CONGRESSIONAL REVIEW OF EXECUTIVE ACTION

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In recent years, actions by the President to engage in military activities and to impound funds appropriated by Congress have caused Congress to consider legislation which would place limitations on the exercise of presidential power. A War Powers Resolution[1] has already become law, passed by both Houses of Congress over a presidential veto on November 7, 1973.[2] In addition, a conference committee is presently meeting to reconcile differences between House and Senate versions of a bill dealing with the President's authority to impound funds.[3] These legislative efforts illustrate the power of Congress to determine the authority of the executive branch and demonstrate the continued vitality of the separation of powers doctrine embodied in the Constitution.

COOPERATION AND NON-COOPERATION IN THE SEPARATION OF POWERS

In vesting all legislative power in Congress and executive power in a President,[4] the Framers of the Constitution placed the lawmaking function with the branch of government closest to the people.[5] This

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1 Pub. L. No. 93-148 (Nov. 7, 1973).

2 House Calendar 99 (Mar. 28, 1974). *See* note 122 *infra*.

3 House Calendar 123 (Mar. 28, 1974). The purpose of a House-Senate conference committee is to reconcile the bills passed by both houses, by resolving the differences and coming up with a compromise measure. For a further discussion of the differences in these bills, see notes 142-72 *infra* and accompanying text.

4 *See* U.S. CONST. art. I, § 1 & art. II, § 1, cl. 1. According to James Madison, the Framers adopted the theory of separation of powers espoused by the philosopher Montesquieu:

> "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*."

THE FEDERALIST No. 47, at 302-03 (H. Lodge ed. 1888) (J. Madison) (emphasis in original).

5 U.S. CONST. art. I, § 2, cl. 1 provides:

> The House of Representatives shall be composed of Members *chosen* every second Year *by the People* of the several States, and the Electors in each State

discourages the passage of oppressive or unwise laws since, as Alexander Hamilton said, the Congress "can make no law which will not have its full operation on themselves and their friends."[6] Between the people and their elected representatives there is created, as a result, a "communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny."[7] The Framers were careful to ensure that such a relationship would result under the Constitution.

While the term of office for elected representatives to state legislatures at the time of the drafting of the Constitution generally was only one year,[8] the Framers felt the need for a longer term. In order to legislate effectively, Hamilton said, a federal representative would need time to attain a competent "degree of knowledge of the subjects on which he is to legislate."[9] The decision was to hold congressional elections every two years, a period of time believed short enough to ensure that the House would remain a substitute "scheme of representation . . . for a meeting of the citizens in person,"[10] but sufficient to permit competent lawmaking.

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shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Id. (emphasis added). Originally, the Senate was chosen by the individual state legislatures, but as a result of constitutional amendment, the Senate today is also elected directly by the people. *See* note 11 *infra*.

6 THE FEDERALIST No. 57, at 358 (H. Lodge ed. 1888) (A. Hamilton). This paper is a defense of the system of choosing the House. The objection is that the members of the House would be chosen from a group having little sympathy with the majority of people. *Id.* at 355. Hamilton counters by saying that all of the people will be the electors of the representatives. *Id.* at 356. Thus if the spirit of communion of interests and sympathies can

ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.

Such will be the relation between the House of Representatives and their constituents. Duty, gratitude, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people.

Id. at 358.

7 *Id.*

8 THE FEDERALIST No. 53, at 335 (H. Lodge ed. 1888) (A. Hamilton). "The period of legislative service established in most of the States . . . is, as we have seen, one year." *Id.*

9 *Id.* Hamilton's view was that part of the knowledge needed by an effective legislator could only be attained through experience. In addition, even though the House was not intended to participate directly in foreign negotiations, the representatives "ought not to be altogether ignorant of the law of nations." *Id.* at 337. Finally, the problems of living arrangements and travel also influenced the decision to have a two-year term of office. *Id.* at 338.

10 THE FEDERALIST No. 52, at 329 (H. Lodge ed. 1888) (A. Hamilton). In dealing with the two year term of office, Hamilton noted that in the Virginia colony representatives were elected every seven years. *Id.* at 332. Yet the people of Virginia were the first to both resist the oppressive acts of the Crown and publicly adopt the Declaration of Independence. *Id.* at 331-32. Hamilton considered this example substantive proof "that the liberties of

Although the House of Representatives controlled only part of the legislative process,[11] that part which the Framers assigned to the House is further evidence of their intent to place control over the most sensitive legislation in the body closest to the people. The Constitution provides that with respect to the essential governmental power of taxation "[a]ll Bills for raising Revenue shall originate in the House of Representatives."[12]

In contrast to the Representatives is the President. He is only one person, which necessarily makes him more distant from individual views and opinions than the Congress. Furthermore, the vast expansion of the scope and activities of the executive branch over the course of the past two hundred years, and the resultant increase in responsibilities to which the President must devote a great deal of attention, accentuates the separation between the President and the people.[13]

While the President has no inherent legislative power,[14] the Constitution does provide a place for him in the legislative process. To safeguard against the passage of ill-conceived laws by Congress, the Framers provided the President with veto power over legislation, but with an important qualification. Fearing the tyrannical power of an absolute veto wielded by the British monarch against the colonies, the Framers twice, at the Constitutional Convention, rejected this type of

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the people can be in no danger from *biennial* elections." *Id.* at 332 (emphasis in original). This power of the people to choose their representatives at biennial elections, coupled with the fact that the House would have only part of the legislative power, led Hamilton to conclude that the federal representatives would "be less tempted on one side, and will be doubly watched on the other." *Id.*

11 The Constitution originally provided that the members of the Senate be chosen by the legislatures of the several states rather than by the people directly:

> The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

U.S. CONST. art. I, § 3, cl. 1. This section remained in effect until 1913 when the passage of the seventeenth amendment superceded the existing provision. The seventeenth amendment provides in part:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . .

U.S. CONST. amend. XVII.

12 U.S. CONST. art. I, § 7, cl. 1.

13 The tremendous expansion of the responsibilities of the federal government is indicated by the unprecedented growth in the size of the federal bureaucracy since the turn of the century. In 1901, the federal government employed 351,798 persons or less than 1-1/2 percent of the national labor force. In 1962, there were 5,232,819 federal employees, constituting 7 percent of the labor force. *See* Huntington, *Congressional Responses to the Twentieth Century*, in CONGRESS AND THE PRESIDENT 8 (R. Moe ed. 1971).

14 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952).

veto for the President.[15] Instead, the Framers provided a qualified veto in which there is a mechanism for the reconsideration of bills in which the President's objections to legislation may be taken into account and given appropriate weight by Congress, but in which Congress has the final say.[16]

The Constitution also places a time limitation on the presidential veto. The President must exercise his veto power within ten days after a bill is presented to him or it becomes law without his signature.[17] An exception to this is that if Congress prevents the return of a bill by an adjournment, the President does not have to return it to make his disapproval effective.[18]

Through the veto power, the Framers provided a means through which disagreements over law and policy between the two branches of government could be aired and settled. In this way, the qualified veto power contributes to a process in which both the executive and legislative branches can mould national policy.[19]

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15 *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 102 (M. Farrand ed. 1911); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 200 (M. Farrand ed. 1911).

16 Alexander Hamilton, in writing about the President's veto power, said:

> [T]he convention have pursued a mean in this business, which will both facilitate the exercise of the power vested in this respect in the executive magistrate, and make its efficacy to depend on the sense of a considerable part of the legislative body. . . . He would be encouraged by the reflection, that if his opposition should prevail, it would embark in it a very respectable proportion of the legislative body, whose influence would be united with his in supporting the propriety of his conduct in the public opinion.

THE FEDERALIST No. 73, at 461 (H. Lodge ed. 1888) (A. Hamilton).

The constitutional veto power provides that whenever a bill has passed both houses of Congress, it shall "be presented to the President." U.S. CONST. art. I, § 7, cl. 2. If he approves of the bill, his signature makes it law. If, instead, he vetoes the measure, it must be returned, with his objections, to the house that introduced it. That house reconsiders the bill. The Constitution then provides, in part:

> If after . . . Reconsideration two thirds of [the House which originally passed the measure] shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

Id. Unsaid is whether two-thirds means two-thirds of those members voting or of the legislature at large. United States v. Weil, 29 Ct. Cl. 523 (1894), discussed this issue. The court cited a decision by the Senate on July 7, 1856 that "two thirds of a quorum only were requisite to pass a bill over the President's veto." *Id.* at 539. Since the Constitution provides that "a Majority of each [House] shall constitute a Quorum to do Business," only two-thirds of a majority of each house is needed. *See* U.S. CONST. art. I, § 5, cl. 1.

17 U.S. CONST. art. I, § 7, cl. 2. Sundays are excepted from this time provision.

18 *Id.*

19 In United States v. Weil, 29 Ct. Cl. 523 (1894), the Court of Claims defined the veto power as:

> An auxiliary power of revision lodged in the officer charged by the Constitution with the duty of seeing "that the laws be faithfully executed". . . .

Id. at 540. The court said that this method for reconciling differences was in keeping with

The President has another avenue into the legislative process through his duty to suggest and sponsor legislation. The Constitution requires that the President report to the Congress on the State of the Union each year, a message which often has been a vehicle for initiating legislative reform.[20] The extent to which various proposals are successful depends upon cooperation between the President and Congress in the passage of legislation.

A prominent example of cooperation between the President and Congress is the 73rd Congress in 1932 when the Great Depression required laws which would equip the executive branch with power to deal with the economic emergency. Although the 73rd Congress has been referred to as a "rubber stamp" for the legislative proposals of President Roosevelt, this picture may not be accurate. According to an historian of that period, Congress

> contained strong, independent-minded, and intelligent men and on crucial occasions itself assumed the legislative initiative. Far from being a tame and servile body, it played a vital and consistently underestimated role in shaping the New Deal.[21]

The initial days of President Lyndon Johnson's Administration were also a period of cooperation which resulted in the passage of

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the concept of separation of powers, since it unites "with the power of revision the check of undivided responsibility." *Id.* Concluding, the court said:

> It is apparent, then, that the purpose of the Constitution is to secure to the people of this country the best legislation by the simplest means.

Id.

20 Social programs such as The Great Society, The New Deal, and The Alliance for Progress were all initiated by the President.

21 A. SCHLESINGER, THE COMING OF THE NEW DEAL 554 (1958). The key to cooperation between the legislature and the executive at this time of nationwide depression was not the overpowering character of the Presidency. Rather, it was the informative give and take between the two branches which resulted in the passage of fifteen major pieces of legislation between March 9 and June 16, 1932. *Id.* at 20-21. Among the Bills passed during the period were:

March 9 —the Emergency Banking Act
March 20—the Economy Act
March 31—establishment of the Civilian Conservation Corps
April 19 —abandonment of the gold standard
May 12 —the Federal Emergency Relief Act, setting up a national relief system
May 12 —the Agricultural Adjustment Act, establishing a national agricultural policy, with the Thomas amendment conferring on the President powers of monetary expansion
May 12 —the Emergency Farm Mortgage Act, providing for the refinancing of farm mortgages
May 18 —the Tennessee Valley Authority Act, providing for the unified development of the Tennessee Valley
May 27 —the Truth-in-Securities Act, requiring full disclosure in the issue of new securities
June 5 —the abrogation of the gold clause in public and private contracts

many pieces of significant legislation. President Johnson was well-versed in the operation of Congress through his more than two decades of service and leadership in both the House and Senate. President Kennedy's legislative program was bogged down in committee when Johnson took office. Most of the year's appropriations bills remained unpassed, a situation unparalleled since the Depression.[22] After deciding to concentrate his attention on enactment of a tax cut and civil rights legislation, President Johnson spoke before a Joint Session of Congress and urged that President Kennedy's proposals be enacted into law.[23] He then met regularly "with the congressional leaders from both sides of the aisle and urged them to start the legislative machinery moving forward."[24] President Johnson's efforts to unify his political party and to unite congressional leaders resulted in the passage, over the next ten months, of nine major bills including the Civil Rights Act.[25]

In contrast, when the President and Congress do not cooperate, even clearly advantageous objectives cannot be achieved. This is illustrated by the failure of Congress to ratify the Treaty of Versailles at the conclusion of the First World War. President Wilson refused to compromise and cooperate in modification of the Treaty and the Senate refused to ratify it. The result was that the Versailles Treaty,

June 13 —the Home Owner's Loan Act, providing for the refinancing of home mortgages
June 16 —the National Industrial Recovery Act, providing both for a system of industrial self-government under federal supervision and for a $3.3 billion public works program
June 16 —the Glass-Steagall Banking Act, divorcing commercial and investment banking and guaranteeing bank deposits
June 16 —the Farm Credit Act, providing for the reorganization of agricultural credit activities
June 16 —the Railroad Coordination Act, setting up a federal Coordinator of Transportation

Id. See also S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 954 (1965). During these first "Hundred Days," President Roosevelt sent Congress fifteen messages, worked through the regular Capitol Hill party leadership, and, by his own estimate, spent almost three hours a day just on congressional relations. *Compare id. with* A. SCHLESINGER, *supra* at 553-54.

22 L. JOHNSON, THE VANTAGE POINT 34 (1971). When the budget remains unpassed, the result is that the federal government is "operating on billions of dollars' worth of promises." *Id.*

23 *Id.* at 28-29.

24 *Id.* at 29.

25 Among the major bills passed in addition to the Civil Rights Act during this period were the following:

> [T]he tax bill, . . . the food stamp bill, the War on Poverty, the Urban Mass Transit Act, the Housing Act, the Wilderness Areas Act, the Fire Island National Seashore Act, and the Nurse Training Act.

Id. at 41.

the League of Nations, and the long-term prospects for world peace were dealt a severe blow.[26] Neither the Treaty nor the League, favored by the Democratic President, were unacceptable to the Republican Congress. Several prominent Republicans, including former President Taft, had endorsed the idea of a League before the war.[27] In addition, more than three-fourths of the Senators were ready to vote for ratification of the Treaty if there could be some compromise.[28] President Wilson, however, who has been described as "irritatingly virtuous"[29] and as a man with "stubborn pride and a distaste for personal contacts,"[30] was adamant. As a result, no compromise could be reached. Furthermore, during this period of executive-congressional infighting over foreign affairs, other problems were neglected to the detriment of the country.[31]

Another example of non-cooperation between the President and Congress occurred during the administration of Harry Truman. In 1947, Congress passed the Taft-Hartley Labor Management Relations Act.[32] The bill was intended to encourage the settlement of labor-management problems through "the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports."[33]

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26 *Cf.* S. MORISON, *supra* note 21, at 882-83.

27 *Id.* at 880-81. Other Republicans who favored the idea of the League included Elihu Root and Senator Henry Cabot Lodge, Wilson's biggest antagonist in the Senate. Lodge told the League to Enforce Peace in 1916

> that George Washington's warning against entangling alliances was never meant to exclude America from joining other nations in "a method . . . to diminish war and encourage peace."

Id. at 881. The League was also endorsed in the pre-Versailles years by intellectuals, labor unions, financial organizations and most of the press. *Id.*

28 *Id.* at 881.

29 *Id.* at 887.

30 *Id.* at 886.

31 *Id.* at 883-85. One of the problems was the rise of an anti-Red movement due to the rise of the Bolsheviks in Russia. Led by Attorney General A. Mitchell Palmer, a man with presidential aspirations,

> a series of lawless raids [was instigated] on homes and labor headquarters, on a single night of January 1920, arresting more than 4000 alleged communists in 33 different cities.

Id. at 883. In addition, there were campaigns against Jews, Catholics, and Blacks. In fact:

> In July of 1919, the month that President Wilson returned from Paris and submitted the Treaty to the Senate, there occurred in the capital city the most serious race riots in its history between whites and Negroes, not quelled until thousands of troops had been brought in to help the police, and six people killed.

Id. at 884-85.

32 29 U.S.C. § 141 *et seq.* (1970).

33 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586 (1952). For a more detailed discussion of the decision in *Youngstown*, see notes 38-45 *infra* and accompanying text.

Temporary injunctions against strikes were made available by the Act in order to provide a cooling-off period in appropriate situations.[34] A proposed amendment to the Act provided that the executive branch could "seize" businesses to prevent work stoppages.[35] The Congress, however, rejected this approach on the theory that such a seizure would interfere with collective bargaining.[36] President Truman vetoed the Taft-Hartley bill, but his veto was overridden by both Houses of Congress and it became law.[37]

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[34] 29 U.S.C. § 178 (1970) provides in part:

> (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—
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> (i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and
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> (ii) if permitted to occur or to continue, will imperil the national health or safety it shall have jurisdiction to enjoin any such strike or lockout, or the continuing thereof, and to make such other orders as may be appropriate.

[35] The amendment was introduced by then Congressman Javits of New York and provided in part:

> Whenever the President finds after investigation and proclaims that a labor dispute has resulted in, or imminently threatens to result in the cessation or substantial curtailment of interstate or foreign commerce in an industry essential to the public health or security, of sufficient magnitude to imperil or imminently threaten to imperil the public health or security . . . the President is authorized to declare a national emergency relative thereto, and by order to take immediate possession of any plant, mine, or facility, the subject of such labor dispute, and to use and to operate such plant, mine or facility in the interests of the United States . . . .

93 CONG. REC. 3637 (1947) (remarks of Representative Javits). The purpose of this provision was to substitute emergency seizures, with safeguards, for the injunctive remedy originally proposed in the bill. Representative Javits felt that the injunctive procedure was "involuntary servitude and ineffective in the public interest." *Id.* While it appears that other members of the House were in favor of the Javits amendment, *see, e.g., id.* at 3645 (remarks of Representative Lanbaum), the amendment was soundly defeated by a vote of 130 to 41. *Id.* at 3645.

[36] Part of the purpose of the Taft-Hartley Act was "to provide *orderly and peaceful* procedures for preventing the interference by either [Labor or Management] with the legitimate rights of the other." 29 U.S.C. § 141 (1970) (emphasis added). In light of this declared purpose on the part of the Congress, the concept of "seizure" seems inimical.

[37] The bill was submitted to the President on June 18, 1947. He vetoed the measure two days later but the veto was overridden on June 23, thus making the act law. 2 H. TRUMAN, MEMOIRS 30 (1956). According to President Truman, he vetoed the measure because:

> The bill was completely contrary to our national policy of economic freedom because it would result in more or less government intervention into the collective-bargaining process. Because of its legal complexities the act would become a source of time-consuming litigation which would encourage distrust and bitterness between labor and management. The bill was neither workable nor fair. The

After the beginning of the Korean conflict, a proposed strike by steel workers in 1952 threatened to interfere with the war effort. President Truman reacted by declaring the threatened stoppage a national emergency and ordering "the Secretary of Commerce to take possession of and operate most of the Nation's steel mills."[38] The President immediately reported his action to Congress and later sent Congress two messages asking for ratification of the step he had taken. Congress did not act.

Shortly after the seizure, the steel companies brought suit against the Secretary of Commerce to regain their property.[39] The landmark case, *Youngstown Sheet & Tube Co. v. Sawyer*,[40] quickly reached the Supreme Court, where "the government contended that the President had the right to act . . . unless or until Congress expressly denied his power."[41] The steel companies argued that "the President had no power to act without prior congressional authorization."[42] The Court held for the steel companies and ordered President Truman to return control of the mills to their owners. Writing for the Court, Justice Black agreed with the steel companies that presidential power is grounded in Acts of Congress. He said:

> The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.[43]

Justice Jackson added cautionary words to Congress in a concurring opinion. He also concluded that the seizure was illegal, but went

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Taft-Hartley bill would go far toward weakening our trade-union movement by injecting political considerations into normal economic decisions.

Id.

38 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952). It appears that [i]n the name of emergency, in short, Truman was asserting the power to rule by decree in a field—industrial seizure—customarily controlled by Congress.

A. SCHLESINGER, THE IMPERIAL PRESIDENCY 142 (1973).

39 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952). The companies had followed the Secretary's order "to carry on their activities in accordance with [the] regulations and directions of the Secretary" under protest and then had brought proceedings in the district court. *Id.* "Their complaints charged that the seizure was not authorized by an act of Congress or by any constitutional provisions." *Id.*

40 343 U.S. 579 (1952).

41 A. SCHLESINGER, *supra* note 38, at 143.

42 *Id.*

43 343 U.S. at 589.

on to say that he had "no illusion that any decision by this Court can keep power in the hands of Congress."[44] Jackson further stated:

> We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.[45]

In the *Youngstown* case, Congress did not act to protect a decision on the seizure of property in labor disputes it had made years before, but relied on the courts to do so. While the result was that President Truman swiftly obeyed the Supreme Court, Justice Jackson's observation suggested that judicial power should not be relied upon to protect legislative power in all cases.

INTERFERENCE WITH LEGISLATIVE POWER

The current problems with war powers and impoundment also arise from a lack of cooperation between Congress and the President. But, in various ways the current problems differ from past difficulties and may demand, as Justice Jackson cautioned, congressional action to protect legislative power.

Military Activities in Southeast Asia

Military activities in Vietnam and Southeast Asia undertaken by this country during the past decade have raised a great deal of discontent. The absence of a declaration of war by Congress or specific statutory authorization for the full range of these military activities has raised serious constitutional questions about the power of the President to commit the Nation's armed forces to combat and the responsibility of Congress to act in this regard.[46] While the Constitution provides that the President should be Commander in Chief of the armed forces, the power to raise and support military forces belongs to Congress.[47] As early as 1801, this limitation on presidential power was recognized by President Jefferson when the Bey of Tripoli threatened war against the United States.[48] Although he had unilaterally sent

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44 *Id.* at 654 (Jackson, J., concurring).

45 *Id. See also* A. SCHLESINGER, *supra* note 38, at 145-50 for a somewhat detailed discussion of the implications of Justice Jackson's opinion.

46 *See generally* Note, *Congress, the President, and the Power To Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

47 THE FEDERALIST No. 69, at 431-32 (H. Lodge ed. 1888) (A. Hamilton). The power to raise and direct military forces was inherent in the English monarch. *Id.* at 431.

48 Note, *supra* note 46, at 1779-80.

warships to the area, the President ordered the cessation of military actions and the release of all prisoners and vessels captured by the American forces.[49] Jefferson would not go further because he believed that

> his authority to act in defense of the country did not extend to taking further aggressive action, even against a declared adversary, in the absence of congressional authorization.[50]

Since Jefferson's time, the President's power to commit troops to war absent specific authorization from Congress has seemed to be limited to the minimum steps necessary to defend against attack and does not extend to offensive actions.[51]

As the involvement of the United States in Southeast Asia grew into what amounted to a war, lawsuits were brought by citizens opposed to the military activities to test the constitutional question raised by the absence of specific congressional authorization for many of the military steps that were taken. However, the courts have not reached a determination of the scope of the President's war powers in connection with conflicts such as Vietnam.

A principal barrier to court review of presidental authority to commit United States armed forces to combat was the conclusion of the judiciary that this area involved "political questions" beyond the jurisdiction of the courts. Case after case was decided, at least in part, on this basis.[52] Lack of standing was another problem in obtaining

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[49] *Id.* at 1779.

[50] *Id.* (footnote omitted).

[51] *See id.* at 1779-82. For an extensive discussion of the President and his war making powers, see Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. (1974).

[52] *E.g.*, DaCosta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973); Sarnoff v. Connally, 457 F.2d 809, 810 (9th Cir.), *cert. denied*, 409 U.S. 929 (1972); Luftig v. McNamara, 373 F.2d 664, 665 (D.C. Cir. 1967); Atlee v. Laird, 347 F. Supp. 689, 706 (E.D. Pa. 1972) (three-judge court), *aff'd mem. sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973); Meyers v. Nixon, 339 F. Supp. 1388, 1390 (S.D.N.Y. 1972); Davi v. Laird, 318 F. Supp. 478, 482 (W.D. Va. 1970); Berk v. Laird, 317 F. Supp. 715, 728-29 (E.D.N.Y. 1970), *aff'd on other grounds*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

The political question doctrine is a rule of law whereby a court will not consider an issue involving a coordinate branch of the federal government. "The nonjusticiability of a political question is primarily a function of the separation of powers." Baker v. Carr, 369 U.S. 186, 210 (1962). The scope of the political question doctrine was defined by the Court in Baker v. Carr with the following language:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a poli-

judicial review of the legality of military activities.[53] In those few cases which did consider the merits of presidential power, the authority to undertake military activities was found sufficient based upon either congressional action in appropriating funds for such activities[54] or upon the absence of an open conflict between the Congress and the President over authority in this area.[55] Furthermore, a district court decision which enjoined military activity in Cambodia because of an absence of congressional authorization was quickly reversed.[56]

The absence of judicial decision on the President's authority to commit United States armed forces to combat left the decision to restrain the President or to leave him free to exercise discretion in military matters up to the Congress. The military incursion into Cambodia by United States and South Vietnamese troops in 1970,[57] undertaken by the President without consulting Congress, encouraged the Con-

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> tical 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.

Id. at 217.

[53] *E.g.*, Mottola v. Nixon, 464 F.2d 178, 179 (9th Cir. 1972); Velvel v. Nixon, 415 F.2d 236, 239 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). *But see* Atlee v. Laird, 339 F. Supp. 1347, 1355-56 (E.D. Pa.), *dismissed on other grounds*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd mem. sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973).

[54] *E.g.*, DaCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971); Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

[55] *See* Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971).

[56] Holtzman v. Schlesinger, 361 F. Supp. 553, 566 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973) *cert. denied*, — U.S. — (Apr. 15, 1974). The district court decision was entered July 25, 1973 with reversal by the court of appeals occurring on August 8, 1973.

The effective date of the district court's injunction was delayed until July 27 to allow the defendants time to seek a stay pending appeal. The stay was granted on July 27 by the Second Circuit court of appeals. The plaintiffs applied to Thurgood Marshall, the Circuit Justice for the Second Circuit, to vacate the stay. The application was denied on August 1. Holtzman v. Schlesinger, 414 U.S. 1304, 1315 (1973). The plaintiffs then made a reapplication to vacate the stay to William O. Douglas, Circuit Justice for the Ninth Circuit, who on August 3 ordered the stay vacated, reinstating the district court's order. Holtzman v. Schlesinger, 414 U.S. 1316, 1320 (1973). After communicating with the other Justices of the Court by telephone, Justice Marshall overruled the decision of Justice Douglas and stayed the order of the district court on August 4. Schlesinger v. Holtzman, 414 U.S. 1321, 1322 (1973). Justice Douglas vigorously dissented to this procedure. *Id.* at 1322-26.

[57] On April 30, 1970, President Nixon announced that "[i]n cooperation with the armed forces of South Vietnam, attacks are being launched this week to clean out major enemy sanctuaries on the Cambodian-Vietnam border." *The President's Address to the Nation*, 6 PRES. DOCUMENTS 596, 598 (Apr. 30, 1970).

gress to repeal the Tonkin Gulf Resolution,[58] a narrowly worded document upon which the executive had relied to justify military action in Southeast Asia.

The principal effort by the Congress to restrain the President came in 1973 after the discovery of the secret bombing of Cambodia.[59] As a result of this military activity, Congress provided, in an appropriations bill, a cutoff for funds used

> to support directly or indirectly combat activities in, over or from off the shores of Cambodia or in or over Laos by United States forces.[60]

Although the enactment of this appropriations legislation was essential to the continuity of government operations, the President vetoed it, because he felt the bill "would cripple or destroy the chances for an effective negotiated settlement in Cambodia."[61] The House failed to override the President's veto.[62]

The prospect of no funds being available for government operations led to compromises between Congress and the President. New legislation was prepared and passed with an August 15, 1973 cutoff date for military operations in Cambodia.[63] The President signed the legislation[64] and said he would abide by the cutoff date.[65]

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58 On January 12, 1971, Congress repealed the Gulf of Tonkin Resolution with a provision in The Foreign Military Sales Act. Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2055, *repealing* Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384. S. REP. No. 91-865, 91st Cong., 2d Sess. 1 (1970) states that the principle purpose of the bill is to "[p]revent United States forces from becoming involved in a war in behalf of Cambodia and to insure that United States forces now in Cambodia are withdrawn." The Senate Foreign Relations Committee further commented: "Members of the committee have tried persuasion, private and public, in an effort to prevent any U.S. involvement in Cambodia. But to no avail." *Id.* at 3.

59 A former Air Force officer revealed that from March 1969 to May 1970, B-52 bombers had conducted from 20 to 24 secret raids daily on neutral Cambodia. Official records were falsified to conceal this information from the Congress. *See* 19 KEESING'S CONTEMPORARY ARCHIVES 26166-67 (H. Tobin & R. Fraser eds. 1973). A review of the Cambodian hostilities, including the intensive bombings of February and March, 1973, may be found in Judge Judd's opinion in Holtzman v. Schlesinger, 361 F. Supp. 553, 555-59 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, — U.S. — (Apr. 15, 1974).

60 H.R. 7447, 93d Cong., 1st Sess., tit. I, ch. II (1973).

61 *The President's Message to the House of Representatives Returning H.R. 7447 Without His Approval Because of the "Cambodia Rider,"* 9 PRES. DOCUMENTS 861 (June 27, 1973).

62 *See* House Calendar 81 (Mar. 28, 1974).

63 H.R. 9055, 93d Cong., 1st Sess., § 307 (1973). This bill passed both the House and Senate on June 29, 1973. *See* House Calendar 86 (Mar. 28, 1974).

64 The bill was approved July 1, 1973. Act of July 1, 1973, Pub. L. No. 93-50, 87 Stat. 99.

65 On August 3, 1973, the President wrote to the Speaker of the House and the Majority Leader of the Senate:

Thus, while the commitment of United States armed forces to combat in Southeast Asia was a serious matter for the Nation, it was an area in which the courts felt unable to determine the legality of the President's actions on the merits because of the political question issues involved. The result was that problems arising from military activities were ultimately worked out by the Congress and the President, although over an extended period of time.

Impoundment

Increasing friction between the executive and legislative branches of government has been evident in recent years in connection with the impoundment by the President of funds appropriated by Congress. The magnitude of the Nixon Administration's impoundments[66] and its interference with programs designed to benefit many Americans has led to considerable public attention.

Impoundment, which has become the name for the failure of the executive branch to expend funds Congress has made available to carry out programs it has enacted into law,[67] is not unique to the pres-

> The wording of the Cambodia rider is unmistakable; its intent is clear. The Congress has expressed its will in the form of law and the Administration will obey that law.

The President's Letter to Carl Albert, Speaker of the House of Representatives, and Mike Mansfield, Majority Leader of the Senate, 9 PRES. DOCUMENTS 955 (August 3, 1973).

66 There is considerable variation in the estimates of funds impounded under the Nixon Administration. The estimate has ranged from $11.1 billion over the four-year period from the President's first inauguration to $25 billion in 1971 and 1972 alone. *Compare Hearings on H.R. 5193 Before the House Comm. on Rules*, 93d Cong., 1st Sess. 1 (1973) (opening statement of Chairman Madden) *with* 118 CONG. REC. 9355-56 (daily ed. Oct. 10, 1972) (remarks of Representative Boggs). The difficulty in making an accurate determination of the amount of impounded funds is due in major part to the unwillingness of the Administration to disclose its impoundment actions. *See* S. REP. No. 93-121, 93d Cong., 1st Sess. 25 (1973).

67 There is little agreement between opposing viewpoints even as to the definition of the term impoundment. One writer observed recently:

> At the most basic level an impoundment is a withholding of appropriated funds for a period of time. A definitional problem arises because the executive branch uses impoundment in an all-encompassing sense, favorable to its position, while members of Congress use the word pejoratively in connection with specific withholding of funds.

Note, *Presidential Impoundment: Constitutional Theories and Political Realities*, 61 GEO. L.J. 1295, 1295 (1973).

In opening the first session on executive impoundment of appropriated funds before the Senate Subcommittee on the Separation of Powers, Senator Ervin indicated that impoundment may include various specific techniques to withhold funds:

> Impounding—or reserving, freezing, withholding, sequestering, depending on semantic choice—is not a new concept, and when undertaken for proper purposes, it may be quite useful in effecting economy. Various procedures have been

ent administration. However, the present administration has added significant new dimensions to the impoundment issue by refusing to spend funds on a broad scale for programs approved by Congress.

One of the first documented examples of impoundment of appropriated funds by the executive occurred in 1803 during the administration of President Jefferson.[68] The purchase of Louisiana reduced military threats to the country and Jefferson found it unnecessary to expend $50,000 previously voted by Congress for the construction of gunboats to patrol the Mississippi River.[69] Jefferson, however, did not intend to impound the money permanently, but wanted to delay the expenditure until a better boat could be developed.[70] The following year he reported to Congress that the construction of gunboats was underway as intended by Congress.[71] Thus, Jefferson delayed spending in a manner which did not endanger the goals of Congress, but rather made a program more effective.[72]

Although there was an occasional instance of a refusal to spend

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used over the years, the most common being the reserving of funds to prevent deficiencies in a Federal program, or to effect savings.

Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 1 (1971) (opening statement of Senator Ervin) [hereinafter cited as *1971 Hearings*].

68 *See, e.g.*, A. SCHLESINGER, *supra* note 38, at 235 (1973); Stanton, *The Presidency and the Purse: Impoundment 1803-1973*, 45 U. COLO. L. REV. 25, 26 (1973).

69 In his Third Annual Message to Congress delivered on October 17, 1803, Jefferson said:

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

1 MESSAGES AND PAPERS OF THE PRESIDENTS 348 (J. Richardson ed. 1897).

70 *Id.*

71 A. SCHLESINGER, *supra* note 38, at 235. *See also* 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 69, at 360.

72 In a paper submitted to Senator Ervin, Chairman of the Senate Subcommittee on Separation of Powers, Professor Joseph Cooper of Rice University wrote:

> [W]hat occurred in 1803 was in reality merely a case of deferred spending which did not destroy or impair the program goals of Congress, rather than an impoundment as now practiced by the Nixon Administration. Note that in his October Message Jefferson did not assert a right to impound; he merely stated that he was not going to spend the money until the gunboats in question could be built "on models the most approved by experience." In short, he did not, as the Nixon Administration now does, claim a right to impose his own policy judgments on the execution of law, to kill or trim programs in accord with his own policy desires, to determine personally what laws deserve or do not deserve to be executed.

Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Gov't Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 677 (1973) [hereinafter cited as *1973 Hearings*].

appropriations by the executive during the nineteenth century,[73] the use of impoundment did not increase significantly until the administration of Franklin Roosevelt.[74] By 1941, the President began to withhold funds appropriated for public works because he believed they interfered with the growing war effort.[75] In effecting this economy measure in the face of a military problem, however, Roosevelt emphasized that he did not intend to use the impoundment of programs enacted by Congress as an item veto. President Roosevelt recognized the constitutional problem of a refusal to spend money for specific programs in appropriations bills where he was unwilling to veto the whole bill. He observed:

> "While our statutory system of fund apportionment is not a substitute for item or blanket veto power, and should not be used to set aside or nullify the expressed will of Congress, I cannot believe that you or Congress as a whole would take exception to either of these purposes [compliance with the Antideficiency Act and effecting savings] which are common to sound business management everywhere."[76]

The practice of refusing to release appropriated funds did not end

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73 Spokesmen for the executive branch frequently cite President Grant's refusal to release funds appropriated for river improvements in 1876 as a historical basis for presidential impoundment power. *See, e.g., 1973 Hearings* at 835. The bill in question provided for improvements to river and harbor facilities, and although President Grant signed the bill he announced his intention not to spend the full amount appropriated in a special message to the House of Representatives. In his letter, Grant wrote that his decision was based partly on considerations of economy and partly on the purely local nature of some of the projects:

> Without enumerating, many appropriations are made for works of purely private or local interest, in no sense national. I can not give my sanction to these, and will take care that during my term of office no public money shall be expended upon them.

9 MESSAGES AND PAPERS OF THE PRESIDENTS 4331 (J. Richardson ed. 1897).

74 *1973 Hearings* at 836. *See also* Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 STAN. L. REV. 1240, 1242 (1970).

75 A. SCHLESINGER, *supra* note 38, at 236. The impoundment practices of the Roosevelt Administration have been viewed as a transitional phase marking the emergence of impoundment as a policy device rather than as a purely economic measure:

> Executive impoundment lost its character as an economy measure and became a full-fledged policy tool early in the administration of Franklin Delano Roosevelt. The Bureau of the Budget initiated the practice of impounding funds for specific purposes. The frequency of impounding increased sharply as the Roosevelt administration coped with the emergencies of the Depression and World War II.

Church, *supra* note 74, at 1242 (footnote omitted).

76 *Hearings on H.R. 3598 Before a Subcomm. of the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 739 (1944) (letter from President Roosevelt to Senator Russell of Georgia, dated August 18, 1942). *See also* 42 OP. ATT'Y GEN. No. 32, at 5-6 (1967).

after the Second World War, although such actions shifted to appropriations for military purposes. Presidents Truman, Eisenhower, and Kennedy all withheld defense appropriations of one form or another during their administrations.[77] However, Congress never authorized such actions and they should not be viewed as a basis for the use of impoundment on a broad scale or where domestic affairs are involved.[78] Furthermore, the impoundments practiced by previous administrations had often involved political compromises between Congress and the President which averted the constitutional issue.[79]

[77] President Truman withheld funds appropriated by Congress for a 70-group air force and for the construction of two modern aircraft carriers. President Eisenhower impounded funds for the acquisition of strategic aircraft and anti-aircraft missile systems. Stanton, *supra* note 68, at 30-31. *See also 1971 Hearings* at 526 (Exhibit 2). More recently, the Kennedy Administration refused to release nearly $200 million which Congress added to an administration request for the development of the B-70 bomber. Relying on the American advantage over the Soviets in strategic bombers and missile strength, Defense Secretary McNamara refused to release the additional funds. Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROB. 135, 161 (1972).

[78] When funds are impounded in the national defense context, the President can argue that his constitutional role in foreign affairs and his position as Commander in Chief authorize him to refuse to release the funds. Speaking before the Ad Hoc Subcommittee on Impoundment of Funds, Senator Edward Kennedy characterized this source of impoundment power as implied:

> A reading of the Constitution does suggest one area where it can reasonably be argued that Presidential power—in this case power to impound funds—may flow directly from that document and not be dependent upon statutory authorities. That is the power of the President which can be implied from his constitutional role in foreign affairs and his designation as Commander in Chief.

1973 Hearings at 333 (remarks of Senator Kennedy). Senator Kennedy pointed out that after considering the question of impoundment early in the administration of John Kennedy, the Counsel to the President concluded:

> "Previous Presidents, in their roles as Commander-in-Chief, have 'impounded' Defense appropriations. Similar action in the civilian area is not customary and of doubtful legal basis."

Id.

[79] One frequently cited example of a political solution to potential constitutional confrontation over impoundment of funds occurred during the Kennedy Administration. After the Secretary of Defense refused to release the extra funds provided by Congress for the B-70 bomber, the House Armed Services Committee voted to *direct* the Executive to spend the funds. Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1, 12-13 (1974). Anticipating a constitutional confrontation between the executive and legislative branches over congressional power to mandate the expenditure of funds, Kennedy side-stepped the issue by requesting a change in the language of the authorizing bill from mandatory to permissive. In his letter to Representative Vinson, the chairman of the committee, Kennedy wrote:

> I would respectfully suggest that, in place of the word "directed," the word "authorized" would be more suitable to an authorizing bill (which is not an appropriation of funds) and more clearly in line with the spirit of the Constitution.

1971 Hearings at 526 (Exhibit 3) (letter from President John F. Kennedy to Representative Carl Vinson, March 20, 1962). Congress acceded to the request and Kennedy promptly impounded the funds. *See* A. SCHLESINGER, *supra* note 38, at 237.

Thus, although there were occasional instances of impoundments of appropriated funds by Presidents in the past, the "nature and scope of executive branch refusals to spend funds have dramatically changed during the Nixon Administration."[80] One observer has concluded that despite the warnings of previous Presidents[81] impoundment is presently being used as a method to reorder domestic priorities.[82]

Impoundment on the scale presently being undertaken amounts to the exercise of an absolute veto power which the Constitution clearly does not give the President. This conclusion is illustrated by the recent withholding of funds by the President for water pollution control.

In enacting the Federal Water Pollution Control Act of 1972,[83] and appropriating funds for its implementation,[84] Congress responded to what it considered a strong popular demand for cleaner water. The President opposed the measure and, believing that the program was not in the public interest, vetoed the bill in exercise of his constitutional power.[85] The President's veto, however, was overridden by overwhelming margins in both the House and the Senate, and the bill became law in October 1972.[86]

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80 Stanton, *supra* note 68, at 33 (footnote omitted).

81 *See, e.g.*, remarks of President Roosevelt in the text accompanying note 76 *supra*.

82 Stanton, *supra* note 68, at 33. Similar sentiments were expressed by the chairman of the House Committee on Rules when he opened the hearings on H.R. 5193, the Impoundment Reporting and Review Bill:

> The American public should know that since President Nixon was inaugurated over 4 years ago, approximately $11.1 billion of funds have been impounded which cover legislation on housing, education, health, transportation, antipollution, hospital construction, veterans hospitals, small business loans, watershed and flood prevention, help for domestic farm labor, food stamp programs, rural electrification loans, waste, sewer facilities, and so forth.

Hearings on H.R. 5193 Before the House Comm. on Rules, 93d Cong., 1st Sess. 1-2 (1973) (opening statement of Chairman Madden).

83 33 U.S.C. § 1251 *et seq.* (Supp. II, 1972).

84 *Id.* § 1287 provides:

> There is authorized to be appropriated to carry out this subchapter, other than sections 1288 and 1289 of this title, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

In addition, section 1285 provides in part that "[s]uch sums *shall* be allotted among the States by the Administrator in accordance with regulations promulgated by him." *Id.* § 1285 (emphasis added).

85 *See The President's Veto Message to the Senate Returning S. 2770 Without His Approval*, 8 PRES. DOCUMENTS 1531 (Oct. 17, 1972). The President said that the legislation called for "extreme and needless overspending, [and] does not serve the public interest." *Id.*

86 The Senate voted 52 to 12 on October 17, 1972, to override the President's veto of the Federal Water Pollution Control Act of 1972. 118 CONG. REC. 18554 (daily ed. Oct. 17,

Despite the resounding vote in Congress, less than one month later, the President ordered the Environmental Protection Agency to impound over half the funds which the legislative branch had made available for water pollution control grants.[87] This action, taken shortly after a decisive override of an executive veto by the Congress, illustrates the seriousness of the constitutional question raised by impoundment. In vetoing a bill enacted by the Congress, the President has a constitutional opportunity to express his disapproval of the proposed legislation. If the legislative branch overrides his veto, however, the Act becomes law and must be enforced, notwithstanding the President's disapproval of the wisdom of the measure, since it is the President's constitutional duty to "take Care that the Laws be faithfully executed."[88] The executive cannot resort to impoundment to avoid enforcement of a law. The exercise of that kind of presidential power was expressly rejected by the Framers when they rejected an absolute veto power for the President.[89] Faced with bills passed by Congress with which he does not agree, the President may invoke his veto power and require reconsideration of the legislation by Congress or he can seek political compromises such as those effected by Presidents Roosevelt and Johnson. Failing this, he has a duty not to interfere with their enforcement through impoundment.

President Nixon, however, claimed statutory authority to impound funds appropriated for water pollution control. When he vetoed the Water Pollution Control Act, the President said:

> I am prepared for the possibility that my action on this bill will be overridden.
>
> . . . .
>
> Certain provisions . . . confer a measure of spending discretion and flexibility upon the President, and if forced to administer this legislation I mean to use those provisions . . . .[90]

1972). The House voted 247 to 23 to override the President's veto on October 18, 1972, and the measure became law. 118 CONG. REC. 10272-73 (daily ed. Oct. 18, 1972).

87 The President ordered the Environmental Protection Administration to allot only $5 billion of the $11 billion of contract authority issued by Congress for water pollution control for fiscal years 1973 and 1974. *See* N.Y. Times, Nov. 29, 1972, at 1, col. 4 (city ed.).

In his recent study of the Presidency, Arthur M. Schlesinger wrote:

> Nixon's distinctive contribution was what Senator Humphrey called "policy impoundment": that is, impoundment employed precisely as FDR had said it should not be employed—to set aside or nullify the expressed will of Congress.

A. SCHLESINGER, *supra* note 38, at 238 (footnote omitted).

88 U.S. CONST. art II, § 3.

89 See note 15 *supra* and accompanying text.

90 *The President's Veto Message to the Senate, Returning S. 2770 Without His Approval, supra* note 85, at 1532. The President also expressed the view that his legislative

In addition, the executive branch has advanced several justifications for impoundment before congressional committees.[91] The most frequent arguments made in support of impoundment power are founded on permissive statutory language in appropriations bills and legislation enacted to ensure efficient spending of the federal budget, although these do not exhaust the theories invoked to justify impoundment.[92] The defense based on efficient spending, however, is particularly inappropriate to the water pollution control legislation where impoundment occurred shortly after Congress initiated a program of grants and determined the amount of funds the government should make available. The President is required by law to promote efficiency in government operations under the Antideficiency Act of 1950.[93] The Act authorizes the Office of Budget and Management to set up "reserves" in which funds are placed in order

> 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.[94]

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proposals for pollution control were sufficient and that Congress was irresponsible. He said:

> My proposed legislation, as reflected in my budget, provided sufficient funds to fulfill that same intent [*i.e.*, water pollution control] in a fiscally responsible manner. Unfortunately the Congress ignored our other vital national concerns and broke the budget with this legislation.

Id.

91 *See, e.g.*, Statements of Roy C. Ash, Director-Designate, Office of Management and Budget, Executive Office of the President, and Samuel M. Cohen, Assistant Director of the Office of Management and Budget, *1973 Hearings* at 269-302.

92 For a more detailed analysis of the constitutional and statutory justification of executive impoundment power, see Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973).

93 31 U.S.C. § 665 (1970). The Administration position is reflected in the statement of Caspar W. Weinberger, Deputy Director of the Office of Management and Budget, before the Senate Subcommittee on Separation of Powers:

> Perhaps the most explicit authority for withholding appropriated funds is section 3679 of the Revised Statutes—the so-called "Antideficiency Act" (31 U.S.C. 665). Since the turn of the century, this statute has required that appropriations be subdivided so as to insure that agencies will not enter into commitments in excess of the amounts appropriated. In 1950, the law was strengthened by the addition of provisions for central management of appropriations of the executive branch. These provisions include the authority to establish reserves in particular circumstances to:
>
> (1) Provide for contingencies, and
>
> (2) Provide for savings when savings are made possible by changes in requirements, greater efficiency of operations, or other developments subsequent to the date when the appropriation was made available.

1971 Hearings at 95.

94 31 U.S.C. § 665(c)(2) (1970).

However, the Antideficiency Act contemplates a withholding of funds only under limited circumstances. First, the express provisions of the Act apply only to contingencies which arise subsequent to the passage of the challenged spending bill. Second, the Act was intended by Congress to achieve efficiency and economy with respect to specific appropriations.[95] Consequently, the measure does not apply to executive actions which are based on circumstances which existed at the time a spending bill was before the Congress.[96] The management flexibility allowed by Congress in this Act in order to ensure efficient administration of particular programs does not authorize general reservation of funds[97] especially when the effect is to reorder priorities established by the Congress.

Authority to impound funds based upon statutory language requires an examination of the terminology used by Congress to describe the obligation of the executive branch with respect to the expenditure of appropriations. Words such as "direct," "mandate" or "require" used in one instance or more permissive terminology such as "authorize," "permit" or "may" in another instance, can determine whether or not a particular refusal to spend is legal.[98] Proponents of impound-

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[95] *See 1973 Hearings* at 108 (attachment to prepared statement of Elmer B. Staats, Comptroller General of the United States).

[96] In a prepared statement before the Senate Subcommittee on the Separation of Powers, the Comptroller General of the United States evaluated the reach of subsection (c)(2) of the Antideficiency Act. Mr. Staats concluded:

> It is clear that the provisions discussed above confer authority only in the context of achieving efficient and economical management of appropriations. This is accomplished by providing administrative flexibility to respond to changed circumstances arising after completion of the appropriations process. These provisions do not confer any authority to take actions on the basis of circumstances existing at the time appropriations were made and which were, therefore, within the purview of congressional consideration. In other words, no authority is provided to reconsider, modify, or negate congressional determinations.

1973 Hearings at 110 (attachment to prepared statement of Elmer B. Staats, Comptroller General of the United States).

[97] In a recent suit by the Missouri State Highway Commission against the Secretary of Transportation of the United States challenging the Secretary's refusal to release $21.9 million of highway funds previously apportioned to the State of Missouri, the Eighth Circuit, on its own initiative, considered the applicability of the Antideficiency Act to the controversy. State Highway Comm'n v. Volpe, 479 F.2d 1099, 1118 (8th Cir. 1973). In concluding that the Act did not authorize the impoundment of funds appropriated under the Federal-Aid Highways Act, 23 U.S.C. § 101 *et seq.* (1970), the court emphasized that

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

479 F.2d at 1118. *See also* Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636, 1645-48 (1973).

[98] *See* Church, *supra* note 74, at 1245-46; Note, *supra* note 97, at 1645-46.

ment argue that when statutory language is ambiguous, the President has the discretion to construe the terms of the measure in discharging his responsibility to execute the laws.[99]

The duty of the executive to ensure that all the laws are faithfully executed is also proposed as a source of authority for impoundment. The argument is that laws authorizing specific expenditures sometimes conflict with other more general statutes which restrict spending and that such a conflict is a situation in which the executive has authority to impound funds in order to give effect to the law which restricts spending.[100] The general statutes cited in support of this position are the Employment Act of 1946[101] and the Economic Stabilization Act Amendments of 1971.[102]

The Employment Act commits the federal government to the promotion of full employment and stable price levels.[103] Relying upon the broad references to the economic policies expressed in the preamble to the Act, the Administration has argued that the Act gives the President authority to withhold funds where the possible result of the expenditures would be inflationary or otherwise adverse to the economy.[104] This argument, however, appears to be misplaced since if

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99 Two refinements to this argument have frequently been advanced to give the executive the widest possible latitude in construing spending statutes. The first, which has been termed the "loophole theory" by some writers, is founded upon the theory that as long as the President does not clearly contradict the express terms of the particular Act, he is free to withhold the funds. In order to mandate spending, Congress must use absolutely unmistakable terms in the statute. The second variation of the discretion argument has been phrased in terms of a presumption. According to this view, all appropriations bills are presumptively permissive, and in construing them the executive task is limited to an examination of the statutory language for clearly mandatory terms. In the absence of such terms, the impoundment must be sustained. For a more complete discussion of the loophole and presumptively permissive theories, see Note, *supra* note 97, at 1646-50.

100 *Id.* at 1653.

101 15 U.S.C. § 1021 *et seq.* (1970), *as amended* 15 U.S.C.A. §§ 1024, 1026 (Supp. 1973).

102 Act of Dec. 22, 1971, Pub. L. No. 92-210, 85 Stat. 743 (codified as a note at 12 U.S.C. § 1904 (Supp. I, 1971)), *as amended* Act of Apr. 30, 1973, Pub. L. No. 93-28, 87 Stat. 27 (codified as a note at 12 U.S.C. § 1904 (Supp. I, 1972)).

103 15 U.S.C. § 1021 (1970) provides:

> The Congress declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and State and local governments, to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power.

104 *See, e.g.*, S. REP. No. 93-121, 93d Cong., 1st Sess. 7-8 (1973).

Congress had intended to vest such broad discretion to determine the value of specific expenditures in comparison to the putative economic harm a specific expenditure may cause, it would have explicitly authorized impoundment. The Act, however, contains no such specific grant to the President. His function is limited to the preparation of an annual report to the Council of Economic Advisors,[105] and the recommendation of legislation he deems necessary to effectuate the policy of the Act.[106]

Although the Economic Stabilization Act Amendments of 1971 were enacted to deal more directly with the problem of inflation[107] and additionally grant the President broad powers to deal with the problem,[108] the judiciary found it necessary to place a limiting construction upon the delegation of powers in order to uphold the constitutionality of the measure.[109] This construction precludes reliance on the Act as a basis for impoundment. Furthermore, a subsequent amendment to the Act has made explicit the view of Congress that it does not authorize impoundment.[110]

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105 15 U.S.C. §§ 1022, 1023 (1970).

106 *Id.* § 1022(a)(4).

107 See § 202 of the 1971 Amended Act (codified as a note at 12 U.S.C. § 1904 (Supp. I, 1971)).

108 Section 203(a) of the 1971 Amended Act (codified as a note at 12 U.S.C. § 1904 (Supp. I, 1971)) provides:

> "(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—
>
> "(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title; and
>
> "(2) stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth.

109 In Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971), a three-judge district court considered a labor union's challenge to the Act on the theory that the measure was an unconstitutional delegation of legislative power to the executive. The main thrust of the union's argument was that the Act delegated " 'unbridled legislative power in the President.' " *Id.* at 745. In deciding the case, the court invoked the Nation's past experience with wage-price controls, and the legislative history of the Act to find the requisite standards to guide executive action. As a consequence, *Amalgamated Meat Cutters* has been viewed as a narrow reading of the Act in granting executive power to impound:

> Without defining precisely the outer limits of the power therein granted, the opinion strongly suggests that the Act is only a grant to the President of authority to impose wage-price controls. If the President were to use the Act as explicit authority as well for impoundment of all manner of federal expenditures, it is unlikely that the Act as then applied could survive a similar challenge.

Note, *supra* note 97, at 1656.

110 When Congress extended the life of the Act in 1973, it added a proviso that the

The judiciary has been confronted with numerous suits brought by parties aggrieved by the impoundment of funds by the President, and the courts have been more receptive to suits challenging the legality of impoundment than they have been to the question of war powers.[111] In *City of New York v. Ruckelshaus*,[112] for example, a district court rejected the executive branch's argument that the action should be dismissed because of sovereign immunity, the absence of a justiciable controversy, and the presence of a political question.[113] Proceeding to the merits of the case, the court examined the language and legislative history of the Water Pollution Control Act, and determined that the failure of the executive branch to allot contract authority was unauthorized.[114] The EPA Administrator's argument based on the theory that the Act granted the President sufficient discretion to withhold portions of the sum authorized by the statute was expressly rejected by the court.[115] Other courts have reached similar conclusions in suits involving the Water Pollution Control Act.[116]

Elsewhere, in actions challenging executive refusals to release funds appropriated for other programs, the courts have considered the impoundment issue. In the overwhelming majority of the cases adjudicated to date, the judiciary has concluded that the particular impoundments in question were illegal. In litigation contesting impoundment under statutes for education,[117] health care,[118] and highway construction,[119] for example, the courts have refused to endorse claims of executive authority to withhold funds appropriated by Congress. Although an occasional case does uphold impoundment under the specific statute in question, the judicial response has generally been clearly against the Administration's position. In the approximately

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statute shall not be taken to authorize or require the impoundment of funds. Pub. L. No. 93-28, § 4 (Apr. 30, 1973).

111 See notes 52-53 *supra* and accompanying text.

112 358 F. Supp. 669 (D.D.C. 1973), *aff'd sub nom.* City of New York v. Train, 6 E.R.C. 1177 (D.C. Cir. 1974), *cert. granted*, — U.S. — (Apr. 29, 1974). This will be the first case in which the Supreme Court will consider Presidential impoundment power. *See* N.Y. Times, Apr. 30, 1974, at 19, col. 1 (city ed.).

113 358 F. Supp. at 673-76.

114 *Id.* at 679.

115 *Id.* at 676-79.

116 *See, e.g.*, Martin-Trigona v. Ruckelshaus, 5 E.R.C. 1665 (N.D. Ill. 1973); Minnesota v. Environmental Protection Agency, 5 E.R.C. 1586 (D. Minn. 1973).

117 *See, e.g.*, Massachusetts v. Weinberger, Civil No. 1308-73 (D.D.C. July 27, 1973).

118 *See, e.g.*, American Ass'n of Colleges of Podiatric Medicine v. Ash, Civil No. 1244-73 (D.D.C. October 26, 1973).

119 State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973).

thirty impoundment cases decided thus far, less than a half dozen have upheld the action of the executive branch.[120]

The judicial response to the impoundment controversy demonstrates the ability of the courts to deal with this problem in an effective fashion. But the courts can only consider specific instances of impoundment under the terms of a particular spending statute and are not equipped to deal with the law and policy in general, a task which belongs to Congress.[121]

THE LEGISLATIVE RESPONSE—CONGRESSIONAL REVIEW OF EXECUTIVE ACTION

The interference by the President with legislative power in the areas of warmaking and government expenditures has led Congress to consider legislation which would prevent the commitment of armed forces and the impoundment of funds without congressional authorization. In view of the President's resistance to the congressional view of national policy in both military and budgetary matters, lawmaking is a natural response to require the changes Congress desires. It also is an appropriate exercise of the separate power of the Congress over war and government expenditures to curb executive action believed by Congress to be improper.

The legislative approach taken by the Congress is to require consultation with Congress and its ratification of executive action which results in the commitment of United States armed forces to combat or the impoundment of funds without prior congressional authorization. Without such ratification, the action must be reversed and terminated.

The War Powers Resolution

The War Powers Resolution became law when it was passed over a presidential veto on November 7, 1973.[122] Prior to enactment of the Resolution, on three occasions in the two preceding sessions, the

120 *See* S. GLASS, PRESIDENTIAL IMPOUNDMENT OF CONGRESSIONALLY APPROPRIATED FUNDS 3 (1973).

121 Note, *The Impoundment Question—An Overview*, 40 BROOKLYN L. REV. 342, 387 (1973).

122 Pub. L. No. 93-148 (Nov. 7, 1973). The vote to override the President's veto was 75 in favor and 18 against in the Senate, and 284 in favor and 135 against in the House. 119 CONG. REC. 9661, 20115 (daily ed. Nov. 7, 1973). *See generally* Note, *1973 War Powers Legislation: Congress Re-Asserts Its Warmaking Power*, 5 LOYOLA U. CHI. L.J. 83 (1974).

House of Representatives had passed war powers legislation which for various reasons had not become law.[123] The bombing of Cambodia and the Southeast Asian military activities of the President were the primary catalysts for the legislation finally becoming law.[124]

The studies and hearings by congressional committees demonstrated that the warmaking problem did not involve executive response to military emergencies, such as a surprise nuclear attack, but rather involved the commitment of American troops by the President acting as Commander in Chief without the approval of or consultation with Congress.[125] The War Powers Resolution sought to balance the responsibility of Congress as the source of warmaking power and the flexibility needed by the President as Commander in Chief to respond to military emergencies. The mechanism chosen was an explicit limitation on the President's authority to "introduce United States Armed Forces into hostilities"[126] without congressional approval.

As embodied in the War Powers Resolution, the President has constitutional power to commit troops

> only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[127]

The President is required by the Resolution to consult with Congress both before and after the introduction of troops.[128] This

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123 *See* H.R. REP. No. 93-287, 93d Cong., 1st Sess. 2 (1973). In addition to the War Powers Resolution, many other measures concerning the President's authority to wage war were introduced in the 93rd Congress. *Id.* at 2-3.

124 The House Report on the War Powers Resolution specifically identifies the Cambodian incursion of May 1970 as the impetus for the subsequent bills and resolutions regarding war powers:

> Many Members of Congress, including those who supported the action, were disturbed by the lack of prior consultation with Congress and the near crisis in relations between the executive and legislative branches which the incident occasioned.

Id. at 3-4.

125 *Id.* at 5.

126 Pub. L. No. 93-148, § 2(c) (Nov. 7, 1973). The War Powers Resolution defines this key phrase as:

> [T]he assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompanying the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

Id. § 8(c).

127 *Id.* § 2(c).

128 The War Powers Resolution makes clear that the duty of the President to consult with the Congress is not to be taken lightly.

> The President *in every possible instance shall* consult with Congress *before* introducing United States Armed Forces into hostilities or into situations where

consultation section is intended to bring the people's elected representatives into the formulation of policy in an area where Congress has not fully participated for some time.[129] While consultation with Congress might lead to the declaration of war or specific statutory authorization for the commitment to combat, the process of consultation itself does not provide authority for the President to make war.[130] The provision is intended to restore the traditional consultation between the executive and legislative branches in foreign affairs and security matters.[131]

The reporting requirement of the Resolution is a provision to guarantee that Congress has the information it needs to fulfill its constitutional obligations in deciding whether or not to commit the country to war.[132] In the absence of a declaration of war, when armed forces are introduced into hostilities, or into the territory of a foreign state, or in numbers substantially enlarging American combat troops already located in a foreign state, the President must submit a written report to the Speaker of the House and President *pro tempore* of the Senate within 48 hours.[133] This report must set forth

> (A) the circumstances necessitating the introduction of United States Armed Forces;

> imminent involvement in hostilities is clearly indicated by the circumstances, and *after* every such introduction *shall* consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Id. § 3 (emphasis added).

129 *See* 119 CONG. REC. 5303 (daily ed. June 25, 1973) (remarks of Representative Zablocki).

130 Senator Jacob Javits, the sponsor of the Senate version of the War Powers Resolution, pointed this out during the Senate debate.

> It is important to note that, while consultation is a statutorily established requirement in this legislation, the President does not acquire or derive any authority respecting the use of Armed Forces through the consultation process per se . . . .

119 CONG. REC. 18986 (daily ed. Oct. 10, 1973).

131 *Id.* Senator Javits further stated:

> The breakdown in recent years of this consultative tradition has contributed heavily to strains between the executive and the Congress, and in my judgment is an important contributory element in the constitutional crisis now confronting our Nation with respect to the war powers.

Id.

132 H.R. REP. No. 93-547, 93d Cong., 1st Sess. (1973) is the Conference Report on the War Powers Resolution. It declares that the provision is

> to ensure that the Congress by right and as a matter of law will be provided with all the information it requires to carry out its constitutional responsibilities . . . .

Id. at 8.

133 Pub. L. No. 93-148, § 4(a) (Nov. 7, 1973).

> (B) the constitutional and legislative authority under which such introduction took place; and
>
> (C) the estimated scope and duration of the hostilities or involvement.[134]

Where American troops are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,"[135] the President must terminate the involvement within 60 days of the date of the initial report unless the Congress declares war or grants specific authorization to undertake military activities.[136] Notwithstanding the 60-day automatic termination provision,

> at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.[137]

A concurrent resolution is not subject to a veto and its use in the Resolution places the decision to remove armed forces solely with Congress.[138]

The Resolution is explicit in stating that it in itself does not provide the President with authority to introduce troops into hostilities.[139]

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134 *Id.*

135 *Id.* § 4(a)(1).

136 *Id.* § 5(b). The President need not remove the troops within the 60-day period if he determines and certifies that the forces cannot safely be withdrawn in that period. Congress may then extend "for not more than an additional thirty days" the President's authority to involve American troops in hostilities. *Id.*

The 60-day automatic termination does not apply to the peacetime movements of troops under sections 4(a)(2) and 4(a)(3) of the War Powers Resolution. However, these military commitments are still covered by the mandatory reporting requirement. *See* 119 CONG. REC. 18987 (daily ed. Oct. 10, 1973) (remarks of Senator Javits).

137 Pub. L. No. 93-148, § 5(c) (Nov. 7, 1973).

138 A concurrent resolution was specifically chosen because such resolutions are not presented to the President and therefore cannot be vetoed. *See* H.R. REP. No. 93-287, 93d Cong., 1st Sess. 14 (1973). The use of concurrent resolutions is further discussed in the context of the proposed impoundment control procedures. See note 168 *infra*.

139 Pub. L. No. 93-148, § 8(d) (Nov. 7, 1973) provides in pertinent part:

> Nothing in this joint resolution . . . shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

The fear that the Resolution would provide a source of power for the President to make war was expressed by Senator Thomas Eagleton during the debate to override the President's veto of the measure. 119 CONG. REC. 20094-96 (daily ed. Nov. 7, 1973). Although a co-sponsor of the Senate version of the Resolution, Senator Eagleton felt constrained by amendments to the bill to speak against overriding the veto:

It also states that such authority is not to be inferred "from any provision of law . . . including . . . any appropriation Act . . . or . . . from any treaty."[140] There must be a declaration of war, specific statutory authorization, or a national emergency created by an attack on the United States before the President has constitutional authority to involve United States armed forces in hostilities.[141]

The Proposed Impoundment Control Procedures

Presently pending before the House and Senate is legislation which provides for congressional review of executive impoundment of funds appropriated by the Congress.[142] The approach of this legislation is similar to the War Powers Resolution in that it requires the President to report promptly any impoundment action and the Congress then to either ratify or disapprove the impoundment. This response en-

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> What this bill says is that the President can send us to war wherever and whenever he wants to. Troops could be deployed tomorrow to the Mideast under this bill without our prior authority. All the President has to do is to make a telephone call to Senator Mansfield and Senator Scott and say, "The boys are on the way. I think you should know." Consultation. There they are; 60 to 90 days. Once those troops are committed the history of this country is replete with examples; that once committed they remain.

Id. at 20095.

140 Pub. L. No. 93-148, § 8(a) (Nov. 7, 1973). This section reads in its entirety as follows:

> Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—
>
> (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision *specifically* authorizes the introduction of United States Armed Forces into hostilities or into such situations and *states that it is intended* to constitute specific statutory authorization within the meaning of this resolution; or
>
> (2) from any treaty heretofore or hereafter ratified unless such treaty is *implemented by legislation specifically authorizing* the introduction of United States Armed Forces into hostilities or into such situations and *stating that it is intended* to constitute specific statutory authorization within the meaning of this joint resolution.

Id. (emphasis added).

However, section 8(b) makes it clear that the War Powers Resolution does not prevent the participation of the United States in the headquarters operation of existing "high-level military commands." This phrase is understood to be the organizations of NATO, the North American Air Defense Command (NORAD), and the United Nations Command in Korea (UNC). H.R. REP. No. 93-547, 93d Cong., 1st Sess. 10 (1973).

141 Pub. L. No. 93-148, § 2(c) (Nov. 7, 1973). See note 127 *supra* and accompanying text for the language delineating the President's authority.

142 S. 373, 93d Cong., 1st Sess. (1973). This bill passed the Senate on May 10, 1973, and the House, in amended form, on July 25, 1973. A House-Senate conference committee is currently considering the bill. *See* House Calendar 123 (Mar. 28, 1974).

sures that the President will not curtail programs enacted into law without permission from Congress.[143]

The impoundment legislation is the product of congressional hearings on impoundment held over the course of two years.[144] The legislation would provide the definite guidelines that existing laws, such as the Antideficiency Act, apparently lack in view of the President's withholding of funds for various programs.[145] Both the House

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143 In the Senate debate, Senator Sam Ervin, the sponsor of S. 373, stated that this impoundment legislation

> reflects the growing concern in Congress about the use of impoundments by the Executive to nullify or seriously curtail programs that have been enacted into law by the Congress. Impoundment goes to the very heart of the doctrine of separation of powers, for the Constitution very clearly gives to the Congress the power of the purse, which it exercises through appropriation legislation, and to the President the duty to faithfully execute those laws. This is an issue which goes far beyond partisan politics or the merits or demerits of programs enacted by Congress, for it involves the balance of powers established by the Founding Fathers as a check against unbridled power in any branch of the Federal Government.

119 CONG. REC. 8830 (daily ed. May 10, 1973).

A similar perspective was expressed by Representative Richard Bolling, a co-sponsor of the House impoundment measure:

> The impoundment bill reported by the House Rules Committee maintains the sharing of powers between the legislative and executive branches established by the Constitution. It recognizes that the legislative branch has the duty to formulate national policies and that in this role Congress must determine how public funds are to be spent. It also recognizes that as the head of the executive branch, the President has day to day responsibility for carrying out policies and for the expenditure of moneys. Both roles are preserved in a formula which enables Congress to review and disapprove any impoundment action taken by the President.
>
> . . . .
>
> The need for this legislation arises out of the unprecedented action of the President in withholding funds voted by Congress.

119 CONG. REC. 6547 (daily ed. July 24, 1973).

144 See *Hearings on H.R. 5193 Before the House Comm. on Rules*, 93d Cong., 1st Sess. (1973); *Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Gov't Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); *Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971).

145 *See* 119 CONG. REC. 6552 (daily ed. July 24, 1973) (remarks of Representative Rodino).

The Senate version of the bill makes the explicit findings that:

> (5) there is no authority expressed or implied under the Constitution of the United States for the Executive to impound budget authority and the only authority for such impoundments by the executive branch is that which Congress has expressly delegated by statute;
>
> (6) by the Antideficiency Act (Rev. Stat. sec. 3679), the Congress delegated to the President authority, in a narrowly defined area, to establish reserves for contingencies or to effect savings through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which appropriations are made available . . . .

S. 373, 93d Cong., 1st Sess. § 1 (1973) (as passed by the Senate May 10, 1973).

The narrowness of Presidential authority under the Antideficiency Act and the ille-

and the Senate have passed impoundment control measures[146] which, while differing in some significant respects, bring the President's withholding of funds under the supervision of Congress.

Both versions require the President to report to the Congress any impoundment action taken by any executive officer within 10 days of such action.[147] Impoundment is broadly defined to include various types of executive action and inaction which result in the thwarting and non-implementation of congressional programs.[148] In his report, the President is required to provide Congress with specific information giving, among other things, "the reasons for the impoundment, including any legal authority invoked by him to justify the impoundment."[149] A copy of the President's report is to be sent to the Comp-

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gality of many of the recent impoundments is demonstrated by several federal court decisions. *See* notes 111-20 *supra* and accompanying text.

146 The Senate passed S. 373 on May 10, 1973. When the bill was referred to the House, it was amended to insert the House proposal, H.R. 8480, and was passed as amended on July 25, 1973. *See* House Calendar 84, 123 (Mar. 28, 1974).

147 S. 373, 93d Cong., 1st Sess. § 2 (1973) (as passed by the Senate) [hereinafter cited as Senate Version]; S. 373, 93d Cong., 1st Sess. § 101 (1973) (as passed by the House) [hereinafter cited as House Version]. The provisions of the bill apply to "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." Senate Version § 2; House Version § 101.

148 While the House bill speaks of the impoundment of "funds," the Senate version uses the phrase "budget authority." *Compare* House Version § 103 *with* Senate Version § 4. The Senate language arose out of an amendment seeking a more comprehensive term than "funds." S. REP. No. 93-121, 93d Cong., 1st Sess. 20 (1973). Budget authority includes not only funds but also authority to enter into contractual obligations and to use borrowed money in making payments. *Id.*

The need for a far-reaching definition of impoundment was expressed by the Senate Committee on Government Operations:

> The Committee regrets the necessity for such an extensive and comprehensive definition of impoundment. However, the interpretations and practices of the Administration permit no other alternative. In recent years, in its good-faith efforts to obtain information on impoundment from the executive branch, Congress has been led through a conceptual and semantic labyrinth.

Id. at 25. *See also* H.R. REP. No. 93-336, 93d Cong., 1st Sess. 7 (1973).

149 Senate Version § 2(6); House Version § 101(6). The President's report must specify

> (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 account, department, or establishment of the Government to which such impounded funds would have been available for obligation except for such impoundment, and the specific projects or governmental functions involved;
> (5) the period of time during which the funds are to be impounded;
> (6) the reasons for the impoundment, including any legal authority invoked by him to justify the impoundment; and
> (7) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the impoundment.

Id.

troller General of the United States at the same time the report is sent to Congress.[150] Under both versions, the Comptroller General advises the Congress whether, in his opinion, the impoundment is in accordance with existing statutory authority.[151] The Comptroller General is also charged with overseeing the operations of the executive branch so that the executive does not by action or inaction cause an impoundment to occur and not report the impoundment.[152] Whenever he determines that an impoundment has occurred and has not been reported, the Comptroller General is to report to Congress.[153]

This reporting scheme is the first step in congressional review. But while both bills seek to bring the impoundment actions under legislative scrutiny, they follow different paths.

The Senate proposes that a specific impoundment should be permitted only if both the Senate and the House ratify such action.[154] If there is no approval of an impoundment within 60 days, it must cease.[155] The House version, on the other hand, requires an

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The "reasons for the impoundment" anticipated by the bill are not of a vague and general nature but rather should explain why a particular program was singled out for impoundment. S. REP. No. 93-121, 93d Cong., 1st Sess. 22 (1973).

150 Senate Version § 2(c); House Version § 101(c).

151 Senate Version § 2(c); House Version § 101(c). The responsibilities placed upon the Comptroller General under the Senate version exceed those imposed on him under the House measure. While in the House's bill, the Comptroller General's role is merely advisory, the Senate charges him with authority to screen impoundments which will actually be brought to the scrutiny of the Congress. *See* notes 158-60 *infra* and accompanying text.

152 Senate Version § 6; House Version § 105. *See generally* S. REP. No. 93-121, 93d Cong., 1st Sess. 26-27 (1973).

153 Senate Version § 6; House Version § 105. Under both versions, the provisions of the impoundment control procedures apply as if the President had made the required report. However, the running of the time is different. The House measure provides that the time period shall be "deemed to have commenced at the time at which the Comptroller General makes the report." House Version § 105. In contrast, the Senate proposal commences as of the time "at which, in the determination of the Comptroller General, the impoundment action was taken." Senate Version § 6. The Senate intent was to provide a sanction discouraging the executive from making impoundments and not reporting them. S. REP. No. 93-121, 93d Cong., 1st Sess. 14 (1973).

Both the Senate and the House empower the Comptroller General to bring suit in the United States District Court for the District of Columbia to enforce the provisions of the impoundment legislation. Senate Version § 8; House Version § 106. The need for a "Congressional lawyer" arose out of Congress' feeling that it could not depend upon the Department of Justice to provide assistance with legal problems. "[B]y definition that Department operates as the President's legal staff. The Attorney General is responsible to the President and takes his orders from the President." S. REP. No. 93-121, 93d Cong., 1st Sess. 15 (1973). Congress felt it should not await or rely upon private litigation to enforce the legislative will. *Id.* at 27.

154 Senate Version § 3.

155 *Id.*

impoundment to terminate upon the disapproval of either House of Congress.[156] Impoundments not disapproved within a 60-day period continue in effect.[157] This difference in approach—approval versus disapproval—reflects a difference in view between the Senate and the House as to whether affirmative action by Congress should be necessary to terminate a specific impoundment.[158] The Senate also provides that if Congress is unwilling to wait 60 days for the automatic termination of an impoundment, it may disapprove at an earlier date and force the President to spend the funds.[159]

Since the Senate bill requires affirmative action to permit an impoundment, it gives the Comptroller General the duty to screen impoundments for congressional review in order to eliminate impoundments which are clearly legal. When he receives the President's report of an impoundment or determines that an impoundment has been made but not reported, the Comptroller General determines whether it is in accordance with the Antideficiency Act, or any other statutory authority.[160] If the Comptroller General finds the executive action is within the Antideficiency Act, the provisions on termination do not apply and the congressional review would be ended.[161] If the Comp-

156 House Version § 102.

157 *Id.*

158 The position of the Senate was expressed by the bill's sponsor, Senator Ervin:

> My approach puts the burden on the President to make his case to the Congress for each impoundment. The [House] approach puts the burden on the Congress to make its case for overriding an impoundment. Since the Congress has already exercised its constitutional power in passing the appropriation act, and since the Constitution puts a duty on the President to faithfully carry out laws, I am convinced that the President should have the burden of justifying an impoundment. My approach puts the duty of executing the laws where the Constitution puts it—on the President.

119 CONG. REC. 8837 (daily ed. May 10, 1973) (statement inserted in the record by Senator Ervin).

The perspective of the House of Representatives is embodied in H.R. REP. No. 93-336, 93d Cong., 1st Sess. 6 (1973) which states:

> The great strength of [the House] approach is its practicality. In the normal process of apportionment [under the Antideficiency Act], the executive branch necessarily withholds funds on hundreds of occasions during the course of a fiscal year. If Congress adopts a procedure requiring it to approve every necessary impoundment, its legislative process would be disrupted by the flood of approvals that would be required for the normal and orderly operation of the government. The negative mechanism provided in [the House version] will permit Congress to focus on critical and important matters, and save it from submersion in a sea of trivial ones.

159 Senate Version § 3. Disapproval of an impoundment, either by a concurrent resolution before the expiration of 60 days or by a failure to approve at the end of the 60-day period, precludes the President from taking action to reimpound the funds appropriated by Congress. *Id.*

160 *Id.* § 2(c).

161 *Id.*

troller General determines either that the impoundment is supported by some other statutory authority or that it is without support in any Act of Congress, the provisions of the bill apply and the impoundment must cease unless expressly ratified within 60 days.[162]

Another difference between the two impoundment measures is the legislative vehicle for congressional action. The Senate, as in the War Powers Resolution, utilizes a concurrent resolution—a vote of both Houses of Congress—for approval or disapproval of an impoundment.[163] The validity of the appropriation and program affected by the impoundment is presumed. Ratification is intended "to retain and exercise the power of the purse."[164] Since impoundments involve national policies and priorities, the Senate believes that there should be a concurrence by both Houses of Congress in allowing or disapproving them.[165]

In contrast, the House measure provides that an impoundment can continue unless either the House or Senate act to prohibit it.[166]

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162 *Id.* Senator Ervin in explaining this portion of the bill stated that:

> Since Congress has such high respect for the opinion of the Comptroller General, it is likely that the ratification of the President's action will usually follow as a matter of course where the Comptroller General rules that the impoundment action of the President is supported by some act of Congress other than the Anti-Deficiency Act.

119 CONG. REC. 8836 (daily ed. May 10, 1973) (statement inserted in the record by Senator Ervin).

The House Rules Committee, in comparing the House and Senate versions of impoundment legislation, took exception to this aspect of the Senate's proposal:

> We do not believe Congress should delegate its power to review Presidential impoundments to a subordinate official. Under the procedure embodied in [the House's version], there is no necessity for doing so. Since an impoundment will continue unless either House of Congress disapproves it, no winnowing process is required.
>
> . . . Congress will have the benefit of [the Comptroller General's] opinion but retain to itself the final decision-making authority.

H.R. REP. No. 93-336, 93d Cong., 1st Sess. 6 (1973).

While the Senate takes direct floor action on the recommendation of the Comptroller General regarding an impoundment, the House provides for preparatory study by the Appropriations Committees before consideration of the impoundment by the full Congress. *Compare* Senate Version § 5(c)(1) *with* House Version § 104(c). The Appropriations Committees are the congressional experts on fiscal matters and the House sought to draw upon their experience. H.R. REP. No. 93-336, 93d Cong., 1st Sess. 7 (1973). *See generally* 119 CONG. REC. 6548 (daily ed. July 24, 1973) (remarks of Representative Bolling). To avoid locking up an impoundment resolution in committee, the House provides for its discharge after 30 days on petition by 20 percent of the Members of the House involved. House Version § 104(d).

163 Senate Version § 3.

164 *See* 119 CONG. REC. 8836 (daily ed. May 10, 1973) (remarks of Senator Ervin).

165 *See* 119 CONG. REC. 6548 (daily ed. July 24, 1973) (remarks of Representative Bolling).

166 *Id.*

An impoundment is viewed as a proposal by the President to alter an existing appropriations law and the House bill

> equips each House of Congress with the power to block a proposed change, for once a single House has expressed disapproval, the President no longer has a legislative possibility for securing a change in policy.[167]

Accordingly, the House measure provides that a resolution passed by a majority of either the House or Senate, and which may be introduced by any Member, requires the termination of an impoundment.[168]

Although the proposed legislation limits executive action to impound funds, the Senate and House both propose to grant a certain amount of impoundment authority to the President and the executive branch. Title II of both the House and the Senate bills establishes an expenditure ceiling for 1974 and provides that the President can reserve a proportionate amount from government programs, with some exclusions, in order to stay within the ceiling.[169] The impoundment of a proportionate amount of government expenditures would prevent the use of impoundment as a means of selective nonenforcement by the executive of laws it does not favor, while permitting impoundment to maintain a ceiling on government expenditures.[170] Both versions of Title II of the impoundment measures state that:

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167 *Id.*

168 House Version §§ 102, 104. Neither the House's simple resolution nor the Senate's concurrent resolution are Acts of Congress which can be vetoed. While U.S. CONST. art. I, § 7 provides that all "Bills," "Orders," "Resolutions," and "Votes," are to be presented to the President, both the War Powers Resolution and the proposed impoundment control measures make the President subject to votes of Congress, or of one House, by including such acts as part of carefully drawn procedures to carry out the purposes of specific legislation. The President can disapprove and veto the specific legislation which provides for such procedures, as was done with the War Powers Resolution, but if the specific legislation becomes law, he is bound by the procedures. See 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 32-35 (1963) for an analysis of votes of Congress which are not presented to the President.

169 Senate Version § 202(a); House Version § 202(a). The President may not reserve funds allocated to social security, interest payments, veterans' benefits, public assistance grants, food stamp programs, military retirement pay, medicaid, and judicial salaries. Senate Version § 202(b); House Version § 202(b)(1).

170 The House Rules Committee in discussing this facet of the impoundment measure stated:

> We recognize that the President should be permitted some latitude in making reservations to remain within the ceiling. The bill therefore directs the President to reserve such amounts as may be necessary, but with several provisos intended to retain the spending priorities adopted by Congress.

H.R. REP. No. 93-336, 93d Cong., 1st Sess. 9 (1973).

The Senate and House versions differ as to the effect of the Title II reservation authority on the impoundment control procedures of Title I. House Version § 202(c) does

> [I]n no event shall the authority conferred by this section be used to impound funds, appropriated or otherwise made available by Congress, for the purpose of eliminating a program the creation or continuation of which has been authorized by Congress.[171]

In both versions of the bill the provision for proportionate impoundment concerns the fiscal 1974 budget only. After that, the President will be subject to the permanent impoundment control procedures of Title I. Both bills further provide that nothing in them is to be construed as ratifying any past or future impoundments unless done pursuant to statutory authority in effect at that time.[172]

The proposed legislation establishes procedures concerning impoundments which do not proscribe such actions, but make them subject to the scrutiny and judgment of Congress, the legislative branch of government.

CONCLUSION

The enactment of the War Powers Resolution and the consideration of impoundment control procedures demonstrate the ability of Congress to respond in a responsible and creative way to difficult problems. The efforts Congress has made should help to resolve differences between Congress and the President regarding military and budgetary matters.

The War Powers Resolution should change the posture of the courts as to judicial review of executive action involving United States military forces in hostilities. The failure of the President either to comply with the reporting procedures or to remove armed forces absent a declaration of war or specific authorization would be a clear violation of law and would not be blurred by the political question doctrine. With specific authorization, the President's military activities would have the force of Congress behind them and be legally secure.

There has been no difficulty in obtaining judicial review of executive impoundments. While the courts have necessarily dealt

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not require the President to report impoundments made in accordance with the proportional reservation requirements of Title II. However, he must report impoundments that violate these provisions. The Comptroller General, charged with reviewing such reservations, would report an impoundment in violation of the Title II authority and trigger the congressional review set out in Title I. On the other hand, the Senate impoundment control procedures apply unless the Comptroller General determines that the reservation was made in accordance with Title II. Senate Version § 202(c).

171 Senate Version § 202(e). The House version changes one word, using "combination" in place of "continuation." House Version § 202(d).

172 Senate Version § 7; House Version § 108(2).

with this issue on a case-by-case basis, the impoundment control procedures presently pending in Congress would allow a rapid review of impoundments. The 60-day period for congressional review is more expeditious than private litigation and would save individuals the time and expense of such litigation. Furthermore, the impoundment measure would allow the Congress to declare in clear terms its approval or disapproval of impoundments.

The War Powers Resolution and the proposed impoundment control procedures would separate military and budgetary policy disputes from other lawmaking efforts. Rather than having to place a bombing cutoff date as a rider to an appropriations bill favored by both the President and Congress in order to discourage a veto of the rider, as occurred in June 1973, there can be public debate of the central issue without involving collateral matters.

Finally, both proposals demonstrate the continued vitality of the separation of powers embodied in the Constitution as a means of guaranteeing the effective operation of a democratic government. The President enforces the laws, but his actions are subject to the separate power of the elected representatives of the people assembled in Congress.