.S.C. 665)

[This act is shown as amended by the Impoundment Control Act of 1974, Pub. L. 93–344, title X, sec. 1002, 88 Stat. 297 (July 12, 1974). Provisions of prior law omitted are enclosed in black brackets. New matter is printed in italic. Existing law remaining unchanged is shown in roman.]

§ 665. Appropriations.

(a) Expenditures or contract obligations in excess of funds prohibited.

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

(b) Voluntary service forbidden.

No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

(c) Apportionment of appropriations; reserves; distribution; review.

(1) Except as otherwise provided in this section, all appropriations or funds available for obligation for a definite period of time shall be so apportioned as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period; and all appropriations or funds not limited to a definite period of time, and all authorizations to create obligations by contract in advance of appropriations, shall be so apportioned as to achieve the most effective and economical use thereof. As used hereafter in this section, the term "appropriation" means appropriations, funds, and authorizations to create obligations by contract in advance of appropriations.

(2) In apportioning any appropriation, reserves may be established *solely* to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements *or* greater efficiency of operations [or other developments subsequent to the date on which such appropriation was made available]. Whenever it is determined by an officer designated in subsection (d) of this section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the [purposes] *full objectives and scope* of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations. *Except as specifically provided by particular appropriations acts or other laws, no reserves shall be established other than as authorized by this subsection. Reserves established pursuant to this subsection shall be reported to the Congress in accordance with the Impoundment Control Act of 1974.*

(3) Any appropriation subject to apportionment shall be distributed by months, calendar quarters, operating seasons, or other time periods, or by activities, functions, projects, or objects, or by a combination thereof, as may be deemed appropriate by the officers designated in subsection (d) of this section to make apportionments and reapportionments. Except as otherwise specified by the officer making the apportionment, amounts so apportioned shall remain available for obligation, in accordance with the terms of the appropriation, on a cumulative basis unless reapportioned.

(4) Apportionments shall be reviewed at least four times each year by the officers designated in subsection (d) of this section to make apportionments and reapportionments, and such reapportionments made or such reserves established,

modified, or released as may be necessary to further the effective use of the appropriation concerned, in accordance with the purposes stated in paragraph (1) of this subsection.

(d) Officers controlling apportionment or reapportionment.

(1) Any appropriation available to the legislative branch, the judiciary, or the District of Columbia, which is required to be apportioned under subsection (c) of this section, shall be apportioned or reapportioned in writing by the officer having administrative control of such appropriation. Each such appropriation shall be apportioned not later than thirty days before the beginning of the fiscal year for which the appropriation is available, or not more than thirty days after approval of the Act by which the appropriation is made available, whichever is later.

(2) Any appropriation available to an agency, which is required to be apportioned under subsection (c) of this section, shall be apportioned or reapportioned in writing by the Direction of the Office of Management and Budget. The head of each agency to which any such appropriation is available shall submit to the Office of Management and Budget information, in such form and manner and at such time or times as the Director may prescribe, as may be required for the apportionment of such appropriation. Such information shall be submitted not later than forty days before the beginning of any fiscal year for which the appropriation is available, or not more than fifteen days after approval of the Act by which such appropriation is made available, whichever is later. The Director of the Office of Management and Budget shall apportion each such appropriation and shall notify the agency concerned of his action not later than twenty days before the beginning of the fiscal year for which the appropriation is available, or not more than thirty days after the approval of the Act by which such appropriation is made available, whichever is later. When used in this section, the term "agency"means any executive department, agency, commission, authority, administration, board, or other independent establishment in the executive branch of the Government, including any corporation wholly or partly owned by the United States which is an instrumentality of the United States. Nothing in this subsection shall be so construed as to interfere with the initiation, operation, and administration of agricultural price support programs and no funds (other than funds for administrative expenses) available for price support, surplus removal, and available under section 612(c) of Title 7, with respect to agricultural commodities shall be subject to apportionment pursuant to this section. The provisions of this section shall not apply to any corporation which obtains funds for making loans, other than paid in capital funds, without legal liability on the part of the United States.

(e) Apportionment necessitating deficiency or supplemental estimates.

(1) No apportionment or reapportionment, or request therefor by the head of an agency, which, in the judgment of the officer making or the agency head requesting such apportionment or reapportionment, would indicate a necessity for a deficiency or supplemental estimate shall be made except upon a determination by such officer or agency head, as the case may be, that such action is required because of (A) any laws enacted subsequent to the transmission to the Congress of the estimates for an appropriation which require expenditures beyond administrative control; or (B) emergencies involving the safety of human life, the protection of property, or the immediate welfare of individuals in cases where an appropriation has been made to enable the United States to make payment of, or contributions toward, sums which are required to be paid to individuals either in specific amounts fixed by law or in accordance with formulae prescribed by law.

(2) In each case of an apportionment or a reapportionment which, in the judgment of the officer making such apportionment or reapportionment, would indicate a necessity for a deficiency or supplemental estimate, such officer shall immediately submit a detailed report of the facts of the case to the Congress. In transmitting any deficiency or supplemental estimates required on account of any such apportionment of reapportionment, reference shall be made to such report.

(f) Exemption of trust funds and working funds expenditures from apportionment.

(1) The officers designated in subsection (d) of this section to make apportionments and reapportionments may exempt from apportionments trust funds and working funds expenditures from which have no significant effect on the financial operations of the Government, working capital and revolving funds established

for intragovernmental operations, receipts from industrial and power operations available under law and any appropriation made specifically for—

(1) interest on, or retirement of, the public debt;

(2) payment of claims, judgments, refunds, and draw-backs;

(3) any item determined by the President to be of a confidential nature;

(4) payment under private relief acts or other laws requiring payments to designated payees in the total amount of such appropriation;

(5) grants to the States under subchapters I, IV, or X of chapter 7 of Title 42, or under any other public assistance subchapter in such chapter.

(2) The provisions of subsection (c) of this section shall not apply to appropriations to the Senate or House of Representatives or to any Member, committee, Office (including the office of the Architect of the Capitol), officer, or employee thereof.

(g) Administrative division of apportionment; simplification of system for subdividing funds.

Any appropriation which is apportioned or reapportioned pursuant to this section may be divided and subdivided administratively within the limits of such apportionments or reapportionments. The officer having administrative control of any such appropriation available to the legislative branch, the judiciary, or the District of Columbia, and the Director of the Office of Management and Budget, shall prescribe, by regulation, a system of administrative control (not inconsistent with any accounting procedures prescribed by or pursuant to law) which shall be designed to (A) restrict obligations or expenditures against each appropriation to the amount of apportionments or reapportionments made for such appropriation, and (B) enable such officer or agency head to fix responsibility for the creation of any obligation or the making of any expenditure in excess of an apportionment or reapportionment. In order to have a simplified system for the administrative subdivision of appropriations or funds, each agency shall work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative subdivision for each appropriation or fund affecting such unit.

(h) Expenditures in excess of apportionment prohibited; penalties.

No officer or employee of the United States shall authorize or create any obligation or make any expenditure (A) in excess of an apportionment or reapportionment, or (B) in excess of the amount permitted by regulations prescribed pursuant to subsection (g) of this section.

(i) Administrative discipline; reports on violations.

(1) In addition to any penalty or liability under other law, any officer or employee of the United States who shall violate subsections (a), (b), or (h) of this section shall be subjected to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office; and any officer or employee of the United States who shall knowlingly and willfully violate subsections (a), (b) or (h) of this section shall, upon conviction, be fined not more than $5,000 or imprisoned for not more than two years, or both.

(2) In the case of a violation of subsections (a), (b), or (h) of this section by an officer or employee of any agency, or of the District of Columbia, the head of the agency concerned or the Commissioner of the District of Columbia, shall immediately report to the President, through the Director of the Office of Management and Budget, and to the Congress all pertinent facts together with a statement of the action taken thereon. (R.S. § 3679; Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48; Sept. 6, 1950, ch. 896, ch. XII, § 1211, 64 Stat. 765; Aug. 1, 1956, ch. 814, § 3, 70 Stat. 783; Aug. 28, 1957, Pub. L. 85–170, ch. XIV, § 1401, Stat. 440; 1970 Reorg. Plan No. 2, § 102, eff., July 1, 1970, 35 F.R. 7959, 84 Stat.—)

DERIVATION

Act July 12, 1870, ch. 251, § 7, 16 Stat. 251.

REFERENCES IN TEXT

The Budget and Accounting Act of 1921, referred to in the text of subsection (c)(2), is classified to chapter 1 and sections 71, 471, 581 and 581a of this title.

AMENDMENTS

1957—Subsec. (e)(1). Pub. L. 85–170 included requests for apportionment or reapportionment by heads of agencies.

1956—Subsec. (g). Act Aug. 1, 1956, added the provision relating to simplification of system for subdividing funds.

1950—Act Sept. 6, 1950, amended section generally to require careful apportionment of all types of funds expended by Federal agencies and efficient administration of the Government's business.

CHANGE OF NAME

The Bureau of the Budget was designated the Office of Management and Budget and the offices of Director of the Bureau of the Budget, Deputy Director of the Bureau of the Budget, and Assistant Directors of the Bureau of the Budget were designated Director of the Office of Management and Budget, Deputy Director of the Office of Management and Budget, and Assistant Directors of the Office of Management and Budget, respectively, by Reorg. Plan No. 2 of 1970. Records, property, personnel, and funds of the Bureau of the Budget were transferred to the Office of Management and Budget.

TRANSFER OF FUNCTIONS

Reference to the Board of Commissioners of the District of Columbia has been changed to the Commissioner of the District of Columbia pursuant to section 401 of Reorganization Plan No. 3 of 1967, 32 F.R. 11669, which transferred the functions of the Board of Commissioners, including functions of the President of the Board and all functions of each other member of the Board, including the executive power vested therein, to the Commissioner of the District of Columbia, except as provided by other sections of the Reorganization Plan. For provisions establishing the office of Commissioner of the District of Columbia and abolishing the Board of Commissioners, see sections 301 and 503 of the Plan, set out in the Appendix to Title 5, Government Organization and Employees. See, also, effective date note under such plan.

Functions of making, waiving, and modifying apportionments of appropriations as transferred to Director of the Bureau of the Budget [now Office of Management and Budget], see Ex. Ord. No. 6166, § 16, eff. June 10, 1933, set out as a note under section 901 of Title 5.

DEPARTMENT OF STATE

Contracts for use of international short-wave radio stations and facilities may provide for indemnity of owners and operators of such stations against loss or damage on account of injury to persons or property arising from use of such stations or facilities, acts July 5, 1946, ch. 541, title I, 60 Stat. 447; July 9, 1947, ch. 211, title I, § 101, 61 Stat. 280; June 3, 1948, ch. 400, title I, § 101, 62 Stat. 312; July 20, 1949, ch. 354, title I, § 101, 63 Stat. 451; Sept. 6, 1950, ch. 896, ch. III, title I, § 101, 64 Stat. 614; Oct. 22, 1951, ch. 533, title I, § 101, 65 Stat. 581; July 10, 1952, ch. 651, title I, § 101, 66 Stat. 554; Aug. 7, 1953, ch. 340, ch. III, § 301, 67 Stat. 420.

Similar provisions conferring this authority on the Office of the Coordinator of Inter-American Affairs and Office of War Information were carried in acts Oct. 26, 1942, ch. 629, title II, 56 Stat. 996, 997, July 12, 1943, 3 p.m., E.W.T., ch. 228, § 1, 57 Stat. 529, 532; June 28, 1944, ch. 301, title I, § 1, 58 Stat. 538, 539; July 17, 1945, ch. 319, § 1, 59 Stat. 477.

CROSS REFERENCES

Administrator of Rural Electrification Administration empowered to accept and utilize voluntary and uncompensated services of Federal, State, and local officers and employees in carrying out his program, see section 911 of Title 7, Agriculture.

Heads of the Executive Departments required to apportion contingent funds among the bureaus and offices of departments, see section 669 of this title.

No contracts or purchases unless authorized or under adequate appropriation, see section 11 of Title 41, Public Contracts.

Officers knowingly contracting for erection of public buildings or any public improvements for a larger amount than specific sum appropriated as misdemeanor, see section 435 of Title 18, Crimes and Criminal Procedure.

Peace Corps program, Presidential acceptance and employment of voluntary services, see section 2509 of Title 22, Foreign Relations and Intercourse.

Projects under Mexican treaties, authority to enter into contracts beyond amount appropriated, notwithstanding this section, see section 277d–3 of Title 22.

Cross Reference

Public lands, fire protection: contract authority of Secretary of Interior for use of aircraft, and for supplies and services, in advance of appropriation; accrual of obligation; contingent obligation, see section 1362a of Title 43, Public Lands.

Removal of persons in competitive service to be only for cause, see section 7501 of Title 5, Government Organization and Employees.

Restrictions on contracts for—

Public buildings or any public improvements exceeding amount appropriated for specific purpose, see section 12 of Title 41.

Rent of any building in city of Washington until an appropriation therefor has been made, see section 34 of Title 40, Public Buildings, Property, and Works.

Unexpended balances of funds appropriated for other agencies to be available for expenditure by Maritime Commission without regard to requirement of apportionment under this section, see section 1119 of Title 46, Shipping.

Section Referred to in Other Sections

This section is referred to in sections 665a, 665b, 669 of this title; title 5 section 5307; title 12 section 1749bbb–8; title 15 sections 636, 713a–10; title 16 sections 470m, 831n–4; title 20 sections 241–1, 646, 1103; title 22 sections 277d–3, 1461b, 2509, 2587; title 33 section 1104; title 39 section 2003; title 42 sections 2204, 2204a, 2210, 2293, 2295, 2394, 2942; title 47 section 603; title 49 section 921; title 50 App. section 2094.

Section Referred to in D.C. Code

This section is referred to in section 47–105 of the District of Columbia Code.

§ 665a. Same; basis of apportionment; need for funds for increased compensation for wage-board employees.

After June 5, 1957, any appropriation required to be apportioned pursuant to section 665 of this title, may be apportioned on a basis indicating the need for a supplemental or deficiency estimate of appropriation to the extent necessary to permit payment of such pay increases as may be granted those employees (commonly known as wage-board employees) whose compensation is fixed and adjusted from time to time in accordance with prevailing rates (section 1082 (7) of Title 5). (Pub. L. 85–48, title II, § 210, June 5, 1957, 71 Stat. 55.)

Reference in Text

Section 1087(7) of Title 5, referred to in the text, was repealed in the general revision of Title 5 and the provisions are now covered by sections 5102 and 5341 of Title 5, Government Organization and Employees.

§ 666. Gratuitous services of officers of Army Reserve.

Section 665 of this title shall not be construed to prohibit the Secretary of the Army from accepting the gratuitous services of officers of the Army Reserve in the furtherance of the enrollment, organization, and training of the Army Reserve or the Reserve Officers' Training Corps, or in consultation upon matters relating to the military service. (May 12, 1917, ch. 12, 40 Stat. 72.)

APPENDIX D.—FEDERAL IMPOUNDMENT AND INFORMATION ACT (Humphrey Amendment)

(Public Law 92–599, act of October 27, 1972; 86 Stat. 1324)

[This act was repealed by the Impoundment Control Act of 1974, Pub. L. 93–344, title X, sec. 1003, 88 Stat. 332 (July 12, 1974).]

AN ACT To provide for a temporary increase in the public debt limit and to place a limitation on expenditures and net lending for the fiscal year ending June 30, 1973.

* * * * * * *

TITLE IV—FEDERAL IMPOUNDMENT INFORMATION

SHORT TITLE

SEC. 401. This title may be cited as the "Federal Impoundment and Information Act".

AMENDMENT OF THE BUDGET AND ACCOUNTING PROCEDURES ACT OF 1950

SEC. 402. Title II of the Budget and Accounting Procedures Act of 1950 is amended by adding at the end thereof the following new section:

"REPORTS ON IMPOUNDED FUNDS

"SEC. 203. (a) If any funds are appropriated and then partially or completely impounded, the President shall promptly transmit to the Congress and to the Comptroller General of the United States a report containing the following information:

"(1) the amount of the funds impounded;

"(2) the date on which the funds were ordered to be impounded;

"(3) the date the funds were impounded;

"(4) any department or establishment of the Government to which such impounded funds would have been available for obligation except for such impoundment;

"(5) the period of time during which the funds are to be impounded;

"(6) the reasons for the impoundment; and

"(7) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the impoundment.

"(b) If any information contained in a report transmitted under subsection (a) is subsequently revised, the President shall promptly transmit to the Congress and the Comptroller General a supplementary report stating and explaining each such revision.

"(c) Any report or supplementary report transmitted under this section shall be printed in the first issue of the Federal Register published after that report or supplementary report is so transmitted."

APPENDIX E.—CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974

Public Law 93–344 (Act of July 12, 1974; 88 Stat. 297)

AN ACT To establish a new congressional budget process; to establish Committees on the Budget in each House; to establish a Congressional Budget Office; to establish a procedure providing congressional control over the impoundment of funds by the executive branch; and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLES; TABLE OF CONTENTS

SECTION 1. (a) SHORT TITLES.—This Act may be cited as the "Congressional Budget and Impoundment Control Act of 1974". Titles I through IX may be cited as the "Congressional Budget Act of 1974", and title X may be cited as the "Impoundment Control Act of 1974".

* * * * * * *

TITLE X—IMPOUNDMENT CONTROL

PART A—GENERAL PROVISIONS

DISCLAMER

SEC. 1001. Nothing contained in this Act, or in any amendments made by this Act, shall be construed as—

(1) asserting or conceding the constitutional powers or limitations of either the Congress or the President;

(2) ratifying or approving any impoundment heretofore or hereafter executed or approved by the President or any other Federal officer or employee, except insofar as pursuant to statutory authorization then in effect;

(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment; or

(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.

AMENDMENT TO ANTIDEFICIENCY ACT

SEC. 1002. Section 3679(c)(2) of the Revised Statutes, as amended (31 U.S.C. 665), is amended to read as follows:

"(2) In apportioning any appropriation, reserves may be established solely to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations. Whenever it is determined by an officer designated in subsection (d) of this section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the full objectives and scope of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations. Except as specifically provided by particular appropriations Acts or other laws, no reserves shall be established other than as authorized by this subsection. Reserves established pursuant to this subsection shall be reported to the Congress in accordance with the Impoundment Control Act of 1974."

REPEAL OF EXISTING IMPOUNDMENT REPORTING PROVISION

SEC. 1003. Section 203 of the Budget and Accounting Procedures Act of 1950 is repealed.

PART B—CONGRESSIONAL CONSIDERATION OF PROPOSED RESCISSIONS, RESERVATIONS, AND DEFERRALS OF BUDGET AUTHORITY

DEFINITIONS

SEC. 1011. For purposes of this part—

(1) "deferral of budget authority" includes—

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or

(B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law;

(2) "Comptroller General" means the Comptroller General of the United States;

(3) "rescission bill" means a bill or joint resolution which only rescinds, in whole or in part, budget authority proposed to be rescinded in a special message transmitted by the President under section 1012, and upon which the Congress completes action before the end of the first period of 45 calendar days of continuous session of the Congress after the date on which the President's message is received by the Congress;

(4) "impoundment resolution" means a resolution of the House of Representatives or the Senate which only expresses its disapproval of a proposed deferral of budget authority set forth in a special message transmitted by the President under section 1013; and

(5) continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain shall be excluded in the computation of the 45-day period referred to in paragraph (3) of this section and in section 1012, and the 25-day periods referred to in sections 1016 and 1017(b)(1). If a special message is transmitted under section 1012 during any Congress and the last session of such Congress adjourns sine die before the expiration of 45 calendar days of continuous session (or a special message is so transmitted after the last session of the Congress adjourns sine-die), the message shall be deemed to have been retransmitted on the first day of the succeeding Congress and the 45-day period referred to in paragraph (3) of this section and in section 1012 (with respect to such message) shall commence on the day after such first day.

RESCISSION OF BUDGET AUTHORITY

SEC. 1012. (a) TRANSMITTAL OF SPECIAL MESSAGE.—Whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of authorized projects or activities for which budget authority has been provided), or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year, the President shall transmit to both Houses of Congress a special message specifying—

(1) the amount of budget authority which he proposes to be rescinded or which is to be so reserved;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific project or governmental functions involved;

(3) the reasons why the budget authority should be rescinded or is to be so reserved;

(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed rescission or of the reservation; and

(5) all facts, circumstances, and considerations relating to or bearing upon the proposed rescission or the reservation and the decision to effect the proposed rescission or the reservation, and to the maximum extent practicable, the estimated effect of the proposed rescission or the reservation upon the objects, purposes, and programs for which the budget authority is provided.

(b) REQUIREMENT TO MAKE AVAILABLE FOR OBLIGATION.—Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth

in such special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved.

DISAPPROVAL OF PROPOSED DEFERRALS OF BUDGET AUTHORITY

SEC. 1013. (a) TRANSMITTAL OF SPECIAL MESSAGE.—Whenever the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any officer or employee of the United States proposes to defer any budget authority provided for a specific purpose or project, the President shall transmit to the House of Representatives and the Senate a special message specifying—

(1) the amount of the budget authority proposed to be deferred;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific projects or governmental functions involved;

(3) the period of time during which the budget authority is proposed *t* obe deferred;

(4) the reasons for the proposed deferral, including any legal authority invoked by him to justify the proposed deferral;

(5) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed deferral; and

(6) all facts, circumstances, and considerations relating to or bearing upon the proposed deferral and the decision to effect the proposed deferral, including an analysis of such facts, circumstances, and considerations in terms of their application to any legal authority and specific elements of legal authority invoked by him to justify such proposed deferral, and to the maximum extent practicable, the estimated effect of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

A special message may include one or more proposed deferrals of budget authority. A deferral may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral is transmitted to the House and the Senate.

(b) REQUIREMENT TO MAKE AVAILABLE FOR OBLIGATION.—Any amount of budget authority proposed to be deferred, as set forth in a special message transmitted under subsection (a), shall be made available for obligation if either House of Congress passes an impoundment resolution disapproving such proposed deferral.

(c) EXCEPTION.—The provisions of this section do not apply to any budget authority proposed to be rescinded or that is to be reserved as set forth in a special message required to be transmitted under section 1012.

TRANSMISSION OF MESSAGES; PUBLICATION

SEC. 1014. (a) DELIVERY TO HOUSE AND SENATE.—Each special message transmitted under section 1012 or 1013 shall be transmitted to the House of Representatives and the Senate on the same day, and shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in session. Each special message so transmitted shall be referred to the appropriate committee of the House of Representatives and the Senate. Each such message shall be printed as a document of each House.

(b) DELIVERY TO COMPTROLLER GENERAL.—A copy of each special message transmitted under section 1012 or 1013 shall be transmitted to the Comptroller General on the same day it is transmitted to the House of Representatives and the Senate. In order to assist the Congress in the exercise of its functions under sections 1012 and 1013, the Comptroller General shall review each such message and inform the House of Representatives and the Senate as promptly as practicable with respect to—

(1) in the case of a special message transmitted under section 1012, the facts surrounding the proposed rescission or the reservation of budget authority (including the probable effects thereof); and

(2) in the case of a special message transmitted under section 1013, (A) the facts surrounding each proposed deferral of budget authority (including the probable effects thereof) and (B) whether or not (or to what extent), in his judgment, such proposed deferral is in accordance with existing statutory authority.

(c) TRANSMISSION OF SUPPLEMENTARY MESSAGES.—If any information contained in a special message transmitted under section 1012 or 1013 is subsequently revised, the President shall transmit to both Houses of Congress and the Comptroller General a supplementary message stating and explaining such revision. Any such supplementary message shall be delivered, referred, and printed as provided in subsection (a). The Comptroller General shall promptly notify the House of Representatives and the Senate of any changes in the information submitted by him under subsection (b) which may be necessitated by such revision.

(d) PRINTING IN FEDERAL REGISTER.—Any special message transmitted under section 1012 or 1013, and any supplementary message transmitted under subsection (c), shall be printed in the first issue of the Federal Register published after such transmittal.

(e) CUMULATIVE REPORTS OF PROPOSED RESCISSIONS, RESERVATIONS, AND DEFERRALS OF BUDGET AUTHORITY.—

(1) The President shall submit a report to the House of Representatives and the Senate, not later than the 10th day of each month during a fiscal year, listing all budget authority for that fiscal year with respect to which, as of the first day of such month—

(A) he has transmitted a special message under section 1012 with respect to a proposed rescission or a reservation; and

(B) he has transmitted a special message under section 1013 proposing a deferral.

Such report shall also contain, with respect to each such proposed rescission or deferral, or each such reservation, the information required to be submitted in the special message with respect thereto under section 1012 or 1013.

(2) Each report submitted under paragraph (1) shall be printed in the first issue of the Federal Register published after its submission.

REPORTS BY COMPTROLLER GENERAL

SEC. 1015. (a) FAILURE TO TRANSMIT SPECIAL MESSAGE.—If the Comptroller General finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any other officer or employee of the United States—

(1) is to establish a reserve or proposes to defer budget authority with respect to which the President is required to transmit a special message under section 1012 or 1013; or

(2) has ordered, permitted, or approved the establishment of such a reserve or a deferral of budget authority;

and that the President has failed to transmit a special message with respect to such reserve or deferral, the Comptroller General shall make a report on such reserve or deferral and any available information concerning it to both Houses of Congress. The provisions of this part shall apply with respect to such reserve or deferral in the same manner and with the same effect as if such report of the Comptroller General were a special message transmitted by the President under section 1012 or 1013, and, for purposes of this part, such report shall be considered a special message transmitted under section 1012 or 1013.

(b) INCORRECT CLASSIFICATION OF SPECIAL MESSAGE.—If the President has transmitted a special message to both Houses of Congress in accordance with section 1012 or 1013, and the Comptroller General believes that the President so transmitted the special message in accordance with one of those sections when the special message should have been transmitted in accordance with the other of those sections, the Comptroller General shall make a report to both Houses of the Congress setting forth his reasons.

SUITS BY COMPTROLLER GENERAL

SEC. 1016. If, under section 1012(b) or 1013(b), budget authority is required to be made available for obligation and such budget authority is not made available for obligation, the Comptroller General is hereby expressly empowered, through attorneys of his own selection, to bring a civil action in the United States District Court for the District of Columbia to require such budget authority to be made available for obligation, and such court is hereby expressly empowered to enter in such civil action, against any department, agency, officer, or employee of the United States, any decree, judgment, or order which may be necessary or

appropriate to make such budget authority available for obligation. The courts shall give precedence to civil actions brought under this section, and to appeals and writs from decisions in such actions, over all other civil actions, appeals, and writs. No civil action shall be brought by the Comptroller General under this section until the expiration of 25 calendar days of continuous session of the Congress following the date on which an explanatory statement by the Comptroller General of the circumstances giving rise to the action contemplated has been filed with the Speaker of the House of Representatives and the President of the Senate.

PROCEDURE IN HOUSE AND SENATE

SEC. 1017. (a) REFERRAL.—Any rescission bill introduced with respect to a special message or impoundment resolution introduced with respect to a proposed deferral of budget authority shall be referred to the appropriate committee of the House of Representatives or the Senate, as the case may be.

(b) DISCHARGE OF COMMITTEE.—

(1) If the committee to which a rescission bill or impoundment resolution has been referred has not reported it at the end of 25 calendar days of continuous session of the Congress after its introduction, it is in order to move either to discharge the committee from further consideration of the bill or resolution or to discharge the committee from further consideration of any other rescission bill with respect to the same special message or impoundment resolution with respect to the same proposed deferral, as the case may be, which has been referred to the committee.

(2) A motion to discharge may be made only by an individual favoring the bill or resolution, may be made only if supported by one-fifth of the Members of the House involved (a quorum being present), and is highly privileged in the House and privileged in the Senate (except that it may not be made after the committee has reported a bill or resolution with respect to the same special message or the same proposed deferral, as the case may be); and debate thereon shall be limited to not more than 1 hour, the time to be divided in the House equally between those favoring and those opposing the bill or resolution, and to be divided in the Senate equally between, and controlled by, the majority leader and the minority leader or their designees. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(c) FLOOR CONSIDERATION IN THE HOUSE.—

(1) When the committee of the House of Representatives has reported or has been discharged from further consideration of, a rescission bill or impoundment resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the bill or resolution. The motion shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on a rescission bill or impoundment resolution shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the bill or resolution. A motion further to limit debate shall not be debatable. In the case of an impoundment resolution, no amendment to, or motion to recommit, the resolution shall be in order. It shall not be in order to move to reconsider the vote by which a rescission bill or impoundment resolution is agreed to or disagreed to.

(3) Motions to postpone, made with respect to the consideration of a rescission bill or impoundment resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to any rescission bill or impoundment resolution shall be decided without debate.

(5) Except to the extent specifically provided in the preceding provisions of this subsection, consideration of any rescission bill or impoundment resolution and amendments thereto (or any conference report thereon) shall be governed by the Rules of the House of Representatives applicable to other bills and resolutions, amendments, and conference reports in similar circumstances.

(d) FLOOR CONSIDERATION IN THE SENATE.—

(1) Debate in the Senate on any rescission bill or impoundment resolution, and all amendments thereto (in the case of a rescission bill) and debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours. The time shall be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(2) Debate in the Senate on any amendment to a rescission bill shall be limited to 2 hours, to be equally divided between, and controlled by, the mover and the manager of the bill. Debate on any amendment to an amendment, to such a bill, and debate on any debatable motion or appeal in connection with such a bill or an impoundment resolution shall be limited to 1 hour, to be equally divided between, and controlled by, the mover and the manager of the bill or resolution, except that in the event the manager of the bill or resolution is in favor of any such amendment, motion, or appeal, the time in opposition thereto, shall be controlled by the minority leader or his designee. No amendment that is not germane to the provisions of a rescission bill shall be received. Such leaders, or either of them, may, from the time under their control on the passage of a rescission bill or impoundment resolution, allot additional time to any Senator during the consideration of any amendment, debatable motion, or appeal.

(3) A motion to further limit debate is not debatable. In the case of a rescission bill, a motion to recommit (except a motion to recommit with instructions to report back within a specified number of days, not to exceed 3, not counting any day on which the Senate is not in session) is not in order. Debate on any such motion to recommit shall be limited to one hour, to be equally divided between, and controlled by, the mover and the manager of the concurrent resolution. In the case of an impoundment resolution, no amendment or motion to recommit is in order.

(4) The conference report on any rescission bill shall be in order in the Senate at any time after the third day (excluding Saturdays, Sundays, and legal holidays) following the day on which such a conference report is reported and is available to Members of the Senate. A motion to proceed to the consideration of the conference report may be made even though a previous motion to the same effect has been disagreed to.

(5) During the consideration in the Senate of the conference report on any rescission bill, debate shall be limited to 2 hours, to be equally divided between, and controlled by, the majority leader and minority leader or their designees. Debate on any debatable motion or appeal related to the conference report shall be limited to 30 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report.

(6) Should the conference report be defeated, debate on any request for a new conference and the appointment of conferees shall be limited to one hour, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee, and should any motion be made to instruct the conferees before the conferees are named, debate on such motion shall be limited to 30 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report. Debate on any amendment to any such instructions shall be limited to 20 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report. In all cases when the manager of the conference report is in favor of any motion, appeal, or amendment, the time in opposition shall be under the control of the minority leader or his designee.

(7) In any case in which there are amendments in disagreement, time on each amendment shall be limited to 30 minutes, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee. No amendment that is not germane to the provisions of such amendments shall be received.

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