FOIA Marker

This is not a textual record. This FOIA Marker indicates that material has been removed during FOIA processing by Obama Presidential Library staff.

Counsel's Office, White House (WHCO)

Hartnett, Kathleen - Subject Files

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
M	14	14	9	1	6558	1363	3524	4268

Folder Title:

Debt Ceiling

Chad Millison

1117231
FG006-04

Executive Office of The President
Barcode Scanning Sheet

Collection Code: **CTRACK**

Staff Name:

Document Date:

Correspondent: **KATHLEEN HARTNETT**

Subject/Description: **KATHLEEN HARTNETT FILES; MATERIAL IS FROM BOX OVERSIZE ATTACHMENT # 4268 NARA # 3524; FILE SCANNED AND FILED IN ORIGINAL BOX BY FOLDERS; THE FOLDER FOR THIS CASE IS: DEBT CEILING**

Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Memorandum for the Financial Stability Oversight Council - To: The Financial Stability Oversight Council - From: Timothy Geithner	2	07/31/2011	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

FRC ID:
6558

OA Num.:
4268

NARA Num.:
3524

FOIA ID and Segment:
23-39824-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Letter	Letter from Timothy Geithner to Senator Harry Reid - To: Senator Harry Reid - From: Timothy Geithner	12	04/04/2011	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

FRC ID:
6558

OA Num.:
4268

NARA Num.:
3524

FOIA ID and Segment:
23-39824-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Q and A	Debt Limit Questions and Answers	19	07/31/2011	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

FRC ID:
6558

OA Num.:
4268

NARA Num.:
3524

FOIA ID and Segment:
23-39824-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Q and A	Debt Ceilling Questions and Answers	5	N.D.	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

FRC ID:
6558

OA Num.:
4268

NARA Num.:
3524

FOIA ID and Segment:
23-39824-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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Records Not Subject to FOIA

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Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	ICA Email - To: Mike Gottlieb and Kathleen Hartnett - From: Steve Croley	2	07/28/2011	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

FRC ID:
6558

OA Num.:
4268

NARA Num.:
3524

FOIA ID and Segment:
23-39824-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

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b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	Outstanding Qs Email - To: Kathleen Hartnett and Mike Gottlieb - From: Steve Croley	1	07/28/2011	

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

FRC ID:
6558

OA Num.:
4268

NARA Num.:
3524

FOIA ID and Segment:
23-39824-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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B. Closed by statute or by the agency which originated the document.
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Freedom of Information Act - [5 U.S.C. 552(b)]

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Records Not Subject to FOIA

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Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	Balkin Opinion Piece Email - From: Pat Cunnane	3	07/15/2011	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

FRC ID:
6558

OA Num.:
4268

NARA Num.:
3524

FOIA ID and Segment:
23-39824-F

RESTRICTION CODES

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P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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Records Not Subject to FOIA

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Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Memorandum for the Senior Staff - To: Senior Staff - From: Bob Bauer	2	04/15/2011	P5;

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COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

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FOIA ID and Segment:
23-39824-F

RESTRICTION CODES

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Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Memorandum to Senior Advisors - To: Senior Advisors - From: Kathy Ruemmler	3	07/08/2011	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

FRC ID:
6558

OA Num.:
4268

NARA Num.:
3524

FOIA ID and Segment:
23-39824-F

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Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	Intern Projects Email - To: Steven Croley - From: Mike Gottlieb	1	07/27/2011	P5;

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COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

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RESTRICTION CODES

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Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Handwritten Note	ICA Note	1	N.D.	P5;

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COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

FRC ID:
6558

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RESTRICTION CODES

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Withdrawal Marker
Obama Presidential Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Memorandum to the President - To: POTUS - From: Kathy Ruemmler	3	07/2011	P5;

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COLLECTION:
Counsel's Office, White House (WHCO)

SERIES:
Hartnett, Kathleen - Subject Files

FOLDER TITLE:
Debt Ceiling

FRC ID:
6558

OA Num.:
4268

NARA Num.:
3524

FOIA ID and Segment:
23-39824-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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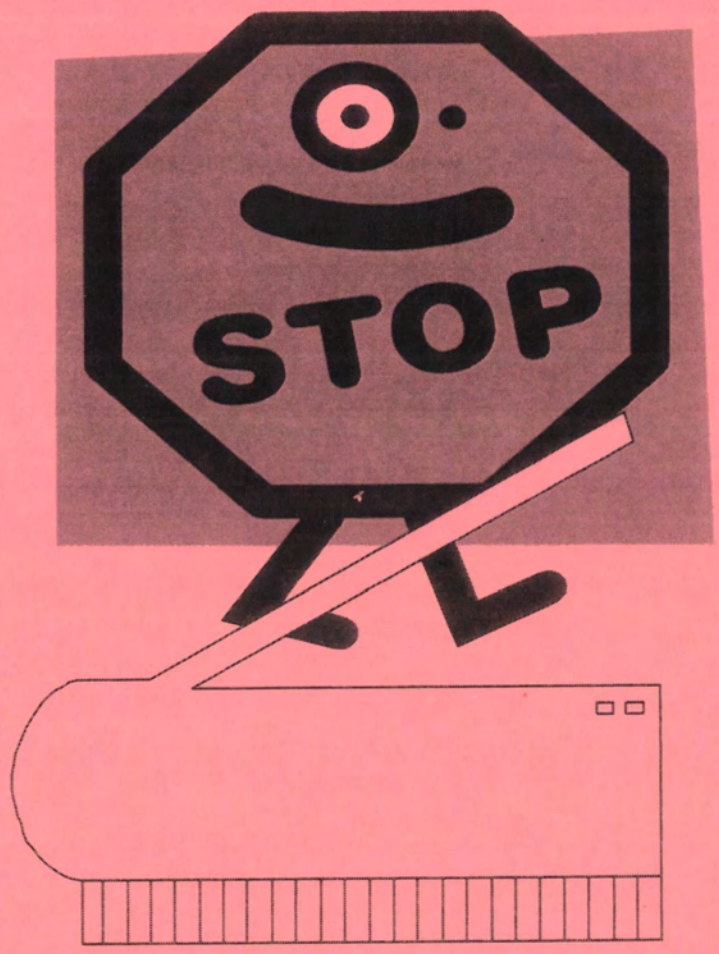

Remainder of case not scanned

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Memorandum to the Attorney General	15	10/21/1985	P5;

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Saturday, July 23, 2011

Imaginative Constitutional Histories, Executive Unilateralism, and the Debt Ceiling

Marty Lederman

In the New York Times yesterday, Professors Eric Posner and Adrian Vermeule argue that if the President and Congress cannot agree upon legislation that will avoid largescale default on the debt, the President can and should "raise the debt ceiling unilaterally," presumably by creating new "obligations" (i.e., borrowing funds) beyond the limit that section 3101 of title 31 currently sets. They do not, however, argue that the President has the constitutional authority to do so by virtue of the Fourteenth Amendment, a possibility that has been the subject of many posts by Jack, Larry Tribe, Neil Buchanan and Mike Dorf, here and on Mike's blog -- and a constitutional argument that the President himself appeared to reject yesterday. Indeed, it's not obvious that Eric and Adrian think that default would result in a Fourteenth Amendment violation at all, or that they care about that question in the slightest -- their argument is, instead, that the President can take such unilateral action in violation of statute *even if the default would not be unconstitutional.*

"The 14th Amendment," they write, "is a red herring": the President could unilaterally incur further debt "**even if its debt provision did not exist**."

What's their theory for such a striking unilateral Executive power? It's this: "[T]he president would derive authority [to borrow in violation of the law] from **his paramount duty to ward off serious threats to the constitutional and economic system**." The "serious threat" in question here would be the risk that the nation would be thrown "back into recession." (It's worth noting, in passing, that it's not at all obvious that P&V's suggestion wouldn't exacerbate the "serious threat"--is it really plausible, for instance, that other nations would lend us trillions of dollars on the President's say-so that he has some unilateral authority to incur such debts even when barred by statute, and his assurances that the U.S. will repay such debts in the teeth of congressional opposition and the furor that would result if the President so acted? For purposes of this post, however, I'll assume the counterfactual that Eric and Adrian's proposed course of action would, in fact, avert the "serious threat to the economic order.")

The Constitution does not, of course, mention or imply any such "paramount duty" of the President to violate statutes in order to "ward off recession or other serious threats." So what is Posner and Vermeule's authority for such a duty? Perhaps there is some historical support for it.

Eric and Adrian assure us that there is -- indeed, they invoke authorities no less august than Lincoln and FDR.

Just because our greatest Presidents did something doesn't make it constitutional, of course. But if Lincoln and FDR both acted upon, or even claimed, a particular constitutional authority, it stands to reason we should consider it seriously, at a minimum.

So, do Posner and Vermeule's historical examples provide the support they need?

As for Lincoln, they naturally point to his message to Congress on July 4, 1861, in which he famously asked the rhetorical question: "Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?" Posner and Vermeule insinuate that Lincoln used this rationale as justification for his earlier suspension of the writ of habeas corpus while Congress was in recess -- the *only* example they cite in our history where a President has allegedly exercised the unilateral power they now urge President

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Obama to use. There are at least two problems with that suggestion, however:

First, Lincoln did not justify his suspension of habeas on the basis of any such "nonexecution" prerogative. Instead, Lincoln argued that the Suspension Clause itself empowered him to suspend the privilege of the writ in cases of rebellion or invasion, at least when Congress was not in session. Therefore, no President has ever actually acted on Lincoln's suggestion that the President has a constitutional emergency authority to violate a statute in order that all others not be violated.

Second, even as a rhetorical flourish -- an argument in the alternative, as it were, for those listeners (and there were many) who were not sympathetic to the argument that the President had a Suspension Clause power -- Lincoln's statement did not remotely suggest that the President has the constitutional power, let alone Posner-Vermeule's "paramount duty"--to "ward off serious threats to the . . . economic system," such as the risk of recession, by disregarding statutes. Lincoln was instead remarking upon the President's alleged responsibility to take unilateral action on an emergency basis *when doing so is necessary to preserve the nation* -- when "*all* the laws" would otherwise go unexecuted because "the Government itself" would "go to pieces." (Lincoln later referred to it as a possible presidential duty to take those measures that are "indispensable to the preservation of the constitution, *through the preservation of the nation.*" As to the 1861 suspension of habeas, the burden on the President would have been to demonstrate that the fate of the nation depended upon denying courts the power to review the legality of a number of executive detentions -- a claim Lincoln understandably did not attempt to defend.)

As horrible a prospect as the August 2d default is, it would be no Civil War: the United States would continue to exist, and the bulk of its laws would be executed. The preconditions for considering the legitimacy of Lincoln's dictum, then, are not present here.

Lincoln, therefore, is hardly good authority.

But what about FDR? Didn't he at least articulate the view that the President could disregard the law in an economic emergency?

Eric and Adrian invoke Roosevelt's first inaugural address -- you know, the "only thing we have to fear is fear itself" speech. They write that in "addressing his plans to confront the economic crisis,"

> FDR "hinted darkly that 'it is to be hoped that the normal balance of executive and legislative authority may be wholly equal, wholly adequate to meet the unprecedented task before us.' 'But it may be,' he continued, 'that an unprecedented demand and need for undelayed action may call for **temporary departure from that normal balance of public procedure**.' In the event, Congress gave him the authorities he sought, and he did not follow through on **this threat**.

Eric and Adrian do not say what FDR's "threat" was--in what way he was invoking a possible "departure from that normal balance of public procedure." Their presumption, however, is that FDR was threatening to act without statutory authority or, as they are encouraging President Obama to do, to act in violation of extant statutes.

Not quite.

FDR explained to the nation that "I am prepared under my constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption."

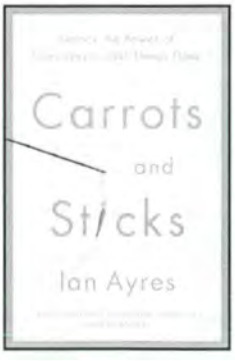
Those options -- the ordinary process of statutory enactment -- defined the "normal balance of public procedure." But how might FDR have deviated from that "normal balance"? "[I]n the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical," he continued, "I shall not evade the clear course of duty that will then confront me."

And that course of duty would be . . . disreagrd of statutory limitations?

Bernard Harcourt, The Illusion of Free Markets: Punishment and the Myth of Natural Order (Harvard University Press, 2010)

Bruce Ackerman, The Decline and Fall of the American Republic (Harvard University Press, 2010)

Balkinization Symposium on The Decline and Fall of the American Republic



Ian Ayres, Carrots and Sticks: Unlock the Power of Incentives to Get Things Done (Bantam Books, 2010)

Culture Wars
Donkey Rising (Emerging Democratic Majority)
Ross Douthat
Daniel Drezner
Kevin Drum (Mother Jones)
Tim Dunlop (The Road to Surfdom)
Electrolite
En Banc
Ernie the Attorney
Eunomia (Daniel Larison)
Fafblog
Feminist Law Professors
Michael Froomkin (Discourse.net)
Glenn Greenwald
GlennReynolds.com
The Hamster
Rick Hasen (Election Law)
History News Network
How Appealing
Ignatz (Sam Heldman)
The Importance of (Ernie Miller)
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International Economic Law and Policy Blog
Jacob Levy
Jesus' General
Jurisdynamics
Kausfiles
Orin Kerr
Kicking Ass
The Kitchen Cabinet
Mark Kleiman
Law of War (Kenneth Anderson)
Law Blog Central
Law Blog Central
Orbiter
LawCulture
Lawmeme
Left2Right
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Larry Lessig
Lawyers, Guns and Money
Liberal Oasis
Brian Leiter's Law School Reports
The Leiter Reports
Many to Many (Clay Shirky)
Marginal Revolution
Maxspeak
Megan McArdle
Memeorandum
Metafilter
Mirror of Justice
Chris Mooney (The Intersection)
MyDD
Newseum
The News Dissector (Mediachannel.org)
No More Mister Nice Blog
Brendan Nyhan
Open University (The New Republic)
Opening Argument
Opinio Juris
Orcinus

Hardly: "I shall *ask the Congress* for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."

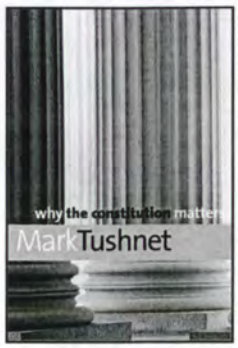
So, the "one remaining instrument to meet the crisis," in FDR's view was . . . a different sort of statute -- namely, a broad legislative delegation.

The FDR example, then, undermines rather than supports Professors Posner and Vermeule's unilateral executive power thesis. Accordingly, it appears that history, like constitutional text and structure, is unavailing. (American history, that is to say -- in contrast with their "retail[ing] a kinder, gentler Carl Schmitt," which if done expressly is not the most optimal way to secure prominent billing in the Times.)

So where does that leave us? As the President said yesterday, it undoubtedly "would be easier if I could do this entirely on my own. (Laughter.) It would mean all these conversations I've had over the last three weeks I could have been spending time with Malia and Sasha instead. But that's not how our democracy works."

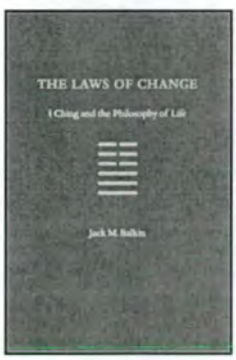
Posted 7:46 AM by Marty Lederman [link]

Home



Mark Tushnet, Why the Constitution Matters (Yale University Press 2010)

Ian Ayres and Barry Nalebuff: Lifecycle Investing: A New, Safe, and Audacious Way to Improve the Performance of Your Retirement Portfolio (Basic Books, 2010)



Jack M. Balkin, The Laws of Change: I Ching and the Philosophy of Life (2d Edition, Sybil Creek Press 2009)

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Summary	Case Summaries	3	N.D.	P5;

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Summary	Youngstown Sheet and Tube Company et al v Sawyer	6	2011	P5;

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Q and A	Debt Ceiling Questions and Answers	11	N.D.	P5;

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809 F.2d 900, 258 U.S.App.D.C. 59, 55 USLW 2405
(Cite as: 809 F.2d 900, 258 U.S.App.D.C. 59)

▷

United States Court of Appeals,
District of Columbia Circuit.
CITY OF **NEW HAVEN**, CONNECTICUT
v.
UNITED STATES of America, Appellant.
NATIONAL LEAGUE OF CITIES, et al.
v.
Samuel R. PIERCE, Jr., Secretary of H.U.D., et al., Appellants.
CITY OF CHICAGO, a municipal corporation, et al.
v.
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al., Appellants.

Nos. 86-5319 to 86-5321.
Argued Nov. 12, 1986.
Decided Jan. 20, 1987.
As Amended Jan. 20, 1987.

Action was brought challenging President's deferring expenditure of funds earmarked for four HUD housing assistance programs and seeking declaratory and injunctive relief was sought. The United States District Court for the District of Columbia, Thomas Penfield Jackson, J., 634 F.Supp. 1449, granted relief sought, holding invalid provision of **Impoundment** Control Act which authorized deferrals, and Government appealed. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that: (1) legislation overturning deferrals did not render request for declaratory relief moot, and (2) unconstitutional legislative veto provision of Act was inseverable from deferral provision and, thus, deferral provision was invalid.

Ordered accordingly.

West Headnotes

[1] Declaratory Judgment 118A ⚿124.1

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(E) Statutes
118Ak124 Statutes Relating to Particular Subjects
118Ak124.1 k. In General. Most Cited Cases
(Formerly 118Ak124)

Legislation overturning deferrals of congressional appropriations for HUD housing projects implemented by President did not render moot request for declaratory relief on claim that deferral provision of **Impoundment** Control Act was facially invalid, though claim for injunctive relief with respect to specific HUD deferrals was rendered moot. **Impoundment** Control Act of 1974, § 1013, 2 U.S.C.A. § 684; Housing and Community Development Act of 1974, § 103, 42 U.S.C.A. § 5303; United States Housing Act of 1937, § 8, as amended, 42 U.S.C.A. § 1437f; Housing Act of 1959, § 202, 12 U.S.C.A. § 1701q; Housing Act of 1964, § 312, 42 U.S.C.A. § 1452b; Urgent Supplemental Appropriations Act, 1986, 100 Stat. 710; Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1986, 99 Stat. 909.

[2] Statutes 361 ⚿64(2)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(2) k. Acts Relating to Particular Subjects in General. Most Cited Cases

United States 393 ⚿85

393 United States
393VI Fiscal Matters
393k85 k. Appropriations. Most Cited Cases

Legislative veto provision of **Impoundment** Control Act, declared unconstitutional, was inseverable from that portion of Act which authorized President to defer congressional appropriations and, thus, deferral provision was invalid; Congress would have preferred no statute at all to statute that conferred unchecked policy deferral authority on President. **Impoundment** Control Act of 1974, § 1013, 2 U.S.C.A. § 684.

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(Cite as: 809 F.2d 900, 258 U.S.App.D.C. 59)

***901 **60** Appeals from the United States District Court for the District of columbia.Douglas Letter, Atty., Dept. of Justice, with whom Richard K. Willard, Asst. Atty. Gen., Dept. of Justice, Joseph E. diGenova, U.S. Atty., James M. Spears, Deputy Asst. Atty. Gen. and Robert E. Kopp, Atty., Dept. of Justice, Washington, D.C., were on the brief for appellants in Nos. 86-5319, 86-5320 and 86-5321.

Neil Proto, with whom Edward R. Venit, Washington, D.C., was on the brief for appellee, City of New Haven in No. 86-5319.

David C. Vladeck, with whom Alan B. Morrison, Eric R. Glitzenstein, Cynthia Pols, Washington, D.C., Joel D. Stein, Craig J. Hanson and Amy L. Beckett, Chicago, Ill., were on the joint brief for appellees, National League of Cities, et al. in Nos. 86-5320 and 86-5321.

Before EDWARDS and BORK, Circuit Judges, and SWYGERT,[FN*] Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.

FN* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

In this case, we are called upon to decide the extent of the President's *statutory* authority to delay (or "defer") the expenditure ****61** of funds appropriated by Congress. Under section 1013 of the **Impoundment** Control Act of 1974 ("ICA" or the "Act"), 2 U.S.C. § 684 (1982), the President must indicate his intention to defer a congressional appropriation by sending a "special message" to Congress. In that message, the President is required to justify the deferral and specify its amount, its intended length and its probable fiscal consequences. Under the Act, if either House of Congress passes an "**impoundment** resolution" disapproving the "proposed" deferral, the President is required to make the funds available for obligation. If neither House acts, the deferral takes effect automatically, although it may not last beyond the end of the fiscal year.[FN1]

FN1. While the statute by its terms only permits the President to "propose [ ]" the deferral of funds, the effect of the statute is to permit the President to implement a deferral of up to one year until such time as Congress acts to disapprove the deferral.

The majority of proposed deferrals are routine "programmatic" deferrals, by which the Executive Branch attempts to meet the inevitable contingencies that arise in administering congressionally-funded agencies and programs. Occasionally, however, the President will seek to implement "policy" deferrals, which are intended to advance the broader fiscal policy objectives of the Administration. The critical distinction between "programmatic" and "policy" deferrals is that the former are ordinarily intended to *advance* congressional budgetary policies by ensuring that congressional programs are administered efficiently, while the latter are ordinarily intended to *negate* the will of Congress by substituting the fiscal policies of the Executive Branch for those established by the enactment of budget legislation.[FN2]

FN2. As a hypothetical example, one might consider a congressional appropriation of $10,000,000 to construct a new highway between Washington, D.C. and New York. If inclement weather threatened completion of the construction project, the President might seek to defer the expenditure of the appropriated funds for "programmatic" reasons. However, if the President believed that the project was inflationary, he might attempt to delay the expenditure of the funds for "policy" reasons.

In the instant case, the President invoked section 1013 as authority for implementing four separate policy deferrals. In particular, the President deferred the expenditure ***902** of funds earmarked for four housing assistance programs to be administered by the Department of Housing and Urban Development ("HUD"). The appellees-various cities, mayors, community groups, members of Congress, associations of mayors and municipalities and disappointed expectant recipients of benefits under the four programs-brought these consolidated actions challenging the authority of the President to implement policy deferrals pursuant to section 1013.[FN3] That challenge was based on the inclusion in the statute of a legisla-

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tive veto provision of the type held unconstitutional by the Supreme Court in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). According to the appellees, the unconstitutional legislative veto provision contained in section 1013 rendered the *entire* section invalid, leaving the President without statutory authority on which to base the deferrals in question. The appellees requested a declaratory judgment that section 1013 was void in its entirety and an injunction obligating the nominal defendants (the United States, the Secretary of HUD and the Director of the Office of Management and Budget) to release the funds appropriated by Congress for the four HUD programs.

FN3. As will be seen shortly, the President need not rely on section 1013 as authority for making routine programmatic deferrals without prior congressional approval. Although the President must *report* programmatic deferrals to Congress under the procedures outlined in section 1013, the President has separate statutory authority under the Anti-Deficiency Act to implement such deferrals. *See* note 18 *infra*. Thus, while the appellees seek to void section 1013 in its entirety, they in effect challenge only the authority of the President to implement *policy* deferrals without prior congressional approval.

After carefully analyzing the intent of Congress in enacting section 1013, the District Court held that the section's unconstitutional legislative veto provision was inseverable from the remainder of the section. *City of New Haven v. United States*, 634 F.Supp. 1449 (D.D.C.1986). Accordingly, it declared section 1013 void in its entirety and ordered the defendants-appellants to make the deferred funds available for obligation. *Id.* at 1460. Shortly thereafter, however, the President signed into law legislation overturning the challenged deferrals.[FN4] Pursuant to this legislation, the funds deferred by the President have been made available for obligation.

FN4. Urgent Supplemental Appropriations Act, 1986, Pub.L. No. 99-349, 100 Stat. 710.

For much the same reasons offered by the District Court in its thorough and able opinion, we hold that the unconstitutional legislative veto provision in section 1013 is inseverable from the remainder of that section. We therefore affirm the District Court's declaratory judgment striking down section 1013 in its entirety. We hold, however, that the request for injunctive relief is now moot.

I. BACKGROUND

In November of 1985, President Reagan signed HUD's fiscal year 1986 appropriations bill.[FN5] Included in that bill were appropriations for four programs administered by HUD: the Community Development Block Grant Program, under which HUD makes grants to state and local governments for community development projects; [FN6] the Section 8 Housing Assistance Payments Program, under which HUD provides subsidies (through public housing agencies) to low-income families to enable them to obtain low-cost housing; [FN7] the Section 312 program, under which HUD lends money (typically to cities or local public agencies) to be used to rehabilitate residential property in low-income neighborhoods; [FN8] and the Section 202 program, under which HUD lends money to rehabilitate low-cost rental units for the ***903 **62** handicapped and the elderly.[FN9] In February of 1986, the President sent **impoundment** notices to Congress pursuant to section 1013 announcing his intention to defer the expenditure of funds for these four programs. One of the reasons provided by the President for the deferrals was to bring 1986 spending levels into line with the Administration's 1987 proposed budget. *See* 51 Fed.Reg. 5953-58 (1986). Previously, the President had failed in his efforts to convince Congress to drastically reduce these expenditures in its 1986 budget. Thus, it is not disputed that the deferrals were made for "policy" reasons.

FN5. Act approved Nov. 25, 1985, Pub.L. No. 99-160, 99 Stat. 909.

FN6. 42 U.S.C. § 5303 (1982 & Supp. I 1983).

FN7. 42 U.S.C. § 1437f (1982 & Supp. II 1984).

FN8. 42 U.S.C. § 1452b (1982 & Supp. III 1985).

FN9. 12 U.S.C. § 1701q (1982 & Supp. II 1984).

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Because the President relied solely on section 1013 as authority for the deferrals, the District Court was faced squarely with the question whether the unconstitutional legislative veto provision in section 1013 is severable from the remainder of that section. This question, the District Court recognized, was purely one of congressional intent. Specifically, the court was required to consider what Congress *would have done* had it known at the time it passed section 1013 that the legislative veto provision was unconstitutional. Would Congress nonetheless have conferred deferral authority on the President, even though it could not exercise control over that authority by means of a legislative veto? Or would Congress have refused to confer deferral authority on the President, preferring "no statute[ ] at all" [FN10] to a statute that permitted the President to defer funds without the check of a legislative veto?

> FN10. *See* Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550, 1560 (D.C.Cir.1985) (quoting *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (Temp.Emer.Ct.App.), *cert. denied*, 469 U.S. 852, 105 S.Ct. 173, 83 L.Ed.2d 108 (1984)), *cert. granted*, --- U.S. ----, 106 S.Ct. 1259, 89 L.Ed.2d 569 (1986).

After thoroughly examining the statutory language, the legislative history and the historical political context surrounding passage of the Act, the District Court had little difficulty concluding that Congress would have preferred no statute at all to a statute that conferred unchecked deferral authority on the President. Beginning with the title of the statute itself, and continuing with an analysis of the statute's legislative history, the court found that the "*raison d'etre*" of the entire legislative effort was to wrest *control* over the budgetary process from what Congress perceived as a usurping Executive:

> Control-how to regain and retain it-was studied and debated at length, on the floor and in committee, over a period of years by a Congress virtually united in its quest for a way to reassert its fiscal prerogative. A clearer case of congressional intent-obsession would be more accurate-is hard to imagine.
>
> 634 F.Supp. at 1454.

In the course of its analysis, the District Court cited numerous statements by individual legislators illustrating Congress' anger at frequent presidential **impoundments** and its preoccupation with *limiting* the President's authority to override duly enacted budget legislation. *Id.* at 1455-58. The court also noted that these same sentiments were expressed in the Conference Committee Report. *Id.* at 1455 (citing S. CONF.REP. NO. 924, 93d Cong., 2d Sess. 49, 76-78, *reprinted in* 1974 U.S. CODE CONG. & ADMIN NEWS 3462, 3591, 3616-18). In contrast, the trial court was unable to find a single legislative expression of support for the proposition "that the President be allowed to defer budget authority *without* the check afforded by *at least* a one-House veto." *Id.* at 1457 n. 9 (emphasis in opinion). This overwhelming evidence of congressional intent, the court concluded, conclusively demonstrated that Congress-had it known that it could not disapprove unwanted **impoundments** by means of a legislative veto-would never have enacted a statute that *conceded* **impoundment** authority to the President. Indeed, it could be said with "conviction" that Congress

> would have preferred no statute to one without the one-House veto provision, for with no statute at all, the President would be remitted to such pre-ICA authority as he might have had for particular***904 **63** deferrals which, in Congress' view (and that of most of the courts having passed upon it) was not much.
>
> *Id.* at 1459.

Having found that the legislative veto provision in section 1013 was inseverable from the remainder of the section, and that the President had therefore relied on an invalid statute in making the policy deferrals in question, the court imposed two remedies. First, it ordered the appellants to make the improperly deferred funds available for obligation. Second, it declared section 1013 void in its entirety. Subsequent to this decision, however, Congress duplicated the District Court's injunctive relief by enacting legislation (signed by the President) disapproving the deferrals and ordering that the funds be made available for obligation.[FN11] It is in this posture that we review the appellants' appeal from the District Court's Memorandum and Order.

> FN11. Urgent Supplemental Appropriations Act, 1986, Pub.L. No. 99-349, 100 Stat. 710.

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II. ANALYSIS

A. *Mootness*

[1] The threshold question presented by this appeal is whether the appellees' challenge to the President's exercise of deferral authority under section 1013 was mooted by the recent legislation overturning the HUD deferrals. This question, we find, is governed by our recent decision in *Better Government Association v. Department of State,* 780 F.2d 86, 90-92 (D.C.Cir.1986). In that case, the appellants challenged a set of agency guidelines and an accompanying agency regulation used in determining when an individual or organization requesting information under the Freedom of Information Act ("FOIA") would be entitled to a waiver of search and copying fees. The appellants, who had incurred administrative denials of FOIA fee waiver requests pursuant to the guidelines and regulation, challenged both the facial validity of the guidelines and regulation and the specific determinations to deny their fee waiver requests. After the appellants filed their complaints, however, the agencies that had originally denied the fee waiver requests reversed their position and granted the requests. We were therefore confronted with the question whether the appellants' challenge to the guidelines and regulation was moot.

We held that the appellants' challenge to the guidelines and regulation *as applied to their specific fee waiver requests* was indeed moot, reasoning that we could not enjoin the appellee agencies to do something they had already done. *Id.* at 91. However, we held that the appellants' challenge to the facial validity of the guidelines and regulation presented a live controversy. *Id.* In so holding, we observed that the appellants' original complaints challenged *both* the specific fee waiver denials *and* the legality of the standards utilized by the agencies in denying their requests. This second claim was not moot, we reasoned, because the appellants were frequent FOIA requesters and because the government had not disavowed reliance on the challenged guidelines and regulation. Indeed, we found that the government "clearly intend[ed] to apply [the] purportedly objectionable standards to FOIA fee waiver requests in the future." *Id.* Thus, the appellants' claim for declaratory relief alleged a continuing injury attributable to the agencies' guidelines and regulation.

In the instant case, the appellees' original complaints similarly challenged both the particular deferrals implemented by the President and the facial validity of the statute under which the President acted. And, as in *Better Government,* the Executive Branch has not disavowed reliance on the challenged statute. Indeed, the appellants frankly concede in their reply brief that they foresee continued reliance by the Executive Branch on the Act as authority for implementing policy deferrals, and that the appellees are likely to be affected by such deferrals in the future.[FN12] Thus, although the appellees' claim for injunctive relief is ***905 **64** clearly moot, [FN13] we must still decide whether the appellees are entitled to declaratory relief on their claim that section 1013 of the Act is facially invalid.[FN14] It is to this issue that we now turn.

FN12. *See* Reply Brief for the Defendants-Appellants at 21.

FN13. Because the appellees' claim for injunctive relief is clearly moot, we do not decide various issues raised by the parties relating to the specific deferrals involved.

FN14. *Cf. Super Tire Eng'g Co. v. McCorkle,* 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974) (proper to consider claim for declaratory relief where need for injunctive relief has been obviated but challenged government practice continues).

B. *Severability of the Unconstitutional Legislative Veto Provision in Section 1013*

[2] The appellants concede, as they must, that the legislative veto provision in section 1013 is unconstitutional under the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). The sole question for decision is whether that unconstitutional provision is severable from the remainder of section 1013, which ostensibly authorizes the President to defer congressional appropriations for a period not exceeding one fiscal year.

Recently, in *Alaska Airlines, Inc. v. Donovan,* 766 F.2d 1550 (D.C.Cir.1985), *cert. granted,* --- U.S. ----, 106 S.Ct. 1259, 89 L.Ed.2d 569 (1986), this circuit had occasion to consider the test for determining when an invalid statutory provision will be found severable from the otherwise valid portions of the statute. In that case, we read the Supreme Court's decision in *Chadha* as establishing a presumption in favor of severability

if what remained after severance of the unconstitutional provision would be "fully operable as law." *Id.* at 1560.[FN15] That presumption could be overcome, however, by strong evidence indicating that Congress would not have enacted the statute had it known it could not include the unconstitutional provision. *Id.*[FN16] In this respect, we recognized that the question of severability was ultimately one of congressional intent. While a court was to presume severability, and attempt to "save as much of the statute as [it could]," the ultimate inquiry was whether "Congress would have preferred [the] statute [ ], after severance of the legislative veto provision[ ], to no statute[ ] at all." *Id.* (quoting *Gulf Oil Corp. v. Dyke,* 734 F.2d 797, 804 (Temp.Emer.Ct.App.), *cert. denied,* 469 U.S. 852, 105 S.Ct. 173, 83 L.Ed.2d 108 (1984)).

FN15. A statutory provision is also presumed severable if Congress has included a "severability clause" in the statute-*i.e.,* a clause expressly stating Congress' intention that other portions of the statute shall remain in effect should a particular statutory provision be found unconstitutional. *See, e.g., Chadha,* 462 U.S. at 932, 103 S.Ct. at 2774. Here, as in *Alaska Airlines,* Congress did *not* include a severability clause in the challenged statute. Although the presence of a severability clause is ordinarily given great weight, it is unclear from the case law what relevance attaches to the *absence* of a severability clause. *See Alaska Airlines,* 766 F.2d at 1559 n. 7. In the instant case, however, we need not rely on the absence of a severability clause to support our holding of inseverability, because we find that more direct evidence of congressional intent conclusively establishes that Congress would not have intended section 1013 to survive excision of its legislative veto provision.

FN16. The court again relied on *Chadha,* which held that the invalid portions of a statute are to be severed unless it is "evident" that Congress "would not have enacted those provisions which are within its power, independently of [those] which [are] not." 462 U.S. at 931-32, 403 S.Ct. at 2773-74 (quoting *Buckley v. Valeo,* 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976) (quoting *Champlin Ref. Co. v. Corporation Comm'n,* 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062 (1932))).

In the instant case, we assume without deciding that section 1013 is "operable" in the absence of its legislative veto provision. However, even assuming the statute is operable, on the record in this case we must affirm the District Court's judgment on congressional intent, *i.e.,* that Congress would not have enacted section 1013 had it known that the legislative veto provision was unconstitutional. Indeed, to the extent that section 1013 is "operable" absent the legislative veto provision, it operates in a manner wholly inconsistent with the intent of Congress in enacting deferral legislation.***906 **65** We therefore hold that the unconstitutional legislative veto provision in section 1013 is inseverable from that portion of the statute conferring deferral authority on the President.

1. Congressional Intent

We assume for purposes of our severability analysis that section 1013 is in a purely technical sense "operable" even without a legislative veto provision. As noted earlier, however, the ultimate inquiry in a severability case is not whether the statute may somehow continue to function after excision of the invalid portion, but rather whether it continues to function *in a manner consistent with congressional intent.* Phrased differently, the question is whether Congress would have intended the statute to operate even in the absence of the invalid provision, or whether it would have preferred no statute at all. In the instant case, the conclusion is inescapable that Congress would have preferred no statute at all to a statute that conferred unchecked deferral authority on the President.

As the District Court observed and catalogued, the ICA was passed at a time when Congress was united in its furor over presidential **impoundments** and intent on reasserting its control over the budgetary process. 634 F.Supp. at 1454-58. Although the Senate and House initially differed over the precise means for reasserting congressional prerogatives,[FN17] the legislation that eventually emerged from Congress contained several strong measures expressly designed to limit the President's ability to **impound** funds appropriated by Congress. For permanent **impoundments** (or "rescissions"), Congress adopted the Senate approach, which required prior legislative approval of proposed **impoundments**. *See* 2 U.S.C. § 683 (1982).

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For temporary **impoundments** (or "deferrals"), Congress adopted the House approach, which allowed **impoundments** to become effective without prior approval *if* neither House of Congress passed a resolution disapproving the **impoundment**. *See* 2 U.S.C. § 684 (1982). Importantly, Congress also amended the Anti-Deficiency Act to preclude the President from relying on that Act as authority for implementing policy **impoundments**.[FN18]

FN17. The bill originally passed by the Senate would have required advance approval by Congress through concurrent resolution if the **impoundment** was to last beyond 60 days. S. 373, 93d Cong., 1st Sess., 119 CONG.REC. 15,255-56 (1973). The bill passed by the House would have allowed **impoundments** to go into effect automatically if neither House of Congress vetoed the **impoundment**. H.R. 7130, 93d Cong., 1st Sess., 119 CONG.REC. 39,721-22 (1973).

FN18. Before it was amended, the Anti-Deficiency Act authorized the President to "apportion[ ]" funds where justified by "other developments subsequent to the date on which such appropriation was made available." 31 U.S.C. § 665(c)(2) (1970). This open-ended language was amended to limit apportionments to three specified situations: "to provide for contingencies," "to achieve savings made possible by or through changes in requirements or greater efficiency of operations" or "as specifically provided by law." 31 U.S.C. § 1512(c)(1) (1982). The purpose of the amendment was to preclude the President from invoking the Act as authority for implementing "policy" **impoundments**, while preserving the President's authority to implement routine "programmatic" **impoundments**. *See, e.g.,* 120 CONG.REC. 7658 (1974) (statement of Sen. Muskie). President Nixon had attempted to use the Act as an instrument for shaping fiscal policy. *See generally* Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the* ***Impoundment*** *Control Act of 1974,* 63 TEX.L.REV. 693, 699-700 (1984).

It is abundantly clear from both the statute and its legislative history that the overriding purpose of the deferral provision was to permit either House of Congress to veto any deferral proposed by the President-particularly policy deferrals. The title of the statute itself-"*Disapproval of proposed deferrals of budget authority* "-makes it plain that Congress was preoccupied with assuring for itself a ready means of disapproving proposed deferrals. The House Report accompanying H.R. 7130-from which the deferral provision was drawn-expressly states that the "basic purpose" of the bill was to provide each House an opportunity to veto an **impoundment**. H.R.REP. NO. 658, 93d Cong., 1st ***907 **66** Sess. 43, *reprinted in* 1974 U.S. CODE CONG. & ADMIN.NEWS 3462, 3488. The Conference Committee Report also emphasizes that the bill was designed to provide Congress with an effective system of **impoundment** control. S.CONF.REP. NO. 924, 93d Cong., 2d Sess. 49, 76-78, *reprinted in* 1974 U.S.CODE CONG. & ADMIN.NEWS 3462, 3591, 3616-18.

When the numerous statements of individual legislators urging the passage of legislation to control presidential **impoundments** are also considered, the evidence is incontrovertible that the "basic purpose" of section 1013 was to provide each House of Congress with a veto power over deferrals. Yet, the appellants would have us hold that Congress, had it foreseen *Chadha,* would nevertheless have gone ahead and enacted section 1013 *without* a legislative veto provision. As difficult (and precarious) as it may be at times to reconstruct what a particular Congress might have done had it been apprised of a particular set of facts, we refuse to entertain this remarkable proposition. As the District Court aptly noted, the "*raison d'etre* " of the entire legislative effort was to assert *control* over presidential **impoundments**. 634 F.Supp. at 1454. It is simply untenable to suggest that a Congress precluded from achieving this goal would have turned around and ceded to the President the very power it was determined to curtail.

In this respect, this case is the complete converse of *Alaska Airlines, Inc. v. Donovan,* 766 F.2d 1550 (D.C.Cir.1985), *cert. granted,* --- U.S. ----, 106 S.Ct. 1259, 89 L.Ed.2d 569 (1986), where we held that an unconstitutional legislative veto provision contained in section 43(f) of the Airline Deregulation Act of 1978, 49 U.S.C. § 1552(f) (1982), was severable from that portion of the statute authorizing the Secretary of Labor to issue regulations necessary to administer an

employee protection program. Here, rather than adding the legislative veto provision as somewhat of an afterthought, as in *Alaska Airlines,* Congress focused almost exclusively on the means for asserting control over presidential **impoundments**.[FN19] The conclusion is thus inescapable that Congress would not have enacted section 1013 had it known that it could not exercise control over deferrals by means of a legislative veto.

> FN19. It is true, as appellants assert, that the congressional debates also touched on the need for more effective notice to Congress of the President's intention to **impound** funds. *See, e.g.,* 120 CONG.REC. 20,481-82 (colloquy between Sen. Humphrey and Sen. Ervin). However, the District Court was correct in observing that the *central* issue debated at great length by Congress was "whether the President should be able to **impound** at all, or should be permitted to **impound**, but with various congressional circumscriptions of his power to do so." 634 F.Supp. at 1457-58. Our examination of the Act's legislative history also confirms the District Court's conclusion that Congress was not "very much concerned with, let alone determined to achieve, further detail about future Presidential **impoundments** *absent a mechanism for exercising control over them.*" *Id.* (emphasis added).

The appellants argue vigorously that the opposite conclusion is compelled by the distinction drawn in the Act between rescissions and deferrals. As noted earlier, the original bill passed by the House would have permitted both rescissions and deferrals to go into effect automatically, subject of course to a legislative veto. *See* note 17 *supra.* The House Report explained that the Committee favored a legislative veto mechanism because

[i]n the normal process of apportionment, 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 H.R. 7130 will permit Congress to focus on critical and important matters, and save it from submersion in a sea of trivial ones.

H.R.REP. NO. 658, 93d Cong., 1st Sess. 41, *reprinted in* 1974 U.S.CODE CONG. & ADMIN.NEWS 3462, 3486-87. In the final analysis, however, the House approach prevailed ***908 **67** only for deferrals; for rescissions, Congress adopted the Senate approach, which required prior congressional approval before a rescission could go into effect. According to the appellants, this distinction is critical, for it demonstrates that Congress' intent in enacting section 1013 was to render deferrals "presumptively valid." Brief of Defendants-Appellants at 31-33. Because Congress did not want to trouble itself by approving deferrals in advance, they argue, Congress would have authorized the President to implement deferrals even had it known that it could not maintain oversight over those deferrals by means of a legislative veto.

This argument completely misreads the above-quoted passage and is completely at odds with Congress' expressed intention to *control* rather than *authorize* presidential deferrals. First, the quoted passage plainly speaks to "trivial," everyday *programmatic* deferrals. It is these "trivial" **impoundments** relating to the "normal and orderly operation of the government" that Congress expected to present little controversy. Congress most certainly did not mean to suggest that **impoundments** designed to negate congressional budgetary *policies* would be "presumptively valid." It is precisely this sort of **impoundment** that Congress was determined to forestall.

Second, the quoted passage proves only that Congress preferred a system in which it need not enact legislation approving deferrals *because it could easily disapprove them* by the relatively simple expedient of the one-House veto. Nowhere in the legislative history is there the slightest suggestion that the President be given statutory authority to defer funds without the possible check of at least a one-House veto. Indeed, the House Report completely refutes the notion that Congress would have granted the President statutory authority to implement deferrals, thereby forcing itself to reenact an appropriations bill each time it disapproved of a deferral:

[The one-House veto] is suggested on the ground that the **impoundment** situation established by the bill

involves a presumption *against* the President's refusing to carry out the terms of an already considered and enacted statute. To make Congress go through a procedure involving agreement between the two Houses on an already settled matter would be to require both, in effect, to reconfirm what they have already decided.

H.R.REP. NO. 658, 93d Cong., 1st Sess. 42, *reprinted in* 1974 U.S. CODE CONG. & ADMIN.NEWS 3462, 3487 (emphasis added). Yet, a finding of severability would create a presumption in favor of deferrals and require Congress to legislate a second time in order to effectuate its budgetary policies. We cannot conceive of a result more contrary to congressional intent.

The appellants further argue that Congress' more permissive treatment of deferrals suggests that the congressional furor over "**impoundments**" was principally a dissatisfaction with rescissions. Brief of Defendants-Appellants at 37-39. Again, this contention has absolutely no basis in the legislative history. Although Congress certainly distinguished between rescissions and deferrals, it spoke in general terms of the need to control "**impoundments**," which it defined as "withholding or *delaying* the expenditure or obligation of budget authority ... and the termination of authorized projects or activities for which appropriations have been made." H.R.REP. NO. 658, 93d Cong., 1st Sess. 52, *reprinted in* U.S.CODE CONG. & ADMIN.NEWS 3462, 3497 (emphasis added).[FN20] The appellants can point to nothing in the legislative history to suggest that members of Congress were disturbed with rescissions but tolerant of deferrals. Indeed, to the extent that Congress expressed any tolerance of deferrals at all, it was referring to routine programmatic deferrals, not policy deferrals. *Id.* at 42, 1974 U.S.CODE CONG. & ADMIN.NEWS at 3488 ("[T]he Committee recognizes that a brief delay in expending or obligating funds may sometimes be legitimately necessary***909 **68** for purely administrative reasons.").[FN21]

FN20. *Cf.* 120 CONG.REC. 19,674 (1974) (statement of Rep. Bolling) (analysis has shown that deferrals constitute the "lion's share" of **impoundment** actions).

FN21. *Cf. id.* (suggesting that Congress will employ legislative veto only when it perceives that the President is attempting to alter Congress' budgetary policies, not when the proposed deferrals "are for routine financial purposes and involve neither questions of policy nor attempts to negate the will of Congress").

We cannot emphasize enough in this context the critical distinction between programmatic and policy deferrals. As the appellants concede, *see* Brief of Defendants-Appellants at 33, our holding in this case will not impair the President's ability to implement routine programmatic deferrals. When Congress amended the Anti-Deficiency Act in the ICA, it did not disturb the President's authority to "**impound**" funds for purely administrative purposes. *See* note 18 *supra.* Thus, the President may still invoke the Anti-Deficiency Act as authority for implementing programmatic deferrals. By amending the Anti-Deficiency Act, however, Congress intended to foreclose the President from relying on that Act as separate statutory authority for *policy* deferrals. Congress intended to permit policy deferrals only under section 1013, and only if it could ensure itself a ready means of overturning policy deferrals with which it disagreed. Had Congress known it could not employ such a mechanism, it most assuredly would not have nullified its own amendment to the Anti-Deficiency Act by creating new statutory authority for policy deferrals.

Finally, the appellants contend that if we invalidate section 1013 in its entirety, we must also strike down the ICA's other "deferral-related provision"-*i.e.,* Congress' amendment to the Anti-Deficiency Act. Brief of Defendants-Appellants at 57. We find this argument to be wholly specious. As noted earlier, a court's duty in a severability case is to preserve as much of the statute as it can consistent with congressional intent. We are unable to preserve section 1013 absent its legislative veto provision because to do so would produce a result wholly contrary to that intended by Congress. The amendment to the Anti-Deficiency Act, in contrast, is fully consistent with the expressed intent of Congress to control presidential **impoundments**. Thus, there is absolutely no basis for overturning Congress' amendment to the Anti-Deficiency Act.

III. CONCLUSION

Section 1013 was designed specifically to provide Congress with a means for controlling presidential

deferrals. As a consequence of the Supreme Court's decision in *Chadha,* however, that section has been transformed into a license to **impound** funds for policy reasons. This result is completely contrary to the will of Congress, which in amending the Anti-Deficiency Act sought to *remove* any colorable statutory basis for unchecked policy deferrals. We cannot imagine that Congress would have acted in complete contravention of its intended purposes by enacting section 1013 without a legislative veto provision. Accordingly, we hold that the unconstitutional legislative veto provision contained in section 1013 is inseverable from the remainder of the section, and we affirm the judgment of the District Court invalidating section 1013 in its entirety.

So ordered.

C.A.D.C.,1987.
City of New Haven, Conn. v. U.S.
809 F.2d 900, 258 U.S.App.D.C. 59, 55 USLW 2405

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Supreme Court of the United States
HOME BUILDING & LOAN ASS'N
v.
BLAISDELL et ux.

No. 370.
Argued Nov. 8, 9, 1933.
Decided Jan. 8, 1934.

Action by John H. Blaisdell and wife against the Home Building & Loan Association. Judgment for plaintiff was affirmed by the state Supreme Court (249 N.W. 893) on the authority of a former opinion (249 N.W. 334), and defendant appeals.

Affirmed.

Mr. Justice SUTHERLAND, Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice BUTLER dissenting.

West Headnotes

[1] Constitutional Law 92 2661

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2661 k. Application in general. Most Cited Cases
(Formerly 92k113)

Constitutional Law 92 2662

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2662 k. Literal application. Most Cited Cases
(Formerly 92k113)

Constitutional prohibition against impairment of obligation of contracts is not absolute, and is not to be read with literal exactness like mathematical formula. U.S.C.A.Const. art. 1, § 10.

[2] Constitutional Law 92 2668

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2668 k. What is a "contractual obligation"; existing law. Most Cited Cases
(Formerly 92k113)

Obligation of contract is law which binds parties to perform their agreement. U.S.C.A.Const. art. 1, § 10.

[3] Constitutional Law 92 2671

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2671 k. Existence and extent of impairment. Most Cited Cases
(Formerly 92k113)

Constitutional Law 92 2739

92 Constitutional Law
92XXII Obligation of Contract
92XXII(C) Contracts with Non-Governmental Entities
92XXII(C)1 In General
92k2739 k. Invalidation of contract. Most Cited Cases
(Formerly 92k113)

Obligations of a contract are impaired by law which renders them invalid, or releases or extinguishes them. U.S.C.A.Const. Amend. 1, § 10.

[4] Corporations and Business Organizations 101 2256

101 Corporations and Business Organizations
101IX Corporate Powers and Liabilities
101IX(A) Extent and Exercise of Powers in General

101k2252 Scope of Corporate Power in General
101k2256 k. Express or implied grant of power in general. Most Cited Cases
(Formerly 101k370(3))

Though charters of private corporations constitute contracts, a grant of exclusive privilege is not to be implied as against state.

[5] Constitutional Law 92 ⚿2674

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2674 k. Eminent domain. Most Cited Cases
(Formerly 92k118)

All contracts are subject to right of eminent domain. U.S.C.A.Const. art. 1, § 10.

[6] Constitutional Law 92 ⚿2672

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2672 k. Police power; purpose of regulation. Most Cited Cases
(Formerly 92k117)

States retain adequate power to protect public health against maintenance of nuisances and to protect public safety despite insistence upon existing contracts. U.S.C.A.Const. art. 1, § 10.

[7] Constitutional Law 92 ⚿2672

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2672 k. Police power; purpose of regulation. Most Cited Cases
(Formerly 92k117)

Economic interests of state may justify exercise of its continuing and dominant protective power, notwithstanding interference with contracts. U.S.C.A.Const. art. 1, § 10.

[8] Constitutional Law 92 ⚿2672

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2672 k. Police power; purpose of regulation. Most Cited Cases
(Formerly 92k117)

Where protective power of state is exercised in manner otherwise appropriate in regulation of business, it is no objection that performance of existing contracts may be frustrated by prohibition of injurious practices. U.S.C.A.Const. art. 1, § 10.

[9] States 360 ⚿4.4(1)

360 States
360I Political Status and Relations
360I(A) In General
360k4.4 Powers Reserved to States
360k4.4(1) k. In general. Most Cited Cases
(Formerly 92k27)

Whatever is reserved of state power must be consistent with fair intent of constitutional limitation of that power.

[10] Constitutional Law 92 ⚿2672

92 Constitutional Law
92XXII Obligation of Contract
92XXII(A) In General
92k2672 k. Police power; purpose of regulation. Most Cited Cases
(Formerly 92k113)

Power of state to give temporary relief from enforcement of contracts exists when urgent public need demanding such relief is produced by economic causes as well as in the presence of disasters caused by fire, flood or earthquake.

[11] Constitutional Law 92 ⚿2481

92 Constitutional Law
92XX Separation of Powers

92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2479 Determination of Facts
92k2481 k. Emergency. Most Cited Cases
(Formerly 92k70.1(1), 92k70(1))

Whether exigency still exists upon which continued operation of law depends to relieve an economic emergency is always open to judicial inquiry.

[12] Evidence 157 ⚿33

157 Evidence
157I Judicial Notice
157k27 Laws of the State
157k33 k. Legislative proceedings and journals. Most Cited Cases

Evidence 157 ⚿43(4)

157 Evidence
157I Judicial Notice
157k43 Judicial Proceedings and Records
157k43(4) k. Proceedings in other courts. Most Cited Cases

United States Supreme Court takes judicial notice that finding of state court respecting emergency has support in facts.

[13] Constitutional Law 92 ⚿2760

92 Constitutional Law
92XXII Obligation of Contract
92XXII(C) Contracts with Non-Governmental Entities
92XXII(C)2 Particular Issues and Applications
92k2760 k. Liens and mortgages. Most Cited Cases
(Formerly 92k113)

Relief afforded mortgage debtors from foreclosure of valid mortgages justified by economic emergency could only be of character appropriate to that emergency, and could be granted only upon reasonable conditions.

[14] Constitutional Law 92 ⚿2760

92 Constitutional Law
92XXII Obligation of Contract
92XXII(C) Contracts with Non-Governmental Entities
92XXII(C)2 Particular Issues and Applications
92k2760 k. Liens and mortgages. Most Cited Cases
(Formerly 92k183)

Constitutional Law 92 ⚿2775

92 Constitutional Law
92XXII Obligation of Contract
92XXII(C) Contracts with Non-Governmental Entities
92XXII(C)2 Particular Issues and Applications
92k2771 Enforcement of Judgment or Debt
92k2775 k. Execution sales; redemption. Most Cited Cases
(Formerly 92k183)

Constitutional Law 92 ⚿3496

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)3 Property in General
92k3496 k. Real property in general. Most Cited Cases
(Formerly 92k225.5, 92k211)

Constitutional Law 92 ⚿4417

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4415 Liens, Mortgages, and Security Interests
92k4417 k. Enforcement; proceedings. Most Cited Cases
(Formerly 92k278(1.3), 92k278(1.2), 92k278(7), 266k592)

Mortgages 266 ⚿599(1)

266 Mortgages
266XI Redemption
266k599 Time for Redemption
266k599(1) k. In general. Most Cited Cases
(Formerly 92k225.5, 92k211)

State law authorizing court to extend time for redemption from mortgage foreclosure sales with certain limitations held not invalid as impairing obligation of contract. Laws Minn.1933, c. 339; U.S.C.A.Const. art. 1, § 10, and Amend. 14.

[15] Constitutional Law 92 ⚷2500

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2500 k. In general. Most Cited Cases
(Formerly 92k70.3(9.1), 92k70.3(9), 92k70(3))

Whether legislation designed to relieve an economic emergency is wise or unwise as a matter of policy is question with which courts are not concerned.

Evidence 157 ⚷33

157 Evidence
157I Judicial Notice
157k27 Laws of the State
157k33 k. Legislative proceedings and journals. Most Cited Cases

United States Supreme Court takes judicial notice that finding of Legislature respecting emergency has support in facts.

Mortgages 266 ⚷592

266 Mortgages
266XI Redemption
266k592 k. Statutory provisions. Most Cited Cases

State law authorizing court to extend time for redemption from mortgage foreclosure sales with certain limitations held valid. Laws Minn.1933, c. 339; U.S.C.A.Const. art. 1, § 10, and Amend. 14.

Constitutional Law 92 ⚷3496

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)3 Property in General
92k3496 k. Real property in general. Most Cited Cases
(Formerly 92k225.5, 92k211)

Mortgages 266 ⚷599(1)

266 Mortgages
266XI Redemption
266k599 Time for Redemption
266k599(1) k. In general. Most Cited Cases
(Formerly 92k225.5, 92k211)

State law authorizing court to extend time for redemption from mortgage foreclosure sales with certain limitations held not invalid as violating equal protection clauses. Laws Minn.1933, c. 339; U.S.C.A.Const. art. 1, § 10, and Amend. 14.

Constitutional Law 92 ⚷4417

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4415 Liens, Mortgages, and Security Interests
92k4417 k. Enforcement; proceedings. Most Cited Cases
(Formerly 92k278(1.3), 92k278(1.2))

State law authorizing court to extend time for redemption from mortgage foreclosure sales with certain limitations held not invalid as violating due process clause. Laws Minn.1933, c. 339; U.S.C.A. Const. art. 1, § 10, and Amend. 14.

****231 *398** Appeal from the Supreme Court of the State of Minnesota.***402** Messrs. Karl H. Covell and

Alfred W. Bowen, both of Minneapolis, Minn., for appellant.

***409** Messrs. Harry H. Peterson and Wm. S. Ervin, both of St. Paul, Minn., for appellees.

***415** Mr. Chief Justice HUGHES delivered the opinion of the Court.

Appellant contests the validity of chapter 339 of the Laws of Minnesota of 1933, p. 514, approved April 18, 1933, called the Minnesota Mortgage Moratorium Law, ***416** as being repugnant to the contract clause (article 1, s 10) and the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. The statute was sustained by the Supreme Court of Minnesota (249 N.W. 334, 86 A.L.R. 1507; 249 N.W. 893), and the case comes here on appeal.

****232** The act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. The act does not apply to mortgages subsequently made nor to those made previously which shall be extended for a period ending more than a year after the passage of the act (part 1, s 8). There are separate provisions in part 2 relating to homesteads, but these are to apply 'only to cases not entitled to relief under some valid provision of Part One.' The act is to remain in effect 'only during the continuance of the emergency and in no event beyond May 1, 1935.' No extension of the period for redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date. Part 2, s 8.

The act declares that the various provisions for relief are severable; that each is to stand on its own footing with respect to validity. Part 1, s 9. We are here concerned with the provisions of part 1, s 4, authorizing the district court of the county to extend the period of redemption from foreclosure sales 'for such additional time as the court may deem just and equitable,' subject to the above-described limitation. The extension is to be made upon application to the court, on notice, for an order determining the reasonable value of the income on the property involved in the sale, or, if it has no income, then the reasonable rental value of the property, and directing the mortgagor 'to pay all or a reasonable part of such ***417** income or rental value, in or toward the payment of taxes, insurance, interest, mortgage * * * indebtedness at such times and in such manner' as shall be determined by the court.[FN1] The section also provides that the time for redemption***418** from foreclosure sales theretofore made, which otherwise would expire less than thirty days after the approval of the act, shall be extended to a date thirty days after its approval, and application may be made to the court within that time for a further extension as provided in the section. By another provision of the act, no action, prior to May 1, 1935, may be maintained for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of the act has expired. Prior to the expiration of the extended period of redemption, the court may revise or alter the terms of the extension as changed circumstances may require. Part 1, s 5.

FN1 That section is as follows:

'Sec. 4. Period of Redemption May be Extended.-Where any mortgage upon real property has been foreclosed and the period of redemption has not yet expired, or where a sale is hereafter had, in the case of real estate mortgage foreclosure proceedings, now pending, or which may hereafter be instituted prior to the expiration of two years from and after the passage of this Act, or upon the sale of any real property under any judgment or execution where the period of redemption has not yet expired, or where such sale is made hereafter within two years from and after the passage of this Act, the period of redemption may be extended for such additional time as the court may deem just and equitable but in no event beyond May 1st, 1935; provided that the mortgagor, or the owner in possession of said property, in the case of mortgage foreclosure proceedings, or the judgment debtor, in case of sale under judgment, or execution, shall prior to the expiration of the period of redemption, apply to the district court having jurisdiction of the matter, on not less than 10 days' written notice to the mortgagee or judgment creditor, or the attorney of either, as the case may be, for an order determining the reasonable value of the income on said property, or, if the prop-

erty has no income, then the reasonable rental value of the property involved in such sale, and directing and requiring such mortgagor or judgment debtor, to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness at such times and in such manner as shall be fixed and determined and ordered by the court; and the court shall thereupon hear said application and after such hearing shall make and file its order directing the payment by such mortgagor, or judgment debtor, of such an amount at such times and in such manner as to the court shall, under all the circumstances, appear just and equitable. Provided that upon the service of the notice or demand aforesaid that the running of the period of redemption shall be tolled until the court shall make its order upon such application. Provided, further, however, that if such mortgagor or judgment debtor, or personal representative, shall default in the payments, or any of them, in such order required, on his part to be done, or commits waste, his right to redeem from said sale shall terminate 30 days after such default and holders of subsequent liens may redeem in the order and manner now provided by law beginning 30 days after the filing of notice of such default with the clerk of such District Court, and his right to possession shall cease and the party acquiring title to any such real estate shall then be entitled to the immediate possession of said premises. If default is claimed by allowance of waste, such 30 day period shall not begin to run until the filing of an order of the court finding such waste. Provided, further, that the time of redemption from any real estate mortgage foreclosure or judgment or execution sale heretofore made, which otherwise would expire less than 30 days after the passage and approval of this Act, shall be and the same hereby is extended to a date 30 days after the passage and approval of this Act, and in such case, the mortgagor, or judgment debtor, or the assigns or personal representative of either, as the case may be, or the owner in the possession of the property, may, prior to said date, apply to said court for and the court may thereupon grant the relief as hereinbefore and in this section provided. Provided, further, that prior to May 1, 1935, no action shall be maintained in this state for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of this Act, has expired.'

****233** Invoking the relevant provision of the statute, appellees applied to the district court of Hennepin county for an order extending the period of redemption from a foreclosure sale. Their petition stated that they owned a lot ***419** in Minneapolis which they had mortgaged to appellant; that the mortgage contained a valid power of sale by advertisement, and that by reason of their default the mortgage had been foreclosed and sold to appellant on May 2, 1932, for $3,700.98; that appellant was the holder of the sheriff's certificate of sale; that, because of the economic depression, appellees had been unable to obtain a new loan or to redeem, and that, unless the period of redemption were extended, the property would be irretrievably lost; and that the reasonable value of the property greatly exceeded the amount due on the mortgage, including all liens, costs, and expenses.

On the hearing, appellant objected to the introduction of evidence upon the ground that the statute was invalid under the federal and state Constitutions, and moved that the petition be dismissed. The motion was granted, and a motion for a new trial was denied. On appeal, the Supreme Court of the state reversed the decision of the district court. 249 N.W. 334, 337, 86 A.L.R. 1507. Evidence was then taken in the trial court, and appellant renewed its constitutional objections without avail. The court made findings of fact setting forth the mortgage made by the appellees on August 1, 1928, the power of sale contained in the mortgage, the default and foreclosure by advertisement, and the sale to appellant on May 2, 1932, for $3,700.98. The court found that the time to redeem would expire on May 2, 1933, under the laws of the state as they were in effect when the mortgage was made and when it was foreclosed; that the reasonable value of the income on the property, and the reasonable rental value, was $40 a month; that the bid made by appellant on the foreclosure sale, and the purchase price, were the full amount of the mortgage indebtedness, and that there was no deficiency after the sale; that the reasonable present market value of the premises was $6,000; and that the ***420** total amount of

the purchase price, with taxes and insurance premiums subsequently paid by appellant, but exclusive of interest from the date of sale, was $4,056.39. The court also found that the property was situated in the closely built-up portions of Minneapolis; that it had been improved by a two-car garage, together with a building two stories in height which was divided into fourteen rooms; that the appellees, husband and wife, occupied the premises as their homestead, occupying three rooms and offering the remaining rooms for rental to others.

The court entered its judgment extending the period of redemption of May 1, 1935, subject to the condition that the appellees should pay to the appellant $40 a month through the extended period from May 2, 1933; that is, that in each of the months of August, September, and October, 1933, the payments should be $80, in two installments, and thereafter $40 a month, all these amounts to go to the payment of taxes, insurance, interest, and mortgage indebtedness. FN2 It is this judgment, sustained by the Supreme Court of the state on the authority of its former opinion, which is here under review. 249 N.W. 893.

> FN2 A joint statement of the counsel for both parties, filed with the court on the argument in this court, shows that, after providing for taxes, insurance, and interest, and crediting the payments to be made by the mortgagor under the judgment, the amount necessary to redeem May 1, 1935, would be $4,258.82.

The state court upheld the statute as an emergency measure. Although conceding that the obligations of the mortgage contract were impaired, the court decided that what it thus described as an impairment was, notwithstanding the contract cause of the Federal Constitution, within the police power of the state as that power was called into exercise by the public economic emergency which the Legislature had found to exist. Attention is thus directed to the preamble and first section of the ***421** statute which described the existing emergency in terms that were deemed to justify the temporary relief which the statute affords.FN3 The state court, declaring that it ****234** ***422** could not say that this legislative finding was without basis, supplemented that finding by its own statement of conditions of which it took judicial notice. The court said:

FN3 The preamble and the first section of the act are as follows:

'Whereas, the severe financial and economic depression existing for several years past has resulted in extremely low prices for the products of the farms and the factories, a great amount of unemployment, an almost complete lack of credit for farmers, business men and property owners and a general and extreme stagnation of business, agriculture and industry, and

'Whereas, many owners of real property, by reason of said conditions, are unable, and it is believed, will for some time be unable to meet all payments as they come due of taxes, interest and principal of mortgages on their properties and are, therefore, threatened with loss of such properties through mortgage foreclosure and judicial sales thereof, and

'Whereas, many such properties have been and are being bid in at mortgage foreclosure and execution sales for prices much below what is believed to be their real values and often for much less than the mortgage or judgment indebtedness, thus entailing deficiency judgments against the mortgage and judgment debtors, and

'Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth has created an emergency of such nature that justifies and validates legislation for the extension of the time of redemption from mortgage foreclosure and execution sales and other relief of a like character; and

'Whereas, The State of Minnesota passesses the right under its police power to declare a state of emergency to exist, and

'Whereas, the inherent and fundamental purposes of our government is to safeguard the public and promote the general walfare of the people; and

'Whereas, Under existing conditions the fo-

reclosure of many real estate mortgages by advertisement would prevent fair, open and competitive bidding at the time of sale in the manner now contemplated by law, and

'Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth have created an emergency of such a nature that justifies and validates changes in legislation providing for the temporary manner, method, terms and conditions upon which mortgage foreclosure sales may be had or postponed and jurisdiction to administer equitable relief in connection therewith may be conferred upon the District Court, and

'Whereas, Mason's Minnesota Statutes of 1927, Section 9608, which provides for the postponement of mortgage foreclosure sales, has remained for more than thirty years, a provision of the statutes in contemplation of which provisions for foreclosure by advertisement have been agreed upon.

'Section 1. Emergency Declared to Exist.-In view of the situation hereinbefore set forth, the Legislature of the State of Minnesota hereby declares that a public economic emergency does exist in the State of Minnesota.'

'In addition to the weight to be given the determination of the Legislature that an economic emergency exists which demands relief, the court must take notice of other considerations. The members of the Legislature come from every community of the state and from all the walks of life. They are familiar with conditions generally in every calling, occupation, profession, and business in the state. Not only they, but the courts must be guided by what is common knowledge. It is common knowledge that in the last few years land values have shrunk enormously. Loans made a few years ago upon the basis of the then going values cannot possibly be replaced on the basis of present values. We all know that when this law was enacted the large financial companies, which had made it their business to invest in mortgages, had ceased to do so. No bank would directly or indirectly loan on real estate mortgages. Life insurance companies, large investors in such mortgages, had even declared a moratorium as to the loan provisions of their policy contracts. The President had closed banks temporarily. The Congress,***423** in addition to many extraordinary measures looking to the relief of the economic emergency, had passed an act to supply funds whereby mortgagors may be able within a reasonable time to refinance their mortgages or redeem from sales where the redemption has not expired. With this knowledge the court cannot well hold that the Legislature had no basis in fact for the conclusion that an economic emergency existed which called for the exercise of the police power to grant relief.'

Justice Olsen of the state court, in a concurring opinion, added the following:

'The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people, and threatens to result in the loss of their homes by many other people in this state; it has resulted in such widespread want and suffering among our people that private, state, and municipal agencies are unable to adequately relieve the want and suffering, and Congress has found it necessary to step in and attempt to remedy the situation by federal aid. Millions of the people's money were and are yet tied up in closed banks and in business enterprises.'[FN4]

FN4 The Attorney General of the state in his argument before this court made the following statement of general conditions in Minnesota: 'Minnesota is predominantly an agricultural state. A little more than one half of its people live on farms. At the time this law was passed the prices of farm products has fallen to a point where most of the persons engaged in farming could not realize enough from their products to support their families, and pay taxes and interest on the mortgages on their homes. In the fall and winter of 1932 in the villages and small cities where most of the farmers must market their produce, corn was quoted as low as eight cents per bushel, oats two cents and wheat

twenty-nine cents per bushel, eggs at seven cents per dozen and butter at ten cents per pound. The industry second in importance is mining. In normal times Minnesota produces about sixty per cent of the iron of the United States and nearly thirty per cent of all the iron produced in the world. In 1932 the production of iron fell to less than fifteen per cent of normal production. The families of idle miners soon became destitute and had to be supported by public funds. Other industries of the state, such as lumbering and the manufacture of wood products, the manufacture of farm machinery and various goods of steel and iron have also been affected disastrously by the depression. Because of the increased burden on the state and its political subdivisions which resulted from the depression, taxes on lands, which provide by far the major portion of the taxes in this state, were increased to such an extent that in many instances they became confiscatory. Tax delinquencies were alarmingly great, rising as high as 78% in one county of the state. In seven counties of the state the tax delinquency was over 50%. Because of these delinquencies many towns, school districts, villages and cities were practically bankrupt. In many of these political subdivisions of the state local government would have ceased to function and would have collapsed had it not been for loans from the state.' The Attorney General also stated that serious breaches of the peace had occurred.

****235 *424** We approach the questions thus presented upon the assumption made below, as required by the law of the state, that the mortgage contained a valid power of sale to be exercised in case of default; that this power was validly exercised; that under the law then applicable the period of redemption from the sale was one year, and that it has been extended by the judgment of the court over the opposition of the mortgagee-purchaser; and that, during the period thus extended, and unless the order for extension is modified, the mortgagee-purchaser will be unable to obtain possession, or to obtain or convey title in fee, as he would have been able to do had the statute ***425** not been enacted. The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession, he must pay the rental value as that value has been determined, upon notice and hearing, by the court. The rental value so paid is devoted to the carrying of the property by the application of the required payments to taxes, insurance, and interest on the mortgage indebtedness. While the mortgagee-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period.

In determining whether the provision for this temporary and conditional relief exceeds the power of the state by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions ***426** which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' Wilson v. New, 243 U.S. 332, 348, 37 S.Ct. 298, 302, 61 L.Ed. 755, L.R.A. 1917E, 938, Ann.Cas. 1918A, 1024. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the federal government is not

created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war sucessfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.[FN5] When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a state to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to 'coin money' or to 'make anything but gold and silver coin a tender in payment of debts.' But, where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause. The necessity of construction is not obviated by ***427** the fact that the contract clause is associated in the same section with other and more specific prohibitions. Even the grouping of subjects in the same clause may not require the same application to each of the subjects, regardless of differences in their nature. See Groves v. Slaughter, 15 Pet. 449, 505, 10 L.Ed. 800; Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 434, 52 S.Ct. 607, 76 L.Ed. 1204.

FN5 See Ex parte Milligan, 4 Wall. 2, 120-127, 18 L.Ed. 281; United States v. Russell, 13 Wall. 633, 627, 20 L.Ed. 474; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 155, 40 S.Ct. 106, 64 L.Ed. 194; United States v. L. Cohen Grocery Co., 255 U.S. 81, 88, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045.

In the construction of the contract clause. the debates in the Constitutional Convention ****236** are of little aid.[FN6] But the reasons which led to the adoption of that clause, and of the other prohibitions of section 10 of article 1, are not left in doubt, and have frequently been described with eloquent emphasis.[FN7] The widespread distress following the revolutionary period and the plight of debtors had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened. 'The sober people of America' were convinced that some 'thorough reform' was needed which would 'inspire a general prudence and industry, and give a regular course to the business of society.' The Federalist, No. 44. It was necessary to interpose the restraining power of a central authority in order to secure the foundations even of 'private faith.' The occasion and general purpose of ***428** the contract clause are summed up in the terse statement of Chief Justice Marshall in Ogden v. Saunders, 12 Wheat. 213, 354, 355, 6 L.Ed. 606: 'The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destory the sanctity of private faith. To guard against the continuance of the evil, was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.'

FN6 Farrand, Records of the Federal Convention, vol. 2, pp. 439, 440, 597, 610; Elliot's Debates, vol. 5, pp. 485, 488, 545, 546; Bancroft, History of the U.S. Constitution, vol. 2, pp. 137-139; Warren, The Making of the Constitution, pp. 552-555. Compare Ordinance for the Government of the Northwest Territory, art. 2.

FN7 The Federalist, No. 44 (Madison); Marshall, Life of Washington, vol. 5, pp. 85-90, 112, 113; Bancroft, History of the U.S. Constitution, vol. 1, p. 228 et seq.; Black, Constitutional Prohibitions, pp. 1-7; Fiske, The Critical Period of American History (8th Ed.) p. 168 et seq.; Adams v. Storey, Fed. Cas. No. 66, 1 Paine, 79, 90-92.

[1] But full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope. Nor does an examination of the details

of prior legislation in the States yield criteria which can be considered controlling. To ascertain the scope of the constitutional prohibition, we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. Justice Johnson, in Ogden v. Saunders, supra, page 286 of 12 Wheat., 6 L.Ed. 606, adverted to such a misdirected effort in these words: 'It appears to me, that a great part of the difficulties of the cause, arise from not giving sufficient weight to the general intent of this clause in the constitution, and subjecting it to a severe literal construction, which would be better adapted to special pleadings.' And, after giving his view as to the purport of the clause, 'that the states shall pass no law, ***429** attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date; and all contracts thus construed, shall be enforced according to their just and reasonable purport,' Justice Johnson added: 'But to assign to contracts, universally, a literal purport, and to exact from them a rigid literal fulfilment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction and fulfilment of contracts, as over the form and measure of the remedy to enforce them.'

The inescapable problems of construction have been: What is a contract? [FN8] What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States, in relation to the operation of contracts, to protect the vital interests of the community? Questions of this character, 'of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation.' Story on the Constitution, s 1375.

FN8 Contracts, within the meaning of the clause, have been held to embrace those that are executed; that is, grants, as well as those that are executory. Fletcher v. Peck, 6 Cranch, 87, 137, 3 L.Ed. 162; Terrett v. Taylor, 9 Cranch, 43, 3 L.Ed. 650. They embrace the charters of private corporations. Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 629. But not the marriage contract, so as to limit the general right to legislate on the subject of divorce. Id. page 629 of 4 Wheat., 4 L.Ed. 629; Maynard v. Hill, 125 U.S. 190, 210, 8 S.Ct. 723, 31 L.Ed. 654. Nor are judgments, though rendered upon contracts, deemed to be within the provision. Morley v. Lake Shore Railway Co., 146 U.S. 162, 169, 13 S.Ct. 54, 36 L.Ed. 925. Nor does a general law, giving the consent of a state to be sued, constitute a contract. Beers v. Arkansas, 20 How. 527, 15 L.Ed. 991.

****237** [2] The obligation of a contract is the law which binds the parties to perform their agreement. Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L.Ed. 529; Story, op. cit., s 1378. This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it ***430** is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. * * * Nothing can be more material to the obligation than the means of enforcement. * * * The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.' Von Hoffman v. City of Quincy, 4 Wall. 535, 550, 552, 18 L.Ed. 403. See, also, Walker v. Whitehead, 16 Wall. 314, 317, 21 L.Ed. 357. But this broad language cannot be taken without qualification. Chief Justice Marshall pointed out the distinction between obligation and remedy. Sturges v. Crowninshield, supra, 4 Wheat. 200, 4 L.Ed. 529. Said he: The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.' And in Von Hoffman v. City of Quincy, supra, 4 Wall. 553, 554, 18 L.Ed. 403, the general statement above quoted was limited by the further observation that 'it is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances.' And Chief Justice Waite, quoting this language in Antoni v. Greenhow, 107 U.S. 769,

775, 2 S.Ct. 91, 96, 27 L.Ed. 468, added: 'In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge.'

431** [3] The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them[FN9] (Sturges v. Crowninshield, supra, 4 Wheat. 197, 198, 4 L.Ed. 529) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights.[FN10] In Sturges v. Crowninshield, supra, a state insolvent law, which discharged the debtor from liability, was held to be invalid as applied to contracts in existence when the law was passed. See Ogden v. Saunders, supra. In Green v. Biddle, 8 Wheat. 1, 5 L.Ed. 547, the legislative acts, which were successfully assailed, exempted the occupant of land from the payment of rents and profits to the rightful owner, and were 'parts of a system the object of which was to compel the rightful owner to relinquish his lands or pay for all lasting improvements made upon them, without his consent or default.' In Bronson v. Kinzie, 1 How. 311, 11 L.Ed. 143, state legislation, which had been enacted for the relief of debtors in view of the seriously depressed condition of business,[FN11] following the panic of 1837, and which provided that the equitable estate of the mortgagor should not be extinguished432** for twelve months after sale on foreclosure, and further prevented any sale unless two-thirds of the appraised value of the property should be bid therefor, was held to violate the constitutional provision. It will be observed that in the Bronson Case, aside from the requirement as to the amount of the bid at the sale, the extension of the period of redemption was unconditional, and there was no provision, as in the instant case, to secure to the mortgagee the rental value of the property during the extended period. McCracken v. Hayward, 2 How. 608, 11 L.Ed. 397; Gantly's Lessee v. Ewing, 3 How. 707, 11 L.Ed. 794, and Howard v. Bugbee, 24 How. 461, 16 L.Ed. 753, followed the decision in Bronson v. Kinzie; that of McCracken, condemning a statute which provided that an execution sale should not be made of property unless it would bring two-thirds of its value according to the opinion of three householders; that of Gantly's Lessee, condemning a statute which required a sale for not less than one-half the appraised****238** value; and that of Howard, making a similar ruling as to an unconditional extension of two years for redemption from foreclosure sale. In Planter's Bank v. Sharp, 6 How. 301, 12 L.Ed. 447, a state law was found to be invalid which prevented a bank from transferring notes and bills receivable which it had been duly authorized to acquire. In Von Hoffman v. City of Quincy, supra, a statute which restricted the power of taxation which had previously been given to provide for the payment of municipal bonds was set aside. Louisiana ex rel. Nelson v. Police Jury of St. Martin's Parish, 111 U.S. 716, 4 S.Ct. 648, 28 L.Ed. 574, and Seibert v. Lewis, 122 U.S. 284, 7 S.Ct. 1190, 30 L.Ed. 1161, are similar cases. In Walker v. Whitehead, 16 Wall. 314, 21 L.Ed. 357, the statute, which was held to be repugnant to the contract clause, was enacted in 1870, and provided that, in all suits pending on any debt or contract made before June 1, 1865, the plaintiff should not have a verdict unless it appeared that all taxes chargeable by law on the same had been ***433** duly paid for each year since the contract was made; and, further, that in all cases of indebtedness of the described class the defendant might offset any losses he had suffered in consequence of the late war either from destruction or depreciation of property. See Daniels v. Tearney, 102 U.S. 415, 419, 26 L.Ed. 187. In Gunn v. Barry, 15 Wall. 610, 21 L.Ed. 212, and Edwards v. Kearzey, 96 U.S. 595, 24 L.Ed. 793, statutes applicable to prior contracts were condemned because of increases in the amount of the property of judgment debtors which were exempted from levy and sale on execution. But, in Penniman's Case, 103 U.S. 714, 720, 26 L.Ed. 602, the Court decided that a statute abolishing imprisonment for debt did not, within the meaning of the Constitution, impair the obligation of contracts previously made;[FN12] and the Court said: 'The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right.' In Barnitz v. Beverly, 163 U.S. 118, 16 S.Ct. 1042, 41 L.Ed. 93, the Court held that a statute which authorized the redemption of property sold on foreclosure, where no right of redemption previously existed, or which extended the period of redemption beyond the time formerly allowed, could not constitutionally apply to a sale under a mortgage executed before its passage. This ruling was to the same effect as that in Bronson v. Kinzie, supra, and Howard v. Bugbee, supra. But in the Barnitz Case, the statute contained a provision for the prevention of waste, and authorized the appointment of a receiver of the premises sold. Otherwise the extension of the period for redemption

was unconditional, and, in case a receiver was appointed, *434 the income during the period allowed for redemption, except what was necessary for repairs and to prevent waste, was still to go to the mortgagor.

FN9 But there is held to be no impairment by a law which removes the taint of illegality and thus permits enforcement, as, e.g., by the repeal of a statute making a contract void for usury. Ewell v. Daggs, 108 U.S. 143, 151, 2 S.Ct. 408, 27 L.Ed. 682.

FN10 See, in addition to cases cited in the text, the following: Farmers' & Mechanics' Bank v. Smith, 6 Wheat. 131, 5 L.Ed. 224; Piqua Bank v. Knoop, 16 How. 369, 14 L.Ed. 977; Dodge v. Woolsey, 18 How. 331, 15 L.Ed. 401; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L.Ed. 173; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L.Ed. 179; Farrington v. Tennessee, 95 U.S. 679, 24 L.Ed. 558; Murray v. Charleston, 96 U.S. 432, 24 L.Ed. 760; Hartman v. Greenhow, 102 U.S. 672, 26 L.Ed. 271; McGahey v. Virginia, 135 U.S. 662, 10 S.Ct. 972, 34 L.Ed. 304; Bedford v. Eastern Building & Loan Association, 181 U.S. 227, 21 S.Ct. 597, 45 L.Ed. 834; Wright v. Central of Georgia Railway Co., 236 U.S. 674, 35 S.Ct. 471, 59 L.Ed. 781; Central of Georgia Railway Co. v. Wright, 248 U.S. 525, 39 S.Ct. 181, 63 L.Ed. 401; Ohio Public Service Co. v. Ohio ex rel. Fritz, 274 U.S. 12, 47 S.Ct. 480, 71 L.Ed. 898.

FN11 See Warren, The Supreme Court in United States History, vol. 2, pp. 376-379.

FN12 See Sturges v. Crowninshield, 4 Wheat. 122, 200, 201, 4 L.Ed. 529; Mason v. Haile, 12 Wheat. 370, 378, 6 L.Ed. 660; Beers v. Haughton, 9 Pet. 329, 359, 9 L.Ed. 145.

None of these cases, and we have cited those upon which appellant chiefly relies, is directly applicable to the question now before us in view of the conditions with which the Minnesota statute seeks to safeguard the interests of the mortgagee-purchaser during the extended period. And broad expressions contained in some of these opinions went beyond the requirements of the decision, and are not controlling. Cohens v. Virginia, 6 Wheat. 264, 399, 5 L.Ed. 257.

Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes,[FN13] but **239 the state also continues to possess authority to safeguard the vital interests of its people. It does *435 not matter that legislation appropriate to that end 'nhas the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.Ed. 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,-a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

FN13 Illustrations of changes in remedies, which have been sustained, may be seen in the following cases: Jackson v. Lamphire, 3 Pet. 280, 7 L.Ed. 679; Hawkins v. Barney's Lessee, 5 Pet. 457, 8 L.Ed. 190; Crawford b. Branch Bank, 7 How. 279, 12 L.Ed. 700; Curtis v. Whitney, 13 Wall. 68, 20 L.Ed. 513; Cairo & F.R. Co. v. Hecht, 95 U.S. 168, 24 L.Ed. 423; Terry v. Anderson, 95 U.S. 628, 24 L.Ed. 365; Tennessee v. Sneed, 96 U.S. 69, 24 L.Ed. 610; South Carolina v. Gaillard, 101 U.S. 433, 25 L.Ed. 937; Louisiana v. New Orleans, 102 U.S. 203, 26 L.Ed. 132; Connecticut Mutual Life Insurance Co. v. Cushman, 108 U.S. 51, 2 S.Ct. 236, 27 L.Ed. 648; Vance v. Vance, 108 U.S. 514, 2 S.Ct. 854, 27 L.Ed. 808; Gilfillan v. Union Canal Co., 109 U.S. 401, 3 S.Ct. 304, 27 L.Ed. 977; Hill v. Merchants' Insurance Co., 134 U.S. 515, 10 S.Ct. 589, 33 L.Ed. 994; New Orleans City & Lake R.R. Co. v. Louisiana, 157 U.S. 219, 15 S.Ct. 581, 39 L.Ed. 679; Red River Valley Bank v. Craig, 181 U.S. 548, 21 S.Ct. 703, 45 L.Ed. 994; Wilson v. Standefer, 184 U.S. 399, 22 S.Ct. 384, 46 L.Ed. 612; Oshkosh Waterworks Co. v. Oshkosh, 187

U.S. 437, 23 S.Ct. 234, 47 L.Ed. 249; Waggoner v. Flack, 188 U.S. 595, 23 S.Ct. 345, 47 L.Ed. 609; Bernheimer v. Converse, 206 U.S. 516, 27 S.Ct. 755, 51 L.Ed. 1163; Henley v. Myers, 215 U.S. 373, 30 S.Ct. 148, 54 L.Ed. 240; Selig v. Hamilton, 234 U.S. 652, 34 S.Ct. 926, 58 L.Ed. 1518, Ann. Cas. 1917A, 104; Security Savings Bank v. California, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301, 31 A.L.R. 391.

Compare the following illustrative cases, where changes in remedies were deemed to be of such a character as to interfere with substantial rights: Wilmington & Weldon R.R. Co. v. King, 91 U.S. 3, 23 L.Ed. 186; Memphis v. United States, 97 U.S. 293, 24 L.Ed. 920; Virginia Coupon Cases, 114 U.S. 269, 270, 298, 299, 330, 5 S.Ct. 903, 962, 29 L.Ed. 185, 207; Effinger v. Kenney, 115 U.S. 566, 6 S.Ct. 179, 29 L.Ed. 495; Fisk v. Jefferson Police Jury, 116 U.S. 131, 6 S.Ct. 329, 29 L.Ed. 587; Bradley v. Lightcap, 195 U.S. 1, 24 S.Ct. 748, 49 L.Ed. 65; Bank of Minden v. Clement, 256 U.S. 126, 41 S.Ct. 408, 65 L.Ed. 857.

[4][5] While the charters of private corporations constitute contracts, a grant of exclusive privilege is not to be implied as against the state. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L.Ed. 773. And all contracts are subject to the right of eminent domain. West River Bridge v. Dix, 6 How. 507, 12 L.Ed. 535.[FN14] The reservation of this necessary authority of the state is deemed to be a part of the contract. In the case last cited, the Court answered the forcible challenge of the state's power by the following statement of the controlling principle, a statement reiterated by this Court speaking through Mr. Justice Brewer, nearly fifty years later, in Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 692, 17 S.Ct. 718, 721, 41 L.Ed. 1165: 'But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise, not out of the literal***436** terms of the contract itself. They are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong. They are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.'

FN14 See, also, New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650, 673, 6 S.Ct. 252, 29 L.Ed. 516; Offield v. New York, N.H. & H.R.R. Co., 203 U.S. 372, 27 S.Ct. 72, 51 L.Ed. 231; Cincinnati v. Louisville & Nashville R.R. Co., 223 U.S. 390, 32 S.Ct. 267, 56 L.Ed. 481; Pennsylvania Hospital v. Philadelphia, 245 U.S. 20, 23, 38 S.Ct. 35, 62 L.Ed. 124; Galveston Wharf Company v. Galveston, 260 U.S. 473, 476, 43 S.Ct. 168, 67 L.Ed. 355; Georgia v. Chattanooga, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796.

[6] The Legislature cannot 'bargain away the public health or the public morals.' Thus the constitutional provision against the impairment of contracts was held not to be violated by an amendment of the state Constitution which put an end to a lottery theretofore authorized by the Legislature. Stone v. Mississippi, 101 U.S. 814, 819, 25 L.Ed. 1079. See, also, Douglas v. Kentucky, 168 U.S. 488, 497-499, 18 S.Ct. 199, 42 L.Ed. 553; compare New Orleans v. Houston, 119 U.S. 265, 275, 7 S.Ct. 198, 30 L.Ed. 411. The lottery was a valid enterprise when established under express state authority, but the Legislature in the public interest could put a stop to it. A similar rule has been applied to the control by the state of the sale of intoxicating liquors. Boston Beer Company v. Massachusetts, 97 U.S. 25, 32, 33, 24 L.Ed. 989. See Mugler v. Kansas, 123 U.S. 623, 664, 665, 8 S.Ct. 273, 31 L.Ed. 205. The states retain adequate power to protect the public health against the maintenance of nuisances despite insistence upon existing contracts. Northwestern Fertilizing Company v. Hyde Park, 97 U.S. 659, 667, 24 L.Ed. 1036; Butchers' Union Company v. Crescent City Company, 111 U.S. 746, 750, 4 S.Ct. 652, 28 L.Ed. 585. Legislation to protect the public safety comes within the same category of reserved power. Chicago, B. & Q.R.R. Co. v. Nebraska, 170 U.S. 57, 70, 74, 18 S.Ct. 513, 42 L.Ed. 948; Texas & N.O.R.R. Co. v. Miller, 221 U.S. 408, 414, 31 S.Ct. 534, 55 L.Ed. 789; Atlantic Coast Line R.R. Co. v. Goldsboro, 232 U.S. 548, 558, 34 S.Ct. 364, 58 L.Ed. 721. This principle has had recent and noteworthy application to the reg-

ulation of the use of public highways by common carriers and 'contract carriers,' where the assertion of *437 interference with existing contract rights has been without avail. Sproles v. Binford, 286 U.S. 374, 390, 391, 52 S.Ct. 581, 76 L.Ed. 1167; Stephenson v. Binford, supra.

[7][8] The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. In Manigault v. Springs, 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274, riparian owners in South Carolina had made a contract for a clear passage through a creek by the removal of existing obstructions. Later, the Legislature of the state, by virtue of its broad authority to make public improvements, and in order to increase the taxable value of the lowlands which would be drained, authorized the construction of a dam across the creek. The Court sustained the statute upon the ground that the private interests**240 were subservicent to the public right. The Court said (Id. page 480 of 199 U.S., 26 S.Ct. 127, 130): 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.' A statute of New Jersey (P.L.N.J. 1905, p. 461 (4 Comp.St. 1910, p. 5794)) prohibiting the transportation of water of the state into any other state was sustained against the objection that the statute impaired the obligation of contracts which had been made for furnishing such water to persons without the state. Said the Court, by Mr. Justice Holmes (Hudson County Water Co. v. McCarter, 209 U.S. page 357, 28 S.Ct. 529, 531, 52 L.Ed. 828, 14 Ann.Cas. 560): 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making*438 a contract about them. The contract will carry with it the infirmity of the subject-matter.' The general authority of the Legislature to regulate, and thus to modify, the rates charged by public service corporations, affords another illustration. Stone v. Farmers' Loan & Trust Company, 116 U.S. 307, 325, 326, 6 S.Ct. 334, 388, 1191, 29 L.Ed. 636. In Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309, 9 A.L.R. 1420, a statute fixing reasonable rates, to be charged by a corporation for supplying electricity to the inhabitants of a city, superseded lower rates which had been agreed upon by a contract previously made for a definite term between the company and a consumer. The validity of the statute was sustained. To the same effect are Producers' Transportation Co. v. Railroad Commission, 251 U.S. 228, 232, 40 S.Ct. 131, 64 L.Ed. 239, and Sutter Butte Canal Co. v. Railroad Commission, 279 U.S. 125, 138, 49 S.Ct. 325, 73 L.Ed. 637. Similarly, where the protective power of the state is exercised in a manner otherwise appropriate in the regulation of a business, it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 363, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A. 1917A, 421, Ann. Cas. 1917B, 455. See, also, St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269, 274, 39 S.Ct. 274, 63 L.Ed. 599.

The argument is pressed that in the cases we have cited the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Another argument, which comes more closely to the point, is that the state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the Legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety, or welfare, or *439 where the prohibition is merely of injurious practices; that interference with the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissible. This is but to contend that in the latter case the end is not legitimate in the view that it cannot be reconciled with a fair interpretation of the constitutional provision.

[9][10] Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to

destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. See American Land Co. v. Zeiss, 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of state power to protect the public interest in the other situations to which we have referred. And, if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood, or earthquake, that ***440** power cannot be said to be nonexistent when the urgent public ****241** need demanding such relief is produced by other and economic causes.

Whatever doubt there may have been that the protective power of the state, its police power, may be exercised-without violating the true intent of the provision of the Federal Constitution-in directly preventing the immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing. Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877; Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595. The case of Block v. Hirsh, supra, arose in the District of Columbia and involved the due process clause of the Fifth Amendment. The cases of the Marcus Brown Company and the Levy Leasing Company arose under legislation of New York, and the constitutional provision against the impairment of the obligation of contracts was invoked. The statutes of New York,[FN15] declaring that a public emergency existed, directly interfered with the enforcement of covenants for the surrender of the possession of premises on the expiration of leases. Within the city of New York and contiguous counties, the owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September, 1920, lodging houses for transients and the larger hotels), were wholly deprived until November 1, 1922, of all possessory remedies for the purpose of removing from their premises the tenants or occupants in possession when the laws took effect (save in certain specified instances) providing the tenants or occupants were ready, able, and willing to pay a reasonable rent or price for their use and ***441** occupation. People v. La Fetra, 230 N.Y. 429, 438, 130 N.E. 601, 16 A.L.R. 152; Levy Leasing Co. v. Siegel, 230 N.Y. 634, 130 N.E. 923. In the case of the Marcus Brown Company the facts were thus stated by the District Court (269 F. 306, 312): 'The tenant defendants herein, by law older than the state of New York, became at the landlord's option trespassers on October 1, 1920. Plaintiff had then found and made a contract with a tenant it liked better, and had done so before these statutes were enacted. By them plaintiff is, after defendants elected to remain in possession, forbidden to carry out his bargain with the tenant he chose, the obligation of the covenant for peaceable surrender by defendants is impaired, and for the next two years Feldman et al. may, if they like, remain in plaintiff's apartment, provided they make good month by month the allegation of their answer, i.e., pay what 'a court of competent jurisdiction' regards as fair and reasonable compensation for such enforced use and occupancy.' Answering the contention that the legislation as thus applied contravened the constitutional prohibition, this Court, after referring to its opinion in Block v. Hirsh, supra, said: 'In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be.' 256 U.S. page 198, 41 S.Ct. 465, 466, 65 L.Ed. 877. This decision was followed in the case of the Levy Leasing Company, supra.

FN15 Laws of 1920 (New York), chapters 942-947, 951.

[11] In these cases of leases, it will be observed

that the relief afforded was temporary and conditional; that it was sustained because of the emergency due to scarcity of housing; and that provision was made for reasonable compensation to the landlord during the period he was ***442** prevented from regaining possession. The Court also decided that, while the declaration by the Legislature as to the existence of the emergency was entitled to great respect, it was not conclusive; and, further, that a law 'depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.' It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. Chastleton Corporation v. Sinclair, 264 U.S. 543, 547, 548, 44 S.Ct. 405, 406, 68 L.Ed. 841.

It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public demain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

****242** It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time ***443** of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget, that it is a constitution we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579); 'a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.' Id. page 415 of 4 Wheat. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U.S. 416, 433, 40 S.Ct. 382, 383, 64 L.Ed. 641, 11 A.L.R. 984, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. * * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'

Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the states to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs ***444** and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the states to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. It is a development forecast by the prophetic words of Justice Johnson in Ogden v. Saunders, already quoted. And the germs of the later decisions are found in the early cases of the Charles River Bridge and the West River Bridge, supra, which upheld the public right against strong insistence upon the contract clause. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the state is read into all contracts, and there is no greater reason for efusing to apply this principle to Minnesota mortgages than to New York leases.

Applying the criteria established by our decisions,

we conclude:

[12][13] 1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community. The declarations of the existence of this emergency by the Legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. Block v. Hirsh, supra. The finding of the Legislature and state court has support in the facts of which we take judicial notice. Atchison, T. & S.F. Rwy. Co. v. United States, 284 U.S. 248, 260, 52 S.Ct. 146, 76 L.Ed. 273. It is futile to attempt to make a comparative estimate of the seriousness of the emergency shown in the leasing cases from New York and of the emergency disclosed here. The particular facts differ, but that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. As the Supreme Court of Minnesota said (249 N.W. 334, 337), the economic emergency which threatened 'the ***445** loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence' was a 'potent cause' for the enactment of the statute.

2. The legislation was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.

3. In view of the nature of the contracts in question-mortgages of unquestionable validity-the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.

4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under****243** the prior law. The mortgagor during the extended period is not ousted from possession, but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as ***446** insurance companies, banks, and investment and mortgage companies. FN16 These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be, individual cases of another aspect. The Legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief.

FN16 Department of Agriculture, Technical Bulletin No. 288, February, 1932, pp. 22, 23; Year Book, Department of Agriculture, 1932, p. 913.

In the absence of legislation, courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience. FN17 The 'equity of redemption' is the creature of equity. While courts of equity could not alter the legal effect of the forfeiture of the estate at common law on breach of condition, they succeeded, operating on the conscience of the mortgagee, in maintaining that it was unreasonable that he should retain for his own benefit what was intended as a mere security, that the breach of condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest and costs, ***447** notwithstanding the forfeiture at law. This principle of equity was victorious against the strong opposition of the common-law judges, who thought that by 'the Growth of Equity on Equity the Heart of the Common Law is eaten out.' The equitable principle became firmly established, and its applica-

tion could not be frustrated even by the engagement of the debtor entered into at the time of the mortgage, the courts applying the equitable maxim 'once a mortgage, always a mortgage, and nothing but a mortgage.'[FN18] Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the state's protective power, this legislation is clearly so reasonable as to be within the legislative competency.

FN17 Graffam v. Burgess, 117 U.S. 180, 191, 192, 6 S.Ct. 686, 29 L.Ed. 839; Schroeder v. Young, 161 U.S. 334, 337, 16 S.Ct. 512, 40 L.Ed. 721; Ballentyne v. Smith, 205 U.S. 285, 290, 27 S.Ct. 527, 51 L.Ed. 803; Howell v. Baker, 4 Johns Ch. (N.Y.) 118, 121; Gilbert v. Haire, 43 Mich. 283, 286, 5 N.W. 321; Littell v. Zuntz, 2 Ala. 256, 260, 262, 36 Am.Dec. 415; Farmers' Life Insurance Co. v. Stegink, 106 Kan. 730, 189 P. 965; Strong v. Smith, 68 N.J.Eq. 650, 653, 58 A. 301, 64 A. 1135. Compare Suring State Bank v. Giese, 210 Wis. 489, 246 N.W. 556, 85 A.L.R. 1477.

FN18 See Coote's Law of Mortgages (8th Ed.) vol. 1, pp. 11, 12; Jones on Mortgages (8th Ed.) vol. 1, ss 7, 8; Langford v. Barnard, Tothill, 134, temp. Eliz.; Emmanuel College v. Evans, 1 Rep. in Ch. 10, temp. Car. I; Roscarrick v. Barton, 1 Ca. in Ch. 217; Noakes v. Rice, (1902) A.C. 24, per Lord Macnaghten; Fairclough v. Swan Brewery, 81 L.J.P.C. 207.

5. The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.

[14][15] We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or ***448** unwise as a matter of policy is a question with which we are not concerned.

What has been said on that point is also applicable to the contention presented under the due process clause. Block v. Hirsh, supra.

Nor do we think that the statute denies to the appellant the equal protection of the laws. The classification which the statute makes cannot be said to be an arbitrary one. Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037; Clark v. Tutusville, 184 U.S. 329, 22 S.Ct. 382, 46 L.Ed. 569; Quong Wing v. Kirkendall, 223 U.S. 59, 32 S.Ct. 192, 56 L.Ed. 350; Ohio Oil Co. v. Conway, 281 U.S. 146, 50 S.Ct. 310, 74 L.Ed. 775; Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167.

The judgment of the Supreme Court of Minnesota is affirmed.

Judgment affirmed.

****244** Mr. Justice SUTHERLAND, dissenting.

Few questions of greater moment than that just decided have been submitted for judicial inquiry during this generation. He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts. The effect of the Minnesota legislation, though serious enough in itself, is of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument. And those of us who are thus apprehensive of the effect of this decision would, in a matter so important, be neglectful of our duty should we fail to spread upon the permanent records of the court the reasons which move us to the opposite view.

A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations.***449** It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed

and adopted, meant that the terms of a contract for the payment of money could not be altered in invitum by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now. This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court. The true rule was forcefully declared in Ex parte Milligan, 4 Wall. 2, 120, 121, 18 L.Ed. 281, in the face of circumstances of national peril and public unrest and disturbance far greater than any that exist to-day. In that great case this court said that the provisions of the Constitution there under consideration had been expressed by our ancestors in such plain English words that it would seem the ingenuity of man could not evade them, but that after the lapse of more than seventy years they were sought to be avoided. 'Those great and good men,' the Court said, 'foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future.' And then, in words the power and truth of which have become increasingly evident with the lapse of time, there was laid down the rule without which the Constitution would cease to be the 'supreme law of the land,' binding equally upon governments and governed at all times ***450** and under all circumstances, and become a mere collection of political maxims to be adhered to or disregarded according to the prevailing sentiment or the legislative and judicial opinion in respect of the supposed necessities of the hour:

'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. * * *'

Chief Justice Taney, in Dred Scott v. Sandford, 19 How. 393, 426, 15 L.Ed. 691, said that, while the Constitution remains unaltered, it must be construed now as it was understood at the time of its adoption; that it is not only the same in words but the same in meaning, 'and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.' And in South Carolina v. United States, 199 U.S. 437, 448, 449, 26 S.Ct. 110, 111, 59 L.Ed. 261, 4 Ann.Cas. 737, in an opinion by Mr. Justice Brewer, this court quoted these words with approval and said:

'The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. * * * Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded.'

***451** The words of Judge Campbell, speaking for the Supreme Court of Michigan in People ex rel. Twitchell v. Blodgett, 13 Mich. 127, 139, 140, are peculiarly apposite. 'But it may easily happen,' he said, 'that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. ****245** They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not completent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things.

'* * * Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances. * * * But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false constructions.'

The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate

cases they have the capacity of bringing within their grasp every new condition which falls within their meaning.[FN1] But, their meaning is changeless; it is only their application which is extensible. See South Carolina v. United States, supra, 199 U.S. pages 448, 449, 26 S.Ct. 110, 59 L.Ed. 261, 4 Ann.Cas. 737. Constitutional grants of ***452** power and restrictions upon the exercise of power are not flexible as the doctrines of the common law are flexible. These doctrines, upon the principles of the common law itself, modify or abrogate themselves whenever they are or whenever they become plainly unsuited to different or changed conditions. Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369, decided December 11, 1933. The distinction is clearly pointed out by Judge Cooley, 1 Constitutional Limitations (8th Ed.) 124:

> FN1 In such cases it is no more necessary to modify constitutional rules to govern new conditions than it is to create new words to describe them. The commerce clause is a good example. When that was adopted, its application was necessarily confined to the regulation of the primitive methods of transportation then employed; but railroads, automobiles, and aircraft automatically were brought within the scope and subject to the terms of the commerce clause the moment these new means of transportation came into existence, just as they were at once brought within the meaning of the word 'carrier,' as defined by the dictionaries.

'A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. * * * What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, ***453** and it is not different at any subsequent time when a court has occasion to pass upon it.'

The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it. Lake County v. Rollins, 130 U.S. 662, 670, 9 S.Ct. 651, 32 L.Ed. 1060. The necessities which gave rise to the provision, the controversies which preceded, as well as the conflicts of opinion which were settled by its adoption, are matters to be considered to enable us to arrive at a correct result. Knowlton v. Moore, 178 U.S. 41, 95, 20 S.Ct. 747, 44 L.Ed. 969. The history of the times, the state of things existing when the provision was framed and adopted should be looked to in order to ascertain the mischief and the remedy. Rhode Island v. Massachusetts, 12 Pet. 657, 723, 9 L.Ed. 1233; Craig v. Missouri, 4 Pet. 410, 431, 432, 7 L.Ed. 903. As nearly as possible we should place ourselves in the condition of those who framed and adopted it. In re Bain, 121 U.S. 1, 12, 7 S.Ct. 781, 30 L.Ed. 849. And, if the meaning be at all doubtful, the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted. Maxwell v. Dow, 176 U.S. 581, 602, 20 S.Ct. 448, 494, 44 L.Ed. 597; Jarrolt v. Moberly, 103 U.S. 580, 586, 26 L.Ed. 492.

An application of these principles to the question under review removes any doubt, if otherwise there would be any, that the contract impairment clause denies to the several states the power to mitigate hard consequences resulting to debtors from financial or economic exigencies by an impairment of the obligation of contracts of indebtedness. A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause ****246** will demonstrate conclusively that it was

framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress. Indeed,***454** it is not probable that any other purpose was definitely in the minds of those who composed the framers' convention or the ratifying state conventions which followed, although the restriction has been given a wider application upon principles clearly stated by Chief Justice Marshall in the Dartmouth College Case, 4 Wheat. 518, 644, 645, 4 L.Ed. 629.

Following the Revolution, and prior to the adoption of the Constitution, the American people found themselves in a greatly impoverished condition. Their commerce had been well-nigh annihilated. They were not only without luxuries, but in great degree were destitute of the ordinary comforts and necessities of life. In these circumstances they incurred indebtedness in the purchase of imported goods and otherwise far beyond their capacity to pay. From this situation there arose a divided sentiment. On the one hand, an exact observance of public and private engagements was insistently urged. A violation of the faith of the nation or the pledges of the private individual, it was insisted, was equally forbidden by the principles of moral justice and of sound policy. Individual distress, it was urged, should be alleviated only by industry and frugality, not by relaxation of law or by a sacrifice of the rights of others. Indiscretion or imprudence was not to be relieved by legislation, but restrained by the conviction that a full compliance with contracts would be exacted. On the other hand, it was insisted that the case of the debtor should be viewed with tenderness; and efforts were constantly directed toward relieving him from an exact compliance with his contract. As a result of the latter view, state laws were passed suspending the collection of debts, remitting or suspending the collection of taxes, providing for the emission of paper money, delaying legal proceedings, etc. There followed, as there must always follow from such a course, a long trail of ills; one of the direct ***455** consequences being a loss of confidence in the government and in the good faith of the people. Bonds of men whose ability to pay their debts was unquestionable could not be negotiated except at a discount of 30, 40, or 50 per cent. Real property could be sold only at a ruinous loss. Debtors, instead of seeking to meet their obligations by painful effort, by industry and economy, began to rest their hopes entirely upon legislative interference. The impossibility of payment of public or private debts was widely asserted, and in some instances threats were made of suspending the administration of justice by violence. The circulation of depreciated currency became common. Resentment against lawyers and courts was freely manifested, and in many instances the course of the law was arrested and judges restrained from proceeding in the execution of their duty by popular and tumultuous assemblages. This state of things alarmed all thoughtful men, and led them to seek some effective remedy. Marshall, Life of Washington (1807), vol. 5, pp. 88-131.

That this brief outline of the situation is entirely accurate is borne out by all contemporaneous history, as well as by writers of distinction of a later period.[FN2] Compare ***456** ****247**Edwards v. Kearzey, 96 U.S. 595, 604-607, 24 L.Ed. 793. The appended note might be extended for many pages by the addition of similar quotations from the same and other writers, but enough appears to establish beyond all question***457** the extreme gravity of the emergency, the great difficulty and frequent impossibility which confronted debtors generally in any effort to discharge their obligations.

> FN2 Thus McMaster (History of the People of the United States, vol. 1, p. 425), after referring to the conditions in Rhode Island, where 'the bonds of society were dissolved by paper money and tender laws'; in New Jersey, where the people nailed up the doors of their courthouses; in Virginia, where the debtors 'set fire to theirs in order to stop the course of justice,' says:
>
> 'The newspapers were full of bankrupt notices. The formers' taxes amounted to near the rent of their farms. Mechanics wandered up and down the streets of every city destitute of work. Ships, shut out from every port of Europe, lay rotting in the harbors.'
>
> Channing (History of the United States, vol. 3, pp. 410-411, 482-483) paints this graphic picture of the situation:
>
> 'Nowhere was the immediate prospect more gloomy than in South Carolina. * * * In Massachusetts, at the other end of the line, the case was as bad, if not worse * * * the resources of New England were insufficient to pay even what was then owing. The case of

New York was even more desperate, and for the moment Philadelphia alone seemed prosperous, for the wastage of the later years of the war had been severely felt in Virginia. * * *

'* * * Virginia was honeycombed with debt. * * *

'In South Carolina, the planters were even more heavily in debt. * * * The case of Thomas Bee is to the point. His creditors had secured executions against him; the sheriff had seized his property and had sold it at one-thirteenth of what it would have brought at private sale in ordinary times.'

Nevins (The American States During and After the Revolution, p. 536), says:

'The town of Greenwich computed that during each of the five years preceding 1786 the farmers had paid in taxes the entire rental value of their land.'

John Fiske (The Critical Period of American History (8th Ed.) pp. 175, 180) thus describes conditions:

'* * * About the market-places men spent their time angrily discussing politics, and scarcely a day passed without street-fights, which at times grew into riots. In the country, too, no less than in the cities, the goddess of discord reigned. The farmers determined to starve the city people into submission, and they entered into an agreement not to send any produce into the cities until the merchants should open their shops and begin selling their goods for paper (money) at its face value. * * * The farmers threw away their milk, used their corn for fuel, and let their apples rot on the ground. * * *

'* * * The courts were broken up by armed mobs. At Concord one Job Shattuck brought several hundred armed men into the town and surrounded the court-house, while in a flerce harangue he declared that the time had come for wiping out all debts.'

Dr. David Ramsay (History of the United States (2d Ed.) 1818, vol. 3, pp. 46, 47), a member of the old Congress under the Confederation, and who lived in the midst of the events of which he speaks, says:

'The non-payment of public debts sometimes inferred a necessity, and always furnished an apology, for not discharging private contracts. Confidence between man and man received a deadly wound. Public faith being first violated, private engagements lost much of their obligatory force. * * *

'From the combined operation of these causes trade languished; credit expired; gold and silver vanished; and real property was depreciated to an extent equal to that of the depreciation of continental money. * * *'

And, finally, George Ticknor Curtis, in his History of the Origin, Formation, and Adoption of the Constitution of the United States, vol. 1, pp. 332, 333:

'All contemporary evidence assures us that this (1783 to 1787) was a period of great pecuniary distress, arising from the depreciation of the vast quantities of paper money issued by the Federal and State governments; from rash speculations; from the uncertain and fluctuating condition of trade; and from the great amount of foreign goods forced into the country as soon as its ports were opened. Naturally, in such a state of things, the debtors were disposed to lean in favor of those systems of government and legislation which would tend to relieve or postpone the payment of their debts; and as such relief could come only from their State governments, they were naturally the friends of State

'Maryland, * * * In 1782 * * * enacted a not friendly to any enlargement of the powers of the Federal Constitution. The same causes which led individuals to look to legislation for irregular relief from the burden of their private contracts, led them also to regard public obligations with similar impatience. Opposed to this numerous class of persons

were all those who felt the high necessity of preserving inviolate every public and private obligation; who saw that the separate power of the States could not accomplish what was absolutely necessary to sustain both public and private credit; and they were as naturally disposed to look to the resources of the Union for these benefits, as the other class were to look in an opposite direction. These tendencies produced, in nearly every State, a struggle, not as between two organized parties, but one that was all along a contest for supremacy between opposite opinions, in which it was at one time doubtful to which side the scale would turn.'

***458** In an attempt to meet the situation, recourse was had to the Legislatures of the several states under the Confederation; and these bodies passed, among other acts, the following: Laws providing for the emission of bills of credit and making them legal tender for the payment of debts, and providing also for such payment by the delivery of specific property at a fixed valuation; installment laws, authorizing payment of overdue obligations at future intervals of time; stay laws and laws temporarily closing access to the courts; and laws discriminating against British creditors, I have selected, out of a vast number, a few historical comments upon the character and effect of these legislative devices.[FN3]

FN3 Charles Warren, The Making of the Constitution, pp. 5, 6:

'The actual evils which led to the Federal Convention of 1787 are familiar to every reader of history and need no detailed description here. As is well known, they arose, in general; * * * second, from State legislation unjust to citizens and productive of dissensions with neighboring States-the State laws particularly complained of being those staying process of the Courts, making property a tender in payment of debts, issuing paper money, interfering with foreclosure of mortgages. * * *'

Fiske, supra, note 2, p. 168:

'By 1786, under the universal depression and want of confidence, all trade had well-nigh stopped, and political quackery, with its cheap and dirty remedies, had full control of the field. * * * A craze for fictitious wealth in the shape of paper money ran like an epidemic through the country. There was a Barmecide feast of economic vagaries. * * * And when we have threaded the maze of this rash legislation, we shall the better understand that clause in our federal constitution which forbids the making of laws impairing the obligation of contracts.'

Beard, An Economic Interpretation of the Constitution of the United States, pp. 31, 32:

'Money capital was * * * being positively attacked by the makers of paper money, stay laws, pine barren acts, and other devices for depreciating the currency or delaying the collection of debts. In addition there was a wide-spread derangement of the monetary system. * * *

'Creditors, naturally enough, resisted all of these schemes in the state legislatures, and * * * turned to the idea of a national government so constructed as to prevent laws impairing the obligation of contract, emitting paper money, and otherwise benefiting debtors. It is idle to inquire whether the rapacity of the creditors or the total depravity of the debtors * * * was responsible for this deep and bitter antagonism. It is sufficient for our purposes to discover its existence and to find its institutional reflex in the Constitution.'

Fisher Ames, 'Eulogy on Washington,' The Life and Works of Fisher Ames, vol. 2, p. 76:

'Accordingly, in some of the States, creditors were treated as outlaws; bankrupts were armed with legal authority to be persecutors; and by the shock of all confidence and faith, society was shaken to its foundations.'

Illuminating comment upon some of this state legislation is to be found in chapter VI (volume 1) of Bancroft's 'History of the Formation of the Constitution of the United States,' under the heading, 'State Laws Impairing the Obligation of Contracts Prove the

Need of an Overruling Union,' pp. 230-236.

'(In Massachusetts) Repeated temporary stay-laws gave no real relief; they flattered and deceived the hope of the debtor, exasperating alike him and his creditor. * * *

'* * * (In Pennsylvania) in December, 1784, debts contracted before 1777 were made payable in three annual instalments. * * *

'Mayland, * * * in 1782 * * * enacted a stay-law extending to January, 1784, * * *

'Georgia, in August, 1782, stayed execution for two rears from and after the passing of the act. * * *

'* * * (In South Carolina in 1782) the commencement of suits was suspended till ten days after the sitting of the next general assembly. * * * On the twenty-sixth day of March, 1784, came the great ordinance for the payment of debts in four annual instalments. * * *'

Ramsay, supra, note 2, vol. 3, pp. 65, 66, 106:

'The distrust which prevailed among the people, respecting the punctual fulfilment of contracts, arose from the powers claimed, and, in too many instances, exercised by the state legislatures, for impairing the obligation of contracts. * * * These prolific sources of evil were completely done away by the new constitution. * * *

'* * * State legislatures, in too many instances, yielded to the necessities of their constituents, and passed laws, by which creditors were compelled, either to wait for payment of their just demands, on the tender of security, or to take property, at a valuation, or paper money falsely purporting to be the representative of specie. These laws were considered, by the British, as inconsistent with * * * the treaty. * * * The Americans palliated these measures, by the plea of necessity. * * *'

Ramsay, The History of South-Carolina (1809) vol. 2, pp. 429, 430:

'The effects of these laws, interfering between debtors and creditors, were extensive. They destroyed public credit and confidence between man and man; injured the morals of the people, and in many instances ensured and aggravated the final ruin of the unfortunate debtors for whose temporary relief they were brought forward.'

****248 *459** In the midst of this confused, gloomy, and seriously exigent condition of affairs, the Constitutional Convention of 1787 met at Philadelphia. The defects of the Articles of Confederation were so great as to be beyond all hope of amendment, and the Convention, acting in technical excess of its authority, proceeded to frame for submission to the people of the several states an entirely new Constitution. Shortly prior to the meeting of the Convention, Madison had assailed a bill pending in the Virginia Assembly, proposing the payment of private debts in three annual installments, on the ground that 'no legislative principle could vindicate such an interposition ***460** of the law in private contracts.' The bill was lost by a single vote. [FN4] Pelatiah Webster had likewise assailed similar laws as altering the value of contracts; and William Paterson, of New Jersey, had insisted that 'the legislature should leave the parties to the law under which they contracted.' [FN5]

FN4 Bancroft, supra, note 3, Vol. I, p. 239.

FN5 Id. vol. 1, p. 241.

In the plan of government especially urged by Sherman and Ellsworth there was an article proposing that the Legislatures of the individual states ought not to possess a right to emit bills of credit, etc., 'or in any manner to obstruct or impede the recovery of debts, whereby the ***461** interests of foreigners or the citizens of any other state may be affected.' [FN6] And on July 13, 1787, Congress in New York, acutely conscious of the evils engendered by state laws interfering with existing contracts, [FN7] passed the Northwest Territory Ordinance, which contained the clause: 'And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private

contracts, or engagements, bona fide, and without fraud previously formed.'[FN8] It is not surprising, therefore, that, after the Convention had adopted the clauses, no state shall 'emit bills of credit,' or 'make any thing but gold and silver coin a tender in payment of debts,' Mr. King moved to add a 'prohibition on the states to interfere in private contracts.' This was opposed by Gouverneur Morris and Colonel Mason. Colonel Mason thought that this would be carrying the restraint too far; that cases would happen that could not be foreseen where some kind of interference would be essential. This was on August 28. But Mason's view did not prevail, for, on September 14 following, the first clause of article 1, s 10, was altered so as to include the provision: 'No state shall * * * pass any * * * law impairing the obligation of contracts,' and in that form it was adopted.[FN9]

FN6 Id. vol. 2, p. 136.

FN7 See Curtis, supra, note 2, volume 2, pp. 366, 367.

FN8 Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, art. II; Thorpe, American Charters, Constitutions and Organic Laws, vol. 2, pp. 957, 961.

FN9 Elliot's Debates, vol. 5, pp. 485, 488, 545, 546; Id. vol. 1, pp. 271, 311; Farrand, The Records of the Federal Convention, vol. 2, pp. 439, 440, 596, 597, 610.

Luther Martin, in an address to the Maryland House of Delegates, declared his reasons for voting against the provision. He said that he considered there might be times of such great public calamity and distress as should render*462 it the duty of a government in some measure to interfere by passing laws totally or partially stopping courts of justice, or authorizing the debtor to pay by installments; that such regulations had been found necessary in most or all of the states 'to prevent the wealthy creditor and the moneyed man from totally destroying the poor, though industrious debtor. Such times may again **249 arrive.' And he was apprehensive of any proposal which took from the respective states the power to give their debtor citizens 'a moment's indulgence, however necessary it might be, and however desirous to grant them aid.'[FN10]

FN10 Elliot's Debates, vol. 1, pp. 344, 376, 377.

On the other hand, Sherman and Ellsworth defended the provision in a letter to the Governor of Connecticut.[FN11] In the course of the Virginia debates, Randolph declared that the prohibition would be promotive of virtue and justice, and preventive of injustice and fraud; and he pointed out that the reputation of the people had suffered because of frequent interferences by the state Legislatures with private contracts.[FN12] In the North Carolina debates, Mr. Davie declared that the prohibition against impairing the obligation of contracts and other restrictions ought to supersede the laws of particular states. He thought the constitutional provisions were founded on the strongest principles of justice.[FN13] Pinckney, in the South Carolina debates, said that he considered the section including the clause in question as 'the soul of the Constitution,' teaching the states 'to cultivate those principles of public honor and private honesty which are the sure road to national character and happiness.'[FN14]

FN11 Id. vol. 1, pp. 491, 492.

FN12 Id. vol. 3, p. 478.

FN13 Id. vol. 4, pp. 156, 191.

FN14 Id. vol. 4, p. 333.

Mr. Warren, in his book, 'The Making of the Constitution,' pp. 552-555, has an interesting re sume of the proceedings in the Convention and of the conflicting views which were before the state conventions for consideration. He says in part:

'The Convention then was asked to perfect their action in favor of honesty and morality, by adding a prohibition on the States which would put an end to statutes enacting laws for special individuals, setting aside Court judgments, repealing vested rights, altering corporate charters, staying the bringing or prosecution of suits, preventing foreclosure of mortgages, altering the terms of contracts, and allowing tender in payment of debts of something other than that contracted for. The

> State Legislatures had hitherto passed such laws in abundant measure, and the situation was graphically described later by Chief Justice Marshall in one of his most noted decisions (Ogden v. Saunders, 12 Wheat. 213, 354, 6 L.Ed. 606), as follows:
>
> "The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State Legislatures as to break in upon the ordinary intercourse of society and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise as well as virtuous of this great community, and was one of the important benefits expected from a reform of the government.'
>
> 'To obviate the conditions thus described, King of Massachusetts proposed the insertion of a new restriction on the States. * * * Wilson and Madison supported his motion. Mason and G. Morris, however, believed that it went too far in interfering with the powers of the States. * * * There was also a genuine belief by some delegates that, under some circumstances and in financial crises, such stay and tender laws might be necessary to avert calamitous loss to debtors. * * * The other delegates had been deeply impressed by the disastrous social and economic effects of the stay and tender laws which had been enacted by most of the States between 1780 and 1786, and they decided to make similar legislation impossible in the future.'

***463** The provision was strongly defended in The Federalist, both by Hamilton in No. 7 and Madison in No. 44. Madison concluded his defense of the clause by saying:

***464** '* * * One legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.'

Contemporaneous history is replete with evidence of the sharp conflict of opinion with respect to the advisability of adopting the clause. Dr. Ramsay (The History of South-Carolina (1809), vol. 2, pp. 431-433), already referred to, writing of the action of South Carolina and especially referring to the contract impairment clause, says that this Constitution was accepted and ratified on behalf of the state, and speaks of it as an act of great self-denial:

'The power thus given up by South-Carolina, was one she thought essential to her welfare, and had freely exercised for several preceding years. Such a relinquishment she would not have made at any period of the last five years; for in them she had passed no less than six acts interfering between debtor and creditor, with the view of obtaining a respite for the former under particular circumstances of public distress. To tie up the hands of future legislatures so as to deprive them of a power of repeating similar acts on any emergency, was a display both of wisdom and magnanimity. It would seem as if experience had convinced the state of its political errors, and induced a willingness to retrace its steps and relinquish a power which had been improperly used.'

There is an old case, Glaze v. Drayton, 1 Desaus. (S.C.) 109, decided in 1784, where the South Carolina court of chancery entered a decree for the specific performance of a contract****250** for the purchase of land, but providing for the payment of the balance due under the contract***465** 'by instalments, at the times mentioned in the acts of assembly respecting the recovery of old debts.' In reporting that case soon after the adoption of the Constitution, Chancellor De Saussure added the following explanatory and illuminating note:

'The legislature, in consideration of the distressed state of the country, after the war, had passed an act, preventing the immediate recovery of debts, and fix-

ing certain periods for the payment of debts, far beyond the periods fixed by the contract of the parties. These interferences with private contracts, became very common with most of the state legislatures, even after the distresses arising from the war had ceased in a great degree. They produced distrust and irritation throughout the community, to such an extent, that new troubles were apprehended; and nothing contributed more to prepare the public mind for giving up a portion of the state sovereignty, and adopting an efficient national government, than these abuses of power by the state legislatures.'

If it be possible by resort to the testimony of history to put any question of constitutional intent beyond the domain of uncertainty, the foregoing leaves no reasonable ground upon which to base a denial that the clause of the Constitution now under consideration was meant to foreclose state action impairing the obligation of contracts primarily and especially in respect of such action aimed at giving relief to debtors in time of emergency. And, if further proof be required to strengthen what already is inexpugnable, such proof will be found in the previous decisions of this court. There are many such decisions; but it is necessary to refer to a few only which bear directly upon the question, namely: Bronson v. Kinzie, 1 How. 311, 11 L.Ed. 143; McCracken v. Hayward, 2 How. 608, 11 L.Ed. 397; Gantly's Lessee v. Ewing, 3 How. 707, 11 L.Ed. 794; Howard v. Bugbee, 24 How. 461, 16 L.Ed. 753; Gunn v. Barry, 15 Wall. 610, 21 L.Ed. 212; ***466**Walker v. Whitehead, 16 Wall. 314, 318, 21 L.Ed. 357; Edwards v. Kearzey, 96 U.S. 595, 604, 24 L.Ed. 793; Barnitz v. Beverly, 163 U.S. 118, 16 S.Ct. 1042, 41 L.Ed. 93, and Bradley v. Lightcap, 195 U.S. 1, 24 S.Ct. 748, 49 L.Ed. 65.

Bronson v. Kinzie was decided at the January term, 1843. The case involved an Illinois statute, extending the period of redemption for a period of twelve months after a sale under a decree in chancery, and another statute preventing a sale unless two-thirds of the amount at which the property had been valued by appraisers should be bid therefor. This Court held both statutes invalid, when applied to an existing mortgage, as infringing the contract impairment clause. No more need now be said as to the points decided. The opinion of the court says nothing about an emergency; but it is clear that the statute was passed for the purpose of meeting the panic and depression which began in 1837 and continued for some years thereafter.[FN15] And, in the light of what is now to be said, it is evident that the question of that emergency as a basis for the legislation was so definitely involved that it must have been considered by the Court.

FN15 See Dewey, Financial History of the United States, p. 229 et seq.; Schouler, History of the United States, vol. 4, p. 276 et seq; McMaster, supra, note 2, vol. 6, pp. 389 et seq., 523 et seq., 623 et seq.

The emergency was quite as serious as that which the country has faced during the past three years. Indeed, it was so great that in one instance, at least, a state repudiated a portion of its public debt, and others were strongly tempted to do so.[FN16] Mr. Warren, in his book, 'The Supreme Court in United States History,' vol. 2, pp. 376-379, gives a vivid picture of the situation. After referring to Bronson v. Kinzie and the statute extending the period of redemption therein dealt with, he points to the prevailing state of business and finance ***467** which had called the statute into existence; to the bank failures, state debt repudiations, scarcity of hard money, the inability to pay debts except by disposing of property at ruinous prices; to the enactment of statutes for the relief of debtors, stay laws postponing collection of debts, etc., which had been passed by state after state; and to the action of this court in striking down the state statute in the face of these conditions.

FN16 See Dewey, supra, note 15, p. 243 et seq.; McMaster, supra, note 2, vol. 6, p. 627 et seq., vol. 7, p. 19 et seq.; Centennial History of Illinois, vol. 2, p. 231 et seq.

'Unquestionably,' he continues, 'the country owes much of its prosperity to the unflinching courage with which, in the face of attack, the Court has maintained its firm stand in behalf of high standards of business morale, requiring honest payment of debts and strict performance of contracts; and its rigid construction of the Constitution to this end has been one of the glories of the Judiciary. That its decisions should, at times, have met with disfavor among the debtor class was, however, entirely natural; and while, ultimately, these debtor-relief-laws have always proved to be injurious to the very class they were designed to relieve and to increase the financial distress, fraud and extortion, temporarily, debtors have

always believed such laws to be their salvation and have resented judicial decisions holding them invalid. Consequently, this opinion of the Court in the Bronson Case aroused great antagonism in the Western States. In Illinois,****251** a mass meeting was held which resolved that the decision ought not to be heeded. * * * Later, deference to the antagonism aroused against the Court by this decision was made when the Senator from Illinois, James Semple, introduced in the Senate in 1846, a joint resolution proposing a Constitutional Amendment to prohibit the Supreme Court from declaring void 'any Act of Congress or any State regulation on the ground that it is contrary to the Constitution of the United States. * * *''

McMaster (supra, note 2) vol. 7, pp. 44-48, is to the same effect.

***468** McCracken v. Hayward, decided at the January term, 1844, dealt with the same Illinois statute; but involved a sale on execution after judgment, whereas Bronson v. Kinzie involved a mortgage. The decision simply followed the Bronson Case. What has been said in respect of the background and setting of that case is equally applicable and need not be repeated.

Gantly's Lessee v. Ewing was decided at the January term, 1845. It held unconstitutional, as applied to a pre-existing mortgage, an act of Indiana providing that no real property should be sold on execution for less than half its appraised value. The statute, like those of Illinois, was enacted for the benefit of hard-pressed debtors as a result of the same emergency. It is referred to by McMaster, supra, as one of the 'marks on the statute books' which the 'evil times through which the people were passing' had left.

Howard v. Bugbee, decided at the December term, 1860, dealt with an Alabama statute authorizing a redemption of mortgaged property in two years after the sale under a decree. The statute was declared unconstitutional principally upon the authority of Bronson v. Kinzie. The opinion is very short, and does not refer to the question of emergency. The statute was passed, however, in 1842 (the mortgage having been executed prior thereto), and was therefore one of the emergency statutes of that period. The Alabama Supreme Court, whose decision was under review here, so treated it, and justified the statute upon that ground. 32 Ala. 713, 716, 717. It is worthy of note that, after the decision of this court in the Bugbee Case, Judge Walker, who delivered the opinion therein for the Alabama court, filed a dissenting opinion in Ex parte Pollard (Ex parte Woods), 40 Ala. 77, 110, in the course of which he said that his former opinion had been overruled by this court, and he could no longer perceive ***469** any ground upon which the convictions of a Legislature as to the welfare of the people could enlarge the authority to interfere, through the manipulation of the remedy, with the obligation of contracts. The basis of the legislation was, and is shown by the decision of the Alabama Supreme Court sustaining it to be, the existence of the great emergency beginning in 1837; and that question, since the Alabama decision was reviewed, was quite plainly before this court for consideration.

Walker v. Whitehead, decided at the December term, 1872, held unconstitutional a Georgia statute requiring the plaintiff, suing on a debt or contract, to prove as a condition precedent to the entry of judgment in his favor that all legal taxes chargeable by law thereon had been duly paid for each year since the making of the debt or contract. The Georgia Supreme Court, 43 Ga. 538, 544-546, had sustained the act as a measure made necessary by the desperate financial and economic conditions in that state due to the Civil War. This court, making no response to the somewhat fervid presentation of this view of the matter by the state court, simply said that the degree of impairment was immaterial; that any impairment of the obligation of a contract is within the prohibition of the Constitution; that 'a clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur.'

Edwards v. Kearzey, decided at the October term, 1877, held invalid, as applied to a preexisting debt, the provision of the North Carolina Constitution of 1868 increasing the exemptions to which a debtor was entitled. The North Carolina Supreme Court, in a series of decisions, had sustained the state constitutional provision, principally upon the ground (Garrett v. Chesire, 69 N.C. 396, 405, 12 Am.Rep. 647) that it was adopted at a time when 'probably one-half of the debtor class are owing more old debts than ***470** they can pay'; and that, 'if under our circumstances our people are to be left without any exemptions, the policy of christian civilization is lost sight of. * * *' In the brief of defendant in error in this court (pp. 7, 8), the view was strongly urged that the provision was not

so much for the benefit of the debtor as for that of the state to prevent the evils of almost universal pauperism. Attention was called to the desperate condition of the people of the state following the Civil War, and it was said that one-third of the whole population were paupers, all their property except lands having disappeared; that one-half of the people did not own and enough to afford burial for that proportion of the population; and against those who did own land the antewar debts were piled mountain high. It was submitted that the state, on being rehabilitated, was not bound to allow the creditor to strip the few self-supporting landowners of their means of existence and thereby add them to the vast army of the impoverished; but that it had the right to defer ****252** a portion of the creditor's claim until the prostrated community had opportunity to recoup some of its losses.

This court, in response, reviewed the history of the adoption of the contract impairment clause and held the state constitutional provision invalid. "Policy and humanity," it said, 'are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. (Italics added.) Our duty is simply to execute it.'

Barnitz v. Beverly was decided May 18, 1896. A law of Kansas extended the period of redemption from a sale under a mortgage for a period of eighteen months, during which time the mortgagor was to remain in possession and receive rents and profits, except as necessary for repairs. ***471** The act was passed in 1893 in the midst of another panic, the severity of which, still within the memory of the members of this court, is a matter of common knowledge. The effects of that panic extended into every form of industry; bank failures were on an unprecedented scale; more than half the railroads of the country were in the hands of receivers; securities fell to 50 per cent., often to 25 per cent., of their former value; commercial failures and unemployment became general; heavy inroads were made upon public and private resources in caring for the hungry and destitute;[FN17] great bodies of idle men-the so-called 'industrial armies'-marched toward Washington, feeding like locusts upon the country through which they passed.

FN17 See Dewey, supra, note 15, p. 444 et seq.; Andrews, The Last Quarter Century in the United States, vol. 2, p. 301 et seq.

These conditions were brought to the attention of this court. In addition, the Supreme Court of Kansas, 55 Kan. 466, 484, 485, 42 P. 725, 731, 31 L.R.A. 74, 49 Am.St.Rep. 257, had relied upon them as a justification for the legislation, and had inquired why the state Legislature in a time of general depression could not 'extend the indefinite estate impliedly reserved by the mortgagor, as the federal courts of equity do in particular cases, beyond the six months allowed by the general practice?'

In response to all of which, this court, after reviewing its former decisions, held the statute invalid as applied to a sale under a mortgage executed before its bassage.

The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance,***472** financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.

The defense of the Minnesota law is made upon grounds which were discountenanced by the makers of the Constitution and have many times been rejected by this Court. That defense should not now succeed because it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence. With due regard for the processes of logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it.

The lower court, and counsel for the appellees in their argument here, frankly admitted that the statute does constitute a material impairment of the contract, but contended that such legislation is brought within

the state power by the present emergency. If I understand the opinion just delivered, this court is not wholly in accord with that view. The opinion concedes that emergency does not create power, or increase granted power, or remove or diminish restrictions upon power granted or reserved. It then proceeds to say, however, that, while emergency does not create power, it may furnish the occasion for the exercise of power. I can only interpret what is said on that subject as meaning that, while an emergency does not diminish a restriction upon power, it furnishes an occasion for diminishing it; and this, as it seems to me, is merely to say the same thing by the use of another set of words, with the effect of affirming that which has just been denied.

***473** It is quite true that an emergency may supply the occasion for the exercise of power, dependent upon the nature of the power and the intent of the Constitution with respect thereto. The emergency of war furnishes an occasion for the exercise of certain of the war powers. This the Constitution contemplates, since they cannot be exercised upon any other occasion. The existence of another kind of emergency authorizes the United States to protect each of the states of the Union against domestic violence. Const. art. 4, s 4. But we are here dealing, not with a power granted by the Federal Constitution, but with the state police power, which exists in its own right. Hence the ****253** question is, not whether an emergency furnishes the occasion for the exercise of that state power, but whether an emergency furnishes an occasion for the relaxation of the restrictions upon the power imposed by the contract impairment clause; and the difficulty is that the contract impairment clause forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts. That clause restricts every state power in the particular specified, no matter what may be the occasion. It does not contemplate that an emergency shall furnish an occasion for softening the restriction or making it any the less a restriction upon state action in that contingency than it is under strictly normal conditions.

The Minnesota statute either impairs the obligation of contracts or it does not. If it does not, the occasion to which it relates becomes immaterial, since then the passage of the statute is the exercise of a normal, unrestricted, state power and requires no special occasion to render it effective. If it does, the emergency no more furnishes a proper occasion for its exercise than if the emergency were nonexistent. And so, while, in form, the suggested distinction seems to put us forward in a straight line, in reality it simply carries us back in a ***474** circle, like bewildered travelers lost in a wood, to the point where we parted company with the view of the state court.

If what has now been said is sound, as I think it is, we come to what really is the vital question in the case: Does the Minnesota statute constitute an impairment of the obligation of the contract now under review?

In answering that question, we must first of all distinguish the present legislation from those statutes which, although interfering in some degree with the terms of contracts, or having the effect of entirely destroying them, have nevertheless been sustained as not impairing the obligation of contracts in the constitutional sense. Among these statutes are such as affect the remedy merely, as to which this court said in Bronson v. Kinzie, supra, 1 How. at page 316, 11 L.Ed. 143, and repeated in Edwards v. Kearzey, supra, 96 U.S. page 604, 24 L.Ed. 793: 'Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.'

Another class of statutes is illustrated by those exempting from execution and sale certain classes of property, like the tools of an artisan. Chief Justice Taney, in Bronson v. Kinzie, supra, speaking obiter, said that a state might properly exempt necessary implements of agriculture, or the toold of a mechanic, or articles of necessity in household furniture. But this court, in Edwards v. Kearzey, supra, struck down a provision of the North Carolina Constitution which exempted every homestead, and the dwelling and buildings used therewith, not exceeding in value $1,000, on the ground of its unconstitutionality as applied to a contract already in existence. Referring to the opinion in Bronson v. Kinzie, the court said (page 604 of 96 U.S.) ***475** that the Chief Justice seems to have had in his mind the maxim 'de minimis,' etc. 'Upon no other ground can any exemption be justified.'

It is quite true also that 'the reservation of essential attributes of sovereign power is also read into

contracts'; and that the Legislature cannot 'bargain away the public health or the public morals.' General statutes to put an end to lotteries, the sale or manufacture of intoxicating liquors, the maintenance of nuisances, to protect the public safety, etc., although they have the indirect effect of absolutely destroying private contracts previously made in contemplation of a continuance of the state of affairs then in existence but subsequently prohibited, have been uniformly upheld as not violating the contract impairment clause. The distinction between legislation of that character and the Minnesota statute, however, is readily observable. It may be demonstrated by an example. A, engaged in the business of manufacturing intoxicating liquor within a state, makes a contract, we will suppose, with B to manufacture and deliver at a stipulated price and at some date in the future a quantity of whisky. Before the day arrives for the performance of the contract, the state passes a law prohibiting the manufacture and sale of intoxicating liquor. The contract immediately falls because its performance has ceased to be lawful. This is so because the contract is made upon the implied condition that a particular state of things shall continue to exist, 'and when that state of things ceases to exist the bargain itself ceases to exist.' Marshall v. Glanvill, (1917) 2 K.B. 87, 91. In that case the plaintiff had been employed by the defendants upon a contract of service. While the contract was in force, the country became involved in the World War, and plaintiff was called into the military service. The court held that this rendered performance unlawful and that the contract was at an end. It said:

***476** 'Here the parties clearly made their bargain on the footing that it should continue lawful for the plaintiff to render and for the defendants to accept his services. The rendering and acceptance of these services ceased to be lawful in July, 1916, and thereupon the bargain came to an end.'

****254** In Re Shipton, Anderson & Co., (1915) 3 K.B. 676, a parcel of wheat then lying in a warehouse was sold for future payment and delivery. The wheat was subsequently requisitioned by the English government, and the sellers became unable to deliver. The Court of King's Bench Division held that the sellers were not liable. Darling, Justice, agreeing with the opinion of Lord Reading, said (pages 683, 684 of (1915) 3 K.B.):

'If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy. It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject-matter of this contract has been seized by the State acting for the general good. Salus populi suprema lex is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it.'

The general subject is discussed by this court in Omnia Commercial Co. v. United States, 261 U.S. 502, page 513, 43 S.Ct. 437, 67 L.Ed. 773, and it is there pointed out that the effect of such a requisition is not to appropriate the contract but to frustrate it-an essentially different thing.

The same distinction properly may be made as to the contract impairment clause, in respect of subsequent state legislation rendering unlawful a state of things which was lawful when an obligation relating thereto was contracted. ***477** By such legislation the obligation is not impaired in the constitutional sense. The contract is frustrated-it disappears in virtue of an implied condition to that effect read into the contract itself. Thus, in F. A. Tamplin Steamship Co., Ltd., v. Anglo-Mexican Petroleum Products Co., Ltd., (1916) 2 A.C. 397, the House of Lords had before it a case where a steamer, then subject to a charter party having nearly three years to run, had been requisitioned by the Admiralty. The applicable rule was there stated to be that the court should examine the contract and the circumstances in which it was made in order to see whether or not from their nature the parties must have made their bargain on the footing that a particular state of things would continue to exist. And, if they must have done so, a term to that effect would be implied, though not expressed in the contract. In Metropolitan Water Board v. Dick, Kerr & Company, (1918) A.C. 119, 127, 128, 137, that rule was reaffirmed, with the additional statement that a subsequent law might be the cause of an impossibility of performance, by taking away something from the control of the party as to which thing he had contracted to do or not to do something else; and that the court must determine whether this contingency is of such a character that it can reasonably be implied to have been in the con-

templation of the parties when the contract was made.

Bearing in mind these aids toward determining whether such an implied condition may be read into a particular contract, let us revert to the example already given with respect to an agreement for the manufacture and sale of intoxicating liquor. And let us suppose that the state, instead of passing legislation prohibiting the manufacture and sale of the commodity, in which event the doctrine of implied conditions would be pertinent, continues to recognize the general lawfulness of the business, but, because of what it conceives to be a justifying emergency, provides that the time for the performance of existing ***478** contracts for future manufacture and sale shall be extended for a specified period of time. It is perfectly admissible, in view of the state power to prohibit the business, to read into the contract an implied proviso to the effect that the business of manufacturing and selling intoxicating liquors shall not, prior to the date when performance is due, become unlawful; but in the case last put, to read into the contract a pertinent provisional exception in the event of intermeddling state action would be more than unreasonable, it would be absurd, since we must assume that the contract was made on the footing that, so long as the obligation remained lawful, the impairment clause would effectively preclude a law altering or nullifying it however exigent the occasion might be.

That, in principle, is precisely the case here. The contract is to repay a loan within a fixed time, with the express condition that upon failure the property given as security shall be sold, and that, in the absence of a timely redemption, title shall be vested absolutely in the purchaser. This contract was lawful when made; and it has never been anything else. What the Legislature has done is to pass a statute which does not have the effect of frustrating the contract by rendering its performance unlawful, but one which, at the election of one of the parties, postpones for a time the effective enforcement of the contractual obligation, notwithstanding the obligation, under the exact terms of the contract, remains lawful and possible of performance after the passage of the statute as it was before.

The rent cases- Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877; Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595-which are here relied upon, dealt with an exigent situation**255 due to a period of scarcity of housing caused by the war. I do not stop to consider the distinctions between them and the present case or to do more than point out that the question of contract impairment*479 received little, if any, more than casual consideration. The writer of the opinions in the first two cases, speaking for this Court in a later case, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322, 28 A.L.R. 1321, characterized all of them as having gone 'to the verge of the law.' It therefore seems pertinent to say that decisions which confessedly escape the limbo of unconstitutionality by the exceedingly narrow margin suggested by this characterization should be applied toward the solution of a doubtful question arising in a different field with a very high degree of caution. Reasonably considered, they do not foreclose the question here involved, and it should be determined upon its merits without regard to those cases.

We come back, then, directly, to the question of impairment. As to that, the conclusion reached by the court here seems to be that the relief afforded by the statute does not contravene the constitutional provision because it is of a character appropriate to the emergency and allowed upon what are said to be reasonable conditions.

It is necessary, first of all, to describe the exact situation. Appellees obtained from appellant a loan of $3,800; and, to secure its payment, executed a mortgage upon real property consisting of land and a fourteen-room house and garage. The mortgage contained the conventional Minnesota provision for foreclosure by advertisement. The mortgagors agreed to pay the debt, together with interest and the taxes and insurance on the property. They defaulted; and, in strict accordance with the bargain, appellant foreclosed the mortgage by advertisement and caused the premises to be sold. Appellant itself bought the property at the sale for a sum equal to the amount of the mortgage debt. The period of redemption from that sale was due to expire on May 2, 1933; and, assuming no redemption at the end of that day, under the law in force ***480** when the contract was made and when the property was sold and in accordance with the terms of the mortgage, appellant would at once have become the owner in fee and entitled to the immediate possession of the property. The statute here under attack was passed on April 18, 1933. It first recited and de-

clared that an economic emergency existed. As applied to the present case, it arbitrarily extended the period of redemption expiring on May 2, 1933, to Mary 18, 1933-a period of sixteen days; and provided that the mortgagor might apply for a further extension to the district court of the county. That court was authorized to extend the period to a date not later than May 1, 1935, on the condition that the mortgagor should pay to the creditor all or a reasonable part of the income or rental value, as to the court might appear just and equitable, toward the payment of taxes, insurance, interest and principal mortgage indebtedness, and at such times and in such manner as should be fixed by the court. The court to whom the application in this case was made extended the time until May 1, 1935, upon the condition that payment by the mortgagor of the rental value, $40 per month, should be made.

It will be observed that, whether the statute operated directly upon the contract or indirectly by modifying the remedy, its effect was to extend the period of redemption absolutely for a period of sixteen days, and conditionally for a period of two years. That this brought about a substantial change in the terms of the contract reasonably cannot be denied. If the statute was meant to operate only upon the remedy, it nevertheless, as applied, had the effect of destroying for two years the right of the creditor to enjoy the ownership of the property, and consequently the correlative power, for that period, to occupy, sell, or otherwise dispose of it as might seem fit. This postponement, if it had been unconditional, undoubtedly would have constituted an unconstitutional ***481** impairment of the obligation. This Court so decided in Bronson v. Kinzie, supra, where the period of redemption was extended for a period of only twelve months after a sale under a decree; in Howard v. Bugbee, supra, where the extension was for two years; and in Barnitz v. Beverly, supra, where the period was extended for eighteen months. Those cases, we may assume, still embody the law, since they are not overruled.

The only substantial difference between those cases and the present one is that here the extension of the period of redemption and postponement of the creditor's ownership is accompanied by the condition that the rental value of the property shall, in the meantime, be paid. Assuming, for the moment, that a statute extending the period of redemption may be upheld if something of commensurate value be given the creditor by way of compensation, a conclusion that payment of the rental value during the two-year period of postponement is even the approximate equivalent of immediate ownership and possession is purely gratuitous. How can such payment be regarded, in any sense, as compensation for the postponement of the contract right? The ownership of the property to which petitioner was entitled carried with it, not only the right to occupy or sell it, but, ownership being retained, the right to the rental value ****256** as well. So that in the last analysis petitioner simply is allowed to retain a part of what is its own as compensation for surrendering the remainder. Moreover, it cannot be foreseen what will happen to the property during that long period of time. The buildings may deteriorate in quality; the value of the property may fall to a sum far below the purchase price; the financial needs of appellant may become so pressing as to render it urgently necessary that the property shall be sold for whatever it may bring.

However these or other supposable contingencies may be, the statute denies appellant for a period of two years ***482** the ownership and possession of the property-an asset which, in any event, is of substantial character, and which possibly may turn out to be of great value. The statute, therefore, is not merely a modification of the remedy; it effects a material and injurious change in the obligation. The legally enforceable right of the creditor when the statute was passed was, at once upon default of redemption, to become the fee-simple owner of the property. Extension of the time for redemption for two years, whatever compensation be given in its place, destroys that specific right and the correlative obligation, and does so none the less though it assume to create in invitum another and different right and obligation of equal value. Certainly, if A should contract with B to deliver a specified quantity of wheat on or before a given date, legislation, however much it might purport to act upon the remedy, which had the effect of permitting the contract to be discharged by the delivery of corn of equal value, would subvert the constitutional restriction.

A statute which materially delays enforcement of the mortgagee's contractual right of ownership and possession does not modify the remedy merely; it destroys, for the period of delay, all remedy so far as the enforcement of that right is concerned. The phrase 'obligation of a contract' in the constitutional sense

imports a legal duty to perform the specified obligation of that contract, not to substitute and perform, against the will of one of the parties, a different, albeit equally valuable, obligation. And a state, under the contract impairment clause, has no more power to accomplish such a substitution than has one of the parties to the contract against the will of the other. It cannot do so either by acting directly upon the contract or by bringing about the result under the guise of a statute in form acting only upon the remedy. If it could, the efficacy of the constitutional restriction would, in large measure, be made to disappear. ***483** As this court has well said, whatever tends to postpone or retard the enforcement of a contract, to that extent weakens the obligation. According to one Latin proverb, 'He who gives quickly, gives twice,' and according to another, 'He who pays too late, pays less.' 'Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition.' Louisiana ex rel. Ranger v. New Orleans, 102 U.S. 203, 207, 26 L.Ed. 132. I am not able to see any real distinction between a statute which in substantive terms alters the obligation of a debtor-creditor contract so as to extend the time of its performance for a period of two years and a statute which, though in terms acting upon the remedy, is aimed at the obligation (as distinguished, for example, from the judicial procedure incident to the enforcement thereof), and which does in fact withhold from the creditor, for the same period of time, the stipulated fruits of his contract.

I quite agree with the opinion of the Court that whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned. Being unable to reach any other conclusion than that the Minnesota statute infringes the constitutional restriction under review, I have no choice but to say so.

I am authorized to say that Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice BUTLER concur in this opinion.

U.S. 1934.
Home Bldg. & Loan Ass'n v. Blaisdell
290 U.S. 398, 54 S.Ct. 231, 88 A.L.R. 1481, 78 L.Ed. 413

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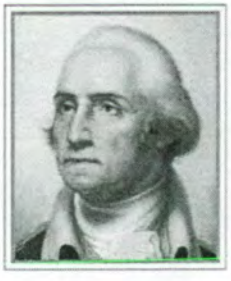
Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment's Public Debt Clause

MICHAEL ABRAMOWICZ

Working Paper



THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
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Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment's Public Debt Clause

Michael Abramowicz

CONTENTS

> The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. . . .[1]

Milling among the tourists and homeless in Lafayette Park across from the White House in the mid-1980s was a protester carrying a sign with a unique political message: "Arrest Me. I Question the Validity of the Public Debt. Repeal Section 4, Fourteenth Amendment to the U.S. Constitution."[2] Although we can safely dismiss the protester's tongue-in-cheek concern that § 4 overrides the First Amendment, the mock protest makes two points worth noting. First, the wording of the first sentence of § 4 is open to a wide range of interpretation. And second, the section has become obscure, less likely to be cited in policy discussion[3] than in a Washington joke.

"The validity of the public debt . . . shall not be questioned." This Article argues that these words mean that the government must be able to meet its fiscal commitments and applies this interpretation to assorted aspects of congressional fiscal management. After all, some might say that since the 1980s, the congressional budget process itself has become a Washington joke. Congress and the President compete over budget policy in a high-stakes game of fiscal chicken.[4] Deficits add to an accumulating debt[5] that is sure to escalate beyond the time horizons of balanced-budget plans.[6] And politicians agree only on the sanctity of entitlement spending,[7] even as

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[1]U.S. CONST. amend. XIV, § 4. Section 4 continues:

> But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

[2]*See* Irvin Molotsky, *Lafayette Park: Not Just Another Pretty Postcard*, N.Y. TIMES, Sept. 7, 1984, at A13.

[3]Indeed, the protester's cryptic reference is the only citation of Section 4 in LEXIS/NEXIS's *New York Times* database.

[4]*See* Stephen Barr & Michael A. Fletcher, *Government Shuts Again After Talks Collapse*, WASH. POST, Dec. 16, 1995, at A1; Jackie Calmes & David Rogers, *Federal Offices Are Preparing for Shutdown*, WALL ST. J., Nov. 10, 1995, at A2 (anticipating possibility of government shutdown and bond default). At the end of the latest impasse, Congress blinked. By then, the government had shut down twice, but avoided default on its bonds. *See* Monica Borkowski, *The Budget Truce: Status Report*, N.Y. TIMES, Apr. 26, 1996, at A22; Christopher Georges, *Congress Passes Debt-Ceiling Measure, Agrees to Spend More on Social Security*, WALL ST. J., Mar. 29, 1996, at A12.

[5]The 1996 budget deficit has been projected at $144 billion. *See* CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1997-2006 at xviii (1996).

[6]Both the President and Congress have unveiled plans that they claim would balance the budget by 2002. The Congressional Budget Office projects, however, that deficits will climb after 2002, especially beginning in about 2010 with the retirement of the baby-boom generation. *See id.* at xxv.

[7]*See, e.g.*, Robert Bixby, *The Missing Debate: Hard Choices on Entitlements*, ST.

economists warn that the United States of the twenty-first century will be unable to deliver on its twentieth century promises.[8]

In short, the budget process needs mending.[9] But in none of these areas does reform of congressional practice require a constitutional amendment[10] or a sudden congressional commitment to fiscal soundness. Rather, reform can evolve from the first sentence of § 4, the Constitution's Public Debt Clause.[11] More prominent provisions of the Fourteenth Amendment have long overshadowed the Clause,[12] assumed to be an anachronism[13] from a war whose fiscal rifts healed faster than its emotional

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PETERSBURG TIMES, Oct. 6, 1996, at 1D.

[8]*See, e.g.*, CONGRESSIONAL BUDGET OFFICE, *supra* note 5, at xxiii ("The path of spending and revenues . . . clearly cannot be sustained because the debt-to-GDP ratio spirals out of control after 2030.").

[9]For an assessment of budget process reform proposals, see Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. LEGIS. 429 (1992).

[10]The primary constitutional reform proposal has been the proposed Balanced Budget Amendment. *See* S.J. Res 1, 105th Cong. (1997); S.J. Res. 1, 104th Cong. (1995). In 1995, the Amendment failed in the Senate, effectively one vote short of the needed two-third majority. *See* 141 CONG. REC. S3310-13 (daily ed. Mar. 13, 1995). The subsequent November, 1996 elections led to an increase in the Republicans' Senate majority, bringing speculation that a balanced-budget amendment might now have enough votes to pass that body. *See* Eric Pianin & Guy Gugliotta, *Budget Amendment Gets Warmer Climate*, WASH. POST, Nov. 11, 1996, at A4. The proposal, however, failed again by one vote. *See* 143 CONG. REC. S1922 (daily ed. Mar. 4, 1997); David E. Rosenbaum, *Republicans' Budget Amendment Is Headed for Defeat in the Senate*, N.Y. TIMES, Feb. 27, 1997, at A1 (reporting Sen. Robert Torricelli's announcement reneging on campaign promise to support Balanced Budget Amendment).

Legal scholars have debated whether a Balanced Budget Amendment would be wise and effective. *See* Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed To—And No More*, 106 YALE L.J. 1449 (1997) (describing proposed Amendment as potentially unenforceable and as poorly drafted); Donald B. Tobin, *The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experiences*, 12 J.L. & Pol. 153 (1996) (asserting that judicial intervention in budget matters will bring unintended consequences); Gay Aynesworth Crosthwait, Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065 (1983); David Lubecky, Comment, *The Proposed Federal Balanced Budget Amendment: The Lesson from State Experience*, 55 U. CIN. L. REV. 563 (1996) (comparing different states' balanced budget amendments).

[11]The provision is so obscure in Fourteenth Amendment scholarship that no commentator appears even to have taken the trouble to name it. In seeking to revitalize the Clause, this Article at least remedies this neglect.

[12]Even at the turn of the century, treatises on the Fourteenth Amendment ignored the Clause. *See, e.g.*, HENRY BRANNON, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 7 (1901) (quoting Fourteenth Amendment as containing only Sections 1 and 5).

[13]In this sense, the Clause is assumed to be the Reconstruction analogue of a provision in the original Constitution: "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." U.S. CONST. art. VI., cl. 1. Placing aside the possibility of a lingering debt from the eighteenth century, this provision is no longer

scars. While the Clause did arise in the peculiar context of Reconstruction, this Article argues that it remains applicable today and that it could transform the Fiscal Constitution[14] by adding an intertemporal constraint to the budget process. This constraint would enhance congressional power by allowing Congress to tie its own hands with irrevocable budgetary promises,[15] and accordingly would reduce Congress's power by blocking it from repudiating or jeopardizing such commitments.

Part I argues that the Public Debt Clause applies beyond Reconstruction. Although there are few historical records available to help us discern the Framers' intention, the history of the Clause's adoption shows that Congress did not intend to limit its applicability to Civil War debt, but rather sought to embed fiscal honor within the Constitution. The Supreme Court has considered the Clause in just one case,[16] but its decision in that case reaffirms the Clause's vitality and legitimizes its future development. Part II argues for a broad reading of the Clause. The language and history of the Clause show that the "public debt" can include more than just bonds, and that formal repudiation need not occur for its validity to have been questioned.

Part III applies the Public Debt Clause to problems in the budget process. The most obvious consequence of taking the Clause seriously would be that a governmental failure to make debt payments, which seemed possible during the budget impasse over the fiscal year 1996 budget, would be unconstitutional. More broadly, the Clause renders unconstitutional the federal debt-limit statute that makes default possible. Beyond fixing a broken budget process, the Public Debt Clause could serve as a partial

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operative. However, the decision of the Framers of the Fourteenth Amendment not to echo this provision by using the phrase "before the Adoption of this article," as they chose to echo other provisions in Section 1 of the Fourteenth Amendment, suggests that they sought to establish a broader principle in the first sentence of § 4. The second sentence of § 4, of course, has little applicability today.

[14]For assessments of restrictions that the Constitution imposes on the budget process, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988); Kenneth Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977). Professor Dam defines the "Fiscal Constitution" as including "Supreme Court decisions interpreting the Constitution, key framework legislation, and implicit understandings derived from existing practice." Dam, *supra*, at 271. The irony of this definition is that though it is part of the Constitution and relates to fiscal matters, the Public Debt Clause is not yet part of the Fiscal Constitution.

[15]The economic notion that a government may benefit by "tying its hands," i.e. providing an institutional mechanism that forces a government to stick to its initial policy commitments, has received more attention in the context of monetary than in the context of fiscal policy. *See* Robert Barro & David Gordon, *Rules, Discretion, and Reputation in a Model of Monetary Policy*, 12 J. MONETARY ECON. 101 (1983) (developing theory); Francesco Giavazzi & Marco Pagano, *The Advantage of Tying One's Hands: EMS Discipline and Central Bank Credibility*, 32 EUR. ECON. REV. 1055 (1982) (applying theory to European Monetary System).

[16]Perry v. United States, 294 U.S. 330 (1935).

substitute for a Balanced Budget Amendment. More speculatively, the Clause might preclude repudiation of entitlement promises.

Without an enforcement mechanism, the unconstitutionality of various governmental practices under the Public Debt Clause would be irrelevant. Part IV addresses justiciability issues. By protecting bondholders, the Clause designates a class of individuals with standing to challenge the government's compliance with the Clause. Other potential bars to jurisdiction, including sovereign immunity, the political questions doctrine, ripeness, and separation-of-powers considerations, do not preclude judicial involvement.

Some might say that the U.S. budgetary process has operated since the Fourteenth Amendment's ratification in blissful ignorance of the Clause. Constitutional provisions can rise to prominence in unexpected ways, however, and public disgust with "government as usual"[17] could make this an ideal time for enforcing the Clause.

I. The Continuing Vitality of the Public Debt Clause

This Part shows that the Public Debt Clause established not a transitional rule for Reconstruction, but a fiscal constraint for all time. Section I.A uses historical evidence to argue that the Framers intended the Clause to be applicable beyond the Reconstruction period. Section I.B reviews the limited jurisprudence addressing the Clause and concludes that it does not contradict and may encourage a broad interpretation. Finally, Section I.C argues that desuetude has not sapped the Clause of its meaning, and that normative considerations may add additional support to this Article's interpretation.

A. The History of the Public Debt Clause

The Public Debt Clause emerged not from a congressional debate about the dynamics of the Fiscal Constitution, but from a Thirty-Ninth Congress focused on reconstructing a war-ravaged nation. It is not surprising then that no member of the House or Senate commented for the record[18] on the Clause's consequences for posterity.[19] This lack of

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[17]*See, e.g.*, Brigid Schulte, *Disgust at All-Time High, Polls Find*, Knight-Ridder News Service, Dec. 19, 1995; Lee Walczak, *The New Populism*, BUSINESS WEEK, Mar. 13, 1995, at 72 (assessing increasing distrust of politicians).

[18]Aside from the *Congressional Globe*, which recorded statements on the floor of the House and Senate, the primary source of information about the Congress's intent is BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914), which contains the proceedings of the joint House-Senate committee that produced an initial draft of the Fourteenth Amendment.

[19]The limited discussion in Congress on the Fourteenth Amendment is a problem not just for Public Debt Clause scholarship, but for examinations of more prominent parts of the

articulation does not mean that the Framers sought to modify the Constitution for only the crisis at hand, as some have assumed.[20] Rather, it demands attention to the evolution of § 4's language and the context in which Congress crafted its words. Indeed, the only scholar to examine the Clause's history tentatively concludes that "the intention was to lay down a constitutional canon for all time in order to protect and maintain the national honor and to strengthen the national credit."[21] In the context of the Equal Protection Clause, the Supreme Court has recognized the broad applicability of the Fourteenth Amendment.[22] The historical records suggest that Congress chose to do in the Public Debt Clause what it did in § 1 of the Amendment--set forth a general principle as applicable today as in Reconstruction.

1. Evolution of the Clause in Congress

The present version of the Public Debt Clause emerged whole with little explanation during the final Senate floor debate on the Fourteenth Amendment.[23] While the history is therefore insufficient to answer many questions about the provision,[24] there are enough clues to justify confidence that the Clause applies to debts incurred after the Civil War. On its face, the provision appears to apply to the entire public debt, including war-related debts but not excluding other debts. Distinctions between the final wording and the language of earlier versions of § 4 suggest that the general wording was not accidental. In particular, the previous version of the Clause[25]

Amendment as well. *See, e.g.*, JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 192 (1951) ("Considering the character of the contemplated action and the fact that a constitutional amendment was at stake, very little was said on the floor of either House, and what was said related primarily to the more obviously political sections of the proposal.").

[20]*See, e.g.*, Arthur Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 YALE L.J. 53, 85 (1934) (asserting that Public Debt Clause "does not seem to proclaim a principal [sic] of legal philosophy, but to envisage a particular situation existing at the time of its enactment (1866)."). Professor Nussbaum offered no evidence for his interpretation.

[21]Phanor J. Eder, *A Forgotten Section of the Fourteenth Amendment*, 19 CORNELL L.Q. 1, 15 (1933).

[22]*See, e.g.*, San Mateo County v. Southern Pacific R.R., 116 U.S. 138 (1882) (repudiating theory that Equal Protection Clause related only to blacks).

[23]*See* CONG. GLOBE, 39th Cong., 1st Sess. 3040. The final language was drafted by Sen. Clark, who also synthesized the debt validity and debt repudiation provisions, which were previously two separate sections, into § 4.

[24]As one scholar has concluded in reference to § 4, "We are on an uncharted sea and . . . it would be hazardous to venture on any dogmatic assertions." Eder, *supra* note 21, at 4.

[25]This version, approved during debate on June 4, 1866, read: "The obligations of the United States, incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto, shall remain inviolate." CONG. GLOBE, 39th Cong., 1st Sess. 2938-41.

unambiguously limited the Clause's applicability to debts "incurred in suppressing insurrection." The addition of the word "including" suggests at least a latent congressional preference for a provision of general applicability.

Indeed, § 4 had evolved to its present state through gradual steps of increasing generality. An early version[26] of § 4 was clearly limited to repudiating the Confederate debt, reflecting the Joint Committee on Reconstruction's apparent lack of concern about the possibility that repudiation of Union debt was imminent.[27] Congress tinkered with the provision, repudiating debt prospectively from any future insurrections instead of just from the "late rebellion."[28] More importantly, Congress added a separate sentence securing the validity of the Union debt.[29] Recommending this addition, Sen. Howard said that the provision "not only accepts honesty as a principle, but indorses [sic] it as the highest and best policy of the State as well as of individuals."[30]

Though a last-minute substitution, the final version of the section hearkened back to the language of an earlier proposed version of the Public Debt Clause that never reached a vote in the Senate.[31] This version is

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[26]Sen. Howard initially proposed a debt repudiation provision as an independent constitutional amendment, which would read:

> That the payment of every kind of indebtedness arising or growing out of the late rebellion, contracted or accruing in aid of it or in order to promote it, is forever prohibited to the United States and to each of the states; such indebtedness and all evidences thereof are hereby declared and in all courts and places shall be held and treated as in violation of this Constitution, and utterly void and of no effect.

KENDRICK, *supra* note 18, at 62.

[27]The Committee, which had jurisdiction over questions related to the readmission of states, gave prominent consideration to debt issues generally in examining a draft of the proposed resolution to readmit Tennessee. The first section of the proposed resolution addressed debt issues, with secession and suffrage provisions relegated to the second through fourth sections. However, the Committee voted to amend the proposal by eliminating language preventing the state from repudiating "any debt or obligation contracted or incurred in aid of the Federal government against said rebellion . . . ." KENDRICK, *supra* note 18, at 69.

[28]The change to general language was gradual; an April 20 version of the provision introduced by Rep. Stevens referred to "Debts incurred in aid of insurrection or of war against the Union." *Id.* at 84. The final version replaces "the Union" with "the United States," thus removing any doubt as to the applicability of the second sentence of § 4 to future rebellions.

[29]*See supra* note 25.

[30]CONG. GLOBE, 39th Cong., 1st Sess. at 3036. Sen. Howard also stated that the provision was "a proper precaution against the establishment of parties hereafter appealing to the sordid interests and lowest passions of men . . . ." *Id.*

[31]The first sentence of the proposal read:

> The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the Union, or for payment of bounties or pensions incident to such war and provided for by law, shall be inviolable.

stylistically much closer to the final language than was the penultimate proposal.[32] The drafter of the final version therefore probably used this earlier proposal rather than the penultimate proposal as a starting point. Therefore, where the meaning of the earlier proposal is clear and the final version appears to revert to this meaning, the earlier proposal and the final version probably share the same meaning. This inference is especially strong if the penultimate version clearly indicated a meaning different from both the earlier and final version.[33]

In fact, the earlier version differed from the penultimate in two critical ways that suggest it was intended to be generally applicable. First, the earlier version, like the final version, used the non-exclusive word "including" to place war debts within the broader category of the public debt. Second, the last two words of the earlier proposal are "be inviolable" rather than the retrospectively oriented "remain inviolate." The statements of Sen. Wade in support of the earlier proposal also suggest an intent to embed in the Constitution a general economic principle.[34] Because the earlier proposal was intended to apply beyond Reconstruction and the final version reverted to similar language, the final version too was probably generally applicable. The Congress drafting § 4 chose from a menu of linguistic variants. The subtle but clear distinctions in these variants suggest that Congress meant to make § 4 applicable beyond Reconstruction.

An argument against the applicability of the Public Debt Clause to post-Civil War Debt would likely focus on a single statement by the sponsor of the final language of § 4, agreeing that the new language did not change the effect of the provision.[35] There are three reasons not to focus too much on this brief comment. First, stylistic changes in constitutional provisions

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CONG. GLOBE, 39th Cong., 1st Sess. 2768.

[32]*Compare supra* text accompanying note 1, *with supra* note 25 (penultimate version), *and supra* note 31 (earlier version).

[33]Ordinarily, evidence from drafts of statutory or constitutional provisions can cut two ways. Either the first version provides evidence of what the drafters meant in the second, or the change in language suggests that the drafters intended to change the underlying meaning. With the Public Debt Clause, however, the existence of a meaning shared by the first and three drafts and a different meaning in the second draft means that both inferences point in the same direction. Both the similarity between the first and third drafts and the difference between the second and third suggest that the drafters intended to recapture the original meaning and discard the second version's meaning in the final version.

[34]While Sen. Wade noted specially that the provision would put "the debt incurred in the civil war on our part under the guardianship of the Constitution," he added that this would "give great confidence to capitalists and will be of incalculable pecuniary benefit to the United States." *Id.* at 2769. In other words, the nation would benefit by increasing the security of its bond issues; this allows the country to borrow more cheaply in the future. This benefit is irrelevant for past debt accumulation, suggesting that Sen. Wade saw this version of the Public Debt Clause as providing a prospective benefit.

[35]After Sen. Clark introduced the proposed substitute that was ultimately passed, Sen. Johnson said, "I do not understand that this changes at all the effect of the fourth and fifth sections. The result is the same." Sen. Clark agreed, "The result is the same." *Id.* at 3040.

are not generally assumed to be without substantive content and thus are not ignored in favor of penultimate drafts.[36] Second, the senator's statement may merely indicate that the versions would have the same result for the purposes of Reconstruction, since the generalization of the language would have impact only in future times. Third, the Senate rejected a subsequent proposal to revert the provision to its prior language.[37] The significance of this rejection is unclear, because the proposal focused on changes other than the reversion of wording in § 4.[38] However, the Senate had just voted to accept the current language, so an independent proposal to revert it would probably have failed.

2. *The Political and Economic Context of the Framing*

Perhaps the Public Debt Clause has become obscure because § 4 contains so many implicit references to the Civil War that readers may assume that Congress could not have been concerned about anything else in passing it. However, a congressional desire to impose a permanent prohibition against default makes sense in the economic and political context of Reconstruction. Economically, financial instruments were precarious in the 1860's. The value of U.S. debt tumbled during the Civil War;[39] while some of the decline may be attributable to the rising interest rates that accompanied the climb in the national debt, the bonds' continuing decline in value as maturity approached suggests skittishness about the possibility that the United States might default.[40] Congressmen professed the moral necessity of paying the debt,[41] but perhaps they felt the need to do so partly because it was so high.[42] A constitutional guarantee provided meaningful assurance to those who might purchase future government debt.

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[36]*See* Nixon v. United States, 506 U.S. 224, 231-32 (1993) (rejecting argument that Committee of Style's changes should be ignored in favor of second to last draft, because that would ignore Framers' decision to pass final draft).

[37]*See* CONG. GLOBE, 39th Cong., 1st Sess. 3040.

[38]Sen. Doolittle's proposal would have both reverted the provision to its prior language and allowed states to ratify some but not all sections of the Fourteenth Amendment. The proposal was defeated, 33-11 with 5 absent. *See id.*

[39]Ten-year, six-percent bonds issued in 1858 had declined in value 14% by 1861, 36% by 1862, and 46% by 1864. *See* DOUGLAS B. BALL, FINANCIAL FAILURE AND CONFEDERATE DEFEAT 132 (1991).

[40]*See* George T. McCandless, Jr., *Money, Expectations, and the U.S. Civil War*, 86 AM. ECON. REV. 661 (1996) (arguing that war news was primary determinant of value of Northern and Southern currency).

[41]The House of Representatives had earlier voted 162-1 to approve a resolution calling the public debt "sacred and inviolate" and urging "that any attempt to repudiate or in any manner to impair or scale the debt, shall be universally discountenanced, and promptly rejected by Congress if proposed." CONG. GLOBE, 39th Cong., 1st Sess. 10.

[42]The debt had climbed from $64.8 million in 1860 to $2.76 billion in 1866. *See* JAMES D. SAVAGE, BALANCED BUDGETS & AMERICAN POLITICS 288 (1988).

The Public Debt Clause also reflects the Thirty-Ninth Congress's almost religious commitment to hard-money principles. The financial exigencies of the War had led to passage of the Legal Tender Acts[43] and the resulting issue of greenbacks, though in ordinary fiscal times Treasury Secretary Chase and Congress would never have tolerated the distribution of Treasury notes not convertible to gold or silver.[44] After the War, Congress passed a resolution, by a vote of 144-6, urging a return to the former monetary regime in which paper was backed by metal.[45] Although the greenbacks' convenience relative to bank drafts thwarted Congress's resolution to cash them in,[46] the Thirty-Ninth Congress surely remembered both the difficulty that the Treasury had experienced in borrowing money[47] and the wartime Congress's fiscal gluttony. The Public Debt Clause served to demonstrate that Congress remained committed to sound financial management.

Underlying the Framers' political concern in § 4 is the ironic electoral calculus that members of the Thirty-Ninth Congress faced. Victory on the battlefields did not bring political security to the Republicans, but rather the prospect that they might lose their hold on Congress. In freeing the slaves, the Emancipation Proclamation[48] unraveled the Three-Fifths

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[43]Act of Feb. 25, 1862, ch. 33, 12 Stat. 345; Act of July 11, 1862, ch. 142, 12 Stat. 532; Act of Mar. 3, 1863, ch. 73, 12 Stat. 709.

[44]*See generally* BRAY HAMMOND, SOVEREIGNTY AND AN EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR 165-229 (1970) (describing Treasury and Congress's reluctant accession to Legal Tender Acts); MARGARET G. MYERS, A FINANCIAL HISTORY OF THE UNITED STATES 150 (1970) (describing Chase as "a hard-money man, as suspicious of bank paper as Jackson and Benton had been"). Even after Treasury Secretary Chase became Chief Justice Chase, he never became entirely comfortable with the Legal Tender Acts, which the Supreme Court initially found unconstitutional in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), *overruled by* Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871). *See generally* Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367.

[45]*See* CONG. GLOBE, 39th Cong., 1st Sess. 75.

[46]Congress faced "a sudden, impatient, popular belief--quite opposite to the Jacksonian hard-money notions previously prevailing and to the intent of the war-time advocates of the notes--that an abundant currency based simply on federal credit and the country's worth was required for the general good." HAMMOND, *supra* note 44, at 253.

[47]Because there had been no national bank since the Jackson Administration, the Lincoln Administration could not simply auction off debt to the highest bidder. Rather, the federal government resorted to commercial banks. Despite high levels of reserves, these banks were hesitant about lending to the federal government, because "they faced a revolutionary change in their business, with a different kind of borrower." HAMMOND, *supra* note 44, at 76. The problem was exacerbated by federally imposed specie rules, which required the federal government to take physical control of gold when it borrowed, instead of merely receiving credit on the bank's books like other borrowers. *Id.* at 59-70. The amount borrowed grew so high that the banks were unable to meet the government's demand for specie, resulting in delays in the United States's payment of creditors, employees, and suppliers. *Id.* at 162.

[48]While the Thirteenth Amendment's ratification in 1865 assured the immediate goal of the Proclamation itself, the purpose that unifies the various provisions of the Fourteenth Amendment was the securing of the remaining "fruits of the war." *See* KENDRICK, *supra* note 18, at 266-67 (listing civil rights and debt provisions among victory spoils that all

Compromise[49] and thus increased the population base that determined the South's representation.[50] Repudiation of rebel debt was consistent with Republican interpretations of existing law,[51] but a Democratic Congress conceivably might have honored the debt or might even have repudiated the Union debt. To minimize the chance of a Democratic resurgence, the Congress included Sections 2 and 3 in the Fourteenth Amendment.[52] Thus, the probability of repudiation of the Union debt in the absence of § 4 was small.[53] But the insertion of the uncontroversial[54] § 4 did more than provide insurance precluding a future Congress from retreating on the Thirty-Ninth Congress's commitment to repay the national debt.[55] Just as important, the provision cemented the North's military victory with a rhetorical one by declaring Confederate obligations (and thus the Confederacy itself) "illegal and void" and by elevating the United States to the fiscal high road.

Republicans sought); *see also* TENBROEK, *supra* note 19, at 184 (noting that Congressmen wanted to place achievements of civil rights bills beyond reach of shifting Congressional majorities).

[49]*See* U.S. CONST. art. I, § 2, cl. 3 (counting slaves as three-fifths persons for purpose of representation in House).

[50]Rep. Conkling estimated that the South would gain twelve representatives by Emancipation, in addition to the eighteen representatives that the South previously was allotted on account of its slave population. CONG. GLOBE, 39th Cong., 1st Sess. 356-59 (1866). In addition, each rebel state's entitlement to two senators upon readmission was beyond even the power of a constitutional amendment. *See* U.S. CONST. art. V (prohibiting amendments depriving unconsenting states of equal suffrage in Senate).

[51]*See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3036 (arguing that invalidity of rebel debt reflected common law principle that agreements founded on immoral consideration are unenforceable). Rep. Miller, however, had earlier noted that if the rebel states were considered to have left the Union and were then reannexed, principles of international law would demand assumption of the states' debts. *Id.* at 2087.

[52]Section 2 provided that representation in the House would be proportionately diminished when males over 21 years old were excluded from the franchise. Section 3 prohibited many Confederate officers and officials from membership in Congress.

[53]Arguing against what became § 4, Sen. Saulsbury asked, "Does the Senator from Nevada say that the Democratic party of this country would, if they had it in their power, repudiate the national debt or would assume the confederate debt? I should like a frank answer." Sen. Stewart of Nevada did not answer the question. CONG. GLOBE, 39th Cong., 1st Sess. 2800 (1866). *See also id.* at 2940 (statement of Sen. Hendricks) ("Who has attacked public credit, or questions the obligation to pay the public debt?"). Testimony before the Joint Committee, however, indicated that Southerners hoped to repudiate the Union debt if the Democrats regained Congress, but would settle for like treatment of Union and Confederate debt. KENDRICK, *supra* note 18, at 283.

[54]Section 4 was the subject of little comment on the floor of Congress largely because of its uncontroversiality. After extensive discussion of other provisions of the Amendment, Rep. Stevens noted simply, "The fourth section, which renders inviolable the public debt and repudiates the rebel debt, will secure the approbation of all but traitors." CONG. GLOBE, 39th Cong., 1st Sess. 3148; *see also id.* at 2530 (statement of Sen. Randall).

[55]Congress acted on its intent to repay much of the Civil War debt at about the same time that it was considering the Fourteenth Amendment by passing a statute permanently appropriating funds to pay off much of it. *See* Act of May 2, 1866, ch. 70, § 2, 14 Stat. 41, 41–42.

B. Jurisprudence on the Public Debt Clause

The Supreme Court has expounded on the Public Debt Clause just once, in *Perry v. United States*.[56] Subsection I.B.1 narrates the facts and holding of the case, and Subsection I.B.2 argues that while *Perry* and subsequent decisions are inconclusive, they do not threaten and may strengthen the Clause's vitality.

1. Perry v. United States

Perry was one of the Gold Clause Cases, which concerned bonds issued by Congress that included a "gold clause" stipulating, "The principal and interest hereof are payable in United States gold coin of the present standard of value."[57] When gold subsequently appreciated vis-à-vis the dollar, Congress retreated, finding "payment in gold or a particular kind of coin or currency [to be] against public policy,"[58] and providing for payment in dollars only. Perry, a bondholder, sued for the dollar equivalent of the gold he would have received at the earlier exchange rates.

The Supreme Court held the Public Debt Clause applicable:

> While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle, which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the Amendment was adopted.[59]

The Court used the Public Debt Clause as support for a structural argument that the Constitution did not allow the federal government to change the terms of its bonds. The Court rested most heavily on the clause of the unamended Constitution authorizing Congress "to borrow Money on the credit of the United States."[60] The Court noted, "The binding quality of the promise of the United States is of the essence of the credit which is so pledged. . . . " Having this power to authorize the issue of definite obligations . . . the Congress has not been vested with authority to alter or destroy those obligations."[61]

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[56]294 U.S. 330 (1935).
[57]*Id.* at 347.
[58]Joint Resolution of June 5, 1933, 48 Stat. 113.
[59]294 U.S. at 354.
[60]U.S. CONST. art. I, § 8, cl. 2.
[61]294 U.S. at 353.

2. Perry*'s Jurisprudential Vitality*

The Supreme Court has not had the opportunity to reconsider *Perry*'s assessment of the Public Debt Clause, so it is unclear whether a future Court would agree that the Clause was applicable beyond the Civil War. An attack on *Perry*'s relevance would note a set of recent lower-court cases finding the Public Debt Clause inapplicable, the peculiar timing of *Perry*, and the decision's primary reliance on the "borrow Money" Clause. None of these arguments seriously undermines *Perry*, however. In the end, of course, courts might or might not adopt this Article's interpretation of the Clause, but there is nothing in the case law that would require a court to find the Clause inapplicable or to reject a broad reading of the Clause.

Several federal appellate courts in 1989–90 declined to apply the Clause in cases involving a federal program providing reinsurance to state-designated student loan guarantee agencies.[62] After Congress created new provisions with which several agencies failed to comply, the Secretary of Education withheld guarantee payments. Because the agreements with the agencies bound them to any changed statutes or regulations[63] and allowed the Secretary to punish violations with such withholdings, the courts probably correctly found that no debt was violated.[64] Commenting on the Clause, two appellate courts implied that it remained applicable,[65] while two district courts noted the Clause's Civil War origins and suggested it applied only to bond debt.[66] None of the decisions carefully assesses the history or language of the Clause, so it is difficult to determine to what extent the courts would have agreed with this Article's arguments. But no court argued that *Perry* should be overruled, thus suggesting that it remains good law.

Perry was decided at the height of the constitutional crisis between the Roosevelt Administration and the Court over new Deal legislation, two years before the "switch in time that saved nine."[67] In post-1937 cases, the Court backed away from earlier activist stances limiting the government's

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[62]*See* Great Lakes Higher Educ. Corp. v. Cavazos, 911 F.2d 10 (7th Cir. 1990); Ohio Student Loan Comm'n v. Cavazos, 900 F.2d 894 (6th Cir. 1990) (reversing district court application of Clause); Colorado v. Cavazos, Civ. A. No. 88-C-207, 1990 WL 367621 at *5 (D. Colo. Aug. 21, 1990); Delaware v. Cavazos, 723 F. Supp. 234 (D. Del. 1989), *aff'd* 919 F.2d 137 (3d Cir. 1990).

[63]*See, e.g.*, *Great Lakes*, 911 F.2d at 12 n.1.

[64]This accords with an interpretation of the Clause as allowing Congress to reserve the right to modify its debt. *See infra* Section II.C.

[65]*See Great Lakes*, 911 F.2d at 17 ("This section is only brought into play when some state or federal government agency questions a debt."); *Ohio Student Loan*, 900 F.2d at 902 ("[B]ecause we find no abrogation of the 'contract' in the instant case, we conclude that there was no violation of section four of the Fourteenth Amendment.").

[66]*See* Colorado v. Cavazos, 1996 WL at *5; Delaware v. Cavazos, 723 F. Supp at 244–45.

[67]*See generally* David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931–1940*, 54 U. CHI. L. REV. 504 (1987) (discussing Court activism and retrenchment).

ability to craft economic policy.[68] But this Article's reading of the Public Debt Clause is hardly comparable to the Court's activist interpretation of the Fourteenth Amendment's Due Process Clause. Moreover, the *Perry* Court appeared determined not to upset governmental policy and ultimately did not award Perry damages. Because there was no free domestic market for gold, the majority reasoned, Perry would not have been able to sell any gold on the hypothetical world market on which his calculations were based.[69]

That the *Perry* Court's analysis of the Public Debt Clause was one support for a broader argument that the Constitution precludes debt repudiations does not narrow its relevance. Just because there are additional reasons that the repudiation in *Perry* was unconstitutional does not change that, according to the Court, the Public Debt Clause confirmed the unconstitutionality of repudiation. Moreover, although *Perry* concerns only direct repudiation of bonds, its holding lends credence to Part II's expansive interpretation of the Public Debt Clause. For if the Constitution already banned debt repudiation, then restricting the Public Debt Clause to outright repudiation of bonds, rather than allowing it to encompass non-bond obligations or extend to actions placing debts into question, would be redundant.

C. Interpreting the Public Debt Clause Today

This Part so far has engaged originalist, textualist, and precedential methodologies to interpret the Public Debt Clause. There are many approaches to constitutional interpretation, however, and the Clause may be vulnerable to minimalist construction by those who would assess it by relying on historical practice or on normative considerations. After all, *Perry* was the only exception to the otherwise uneventful history of the Clause, and though Part III of this Article suggests that the Clause could reform the budget process, the practices that may need reform have long, largely unquestioned histories. Moreover, if the Public Debt Clause would disturb the tranquil continuity of these practices, perhaps it is best to leave it alone. Both of these claims are contestable, however, and the following two subsections address critiques of the Public Debt Clause that focus on desuetude or on normative considerations.

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[68] *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . . .").

[69] *Id.* at 357. Four dissenters argued that the government ought to pay damages. *Id.* at 369-70 (McReynolds, J., dissenting). *See also* Currie, *supra* note 67, at 536 n.161 (calling finding of no damages "bizarre").

1. Desuetude

Concerns about desuetude are generally less applicable in a constitutional context than in a statutory one.[70] When a statute falls into disuse, it may no longer reflect the consensus of society.[71] Constitutional provisions are inherently countermajoritarian, binding one generation to at least the words chosen by another. In addition, while an outdated criminal law may be enforced arbitrarily,[72] this danger does not inhere in constitutional law. Perhaps recognizing these arguments, the Supreme Court has held that longstanding government practice does not waive a constitutional violation.[73]

In some contexts, the potentially destabilizing nature of constitutional adjudication presents a unique desuetude concern not generally applicable to statutory construction,[74] but revitalization of the Public Debt Clause does not threaten the existing constitutional order. Active reconsideration of some obscure constitutional provisions might be dangerous because those provisions are so open-ended that if the courts were to consider them, damaging uncertainty about the structure of government would result. For example, the Constitution's Guarantee Clause[75] could conceivably be interpreted to disallow a wide range of state practices viewed as undemocratic.[76] Even if such an interpretation were correct, adjudication of such claims could mean that the structure of state governments would be modified whenever the composition of the Supreme Court changed and constitutional doctrine surrounding the Clause evolved. Such considerations may underlie the Supreme Court's holdings that

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[70]For arguments that obsolescent statutes should be nullified because of desuetude, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Corey R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449.

[71]*See* CALABRESI, *supra* note 70, at 2, 21.

[72]*See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 153 (1962) (arguing that obsolete statutes are subject to discriminating enforcement).

[73]*See* INS v. Chadha, 462 U.S. 919, 942 (1983).

[74]Destabilization was potentially of particular concern in *Chadha*, because a wide range of statutory schemes assumed the constitutionality of the legislative veto, but the Court found the veto unconstitutional nonetheless.

[75]U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .")

[76]*See, e.g.*, Debra F. Salz, Note, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 GEO. WASH. L. REV. 100 (1993) (arguing that Colorado's Amendment 2 violated the Guarantee Clause); *see also* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994) ("The concept [of Republican Government] is indeed a spacious one, and many particular ideas can comfortably nestle under its big tent.").

Guarantee Clause claims are not justiciable.[77] Because passage of a statute requires the approval of both houses of Congress and approval by the President (or a veto override), congressional resolution of Guarantee Clause claims may be more final than Supreme Court rulings, and it may therefore be wise for the courts not to hear constitutional claims where finality in constitutional principle is particularly important.[78] Even more importantly, an invalidation of a state practice might lead to questioning of statutes passed as a result of that practice, leading to considerable confusion.

Though the Public Debt Clause could help shape the Fiscal Constitution, its potential is not destabilizing. A ruling that a particular statute violated the Public Debt Clause would result simply in the invalidation of that statute. The Public Debt Clause implicates the powers of Congress, but not the structure of government, and it thus has no more destabilizing potential than any other constitutional provision. In addition, the Clause protects against government action that presumably would occur rarely even in the Clause's absence. That the Supreme Court has not regularly applied the Clause does not mean that Congress has relied on its ability to ignore its debt obligations; to the contrary, the Clause's dormancy indicates that Congress generally has recognized its moral, and perhaps constitutional, duty to pay its debts.

2. *Normative Arguments*

Normative concerns need not entrench the status quo, and there is thus no reason to assume that it is best to leave government running as it has. A full normative assessment of a principle requiring the government to follow through on its fiscal promises is beyond the scope of this Article. The basic case for such a provision, however, is simple: By allowing Congress to tie its own hands, the Clause increases the credibility of congressional promises and improves the nation's credit rating. People will be less inclined to hold and purchase government debts if they believe that the government will not honor those obligations.[79]

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[77]*See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (holding that determination of which of two rival claimants was rightful government of Rhode Island required congressional resolution); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (reaffirming that Guarantee Clause claims are not justiciable); *see also* Nixon v. United States, 506 U.S. 224, 253 (1993) (Souter, J., concurring) (arguing that political questions doctrine is based on prudential concerns).

[78]The counterargument is that the Supreme Court may decline to overrule constitutional holdings where there is a strong social interest in finality. *Cf.* Planned Parenthood v. Casey, 503 U.S. 833, 854 (1992) (arguing that constitutional stare decisis has particular force where a "rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling").

[79]The counterargument is also simple: What happens if Congress ties its hands and lives to regret it? Under this Article's interpretation of the Public Debt Clause, Congress must refrain from crafting policies that would violate the Clause, even if those policies would be in the

Moreover, this Article is premised on a belief that several areas of congressional budget practice require reform. Admittedly, this normative basis is not perfectly aligned with the values that the Public Debt Clause protects. In a sense, Part III uses the principle of fiscal honor as the fount of a legal argument for the related but distinct principle of sound fiscal management. A normative argument against either principle might provide a counterweight to this Part's historical and textual interpretation of the Public Debt Clause, but accepting these principles adds purpose and urgency to this Part's historical and textual interpretations.

II. The Meaning of the Public Debt Clause

The history of the Public Debt Clause contributes only to an understanding of the temporal scope of the provision. Assuming the Clause remains in force today leaves additional questions: What constitutes the "public debt"? And what type of action entails a questioning of the debt's validity? These questions, never addressed in a committee report or on the floor of the Senate, are inherently difficult. One response might be to construe the Public Debt Clause as narrowly as possible,[80] but the language of § 4, literally read using standard principles of construction,[81] demands a broad application. As Section II.A argues, the Clause encompasses not just bonds, but also any financial obligation stemming from an agreement. Meanwhile, Congress need not repudiate a debt to trigger the Clause; Section II.B shows that if Congress indirectly makes it so that a debt will not be paid, it has violated the Clause.

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national interest. Ultimately, a full normative assessment of the Clause requires balancing its benefits in improving congressional credibility and its costs in restricting Congress's policy options.

[80]The narrowest possible construction of Public Debt Clause would read it out of the Constitution altogether, by applying it only to Civil War debt. The Supreme Court, of course, has never adopted the principle that ambiguity should always be resolved by limiting constitutional provisions' scope to circumstances that they unambiguously cover. *Cf.* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 405 (1870) (noting need to resolve ambiguities in Constitution by selecting interpretation that "best harmonizes with the nature and objects, the scope and design of the instrument.").

[81]This Section adopts three interpretive principles to resolve ambiguity. First, interpretations that would read words or phrases out of the Clause are rejected in preference for interpretations that consider the meaning of each word. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . . ."). Second, the presence of a particular word or phrase in the Clause leads to the assumption that the Framers intended to use that word rather than another that would correspond to an alternative reading. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 433 n.12 (1987) (noting strong presumption that Congress expresses its intent through language it chooses). Third, the meaning of words is construed by reference to the surrounding words. *See, e.g.*, Neal v. Clarke, 95 U.S. 704, 709 (1877) (discussing canon known as *noscitur a sociis*).

A. Obligations Included Within the Public Debt

To the modern economist, the words "public debt" may connote only bond obligations; in today's budget process, "public debt" is a technical term with a narrow scope.[82] *Black's Law Dictionary*, however, defines the public debt as "[t]hat which is due or owing by the government of a state or nation,"[83] and the words of the Public Debt Clause suggest that the Framers were protecting a similarly broad class of obligations. A key to understanding the scope of the provision lies in the phrase, "including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion." The use of the word "including" rather than "in addition to" or "and of" shows that the enumerated rebellion-related debts[84] delineate the expanse of the phrase "public debt" rather than annexing an additional category of "debts" to it. In other words, the "including" phrase indicates that the Framers conceived the "public debt" as including not just financial instruments, but also such promises as war pensions and bounties.[85] This interpretation is further supported by the use of the words "debts incurred" rather than, for example, "notes and contracts." The word "debts" draws a parallel with the phrase "public debt," suggesting that the Framers naturally thought of pensions and bounties as being part of the "public debt."

This Article construes the "public debt" to include the ordinary pensions of government employees and similar government commitments.

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[82]The federal government currently defines "public debt" to include only bond obligations issued by the Treasury; debt issued by administrative agencies is tallied separately as "agency debt." *See* DEPARTMENT OF THE TREASURY, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1996, at 188 (1995) [hereinafter ANALYTICAL PERSPECTIVES].

[83]BLACK'S LAW DICTIONARY 404 (6th ed. 1990). *See also* Reeside v. Walker, 52 U.S. (11 How.) 272, 284 (1850) (defining "public debt" as including "debts of every description, without reference to their origin.").

[84]One might construe the phrase "pensions and bounties for services in suppressing insurrection or rebellion" by applying the "for" phrase to the word "bounties" but not to "pensions." This approach would be consistent with the general interpretive rule that a phrase applies only to its immediate antecedent. *See, e.g.*, Virginia v. Browner, 80 F.3d 869, 877 (4th Cir. 1996). This interpretation would mean that even if the public debt did not ordinarily include pensions, these are specifically protected by the Public Debt Clause, whether or not insurrection-related. However, this construction seems forced, considering the parallelism of the words "pensions" and "bounties."

[85]The irony of this interpretation is that the presence of the "including" phrase may explain why those not scrutinizing § 4 might conclude that the entire section is no longer relevant. The reference to insurrection or rebellion connects the Public Debt Clause with the second sentence of § 4, which no longer is generally applicable. But once it is conceded that the words "validity of the public debt" have general applicability, as argued in Section I.A, *supra*, the "including" phrase may be seen as narrowing rather than widening the Public Debt Clause only if the enumerated items are read exclusively. Such a reading is implausible, however, since the Clause surely encompasses at least formal debt instruments, which are not specifically enumerated in the "including" phrase.

This construction might appear to read out of the Clause the phrase limiting pensions and bounties to those incurred in suppressing insurrection. This language was essential, however, because the South claimed that secession was legal and the suppression of it illegal. Without an unambiguous syntactic indication that the war-related debts were part of the public debt authorized by law, the Public Debt Clause would have left open the possibility that a Democratic Congress could have repudiated the Union's Civil War bonds as illegal and not part of the public debt. This appears to explain the awkward location of "authorized by law" in between the "including" phrase and "the public debt of the United States."[86] The Framers sought with that location to clarify that the Civil War origins of "pensions and bounties" would not keep them out of the "public debt."

The phrase "authorized by law" and the word "debt" provide plausible limits on the scope of the Public Debt Clause; while Part III of this Article does not depend on these limits, it is useful to see that this Part's construction of the Clause need not radically change the legal order by forcing Congress to follow through on all of its earlier intentions. First, a governmental promise is "authorized by law" only if it is contained in a congressional statute.[87] Second, a debt is "[a] sum of money due by certain and express agreement."[88] Applying this definition to the Public Debt Clause, the United States incurs a public debt only if a statute embodies an agreement, or, more restrictively, only if the government issues a written agreement.[89] Since a gratuitous promise does not ordinarily constitute a legally enforceable agreement, the Clause could be further limited to

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[86]If "authorized by law" were moved after the "including" phrase, it could be seen as a limit on the scope of "pensions and bounties."

[87]The phrase "authorized by law" thus applies a common-sense limitation to the Public Debt Clause that is also found in the law of government contracts, declaring contracts signed by government employees unenforceable if those employees were unauthorized to sign them. *See, e.g.*, United States v. Amdahl Corp., 786 F.2d 387, 392 (Fed. Cir. 1986). In addition, the omission of the words "or equity" reinforces the Public Debt Clause's exclusion of obligations or claims.

An alternative construction of the phrase "authorized by law" would be that the phrase restricts the Clause's applicability to those debts that had already been authorized before the Amendment's adoption. Two factors militate against this reading. First, the phrase "authorized by law" is more naturally construed as a present participial phrase. *Cf.* Linsalata v. Clifford, 290 F. Supp. 338, 342 (S.D.N.Y. 1968) (defining phrase "authorized by law" in contractual context to contemplate subsequently enacted statutes). Second, if the Framers had intended explicitly to limit the Clause's temporal applicability, they could easily have indicate this intent clearly, for example with the phrase "heretofore accumulated."

[88]BLACK'S LAW DICTIONARY 403 (6th ed. 1990).

[89]This restriction suggests that the government cannot become an involuntary debtor for Public Debt Clause purposes through commission of a tort on an individual with which it does not have a contract. In other words, the Public Debt Clause does not override the government's sovereign immunity in tort suits, *cf.* Dalehite v. United States, 346 U.S. 15 (1953) (accepting statutory immunity of United States in tort suit), or require that the government become an involuntary debtor.

governmental promises made in exchange for good consideration.[90] The requirement of an agreement honors § 4's distinction among debts, obligations and claims. While the Public Debt Clause itself uses only the word "debt," the second sentence of § 4 uses the terms "debt or obligation" and the phrase "claim for the loss or emancipation of any slave." By including only the first of these within the public debt, the Public Debt Clause excludes money that the United States ought to pay by virtue merely of a moral obligation.[91]

B. Congressional Actions Triggering the Clause

Once Congress makes a promise that becomes part of the public debt, its "validity . . . shall not be questioned."[92] But questioned by what? A nihilistic interpretation would append to the Clause "by this Section," thus reducing it to a nullity, but the language of § 4 makes this construction insupportable.[93] A better interpretation, therefore, is that no state action may question a debt's validity. This does not resolve, however, what "questioned" means. Dismissing the Lafayette Park protester's interpretation of the word leaves two possibilities. "To question" could mean either "to repudiate" or "to jeopardize." As will become clear in Part III, this distinction is important. The following subsection conceptualizes the choice between these alternatives, and the three subsections that follow mount an affirmative case for the preferability and the manageability of the latter.

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[90]Thus, a statute providing all Californians with a written promise of annual payments of $500 in perpetuity might not create a public debt.

[91]This analysis does not resolve the question of whether a moral obligation may rise to the level of a moral consideration by virtue of a Congressional statute. For example, if Congress had passed a statute promising to give $500 monthly to Oliver Sipple, credited with saving the life of President Ford, would that promise have become part of the public debt? *See, e.g.*, Hawkes v. Saunders, 98 Eng. Rep. 1091 (1782) (providing classic statement of "moral consideration" contract doctrine).

[92]The language echoes the words of the Speech and Debate Clause: "The Senators and Representatives shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses . . . and for any Speech or debate in either House, they *shall not be questioned* in any other Place." U.S. CONST. art. I, § 6, cl. 1 (emphasis added). Whether this was intentional or coincidental, it does not much help, since questioning a congressman does not seem analogous to questioning the public debt.

[93]First, it is implausible that the Framers could have seen the need to clarify that the second sentence of § 4 does not invalidate the Union debt, since that sentence clearly invalidates only debts "incurred in aid of insurrection or rebellion against the United States." Second, the use of the imperative "shall" instead of "is" removes the possibility that the first sentence of § 4 merely comments on the second.

1. Possible Levels of Generality

The question is at what level of generality the Framers drafted the Public Debt Clause.[94] A provision protecting only Civil War Union debt would be a low level of generality. By establishing that the Clause does not apply only to Civil War debt, Section I.A rejected this possibility. An intermediate level of generality would be a permanent ban on governmental failure to honor debts. Finally, a high level would be a prohibition not only of governmental failure to make payments on a debt, but also of government action that will ultimately lead to such failure.[95] Only the high level comes into play when Congress passes a statute that will cause default on a debt unless a future Congress changes the statute.[96]

The following subsections argue for the high level of generality by discussing the Clause's language and historical context. Three factors should be kept in mind in assessing this evidence. First, as defined so far, "jeopardization" and "repudiation"[97] differ only in timing: Congress jeopardizes debts as soon as it places the government on the road to default, but repudiation occurs only once Congress fails to change course and the government reaches the end of that road. There are, however, other ways one might define "repudiation," and thus other ways to conceptualize the difference between the intermediate and high levels of generality. In particular, "repudiation" could refer to government action that *intentionally* leads to debt nonpayment.[98] However, there is no reason to read an

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[94]*Cf.* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1926–28 (1995) (discussing level-of-generality problem in context of Equal Protection Clause).

[95]At an even higher level of generality would be a general requirement of sound financial management, but this is clearly too general because the text of the Clause is concerned only with "the public debt." Part II of this Article attempts to achieve some aspects of this general goal by identifying practices threatening the validity of the debt. This Article does not attack other governmental practices that might be fiscally undesirable, such as taxation policies that arguably discourage savings, because these practices are unrelated to the public debt.

[96]For example, suppose Congress were to repeal a statute providing for the automatic payment of a debt due a number of years hence. Under the high level of generality, the statute would be unconstitutional, since it jeopardizes the debt by depending on a future Congress to unrepeal the statute. Under the intermediate level of generality, the repeal statute is constitutional; an unconstitutional event would occur only once the government failed to restore the statute in time to make the payment.

[97]This Article uses these words as shorthand references for the timing distinction, but different definitions of these words are possible. For example, "repudiation" might be defined to occur only when a statute explicitly states that a debt will not be paid. Under this definition, repudiation would occur in the example of note 96 as soon as the repeal statute was passed. But if the government failed to make a payment even though a statute required it, that would not constitute repudiation under this definition. Though this is a plausible definition of "repudiated," it is not a plausible interpretation of "validity . . . shall not be questioned." *See also infra* note 110; *infra* Subsection II.B.2.c.

[98]"Repudiation" might also refer to action *directly* leading to debt nonpayment. However, assessing the directness of a congressional action's effect on debt really involves assessing

intentionality requirement into the Public Debt Clause, especially since assessment of congressional motive is a disfavored method of interpretation.[99] Moreover, much of the evidence that militates against the intermediate level of generality as defined above also militates against alternative definitions of the intermediate level.[100]

Second, there is no smoking gun. Probably, the Framers did not consider the distinction between the intermediate and high levels directly, and the proper inquiry is thus which level of generality is more consistent with the tenor of the Clause and the purposes of Congress. The answer turns in part on whether Congress envisioned the Clause as a technical rule allowing bond-holders to recover in court after missed debt payments or as a more amorphous commitment by the government to ensuring the debt's validity. If the Framers intended the Clause only as a technical ban on nonpayment, the intermediate level of generality is the right one. But if the Framers intended it as a statement of a broad principle constraining Congress, the high level is preferable, because that level identifies a violation of the Clause when Congress contravenes the principle rather than when this contravention affects debt-holders.[101]

Third, it is important to avoid making reflexive assumptions. There is no default rule that constitutional provisions should be interpreted as narrowly as possible. The advocate of the high level of generality would bear the burden of proof only if there were some a priori evidence suggesting that the Framers intended the Public Debt Clause to be narrow.[102]

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timing and intentionality. Saying that a congressional action directly affects a debt means either that the action affects the debt right away or that Congress meant to legislate about debt rather than about something else. While the word "directness" might refer to some combination of these, there is no reason to consider directness independently of timing and intentionality issues.

[99]*See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."); United States v. O'Brien, 391 U.S. 367, 383–84 & 383 n.30 (noting that Court will generally avoid inquiry into congressional intent in constitutional cases because different legislators may have different motives in passing legislation).

[100]*See infra* notes 104, 107, and 112; text accompanying notes 115–116 and 121–122.

[101]A ban on nonpayment furthers the principle of debt validity, but not enough to meet the demands of a general principle. If Congress fails to ensure the validity of debts, the courts might be unable to help, and the need to resort to the courts undermines confidence in debt issues. *See infra* note 118. Moreover, assuming that Congress did not have a specific technical ban in mind, there is no reason to read into the Clause a distinction between actions repudiating and actions jeopardizing debts. Both type of actions mean that Congress has failed to ensure the debt's validity, and restricting the Clause to the former entails an assumption that the Clause directly constrains the courts but not Congress.

[102]If one were (foolishly) to guess at a level of generality without looking at the Clause's language or history, the high level would seem more plausible than the intermediate. First, the fact that the Framers clearly rejected the low generality level suggests a preference for more general provisions. Second, the Framers wrote § 1 of the Amendment at perhaps the broadest level of generality imaginable. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co.,

2. Linguistic Evidence

The words of the Public Debt Clause are consistent with an interpretation that bars statutes jeopardizing the validity of debts. First, the verb "to question" is closer to the verb "to jeopardize" than it is to the verb "to repudiate." Second, the passive construction of the words "shall not be questioned" indicates an intent to inspire confidence in bond-holders that the government will take no action interfering with their debts. Third, the word "validity" implies that the government's obligation to ensure its credit extends over the entire time period during which debt obligations are being held. Fourth, the evolution of the Clause suggests that the Framers chose the Clause's words deliberately. The following subsections consider in turn these linguistic reasons for preferring the high generality level interpretation of "validity . . . shall not be questioned."

a. Meaning of "to Question"

The verb "to question" would be an odd synonym for "to repudiate." Questioning a proposition is not equivalent to insisting that the proposition is false but merely entails suggesting that it might be. To say, "I question whether your debt will be honored," is different from saying, "Your debt will not be honored." Analogously, to say that a statute must not question a debt's validity is different from saying that a statute must not repudiate a debt.[103] Intuitively, the verb "to question" is much closer to the verb "to undermine" than it is to the alternative "to cancel."[104] Therefore, the

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427 U.S. 273, 296 (1976) ("[T]he 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."). The Framers not only did not limit § 1 to a constitutionalization of the Civil Rights Act of 1866, but did not even limit the Equal Protection Clause to protecting blacks. Of course, this is hardly conclusive about § 4. But it suggests that any reflex to assume that provisions were meant narrowly is particularly inappropriate in the context of a Fourteenth Amendment constitutional provision.

[103]For another analogy, consider Justice Brandeis's famous remark: "When the *validity* of an act of the Congress is drawn in *question* . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (Brandeis, J., concurring) (emphasis added). While the similarity in language to the Public Debt Clause is almost surely coincidental, this quotation helps reveal what it means to question something's validity. Justice Brandeis of course did not mean that a statute should be narrowly construed when a constitutional provision has made it unambiguously of no force; he meant that when it seemed there might be an issue of constitutionality, the Court would try to avoid that issue. Likewise, the Public Debt Clause is triggered not only when the government has made it absolutely clear through a failure to make payment that a debt will not be honored, but also when the government's actions effectively raise the issue.

[104]In addition, nothing in the verb "to question" makes it more like "to undermine intentionally" than like "to undermine inadvertently." True, the sentence "I question the debt," makes it sound like I am questioning the debt intentionally. But that is only because the verb has a subject. *See infra* note 107. By contrast, the phrase "the debt is now

literal interpretation of the Clause is that a governmental action making uncertain whether or not a debt will be honored is unconstitutional.[105]

b. Passive Construction

The passive construction of the phrase "shall not be questioned" provides additional evidence about how the Framers conceptualized the Public Debt Clause and thus helps explain why the Framers used the word "questioned." The Framers were not fond of the passive voice; indeed, the Joint Committee voted to change a passive version of what became the second sentence of § 4 to the active voice.[106] Passive sentences are useful for authors who do not wish to restrict a verb to a particular subject. If the Framers meant only that the United States must not question the validity of its debts, they could have used the compact phrase, "The United States shall not question the validity of its public debt . . . ." While the Clause surely means at least this, it might also convey, "the validity of the public debt . . . shall not be questioned by the people."

The passive construction thus allows for a reading of the Clause as containing a reassuring promise from the Framers to bondholders. Moreover, the passive language makes the Clause more evocative than descriptive, more like an announcement of a general principle of debt validity than like a technical rule barring failure to make debt payments. It would be inconsistent with this promissory announcement and with the word "questioned" if a statute could cause bondholders to believe that their debts will not be paid as promised and that they will need to seek redress in the courts to recover belated payment.[107]

c. The Word "Validity"

A debt does not become valid or invalid only at the moment payment is due. A debt's validity may be assessed at any time, and a debt is valid only if the law provides that it will be honored.[108] Therefore, a

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questioned" does not imply that anyone intended the act that caused the questioning.

[105]A counterargument might charge that the Framers used the verb "to question" as a restrained way of saying "to repudiate." This is a weak counter, because its only impetus is an *assumption* that the Framers must have meant to preclude only direct repudiation, the meaning of the words of the Clause notwithstanding.

[106]*See* KENDRICK, *supra* note 18, at 103.

[107]Conceiving of the Clause as containing a promise to debtholders also problematizes a reading of the Clause as prohibiting only congressional acts intentionally leading to nonpayment. Debtholders would care not about whether Congress meant to place their debts into question, but about whether they could count on receiving payment. If the Clause means that debtholders shall have no reason to question their debts—a meaning which the passive construction allows—then there is no reason to limit the Clause with an intentionality requirement.

[108]Among the legal definitions of "valid" is "sustainable and effective in law, as

requirement that the government not question a debt's validity does not kick in only once the time comes for the government to make a payment on the debt. Rather, the duty not to question is a continuous one. If government actions make it so that a debt will not be paid absent future governmental action, that debt is effectively invalid.[109] The intermediate level of generality recognizes that instead of referring to payment of debts, the Clause bans government action at any time that affects the validity of debt instruments.

The word "validity" indicates that not merely the existence of the public debt, but also its binding force on the government "shall not be questioned."[110] The government thus may not acknowledge that the public debt exists but refuse to pay it. If the government fails to make a debt payment, the debt instrument is at least temporarily invalid for legal purposes.[111] Moreover, there is no such thing as a valid debt that will nonetheless not be honored; a debt cannot be called "valid" if existing laws will cause default on it.[112] So as soon as Congress passes a statute that will lead to default in the absence of a change of course, the debt is invalid (or at least of questionable validity) and Congress has violated the Public Debt Clause.

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distinguished from that which exists or took place in fact or appearance, but has not the requisites to enable it to be recognized and enforced by law." BLACK'S LAW DICTIONARY 1440 (6th ed. 1990). None of the definitions of "valid" suggests that the attribute of validity exists only at the time of contract performance or debt payment. Therefore, government action may constitute validity questioning not only when the government fails to make a payment, but also when action brands a debt invalid.

[109]The Public Debt Clause does not distinguish debts that are invalid for all practical purposes from debts that the law explicitly brands as invalid. The word "validity" does not implicitly contain such a distinction, and it is not modified by the word "legal." Reading the distinction into the Clause would allow the government to pass one statute providing that debts shall be legally valid, but another providing that the Treasury must not make payment on them. This perverse definition of validity would allow an end-run around the Clause and would defy the Framers' intent to reassure debt-holders that their debts will be honored.

[110]In the absence of the words "validity of the," the Public Debt Clause might be viewed as establishing only a default rule. In other words, by pronouncing the legitimacy of "the public debt," this version of the Clause would mandate the repayment of debts, including those incurred in suppressing rebellion, unless a future Congress specified otherwise. Such a clause would preclude judges from holding that Congress was unauthorized to accumulate a public debt, but would not prevent future Congresses from repudiating their obligations.

[111]Thus a governmental delay in paying a debt violates the Clause. If the government refuses to make a payment on a debt at the time due but promises to make it later, the government has not maintained the validity of the debt. Rather, the government has effectively canceled the debt and substituted another one. While the government may well make good on its promise, but this compensation validates the later promise, not the original one.

[112]A debt may become invalid regardless of whether Congress intended to make it so. The Clause's focus on the validity of debts rather than on congressional action thus suggests that whether Congress intended for nonpayment to result is irrelevant.

d. Evolution of the Language

The evolution of the Clause suggests that Congress's choice of language was not accidental. As discussed above,[113] the final language of the Clause was close to the language of an earlier proposal, but it differed in that the phrase "validity . . . shall not be questioned" was substituted for "shall be inviolable." The change suggests a conscious choice of "validity . . . shall not be questioned" over "inviolable," which is close to "unrepudiable."[114] Why would the Framers shift to the word "questioned" if the original language was what they actually meant? At the least, the shift suggests a preference for phraseology that protects the public debt so strongly as to put the government's commitment to it beyond question. The only way to give effect to this preference is to interpret the Clause as precluding government action that makes default possible.

3. Historical Evidence

Three historical factors suggest that the Framers viewed the Clause not just as a ban on nonpayment, but rather as a more general expression of the government's commitment to ensuring the debt's validity. First, as argued above,[115] imminent debt repudiation was extremely unlikely given § 3 of the Amendment, so there is no reason that the Framers would have been more concerned with the possibility that Congress would intentionally cancel debts than with the government's general duty to secure payment of its debts. Indeed, the Clause reflected the Framers' commitment to the sanctity of full faith and credit,[116] and a purpose of the Clause was the securing of the nation's credit by guaranteeing payment to bondholders.[117] Full investor confidence in the validity of the debt requires not just a constitutional nonpayment ban, but also a statutory regime that provides for payment.[118]

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[113]*See supra* text accompanying note 31.

[114]The difference between "inviolable" and "unrepudiable" is that the former makes clear that a partial invalidation of debt, such as a promise to pay back a bond but without interest, is impermissible. The phrase "the validity . . . shall not be questioned," also appears to bar such violation, because a partial cancellation invalidates a debt obligation and replaces it with a lesser one.

[115]*See supra* text accompanying notes 48-55.

[116]*See supra* notes 43-47.

[117]*See supra* note 34.

[118]Even with constitutional protection, a statute providing for payment will boost investor confidence. *See also infra* note 181. Investors are more likely to perceive the Public Debt Clause as securing their debts if the Clause is applied to strike down statutes that would result in default. Even if debt-holders ultimately received payment, that payment would be delayed, the value of the debts would likely decline because of the initial repudiation, and the debt-holders would suffer litigation risk. In addition, if Congress were to engage in a course of action that would make it impossible (either practically or mathematically) for a successor

Second, participants in the ratification debate did not conceptualize the Clause as being only a technical ban on the failure of the government to make debt payments. Both proponents and opponents of the Clause agreed that it precluded taxation of income from outstanding bonds.[119] Such taxation would not trigger the intermediate level of generality, which bans only nonpayment, not actions occurring before or after scheduled payment that lower the value of debt.[120] The debate suggests that the Clause was viewed as a general principle requiring the government to ensure the full and unconditional validity of debts.

Third, just a month before the final debate on the Fourteenth Amendment, Congress passed a statute converting the bulk of bond payments into a permanent appropriation.[121] Thus, instead of leaving bondholders to the whims of future Congresses or the courts, Congress sought to place the public debt above the fray.[122] Accepting the intermediate level of generality would mean that Congress could repeal this statute and substitute an annual appropriation. It would be odd if a constitutional limitation and a statute pursued the same goal of protecting government debt, but the constitutional provision would tolerate repeal of the statute and thus subversion of the goal.

4. Identifying Debt Questionings

While a repudiation rule offers the advantage of a simple enforcement test, it is also possible to create administrable tests for a prohibition on a broader class of debt questionings. A fact-finder could assess purported breaches of the Clause using either an objective or a subjective standard.[123] The objective standard inquires into whether a

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Congress to honor all of its debts, then the constitutional provision probably wouldn't work. The Supreme Court might refuse to apply the Public Debt Clause, or it might be repealed through Article V amendment.

[119]*See, e.g.*, JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 18, 224 (1984).

[120]The high level of generality probably does ban taxation of government bonds, at least at rates higher than those existing at the time of the bonds' purchase. A tax jeopardizes debts by providing that they will not be honored in full unless Congress repeals the tax after payment. However, the Sixteenth Amendment's allowance of income taxes arguably trumps the Public Debt Clause's prohibition of excess bond taxation.

[121]*See supra* note 54. Routine appropriations were made on an annual basis. *See, e.g.*, Act of Apr. 6, 1866, ch. 27, 14 Stat. 14 (providing miscellaneous appropriations).

[122]The statute may also reflect administrative simplicity, since Congress could know in advance when bonds would become due. However, in no meaningful sense is it more difficult for the government to budget expected payments during each budget cycle rather than in advance. What makes a permanent appropriation unique is that money will be spent unless Congress affirmatively repeals it. *See, e.g.*, Charles Tiefer, *"Budgetized" Health Entitlements and the Fiscal Constitution in Congress's 1995-1996 Budget Battle*, 33 HARV. J. ON LEGIS. 411, 415–16 (1996) (contrasting annual and permanent appropriations).

[123]This section uses the terms "objective" and "subjective" to refer to whether a test

governmental action in fact jeopardized debt, while the subjective standard asks whether holders of the public debt are genuinely concerned about the validity of their debts. These standards can be translated into bright-line rules. For example, a bright-line test of the objective standard might be whether the United States would meet its debt obligations if Congress never passed another statute (or passed only statutes adhering to long-term budget projections).[124] Similarly, with bond debt, a bright-line test of the subjective standard might be whether any rating service had downgraded the debt.[125] While it might seem odd for a constitutional test to depend on the actions of private agencies, this approach makes sense if the test's aim is to dermine whether debtholders are genuinely considered about government action. Just because the objective and subjective standards may be translated into these bright-line tests does not necessarily mean that these are the only possible tests.[126] The point is that it need not be difficult to apply a test once selected,[127] even if it is difficult to pick a test from among those possible.[128]

It is impossible to prove that the bright-line objective and subjective tests sketched above are the best tests or that one is better than the other. However, there are practical reasons to prefer these tests over others, and to prefer the objective over the subjective. An advantage of both tests is that although they take the word "questioned" seriously, they do not turn the word into a hair-trigger. A wide range of governmental actions presumably has marginal effects on both the probability of default and concern about the

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considers debtholders' state of mind, not to whether a test may be administered without bias.

[124]For example, if Congress repealed a statute providing for repayment of a debt not yet due, thus leaving it to the discretion of a future Congress whether to honor the debt, the repeal would violate the objective test. *See also supra* note 96.

[125]Bright-line subjective tests for non-bond debt are more difficult, but not impossible, to develop. For example, a bright-line test of the solidity of government pensions might find a debt questioning if a given percentage of government employees began to purchase private insurance against the possibility of decreased payments.

[126]For example, an alternative test for the objective standard, also bright-line, would consider a warning by a ratings service to constitute a debt questioning. The subjective standard could be assessed using a multi-factorial test, in which a judicial fact-finder might consider bond ratings, stock and bond prices, statistical studies, newspaper commentary, and testimony by debt-holders. Or a court might create a balancing test that allowed limited questionings where the government had substantial or compelling interests.

[127]Even if the best test required a judge to make an intuitive finding about whether a debt questioning had occurred, such a judgment might still be superior to a rule narrowing debt questioning to repudiation. Judicial tests for violations of the Fourteenth Amendment, such as the intermediate scrutiny Equal Protection Clause test for quasi-suspect classifications, are often difficult to apply but are applied nonetheless. *See, e.g.*, Mississippi University for Women v. Hogan, 458 U.S. 718, 742-44 (Powell, J., dissenting) (disagreeing with Court's conclusion under intermediate-scrutiny test).

[128]The difficulty in picking appropriate tests has, of course, not led the courts to assume that other provisions of the Fourteenth Amendment should be applied as narrowly as possible. Rather, the judiciary actively debates what are appropriate tests for violation, for example, of the Equal Protection Clause. *See, e.g., id.* at 724 n.9 (O'Connor, J.) (confronting objections to intermediate-scrutiny test).

possibility of such default, but to conclude that all of these actions violate the Clause would stifle too much activity.[129] Just because "questioned" is roughly synonymous with "jeopardized" does not provide a textual argument that any statute increasing the probability of repudiation even marginally should be held to constitute a debt questioning. Just because this Article has concluded that "to question" most closely means "to jeopardize" does not mean that it must conclude that "to question" means "to jeopardize even just a little bit." "To question" might also mean "to jeopardize somewhat" or "to jeopardize a lot".

Because nothing in the phrase "shall not be questioned" indicates to what degree jeopardization must occur before it will constitute a questioning, it makes sense for tests of questioning to take a balanced approach. On the one hand, a test should not brand as unconstitutional government actions that have very small effects on debt accumulation, but that Tests can recognize this by identifying only substantial increases in the probability of repudiation or in debt-holders' concern about it. The objective test accordingly finds a questioning only when the existing statutory scheme would in fact lead to default in the absence of further congressional action. Similarly, the subjective test triggers the Clause only when a bond agency lowers the rating of U.S. debt because its riskiness passes a substantial threshold.[130]

The objective and subjective tests reflect different purposes of the Clause and the different plausible subjects of the past participle "questioned." Essentially, the objective test identifies a questioning by the government and thus is compatible with an interpretation of the Clause as banning any congressional or judicial action making a debt's repayment uncertain. The subjective test reflects the reassurance component of the Clause and asks whether the people have genuine concerns about the government's actions. The objective standard may therefore be preferable, because the Clause achieves its goal of reassuring debt-holders through its central mechanism, a limit on governmental action.[131]

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[129]For example, any increase in debt presumably raises the probability that the government will be unable to meet existing debts. But a rule preventing the government from issuing any new debts would clearly sweep too far and, indeed, defeat a purpose of the Public Debt Clause, the securitization of the nation's debt issuance.

[130]Relying on bond ratings rather than bond prices is essential. If the test targeted a decline in bond prices, it would inappropriately assume that investor jitters were a proxy for the probability of default. Bond prices reflect not only the probability of default but also changes in the time value of money and the availability of alternative investments. Bond ratings, however, reflect only those jitters caused by perceptions of an increased probability of default.

[131]However, one could argue that either test alone or both tests together should identify a debt questioning for the Clause to be triggered. If the Public Debt Clause is seen as protecting against only those governmental actions threatening repudiation and worrying debt-holders, then both tests should be necessary conditions for triggering the Clause. In contrast, if the Clause is seen as protecting against only the possibility of repudiation or

C. Outer Reaches of the Clause's Meaning

In sum, reading the Public Debt Clause literally leads to a construction of the Clause that is broad in two senses. First, the "public debt" includes statutorily authorized congressional budgetary promises besides financial bond instruments. Second, governmental actions short of direct repudiation may trigger the Clause if they endanger the validity of debts. This broad construction may not be the only plausible interpretation of the Clause; the Framers might have intended something much narrower but drafted the provision carelessly. The point is, however, that a broad judicial construction of the Clause would not be tantamount to implicit constitutional amendment in defiance of an obvious limited meaning of the Fourteenth Amendment's words. Rather, such a broad construction would reflect a literal and sensible interpretation of the Clause's words.

This Article's interpretation of the Public Debt Clause hardly exhausts questions about the Clause's substantive limits.[132] For example, does the Clause encompass debts that the government incurs through compulsion, or only those in which the government's promise serves as an incentive in the open market for assumption of government debts?[133] May Congress make a promise that would ordinarily become part of the public debt, but reserve to itself the right to change or renege on its promise?[134] Does the Public Debt Clause encompass all debts, or only those that the Congress explicitly makes on the credit of the United States or pursuant to the Clause itself?[135]

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against only concern about repudiation, then the single appropriate test should be sufficient.

[132]Equally difficult are questions about the Clause's procedural limits; what happens when Congress appears to violate the Public Debt Clause? Some of these questions are addressed in Part IV, *infra*, which asks to what extent constitutional infirmities in budget processes and policies are justiciable.

[133]For example, one might argue that if the government were to require all Americans to buy $500 bonds, those bonds would not implicate the Public Debt Clause. Because the government could have simply compelled purchase without exchanging a promise, it has not taken advantage of the credibility that the Public Debt Clause provides. This argument, however, may at odds with a central purpose of the Clause: assuring the public that greenbacks, which the Legal Tender Acts forced on government contractors, would remain valid. *See supra* text accompanying notes 43-46. On the other hand, government contractors retained the option of leaving the market altogether.

[134]Suppose, for example, that the Congress issued bonds with a maturity value of $500, but provided in the bonds' terms that Congress shall pay on maturity $500, or such other amount as it might subsequently decree by law. Although the bondholder recognizes ex ante that the bond's value is subject to Congressional discretion, one might argue that the Public Debt Clause precludes the government from issuing non-full faith debt or, more generally, reserving to itself the right to renege on its promises. On the other hand, if one accepts the principle that the government may reserve to itself the unilateral right to modify promises, one might further argue that such a reservation is inherent in the legislative power itself.

[135]A rule that Congress incurs a debt only by specific reference to the Clause would be tantamount to a default rule treating Congressional promises as retractable. Such a default rule might be a sensible bright-line rule if recipients of governmental promises ordinarily

These questions are difficult both interpretively and normatively. Nothing in the history or language of the Clause indicates to what extent Congress may control whether a given transaction implicates the Clause. Allowing Congress to withhold full-faith status from obligations seems counter to the nature of a constitutional provision limiting congressional power and discretion. On the other hand, robotically tossing all congressional promises into the public debt leaves open the possibility that Congress might use the Public Debt Clause as a constitutional trick to impose its substantive budgetary preferences on future Congresses. There are sensible middle-ground positions; for example, the Clause might be interpreted as binding whenever Congress makes an unqualified promise and could reasonably have believed that binding itself would be beneficial. This Article assumes that the courts could place appropriate limits on the Public Debt Clause,[136] and Part II attempts to distinguish situations in which the Clause's applicability depends on the broad construction that this Section defends or on particular additional assumptions about the Clause's limits.

III. Applications of the Public Debt Clause

This Part describes how application of the Public Debt Clause could reform congressional budget process problems that threaten fiscal disaster along various time horizons. Section III.A shows how the Clause could limit the destructive potential of budget impasses in the short term. Turning to long-term problems, Section III.B explains how the Clause could diminish accumulation of debts, while Section III.C assesses whether the Clause protects the entitlements that contribute to the debt. This organization also tracks movement from budgetary issues that the Clause almost certainly affects to areas in which the Clause's relevance is less certain.

A. Train Wrecks

Congressional budget impasses introduce the specter of "train wrecks."[137] The metaphor goes like this: When Congress and the President fail to agree on a budget by the beginning of the fiscal year, the previously

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realize that the government is likely to renege. The counterargument, of course, would be that the point of the Public Debt Clause is to instill confidence in the reliability of government promises.

[136]Any jurisprudential rules limiting the Clause's applicability would need to clarify first, how unequivocally Congress must act in making a promise for it to become part of the public debt, and second, what showing Congress must make to establish that the promise reflects a genuine debt rather than a substantive value preference. The broadest possible interpretation of the Clause would place any congressional promise into the debt without examining Congress's motives.

[137]*See* Michael Wines, *The Budget: A Train Wreck?*, N.Y. TIMES, June 18, 1995, at 22.

smooth-running government train begins to derail, with non-essential services[138] pushed along only if Congress and the President can agree on "continuing resolutions."[139] The train continues to edge forward until the government both runs out of cash and reaches the federal limit on borrowing. Then, the government train crashes and stops, a wreck that only a subsequent infusion of cash or a suspension of the debt limit can budge.

No budget impasse has ever led to a train wreck, but it has come close, most recently and precariously at the start of the 1996 fiscal year,[140] when the inability of Congress and the President to agree on a budget or a debt-limit increase threatened default.[141] The government shut down non-essential services, but temporary waivers of the federal debt limit[142] and accounting tricks by the Treasury[143] kept the government from reaching the limit.[144] Although the Congressional Budget Office has recommended abolition of the federal debt limit,[145] Congress has not responded. The

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[138]Non-essential services are those not "involving the safety of human life or the protection of property." 13 U.S.C. § 1342 (1996).

[139]*See, e.g.*, Act of Nov. 20, 1995, Pub. L. No. 104-56, 109 Stat. 548 (allowing temporary funding of some federal government programs).

[140]An earlier debt-ceiling crisis occurred in 1985. *See, e.g.*, Alan Murray, *Treasury Says U.S. Will Default Friday Without Debt Bill*, WALL ST. J., Nov. 13, 1985, at A1.

[141]*See, e.g.*, Leon Hadar, *US Default on Debt? Oh Yes, It Can Happen*, BUSINESS TIMES, Jan. 19, 1996, at 10; Alan Murray, *Debt-Limit Crisis Is Not Over Yet*, WALL ST. J., Nov. 27, 1995, at A1.

[142]*See, e.g.*, Act of Feb. 8, 1996, Pub. L. No. 104-103, 110 Stat. 55 (exempting amount equivalent to one month of Social Security payments from being counted toward debt ceiling); Act of March 12, 1996, Pub. L. No. 104-115, 110 Stat. 825.(exempting government trust fund investments and reinvestments from debt ceiling).

[143]Treasury Secretary Rubin took advantage of statutory changes passed in the wake of the 1985 debt-ceiling crisis designed to help avert default. *See* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, Title VI, sec. 6002(a)-(c), 100 Stat. 1874, 1931. The changes authorized him to redirect investments in pensions funds, 5 U.S.C. § 8348(j)(1) (1996), and "to sell or redeem securities, obligations, or other invested assets of the Fund before maturity in order to prevent the public debt of the United States from exceeding the public debt limit," § 8348(k)(1). The Secretary may take these actions only during a "debt issuance suspension period," defined in § 8348(j)(5)(B) as "any period for which the Secretary of the Treasury determines . . . that the issuance of obligations of the United States may not be made without exceeding the public debt limit." The General Accounting Office later determined that the Treasury's actions were authorized by the statute. *See* GENERAL ACCOUNTING OFFICE, DEBT CEILING--ANALYSIS OF ACTIONS DURING THE 1995-1996 CRISIS (1996); Clay Chandler, *GAO Says Rubin Tapped Retirement Funds Legally*, WASH. POST, Sept. 7, 1996, at D2. Republicans have charged, however, that Secretary Rubin exceeded his legal authority. *See* NICK SMITH, REPORT OF THE HOUSE TASK FORCE ON THE DEBT LIMIT AND MISUSE OF THE TRUST FUNDS (1996) (questioning Secretary's authority to declare debt issuance suspension period); *Constitutional Debt Crisis*, ST. LOUIS POST-DISPATCH, Jan. 12, 1996, at 15C (noting statements of former Attorneys General and Treasury Secretaries warning of illegality of Treasury Secretary Rubin's plans).

[144]*See* Contract with America Advancement Act of 1996, Pub. L. No. 104-121, sec. 301, 110 Stat. 847 (resolving crisis by raising debt ceiling).

[145]*See* CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: AN UPDATE 48, 54 (1995). The General Accounting Office has long favored elimination of the statutory

possibility of a future train wreck thus raises two questions: First, is it constitutional under the Public Debt Clause for the government to stop payments on bonds and other obligations? And second, is the debt-limit statute that makes a train wreck possible itself constitutional?

1. Governmental Failure to Make Payments on Bonds

If the debt were to reach the statutory ceiling,[146] the Treasury might fail to make a required interest payments on its bonds.[147] Such a failure would transcend mere questioning of the public debt's validity; it would constitute partial invalidation of the public debt, because the Treasury commits in its regulations to make interest payments at certain times.[148] Such partial invalidation runs afoul of the Public Debt Clause for two reasons.[149] First, a "partial-faith-and-credit" principle would allow the government to liquidate its debts for nominal consideration and convert the Clause into a virtual nullity. Second, a delay in payment calls into question the government's commitment to pay the remainder of a debt and its commitment to pay other debts, thus violating the proviso that the debt's validity "not be questioned."[150]

Assuming that the government must pay damages for a breach of the Public Debt Clause, what is the measure of damages?[151] Because bond

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debt limit. *See* GENERAL ACCOUNTING OFFICE, A NEW APPROACH TO THE PUBLIC DEBT LEGISLATION SHOULD BE CONSIDERED (1979). Bills accomplishing a repeal were considered in the last Congress. *See, e.g.*, H.R. 215, 104th Cong. (1995).

[146]The debt limit is set in 31 U.S.C.A. § 3101 (Westlaw 1996), which currently provides that "[t]he face amount of obligations . . . whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) may not be more than $5,500,000,000,000 outstanding at any one time . . . ." For a comprehensive history of § 3101, see DEPARTMENT OF THE TREASURY, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1996, HISTORICAL TABLES 92-94 (1995) [hereinafter HISTORICAL TABLES].

[147]The United States has failed to make timely payments before, most recently in 1979, when despite the resolution of a debt-limit crisis, administrative snafus at the Treasury Department led to delayed payments on some bond issues. *See* James J. Angel, *Looking Back at Debt Defaults in U.S. History*, CHI. TRIB., Feb. 1, 1996, at 21 (arguing that default "would have serious consequences, but . . . would not be the end of the world").

[148]*See* 31 U.S.C. § 3121(a)(5) (1996) (authorizing Treasury to specify dates on which it will pay bonds' principal and interest).

[149]At least two newspaper editorials have suggested that default on the debt would be unconstitutional. *See* Steve Charnovitz, *Extortion and the Debt Ceiling*, J. COMMERCE, Nov. 16, 1995, at 10A; George B. Tindall, *Is This Train Wreck Constitutional?*, NEWS & OBSERVER (RALEIGH), Nov. 15, 1995, at A25.

[150]Even the possibility of a partial repudiation caused investors to lose some faith in U.S. bonds. *See* David E. Sanger, *S.&P. Strongly Warns U.S. on the Danger of Default*, N.Y. TIMES, Nov. 11, 1995, at 37 (reporting that faith of investors in government debt had been diminished, despite Standard & Poor's decision not to lower United States's AAA credit rating).

[151]Just because the United States would presumably need to pay damages for failing to honor

markets are highly competitive, a bondholder presumably could have purchased a perfect substitute for a U.S. bond, so the bondholder's damages are the same using either an expectancy or a reliance formulation.[152] Under either scheme, the government would owe not just the missed interest payment, but also interest on that payment that would have accumulated during litigation. Even these damages might not fully compensate bondholders, however, since the debt repudiation would hurt the United States's credit rating and thus lower the value of outstanding bonds.[153]

2. *Non-Bond Obligations Within the Public Debt*

The government's reaching the debt ceiling would stop not just interest payments on bonds, but also other government obligations. Unless the Public Debt Clause applies only to debts explicitly made on the credit of the United States, ceasing payments for some of these obligations would also raise constitutional questions. Indeed, such a cessation would be problematic not only if it occurred because of a debt-ceiling crash, but also if Congress and the President failed to reach a budget agreement and the government shut down, as in 1995-96.

Determining which government payments are discretionary and which are required under the Public Debt Clause may be difficult in some instances, but some ordinary government expenditures fit squarely within the broad construction of the public debt defended in Part II. For example,

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a debt does not mean that it is constitutional for the United States not to honor a debt, as long as it pays later. In other words, there is no reason to import into the Public Debt Clause the limited, Holmesian view of contractual obligation: "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass." OLIVER WENDELL HOLMES, THE COMMON LAW 301 (1881). The Public Debt Clause changes the promisor's ordinary choice by requiring the United States to meet its fiscal commitments. For the Clause to have any enforceability, the courts will need to be able to impose damages if the United States fails in its constitutional duty, but this does not mean that the government has taken a constitutionally permissible step by failing to make a debt payment. Nonetheless, there is something anomalous about enforcing a constitutional requirement that the government keep promises by allowing the government to break promises and then pay damages. The cure in the case of the budget impasses is for the courts to strike down the debt-limit statute that makes default possible, as explained below.

[152]*See, e.g.*, E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 225 n.20 (1987) (noting conditions for merger of expectancy and reliance damages).

[153]Computing such damages would be difficult, because a court decision reimbursing a bondholder would reinstill confidence in U.S. bonds and cause them to appreciate. It is possible that the bonds would rise to even greater than their initial value, since such a decision could reassure bondholders about the vitality of the Public Debt Clause and make uncompensated repudiation seem even less likely than initially. On the other hand, bondholders might not have confidence in the precedential value of the court decision, and the willingness of the government to default might overshadow the willingness of the court to order compensation. In addition, any uncompensated litigation costs incurred in defending bonds adds to the cost of their ownership.

government civil-service pension payments and money owed to independent contractors represent unambiguous obligations that the government owes because of past agreements in which the debt-holders have already fulfilled their part of the bargains.

There are gray areas in which recipients of government money have an expectation of continued receipt but in which there may or may not be an agreement triggering the Public Debt Clause. If the Public Debt Clause applies to obligations that the government requires individuals to purchase, a budget crisis might not relieve the government of its duty to issue Social Security checks, since it has promised to make payments from a trust fund accumulated in part through recipients' own contributions.[154] A failure by the government to make a payment because of a train wreck would breach a statutorily established agreement that the government will provide beneficiaries means of subsistence in exchange for their earlier contributions.[155] Medicare is less likely to qualify as a government agreement with beneficiaries, because there is less of a nexus between an individual's contributions and benefits than in the case of Social Security.[156]

Similarly, current government employees expect to be paid, but they are subject to dismissal,[157] and the annual budget process serves as an implicit annual review of which employees' contracts to renew. Whether the government would need to make salary payments depends on whether the government incurs a public debt when it hires an employee or when the employee has actually performed contracted-for duties. This hinges in turn on whether the government is considered to have formed agreements of continued employment with its employees.

3. The Federal Debt-Limit Statute

Regardless of which governmental obligations are part of the public debt and thus unconstitutional to repudiate, the federal debt-limit statute makes train wrecks and thus repudiation possible. Although the debt-limit statute is theoretically written in pursuance of the goals of the Public Debt

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[154]*See* Social Security Act of 1935, 49 Stat. 622 (principally codified as amended at 42 U.S.C. §§ 401-433 (1996)).

[155]The counterargument is that the government has not entered into agreements with beneficiaries, but rather has established a statutory scheme that it can change. *See infra* Section III.C. Even if the government has reserved the right to alter Social Security in general, however, a beneficiary might claim that the government must continue to make payments until it changes the statutory scheme to discontinue them.

[156]Medicare is a hybrid system. Part A of Medicare, providing hospital insurance, is funded like Social Security, through a special payroll tax that accumulates in a trust fund. Part B, offering supplemental medical insurance, is funded primarily through general tax revenues. *See, e.g.*, Tiefer, *supra* note 122, at 417.

[157]*Cf.* Crenshew v. United States, 134 U.S. 99 (1890) (holding that government employee has no contractual right against termination by Congress on public-policy grounds).

Clause,[158] it works counter to the Clause's goals. The statute precludes government borrowing above a level that Congress has set, even if that borrowing is needed to meet expenses required to maintain the public debt's validity. The statute thus works at cross-purposes, serving both as a legitimate exercise of federal power under the Public Debt Clause[159] and as a potential cause of unconstitutional debt repudiation. Whether the statute in fact increases or decreases the probability of default or investor confidence is therefore impossible to determine a priori.[160] Under the objective and subjective tests for debt repudiation defended above,[161] however, it is not necessary to weigh these effects speculatively,[162] and the statute flunks at least the objective test and possibly the subjective test also.

The Public Debt Clause promises bondholders not just that bonds will remain valid, but that their validity will not be questioned.[163] The debt limit will necessarily lead to the repudiation of governmental obligations in the absence of congressional action, as the statutory scheme leaves open to question whether a later Congress will honor the public debt by changing the laws. The debt ceiling thus fails the objective test for debt questioning. Even if the Clause allowed one Congress to count on a future Congress to pay required debts, the debt limit statute is still suspect, because in the absence of the statute, repayment would necessarily occur.[164] The debt limit thus takes an *affirmative* step toward repudiation and places into question Congress's commitment elsewhere expressed to pay the debt.

In addition, the statute functionally has allowed Congress to play chicken in Washington fiscal negotiations;[165] Congress runs the budget train

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[158]Indeed, the drafters of the proposed Balanced Budget Amendment effectively sought to constitutionalize the debt-limit statute by requiring a three-fifths majority of both Houses to raise the debt limit. *See* S.J. Res. 1, § 2 (1995). *But see* Seto, *supra* note 10, at 1516–19 (criticizing this enforcement mechanism).

[159]Combining Sections 4 and 5 of the Fourteenth Amendment gives Congress the power to legislate to ensure the validity of the public debt. *See also infra* Subsection III.B.2.

[160]The empirical question is whether the statute, by reflecting a congressional commitment not to let the debt rise above a certain level, inspires confidence in U.S. bonds that makes up for the chance of repudiation in the event of a train wreck. Because the debt limit has so far failed to stem long-term debt growth but has come close to bringing a train wreck, it seems intuitively likely that the statute decreases confidence.

[161]*See supra* Subsection II.B.4.

[162]That the tests do not require such a weighing makes sense in this context for two reasons. First, the tests are bright-line rules and thus designed not to entail abstract balancing. Second, Congress could exempt payments on the debt from the statute and thus preserve its debt-ensuring effects.

[163]*See supra* Section II.B. Under this Article's interpretation of "validity . . . shall not be questioned," the debt-limit statute may be attacked on its face and not merely only when it leads to repudiation of a debt in a particular circumstance.

[164]*Cf.* 31 U.S.C. § 3123(a) (pledging faith of United States in paying its bond obligations).

[165]*See, e.g.*, Adam Clymer, *G.O.P. Lawmakers Offer to Abandon Debt-Limit Threat*, N.Y. TIMES, Jan. 25, 1996, at A1 (describing Republicans' offer to raise debt limit in exchange for "down payment" on balanced budget).

directly toward the debt limit, hoping to force the President to make the turn that Congress prefers.[166] If this abuse of the public-debt statute causes bondholders to question the validity of their debts, the Clause might be breached under a subjective test of its meaning,[167] even if no default occurs. In addition, this abuse of the debt-limit statute militates against a conclusion that Congress's intent in the statue is genuinely to protect the validity of the debt.

As long as tax receipts are greater than public debt payments, a prioritization of public debt payments over other expenses could harmonize a debt-limit statute with the Public Debt Clause. The statutory scheme does not currently allow for such preferential treatment; the Treasury pays obligations on a rolling basis.[168] When the public-debt ceiling has been reached, the Treasury makes a payment only if it has sufficient governmental receipts to do so. Government receipts arrive sporadically throughout the tax year,[169] and a lump sum of receipts might be depleted by non-public debt expenses just before a debt payment becomes due. Therefore even with a budget in balance or surplus, the government might temporarily hit the debt ceiling in the middle of the year and fail to make needed expenses. It is theoretically possible that the timing of receipts and expenses would work out such that this would not occur, but nothing in federal budget practice guarantees this.

A debt-limit statute aimed only at ensuring the validity of the public debt would exempt borrowing for payments on the debt. In the absence of such amendment, it is difficult to imagine a modification, either judicially or congressionally imposed, that could save the debt-limit statute's constitutionality. A statute might allow the Treasury Secretary to anticipate the possibility of a debt-ceiling crisis and stop non-debt expenses to save for impending debt payments. The Treasury Secretary, however, might fail to anticipate a debt-ceiling crisis[170] or might underestimate its duration. Thus,

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[166]In theory, the game might flip, with the executive branch refusing to approve an increase in the public debt limit unless the legislative branch caves in to budget demands. Congress, however, has rigged the game by providing in 31 U.S.C. § 3101 that the House can unilaterally raise the debt ceiling as necessary under its House Rule XLIX, also known as the Gephardt Rule. This rigging further undermines the claim that the debt ceiling's goal is to preserve the validity of the debt.

[167]*See supra* text accompanying note 125. Under the subjective test proposed, the Clause would not have been breached since the debt was not downgraded. However, under a different formulation of the test, for example considering any investor skittishness sufficient to trigger the Clause, the Clause might have been violated.

[168]Under 31 U.S.C. § 3102 (1996), the Treasury Secretary may issue bonds to cover expenses as they become due.

[169]In December, 1995, for example, a sudden infusion of quarterly estimated tax payments helped keep the government briefly afloat. *See* GENERAL ACCOUNTING OFFICE, *supra* note 143, at 24-25.

[170]Indeed, existing law already gives the Secretary authority to declare a debt issuance suspension period and take certain defensive actions. *See supra* note 143. But like politics

unless the Secretary ultimately has the authority to borrow to make payments on the public debt, the debt-limit statute leaves open the possibility of default and violates the Public Debt Clause.

B. Deficits and Debt

To read the Public Debt Clause as requiring a balanced budget would be a remarkable feat of interpretive legerdemain. After all, the Framers of the Fourteenth Amendment had just accumulated massive deficits and certainly were not promising never to do so again. Additionally, economists agree that a budget deficit of zero is a convenient but arbitrary target,[171] so it can hardly be read into the Public Debt Clause's text. However, just because the Clause is not a Balanced Budget Amendment in disguise does not mean that it cannot serve as a substitute for such an amendment. If the accumulation of deficits makes questionable the government's ability to meet existing debt obligations, then the Clause may be triggered.

1. Unsustainable Debt Accumulation

The U.S. debt today is relatively small,[172] and American bonds are considered among the "world's safest investments."[173] Economists warn, however, that if the United States fails to increase taxes or reduce spending, the debt will spiral to unprecedented levels.[174] Indeed, without change, the debt would increase faster than the growth of the economy itself. Economists define such growth as unsustainable,[175] since if it remained unchecked, payments on the debt would ultimately consume the nation's entire economic output. Of course, at some point Stein's Law will become

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generally, debt-ceiling crises can be unpredictable.

[171]*See, e.g.*, WILLIAM R. KEECH, ECONOMIC POLITICS 123 (1995) ("A nominal balance of the government's revenues and expenditures is a thoroughly arbitrary target, although it is very appealing politically because it is simpler than any other target and thus is more widely understood among voters.").

[172]The debt held by the public at the end of fiscal year 1996 is projected at 52.1% of GDP; in other words, the debt is only about half one-year's national income. *See* HISTORICAL TABLES, *supra* note 146, at 90. The United States's structural budget deficit is smaller than that of all but two other OECD industrialized countries. *See* CONGRESSIONAL BUDGET OFFICE, *supra* note 5, at 90. For a review of the causes of large debts in OECD countries, see ALBERTO ALESINA & ROBERTO PEROTTI, THE POLITICAL ECONOMY OF BUDGET DEFICITS (International Monetary Fund Working Paper No. WP/94/85, Aug. 1994).

[173]*See, e.g.*, *Financial Markets*, L.A. TIMES, Jan. 25, 1996, at D3 (noting that U.S. bonds retain highest possible ratings).

[174]The Congressional Budget Office projects that under current policies, the debt-to-GDP ratio will climb to 311% by 2050. *See* CONGRESSIONAL BUDGET OFFICE, *supra* note 5, at 77.

[175]*See id.* at xxiii ("For a path of spending and revenues to be sustainable, the resulting debt must eventually grow no faster than the economy.").

operative: "If something cannot go on forever, it will stop."[176] The question is whether it will stop before a crisis of confidence in U.S. debt, after such a crisis but before repudiation, or after national insolvency.[177] Most of the United States's debt is internally held,[178] so a political constituency would oppose any effort at debt repudiation. If this Article is correct, such an effort would require a constitutional amendment,[179] so even a minority might thwart it. But some have credited massive debt levels with bringing about the French and Russian Revolutions,[180] and a true debt crisis could force the government to cut social services and bring unpredictable unrest.

The Public Debt Clause's "shall not be questioned" language allows the courts to intervene before debt repudiation becomes a viable option.[181] The quandary, however, is in the line-drawing. Whenever the United States runs a deficit, it moves closer to an unmanageable debt level, but applying a hair-trigger test to debt accumulation would inflate the Public Debt Clause into a full-scale Balanced Budget Amendment. But if this approach would apply the Clause too soon, then waiting for debt repudiation applies it too late.

Both the objective and subjective tests of debt questioning[182] provide ways to apply the Clause in between these extremes. The subjective standard would be triggered when debt accumulation becomes so excessive that bond rating agencies downgrade U.S. debt. The objective standard would preclude any budget that would cause the debt to cross the economic

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[176]*See, e.g.*, Herbert Stein, *Leave the Trade Deficit Alone*, WALL ST. J., Mar. 11, 1987, at A20.

[177]In a technical sense, governments cannot go bankrupt, since bankruptcy proceedings do not apply to the federal government. Moreover, the government can always whittle the debt down through inflation, except to the extent the debt is held in inflation-indexed bonds. *See* John R. Wilke, *Treasury Plans to Sell Inflation-Indexed Bonds*, WALL ST. J., May 16, 1996, at C1 (noting first planned Treasury issue of bonds protected against inflation).

[178]Approximately 20 percent of the national debt is held by foreigners. *See* ANALYTICAL PERSPECTIVES, *supra* note 82, at 195-96.

[179]One could argue that the Public Debt Clause is unrepealable. If repeal were proposed in a national crisis, the debt would unconstitutionally be in question after repeal seemed viable but before ratification by the states. However, Article V's strong presumption of amendability probably means the Framers of the Fourteenth Amendment did not intend to make an exception to Article V.

[180]*See* Seto, *supra* note 10, at 1459 & nn.24–25.

[181]This suggests a paradox: If the Supreme Court held debt accumulation to constitute a questioning, then presumably it would also hold repudiation illegal, but that precedent would mean that debt accumulation could not constitutionally lead to repudiation, and thus the accumulation ought not constitute a questioning. A resolution to this paradox views the government's actions independent of the Public Debt Clause's constitutional restraint. This is the only way to honor the Clause's "shall not be questioned" language. Moreover, Article V permits repeal of constitutional provisions, so fiscal unsustainability puts into question the validity of the public debt by making repeal seem like a viable option. Even without Article V, the Supreme Court might in a national crisis overrule precedent and allow debt repudiation.

[182]*See supra* Subsection II.B.4.

threshold of unsustainability.[183] A deficit hawk might seek earlier application of the objective test by noting that the statutory scheme places the economy on the way to unsustainability. Such an anticipatory thrust is two levels removed from actual default, but there is no compelling counterargument to this expansive interpretation of "shall not be questioned."[184] In addition, it makes normative sense to deal with problems sooner rather than later,[185] and it therefore might be healthy for the courts to ask Congress to clarify its long-term goals.

2. *Legislation Forcing Deficit Reduction*

Although Congress just missed the supermajority needed to pass the Balanced Budget Amendment,[186] congressional support for a scheme that would tie Congress's hands and force budget balance has long been strong. Indeed, with the Balanced Budget and Emergency Deficit Control Act of 1985,[187] popularly known as Gramm-Rudman-Hollings, Congress attempted to create a statutory regime that would force budget balance by requiring the Comptroller General to implement an across-the-board cut, known as a sequestration, of non-entitlement expenditures to achieve balance if Congress failed to reach balance on its own.[188] Although the Supreme Court found the Comptroller General's role in this scheme unconstitutional in *Bowsher v. Synar*,[189] Congress cured the statute's constitutional infirmities.[190] Deficits continued to climb, however, as Congress and the Office of Management and Budget took advantage of accounting

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[183]Application of such a standard would require a determination of whether interest payments on the debt are increasing at a faster rate than the economy will grow. Predictions of economic growth are uncertain, but given governmental economic statistics, this standard should be easy to apply. The statistics might in fact be inaccurate, but by mapping an isomorphism from the unquestionable validity of the public debt to its sustainability, the standard allows for dispassionate, bright-line assessment.

[184]Whether a budget on the path to unsustainability fails the objective test depends on whether the test asks what would happen if Congress passes no further statutes or what would happen if Congress sticks to its long-term plans.

[185]*See, e.g.*, CONGRESSIONAL BUDGET OFFICE, REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS 450 (1996) (arguing for addressing spending growth before retirement of baby boomers).

[186]*See supra* note 10.

[187]Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended in scattered sections of 2, 31 & 42 U.S.C.).

[188]*See generally* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593 (1988).

[189]478 U.S. 714 (1986). The Court held that because Congress reserved the right to remove the Comptroller General, Gramm-Rudman-Hollings violated separations-of-powers principles by giving Congress a role in the execution of the laws. *Id.* at 736.

[190]*See* The Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, tit. I-II, 101 Stat. 754 (1987).

loopholes,[191] and ultimately Congress gave up on the Gramm-Rudman-Hollings approach altogether, replacing it with the Budget Enforcement Act of 1990,[192] which relied mostly on voluntary congressional compliance with deficit targets. In the end, Congress was unable to resist the lure of deficit spending.

Gramm-Rudman-Hollings failed because of the general rule that later legislative enactments are given priority over earlier ones.[193] But later statutes may not *unconstitutionally* repeal earlier ones, and the Public Debt Clause may make it unconstitutional for Congress to deviate from a course adopted pursuant to the Public Debt Clause and § 5 of the Fourteenth Amendment.[194] If Congress explicitly creates a scheme to secure the validity of the public debt, and a subsequent Congress overturns that scheme, such a reversal might constitute a "questioning" of the validity of the debt.

This argument would be strongest for a statute explicitly invoking Sections 4 and 5 and providing that it may be amended only if the modification would not constitute a debt questioning.[195] A court scrutinizing an amendment to or a repeal of such legislation would then apply an incarnation of either the subjective or the objective test of debt questioning.[196] As usual, the subjective test would consider whether the change undercut the bond markets' faith in government debt. The alternative objective test would assess whether the change would cause unsustainable debt growth or, using a broader version of the test, would put the government on the path to such unconstitutional growth.

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[191]For a description of these loopholes, as well as of the failure of Gramm-Rudman-Hollings and the adoption of the Budget Enforcement Act, see Joyce & Reischauer, *supra* note 9, at 433-40.

[192]Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388 (codified as amended at 2 U.S.C. §§ 901-922 (1996)).

[193]*See, e.g.*, Eisenberg v. Corning, 179 F.2d 275 (D.C. Cir. 1949) (holding that later budgets override inconsistencies with earlier ones).

[194]Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[195]Even a court that would not have found the abandonment of Gramm-Rudman-Hollings unconstitutional might be wary if Congress had earlier limited a debt-reduction statute's amendability. Congress's power under § 5 to enforce the values of the Public Debt Clause probably extends beyond the courts' power to enforce the Clause's letter. Although Congress has never taken explicit advantage of § 5 in the context of the Public Debt Clause, the Supreme Court has interpreted § 5 broadly in the context of the Equal Protection Clause. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court applied a rational-basis test to determine whether congressional action reflected the Fourteenth Amendment's goals. The Court thus upheld the Voting Rights Act of 1965's nullification of an English literacy requirement even though such a requirement was not itself unconstitutional. Similarly, even if abandonment of a debt-reduction scheme would not ordinarily be unconstitutional, the Court might uphold legislation defining such abandonment as a debt questioning since the legislation is rationally related to upholding the goals of the Public Debt Clause.

[196]*See supra* Subsection II.B.4.

There are two supplemental reasons for viewing the Clause as allowing Congress to tie its own hands with a Gramm-Rudman-Hollings plan. First, the Public Debt Clause is inherently intertemporal, providing that Congress may not renege on an earlier Congress's budgetary commitments. If Congress were to frame a Gramm-Rudman-Hollings scheme as a promise to future purchasers of government securities that it will adhere to a specific budgetary path, or if it incorporated such a promise directly in the bond contract, then deviating from that path might be considered a default on that promise. Second, the only type of legislation that could ensure the validity of the public debt against the will of future Congresses is legislation that ties Congress's hands, so unless § 5 was not meant to apply to § 4, not enforcing hand-tying legislation thwarts the Framers' intent in § 5.[197] The problem with this analysis is that it seems too broad, since it would afford all debt legislation quasi-constitutional status.[198] But this problem vanishes if § 4 and § 5 are read together as allowing Congress to preclude its successors from amending a debt-reduction statute in a way that would constitute a debt questioning.

C. Entitlements

Part I's broad construction of what constitutes the "public debt" gives encouragement to those who oppose cuts in Social Security and other entitlement spending. After all, Social Security is a social contract providing for insurance payments to be made in exchange for beneficiaries' earlier contributions.[199] In essence, with Social Security and Medicare, the United States has accumulated an "implicit pension debt"[200] that the Constitution protects.

Or so the argument goes. But there are reasons--textual, jurisprudential, and practical--that protecting entitlements with the Public Debt Clause begins to stretch the Clause's meaning. First, the social contract that Social Security embodies might not trigger the Clause, because the government has not entered into written agreements with beneficiaries. Second, Part I of this Article left open the question of whether the Clause is

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[197]Professor Seto similarly notes in the context of the Balanced Budget Amendment that a provision giving Congress enforcement power might allow Congress to override the ordinary rule that subsequent laws supersede prior laws. *See* Seto, *supra* note 10, at 1527.

[198]Indeed, such a reading might suggest that Congress may not repeal, or even amend, the debt-limit statute. This would bludgeon Congress into crafting balanced budgets and could lead to unconstitutional debt defaults if Congress failed.

[199]*See, e.g.*, William G. Dauster, *Protecting Social Security and Medicare*, 33 HARV. J. ON LEGIS. 461 (1996) (describing entitlement programs and urging continued funding).

[200]*See* Cheikh Kane & Robert Palacios, *The Implicit Pension Debt*, FIN. & DEV., June 1996, at 36 (describing magnitude of unfunded pension obligations in both industrialized and developing countries). The authors note that many countries' debt promises are constitutionally protected. *Id.* at 36.

implicated when citizens are required to acquire government obligations. Regardless of label, Social Security insurance contributions are a tax. Like the last argument, this one draws a wall, perhaps artificial, between agreements embodied in statutes and those on paper.

Third, the Supreme Court has held, though without considering the Public Debt Clause, that Congress does have the right to cancel Social Security payments. In *Flemming v. Nestor*,[201] the Court ruled constitutional a statute retroactively withdrawing Social Security benefits from aliens deported for Communist Party affiliations. The Court noted that Congress had reserved to itself "[t]he right to alter, amend, or repeal any provision" of the Social Security Act,[202] and found the beneficiary's absence from the United States a sufficient rationale for the statute to pass muster under the Due Process Clause of the Fifth Amendment.[203]

The fourth, practical reason to be wary of arguments that the Public Debt Clause protects entitlements is that such arguments transform the Clause from a brake against fiscal chaos to an accelerator that could push the economy off the fiscal cliff.[204] If the government must meet its entitlements promises, then it will need to pay for these promises with high tax rates and drastic reduction in other government services.[205] However, if Congress waits too long to respond to the impending entitlements crisis, anything might happen in the "generational warfare" that some say would result.[206] The Supreme Court could overrule *Flemming* because it failed to consider the Public Debt Clause,[207] or seize on the *Flemming* Court's

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[201]363 U.S. 603 (1960).

[202]This reservation remains in force. *See* 42 U.S.C. § 1304 (1996).

[203]363 U.S. at 611-12.

[204]This practical concern may help to explain the Supreme Court's disposition in *Perry v. United States*, 294 U.S. 330 (1935). *See supra* note 69 and accompanying text. Once the government has accumulated debts that it cannot afford to pay, it may make ex post financial sense to relieve the government of its obligations. Because the Public Debt Clause achieves its purposes by tying Congress's hands ex ante, such a rationale is constitutionally insufficient. But it is understandable that the courts might subvert the Framers' intent, especially given the uncertainty of the government's duty not to renege on entitlement obligations, if enforcing those obligations would be economically disastrous.

[205]Of course, if it became clear in the near future that Congress will not be able to renege on its entitlement obligations, Congress might prospectively reform the system by replacing the pay-as-you-go approach with a fully funded, actuarially sound alternative. *See* James Tobin, *The Future of Social Security: One Economist's Perspective*, *in* SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS 41 (Theodore R. Marmor & Jerry L. Mashaw eds., 1988) (suggesting system linking contributions and benefits). Or, Congress might, as Charles Tiefer predicts, budgetize entitlements entirely by subjecting them to the rigors of the appropriations process. *See* Tiefer, *supra* note 122, at 459.

[206]*See, e.g.*, John A Cutter, *Tsongas Warns Against 'Generational Warfare'*, ST. PETERSBURG TIMES, Mar. 20, 1994, at 7A.

[207]The Court also could overrule *Flemming* as incorrectly construing the Due Process Clause. Charles Reich bitterly critiqued *Flemming* in his ultimately vindicated analysis of "new property." *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 768-71 (1964).

comment that its holding does not mean that "Congress may exercise its power to modify the statutory scheme free of all constitutional restraint." *Id.* at 611. And if Congress were to place entitlement obligations on the full faith and credit of the United States and issue written agreements promising to honor them, the *Flemming* Court's analysis would crumble and all bets would be off on the applicability of the Public Debt Clause to entitlements.

IV. Justiciability of the Public Debt Clause

To demonstrate that the federal courts would have jurisdiction over claims filed by debt-holders under the Public Debt Clause, this Part surveys the sovereign immunity, standing, political questions, and ripeness doctrines, as well as separation-of-powers considerations that overlap these areas. Under one view of justiciability, this separate inquiry ought not be required. William Fletcher has argued in the context of standing that the justiciability question is on the merits.[208] Courts, according to Fletcher, should grant standing to anyone in whom the relevant constitutional or statutory provision sued upon grants legal rights. Similar analyses are possible for other prerequisites to jurisdiction;[209] for example, a case would be ripe when a legal injury occurred under a particular provision's definition of injury. Under these formulations, this Article's justiciability analysis is done, because the Article conceptualizes the Public Debt Clause as investing legal rights against the United States in debt-holders. Thus, in this view, the Clause overrides sovereign immunity, grants standing, does not delegate a political question to a co-equal branch, creates ripe cases whenever the debt has been questioned, and provides a check on the legislative branch.

The Supreme Court has not embraced this mode of analysis. For example, in *Lujan v. Defenders of Wildlife*,[210] the Court held that the Endangered Species Act's grant of citizen standing exceeded the bounds of the Article III judicial power. In nullifying an explicit congressional vesting of a legal right, the Court perpetuated its "injury in fact" jurisprudence.[211] This test stands in direct opposition to Fletcher's approach, which assesses legal injuries instead of reading a limit to adjudicable harms into Article III. Thus, this Article must conduct an independent analysis of the current state

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But the Court has so far followed *Flemming*, holding in 1986 that the Social Security Act created no contractual or property rights. *See* Bowen v. Public Agencies Opposed To Social Security Entrapment, 477 U.S. 41, 55 (1986).

[208] William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

[209] *See, e.g.*, Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) (arguing that "governments have neither 'sovereignty' nor 'immunity' to violate the Constitution").

[210] 504 U.S. 555 (1992).

[211] *See id.* at 562–63 (*citing* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1992).

of justiciability law to determine whether there is any remedy to those governmental practices that the Article brands unconstitutional.

This Part argues that the Supreme Court's jurisprudence does not sap the Public Debt Clause of its relevance. This discussion inevitably veers from the Clause's core, but its conclusions underscore that the private rights protected by the Clause provide a means to enforcing public values. Justiciability doctrines may well endanger many constitutional challenges to the Congress's administration of fiscal policy,[212] but the Public Debt Clause's protection of debt-holders provides an anchor on which jurisdiction rests comfortably. Although Part III is motivated by the concern that financial mismanagement may impair the general welfare, it is not this diffuse interest but rather the specific financial injury potentially suffered by debt-holders that leads to its conclusions. The Public Debt Clause paves the road to judicial enforcement by conferring rights in a class of individuals whose financial interests are aligned with the social interest of sound financial management that motivates this Article.

A. Sovereign Immunity

Waivers of sovereign immunity are strictly construed,[213] but Congress's grants of waivers would cover an action by debt-holders. First, the Tucker Act[214] granted the sovereign's clear permission to be sued for money damages on an express contract. Indeed, in *Perry v. United States*,[215] the Supreme Court held that the Claims Court would have had jurisdiction were the petitioner's calculations of damages correct, but that it could not take jurisdiction over claims for nominal damages.[216] Therefore, if the government were to repudiate a bond debt, or another debt founded on an express contract, a debt-holder could sue the United States for damages. Second, the United States has consented to suits for relief for other than money damages, as long as the suit is nominally filed against an agency or an official.[217] A debt-holder could therefore file for declaratory judgment[218]

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[212]*See, e.g.*, National Treasury Employees Union v. United States, 65 U.S.L.W. 2052 (D.D.C. July 3, 1996) (denying standing in challenge to Line Item Veto Act); Crosthwait, *supra* note 10 (arguing that Balanced Budget Amendment would be nonjusticiable); Ondrea D. Riley, Comment, *Annual Federal Deficit Spending: Sending the Judiciary to the Rescue*, 34 SANTA CLARA L. REV. 577, 594–601 (1994) (assessing standing barriers to challenges of debt accumulation, without considering Public Debt Clause).

[213]*See, e.g.*, Library of Congress v. Shaw, 478 U.S. 310, 318 (1986) (requiring courts to "construe waivers strictly in favor of the sovereign").

[214]Act of March 3, 1887, 24 Stat. 505 (codified as amended at 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1996)).

[215]294 U.S. 330 (1935).

[216]*Id.* at 355.

[217]*See* 5 U.S.C. § 702 (1996).

[218]*See* 28 U.S.C. §§ 2201 (1996).

against the Treasury. A taxpayer might, for example, seek a declaration that the federal debt-limit statute or other statute constituting a "debt questioning" is unconstitutional, without violating the United States's sovereign immunity.

The more difficult question is whether the United States would have sovereign immunity if Congress passed a statute withdrawing its consent to suit. In the context of the Fifth Amendment's Just Compensation Clause, the Court has stated that "it is the Constitution that dictates the remedy for interference with property rights amounting to a taking" and thus waives sovereign immunity.[219] The Court could apply similar reasoning to the Public Debt Clause, or could read the Clause in tandem with the Just Compensation Clause to require compensation for debt repudiations. Indeed, the *Perry* Court suggested that there might be some limit on Congress's power to make an end-run around the United States's duty to fulfill its credit obligations.[220] This suggestion recognizes that a key justification of sovereign immunity--"that there can be no legal right as against the authority that makes the law on which the right depends"[221]--does not apply to constitutional provisions in general and to the Public Debt Clause in particular, since the Clause's purpose is to bind Congress to its earlier commitments. However, in the only case to consider whether Congress may withdraw its consent to suit in a case arising under the Clause, the Court of Claims held that sovereign immunity did protect such a withdrawal.[222]

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[219]First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987).

[220]*See Perry*, 294 U.S. at 353 ("The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared."). Later language makes the import of this statement unclear. *See id.* at 354 ("While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign.")

[221]Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (Holmes, J.).

[222]Gold Bondholders Protective Council, Inc. v. United States, 676 F.2d 643 (Ct. Cl. 1982). The case was a delayed Gold Clause action concerning a 1918 bond. After Perry v. United States, 294 U.S. 330 (1935), the Congress had withdrawn its consent to be sued in cases arising under the gold clause provisions of U.S. securities. *See* 31 U.S.C. § 773b (1983). The court noted, "In an unbroken line of decisions, it has been held that Congress may withdraw its consent to sue the Government at any time," and interpreted dicta in *Perry* as implying that the Public Debt Clause did not affect this principle. 676 F.2d at 646. *But cf.* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that Fourteenth Amendment overrides sovereign immunity of states under Eleventh Amendment); analogously, the courts could hold that the Fourteenth Amendment's Public Debt Clause overrides the federal government's sovereign immunity.

B. Standing

Although the Supreme Court's approach to standing is at best confused,[223] debt-holders almost certainly have the concrete interest in relevant aspects of government fiscal management that the general public lacks. In *Allen v. Wright*,[224] Justice O'Connor noted that "application of the constitutional standing requirement [cannot be] a mechanical exercise," but stated that the injury alleged must be "distinct and palpable," "traceable to the challenged action," and "not 'abstract' or 'conjectural' or 'hypothetical.'" Repudiation of debts creates a direct and substantial injury, so a challenge to such repudiation would clear these *Allen* hurdles. Moreover, even restrictive standing decisions have required only that the plaintiff "personally has suffered some actual *or threatened* injury."[225] Therefore, the possibility of injury from, for example, the federal debt-limit statute would be sufficient to allow debt-holders standing to sue on the theory that a debt has been questioned.

A counterargument would equate bondholder standing with taxpayer standing. The government obtains revenue both by borrowing and taxation, so, the argument concludes, bondholders should not have standing where taxpayers would lack it. This argument misses a critical distinction between bondholders and taxpayers: Bondholders, in addition perhaps to the satisfaction of helping fund government programs that may benefit them, have a right to a return on the money they provide. Bondholders would have no greater right than taxpayers to challenge the situation in *Allen*, in which parents of black school children were concerned that the IRS granting of tax-exempt status to racially discriminatory schools would adversely affect their children's ability to receive an education. Bondholders would have standing, however, to challenge any policy that threatened to burden them with a financial loss, just as taxpayers have standing to attack the constitutionality of tax laws imposing burdens on them. Like such taxpayers, bondholders may well be concerned less about their financial well-being than about the state of constitutional law and government financial management, but public-spiritedness has never deprived a plaintiff with a concrete interest in a case's outcome of standing.

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[223] *Compare* Flast v. Cohen, 393 U.S. 83 (1968) (allowing taxpayer standing to challenge of government spending in Establishment Clause case), *with* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (denying standing in similar case).

[224] 468 U.S. 737, 751 (1984).

[225] *Valley Forge*, 454 U.S. at 472 (*quoting* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)) (emphasis added).

C. Political Questions

The political question prong of justiciability bars adjudication of constitutional questions where there is "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 . . . ."[226] A requirement that "Congress shall ensure the validity of the public debt" might be a delegation of the constitutional issue to Congress, but the passive language of the Public Debt Clause suggests that all the branches of government share the responsibility of ensuring that the debt not be questioned. In addition, although the language of the Public Debt Clause does not eliminate ambiguity, this Article outlines manageable standards for interpreting it.[227] Certainly the Clause is no less conducive to the adoption of judicial standards than are other provisions of the Fourteenth Amendment to which the courts have added a thick gloss.

D. Ripeness

The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ."[228] Government default is not required to make a disagreement concrete; a debt questioning will do. If a governmental action is found to be a debt questioning under an objective test, then the action has increased the risk of default and thus lowered the value of debt, decreasing the wealth of debt-holders. If a subjective test identifies a debt questioning, then the public is suspicious of a debt's validity and the debt will thus be harder to sell. Either way, a debt questioning inflicts a financial injury. While debtholders may be less concerned about these small injuries than about the possibility of greater injury in the future, the Supreme Court has made clear that immediate, collateral injuries are sufficient to make cases justiciable.[229]

E. Separation of Powers

Separation-of-powers considerations provide perhaps the most formidable obstacle to the Public Debt Clause. These considerations have independent significance, but have also been folded into the standing and political questions inquiries. For example, in *Valley Forge*, the Court noted

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[226]Baker v. Carr, 369 U.S. 186, 217 (1962).

[227]*See supra* Subsection II.B.4.

[228]Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

[229]*See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 81 (1978) (finding ripe suit challenging constitutionality of law limiting liability in event of nuclear accident, because presence of plant would lead to additional, immediate environmental injury).

that a plaintiff may have standing only if a federal court is capable of dispensing relief consistent with the separation of powers.[230] Also bounded up with separation of powers are "prudential questions" about the wisdom of judicial involvement in a particular area, though this may have lost vitality as an independent doctrine.[231]

Separation-of-powers questions require analysis of whether the courts have the power to order a remedy. Invocation of the Public Debt Clause to invalidate a debt repudiation or the federal debt-limit statute would be an unremarkable exercise of the judicial "duty . . . to say what the law is."[232] The application of the Clause to excessive debt accumulation is more troubling. While the courts might issue a mandamus ordering that the deficit be lowered, congressional defiance of such an order would leave the courts without recourse, since rewriting a budget is a quintessentially legislative task that inevitably implicates economic value judgments other than debt reduction.[233] One solution would be to resolve such cases by granting only money damages; bondholders would be compensated for any decline in the value of their bonds attributable to debt questioning. This approach is workable, but perhaps not a vindication of the Public Debt Clause's values. First, it would exacerbate debt accumulation and thus lead to increased questioning of the remaining portion of the debt. Second, without some form of injunctive relief, it would allow unconstitutional debt accumulation to continue.

Passage of a debt-reduction statute pursuant to § 4 and § 5 of the Fourteenth Amendment[234] would allay separation-of-powers concerns. First, if Congress were to pass a statute tying its hands, later judicial enforcement of this Congress's will against the will of a future Congress would be less countermajoritarian than garden-variety judicial review. The enforcement would be consistent with the will of a Congress and would reflect the people's desire to create time-inconsistent policies, i.e. policies that produce optimal results ex ante only by precluding later exercise of policymaking discretion.[235] Second, such a statute could mitigate the difficulty of crafting

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[230]454 U.S. at 473-74; *see also* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea--the idea of separation of powers."); Crosthwait, *supra* note 10, at 1107 n.31. *But see* Flast v. Cohen, 392 U.S. 83, 99 (1968) (asserting that separation-of-powers is part of political questions inquiry but not standing).

[231]*See* Crosthwait, *supra* note 10, at 1089 (arguing that "prudential doctrine is so ill-defined that it is of little use to courts faced with difficult justiciability questions"). *But see* Nixon v. United States, 506 U.S. 224, 253 (1993) (Souter, J., concurring) (maintaining that political questions doctrine derives "in large part from prudential concerns about the respect we owe the political departments").

[232]Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[233]*Cf.* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that Constitution does not prefer certain economic policies over others).

[234]*See supra* Subsection III.B.2.

[235]*See* Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The*

a judicial remedy. By providing a congressionally approved sequestration method, a statute pursuant to § 4 and § 5 would provide a default rule that judges could return to if a later statute were held to breach the Public Debt Clause.

V. Conclusion

Although the Public Debt Clause is underdeveloped, it is not a constitutional relic. The language and history of the Clause indicate that it was not merely a prohibition on the repudiation of Civil War bonds. Rather, the Clause was and is a promise that Congress will pay its debts. The Clause applies at least to governmental promises embodied in written agreements with debt-holders, and Congress cannot take any action making it possible that the government will break such promises. As a result, not only would a governmental failure during a budget impasse to make bond or other debt payments be unconstitutional, but the federal debt-limit statute making such an impasse possible is also invalid. Moreover, Congress cannot indulge in unsustainable debt accumulation, and it may be able to ensure the debt's validity by passing debt-reduction legislation that it could not easily repeal. While Congress probably may exercise its reserved right to repudiate its entitlement promises, it might secure those promises by invoking the Public Debt Clause. Suits by debt-holders to enforce the Clause would be justiciable.

Perhaps this interpretation of the Public Debt Clause and its application reflect only the Constitution that was at the time of the Fourteenth Amendment's adoption and the Constitution that might have been in the time since. But to some extent it has also described the Constitution that has been. For although the Supreme Court has not developed the Public Debt Clause, it has strained to find its core elsewhere. The Court has read a version of the Contracts Clause, which applies only to states, into the Fifth Amendment's Due Process Clause,[236] though the Public Debt Clause seems textually like a better hinge for this holding. And the Court has recognized that statutes may vest recipients of government benefits with property interests that cannot be taken away without

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Inconsistency of Optimal Plans, 85 J. POL. ECON. 473 (1977). Professors Kydland and Prescott show that optimal control theory may not apply to dynamic economic systems. In other words, when expectations of future policy influence policy effectiveness, a time-inconsistent policy, i.e. one that prevents policymakers from taking the optimal path at each point in time, may be ex ante optimal. This insight is relevant to debt because a government that can tie its own hands through time-inconsistent policy changes expectations and reaps the lower interest-rate benefits of higher confidence in its bond issues. *See also* Guillermo A. Calvo, *Servicing the Public Debt: The Role of Expectations*, 78 AM. ECON. REV. 647 (1988) (arguing that expectation of debt repudiation makes such repudiation more likely).

[236]*See* Lynch v. United States, 292 U.S. 571 (1934); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 613 (2d ed. 1988).

procedural due process.[237] These efforts recognize an attractive principle: The Government should not be able to ignore its promises.

This Article asks that the courts use the Public Debt Clause to amplify this principle in the context of congressional budgeting. Although the courts have shown no proclivity to move in this direction, they have not been given the opportunity. Either a suit by bondholders or a decision by Congress to invoke the Clause directly would provide a test case that the courts might use to resuscitate this Clause. And so perhaps this Article has done more than excoriate Congress and the courts for not ensuring the government's fiscal honor; perhaps it has offered a vision of the Fiscal Constitution that might still be.

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[237] *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

this sort of change is no improvement and still promises a veto. So the forces are mobilizing on both sides of the battle.

"If the bill is vetoed, every effort will be made to override the veto," declares House Speaker John W. McCormack. "I hope the national interest above partisan interest will be displayed by Republican members if the bill is vetoed."

Well, we would hope so too. But is it really true, as some of Mr. Nixon's more virulent critics charge, that he is trying to economize at the expense of the nation's health and well-being?

HEW Secretary Robert H. Finch, who isn't known as a hidebound conservative, obviously doesn't think so. He notes that the bill would increase outlays on several educational programs that are "under a cloud" and should be re-evaluated.

He mentioned compensatory education for deprived children and Title I of the Elementary and Secondary Education Act of 1965, which provides extra money for schools in poor neighborhoods. The Office of Education currently is investigating reports that Title I funds have been widely misused. However great the need to attain the aims of such programs, it would make little sense to pour extra funds into the programs if they are headed in wrong directions.

Moreover, about half of the increase voted by Congress would go to schools in so-called Federally impacted areas, where Government employes may send many children to school but provide only limited tax revenue. This program has always been controversial, and surely could stand closer study before any expansion.

According to White House officials, the program in 1968 paid $5.8 million to Montgomery County, Md., which leads the nation's counties in per-capita income. At the same time, they added, a total of only $3.2 million went to the 100 poorest counties.

"In many cases these (impacted area) payments exceed the cost to local schools of educating Federal pupils," the White House statement continued. "In other instances the program enables wealthy districts to exert a lower tax effort than other districts in the same state."

No matter how stable the nation's economy, Federal spending should be related to need and outlays restricted to programs that have some chance of achieving results. And the fact is, of course, that the economy now is not stable at all.

Thanks to the Congressional spending attitude and the recent broad tax cuts, the projected Federal budget surplus for the current fiscal year is swiftly disappearing. The Administration promises a balanced budget for next fiscal year, but such a result obviously depends on the lawmakers' willingness to approve a wide range of tax boosts, hardly a sure prospect in this election year.

The upshot is that efforts to check inflation depend almost entirely on continuation of the Federal Reserve System's restrictive monetary policy. That policy, with its high interest rates and its uneven impact on the economy, is lamented by numerous lawmakers, few of whom seem to see that their actions have forced the Fed's hand.

It's worth mentioning, too, that the inflation is rapidly raising costs for the nation's educational institutions, just as it is elsewhere. Inflation also is making it vastly more difficult for states and localities to raise funds to finance new or expanded schools.

As Mr. McCormack says, the national interest should be the prime concern of the legislators, Democrats as well as Republicans. That interest won't be advanced by spending that is both excessive and misdirected.

EXHIBIT 2

DECEMBER 1, 1969.

HON. EDWARD L. MORGAN,
Deputy Counsel to the President,
The White House,
Washington, D.C.

DEAR ED: Attached is a memorandum dealing with the authority of the President to impound funds appropriated for assistance to federally impacted schools. A memorandum dealing with other education programs is in preparation.

Sincerely,

THOMAS E. KAUPER,
Deputy Assistant Attorney General,
Office of Legal Counsel.

MEMORANDUM

Re: Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools.

You have asked us to consider whether the President may, by direction to the Commissioner of Education or to the Bureau of the Budget, impound or otherwise prevent the expenditure of funds appropriated by Congress to carry out the legislation for financial assistance to federally impacted schools, Act of September 30, 1950, as amended ("P.L. 874"), 20 U.S.C. 236 *et seq.*, and Act of September 23, 1950, as amended ("P.L. 815"), 20 U.S.C. 631 *et seq.*

In July the House of Representatives, in adopting the Joelson Amendment to the Labor-HEW Appropriations bill, added approximately one billion dollars to the sum to be appropriated for various programs administered by the Office of Education. One of the largest increases was in the appropriation to carry out P.L. 874, which was raised to $585 million, nearly $400 million over the figure requested by the Administration and reported by the House Appropriations Committee. The appropriation for P.L. 815, on the other hand, is only $15,-167,000, the same as that requested by the Administration.

The question arises whether, assuming that the appropriations carried in the Joelson Amendment are not significantly reduced by the Senate, the Administration is bound to spend the money appropriated. This memorandum considers the situation with respect to P.L. 874 and P.L. 815, particularly the former. In a subsequent memorandum we shall consider the situation with respect to certain of the other items in the Joelson Amendment.[1]

P.L. 874 authorizes financial assistance for the maintenance and operation of local school districts in areas where school enrollments are affected by Federal activities. Payments are made to eligible school districts which provide free public education to children who live on Federal property with a parent employed on Federal property (§ 3 (a)) and to children who either live on Federal property or live with a parent employed on Federal property (§ 3(b)); to those school districts having a substantial increase in school enrollment resulting from Federal contract activities with private companies (§ 4); and to school districts when there has been a loss of tax base as a result of the acquisition of real property by the Federal Government (§ 2). Where the State or local educational agency is unable to provide suitable free public education to children who live on Federal property, the Commissioner of Education is required to make arrangements for such education (§ 6). Major disaster assistance is authorized for local educational agencies under section 7 of P.L. 874. It should be noted that the $585 million provided by the Joelson Amendment is for assistance "as authorized by sections 3, 6, and 7" of P.L. 874. Consequently, no funding is provided for sections 2 and 4, and these sections need not concern us further.

Section 3 of P.L. 874 requires the Commissioner to compute the "entitlement" of a local educational agency under a formula, whereby, simply stated, the number of category A children and one-half the category B children[2] is multiplied by the local contribution rate for the school district as determined under section 3(d). The determination of entitlement is not entirely mechanical, for within fairly narrow limits the Commissioner has discretion in selecting the basis for his determination of the local contribution rate, and other provisions permit him to make favorable adjustments in entitlements under narrowly defined circumstances (§§ 3(c)(2), 3(c)(4), 3(e), 5(d)(1)).

Once a district's section 3 entitlement has been determined, however, the process of making payments becomes mechanical. Section 5(b) of P.L. 874 provides:

"(b) The Commissioner shall * * * from time to time pay to each local educational agency, in advance or otherwise, the amount which he estimates such agency is entitled to receive under this title. * * * Sums appropriated pursuant to this title for any fiscal year shall remain available, for obligation and payments with respect to amounts due local educational agencies under this title for such year, until the close of the following fiscal year."[3]

However, P.L. 874 does not constitute a promise by the United States to pay the full entitlement, for the statute contemplates that Congress may choose not to appropriate sufficient money to fund the program at 100% of entitlement. In such a circumstance section 5(c) provides that the Commissioner after deducting the amount necessary to fund section 6, shall, subject to any limitation in the appropriation act, apply the amount appropriated pro rata to the entitlements.[3a] (Since the Joelson Amendment provides no funding for sections 2 and 4, this would mean that after deducting the amount necessary to fund section 6 and, perhaps, constituting a reserve for possible application to section 7,[4] the appropriation would be applied to the payment of section 3 entitlements.)

[1] This memorandum does not consider title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241a *et seq.*, which, although enacted as title II of P.L. 874, is usually cited as a separate statute and is listed as a separate appropriation item in the Joelson Amendment.

[2] The terms "category A" and "category B" refer to the standards for eligibility under subsections 3(a) and 3(b) respectively.

[3] This provision for continued availability beyond the close of the fiscal year conflicts with section 405 of the appropriation bill. However, we understand that HEW regards the obligation of the funds as occurring within the fiscal year, even though the precise amount due may not be ascertained until after the close of the fiscal year.

[3a] Thus, he would have no authority to vary this formula in order to provide fuller funding for category A entitlements at the expense of category B entitlements unless Congress were so to provide in the appropriation act.

[4] It is arguable that since the Joelson Amendment appropriates funds to carry out sections 3, 6 and 7, the Commissioner could set up a reserve for contingencies under section 7, disaster assistance. On the other hand, section 7(c) of P.L. 874 permits the Commissioner, notwithstanding the Anti-Deficiency Act, to grant assistance under section 7 out of moneys appropriated for the other sections, such funds to be reimbursed out of subsequent appropriations for carrying out section 7. Since the statute permits such application of funds allocated to carrying out section 3, it would be hard for the Commissioner to justify withholding funds from allocation on the basis of the possibility that they might be needed for disaster assistance.

In sum, whatever limited discretionary authority the Commissioner may have with respect to determining entitlements, section 5 does not appear to permit any exercise of discretion in the application of appropriated funds to the payment of entitlements. Since the $585 million carried in the Joelson Amendment is only 90% of the total estimated entitlements, Departments of Labor and HEW Appropriations, 1970, Hearings before a subcommittee of the House Appropriations Committee, 91st Cong., 1st Sess., Pt. 5, p. 229, discretionary cutbacks on entitlements would have to exceed 10% of the total before there would be any impact on the total funding of the program.

We do not, in short, find within P.L. 874 any statutory authority for the Commissioner in the exercise of his discretion to avoid applying to the entitlements the full sum appropriated, and we conclude that the provisions of section 5 are mandatory in this respect.[5] We understand that this conclusion is consistent with the position taken over the years by the General Counsel of the Department of HEW.[6]

P.L. 815 authorizes payments to assist local school districts in the construction of school facilities in areas where enrollments are increased by Federal activities. The entitlement for assistance is computed under a statutory formula, and in addition there is provision for judicial review of a Commission's determination refusing to approve part or all of any application for assistance under the Act. (P.L. 815, § 11(b), 20 U.S.C. 641(b).) On the other hand, the mechanics of administration of P.L. 815 differ significantly from those of P.L. 874. First, the Commissioner is not required to apply appropriations pro rata among the eligible districts, but in accordance withwith priorities which he establishes by regulation (§ 3). Second, entitlement for assistance is not computed on a annual basis, but as a share of the cost of a particular project. Thus, if funds are held up in one fiscal year, the project may be funded the next year. Finally, the Commissioner is apparently free to allot, in his discretion, an indefinite share of the appropriation to section 14 purposes, school construction on Indian Reservations.

While we hesitate to conclude, on this fairly summary consideration, that the Commissioner has discretionary authority under P.L. 815 to delay indefinitely the obligation and expenditure of funds appropriated to carry out the statute, it does appear to us that there are enough discretionary powers throughout the statute to permit him to postpone the obligation of funds during fiscal 1970. Indeed, the Joelson Amendment provides that the appropriation for P.L. 815 shall remain available until expended, which would seem to confirm the conclusion that there *is no legal requirement* that the funds be obligated in the year for which the appropriation is made. However, inasmuch as the appropriation in question is relatively small and is consistent with the Administration's budget request, we see no need to discuss in greater detail the legal arguments which could be used to support a deferral of action to obligate the funds.

Notwithstanding the apparently mandatory provisions of P.L. 874, it has been suggested that the President has a constitutional right to refuse to spend funds which Congress has appropriated. In particular, there have been a number of statements by Congressmen with respect to the very programs of the Office of Education presently under consideration that Congress could not force the President to spend money which he did not want to spend.

Section 406 of the Vocational Education Amendments of 1968, 20 U.S.C.A. 1226 (Feb. 1969 Supp.) provides that notwithstanding any other provision of law, unless expressly in limitation of this provision, funds appropriated to carry out any Office of Education program shall remain available for obligation until the end of the fiscal year. The purpose of this provision was to deny to the President authority which he would otherwise have had under the Revenue and Expenditure Control Act (P.L. 90-364), §§ 202, 203, to reduce obligations and expenditures on Office of Education programs, and, in particular, the impacted area programs and title III of the National Defense Education Act, 20 U.S.C. 441 *et seq.* See volume 114, part 22, CONGRESSIONAL RECORD, page 29155. During the debate in both Houses on this provision several members stated that section 406 would not interfere with the President's constitutional authority to reduce expenditures in the area of education. See remarks of Senators Dominick and Yarborough, volume 114, part 22, CONGRESSIONAL RECORD, page 29159; remarks of Congressmen Perkins and Quie, volume 114, part 22, CONGRESSIONAL RECORD, page 29477.

Similar views were expressed almost contemporaneously in connection with the House of Representatives' consideration of a Senate amendment to the Labor-HEW Appropriations Bill, 1969, (H.R. 18037), which would exempt from both the Anti-Deficiency Act and the Revenue and Expenditure Control Act an appropriation of $91 million for impacted area school assistance for fiscal 1968. In advising the House to accept the Senate amendment, Cong. Flood stated:

"Section 406 of the Vocational Education Act amendments seems to many and, I must say, not to others, to cover what the language in disagreement seeks to do; but in any event there are many instances in which it has been made clear that the President has the constitutional powers to refuse to spend money which the Congress appropriates," volume 114, part 23, CONGRESSIONAL RECORD, page 30588.

Cong. Laird agreed:

"The language will not be interpreted as a requirement to spend because of the constitutional question which is involved. The Congress cannot compel the President of the United States to spend money that he does not want to spend." *Ibid.*

More recently, in the hearing on HEW's appropriation bill for fiscal 1970, Congressman Smith stated his belief that HEW was not compelled to spend the funds appropriated for the impact aid program. Hearings before a Subcommittee of the House Appropriations Committee, 91st Cong., 1st Sess., Pt. I, p. 263. Subcommittee Chairman Flood appeared to agree. *Ibid.*, p. 264.

Taken together these statements evidence broad Congressional support for the proposition that the President has some residual constitutional authority to refuse to expend those funds to which section 406 applies. What is not clear is the nature or the precise source of the authority the speakers had in mind.

For the reasons discussed below we conclude that the President does not have a constitutional right to impound P.L. 874 funds notwithstanding a Congressional directive that they be spent. However, before proceeding with discussion of the constitutional question we might note that the Congressional statements cited above might be used in support of another argument for Presidential authority, based on statutory interpretation. It might be argued that although these statements cannot affect the interpretation of P.L. 874, since they were not made in the course of enacting or amending that statute, nevertheless P.L. 874 is not self-executing, and its operation is expressly conditioned on the enactment of subsequent appropriations legislation. Therefore, in determining the duties of the Commissioner of Education one must construe the intent of both the substantive legislation, P.L. 874, and the appropriations legislation, and the present understanding of Congress, as evidenced by the statements above, is that the enactment of the appropriation does not create a duty to spend.

Up to a point this argument has a certain amount of validity. We do not doubt, for example, that notwithstanding the terms of P.L. 874, Congress could provide in its appropriation that the money need not be spent. Or it could enact an appropriation, and then provide in contemporaneous or subsequent legislation that the money need not be spent, as was done in title II of the Revenue and Expenditure Control Act of 1968, P.L. 90-364. However, the Congressional statements cited above refer to the President's constitutional powers and not to Congressional intent. It seems doubtful that one can infer from those statements, most of them made in 1968, that Congress, in enacting the appropriations legislation in 1969, intended to exert less than its full authority to require the expenditure of funds appropriated to P.L. 874. Still, since at this writing the appropriations legislation has not yet been passed, it may be that legislative history may still be made which would support the argument that Congress does not intend to require the expenditure of the entire sum appropriated.

With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent. There is, of course, no question that an appropriation act permits but does not require the executive branch to spend funds. See 42 Ops. A. G. No. 32, p. 4 (1967). But this is basically a rule of construction, and does not meet the question whether the President has authority to refuse to spend where the appropriation act or the substantive legislation, fairly construed, require such action.

In 1967 Attorney General Clark issued an opinion, 42 Ops. A. G. No. 32, upholding the power of the President to impound funds which had been apportioned among the States pursuant to the Federal-Aid Highway Act of 1956, 23 U.S.C. 101 *et seq.*, but had not been obligated through the approval by the Secretary of Transportation of particular projects. This opinion appears to us to have been based on the construction of the particular statute, rather than on the assertion of a broad constitutional principle of Executive authority. While the reasoning of the opinion might lend support to Executive action deferring the obligation of funds under P.L. 815, we think the case of P.L. 874 is cleary distinguishable, because, among other reasons, impounding the P.L. 874 funds would result not in a deferral of expenditures, but in permanent loss to the recipient school districts of the funds in question and defeat of the Congressional intent that the operations of these districts be funded at a particular level for the fiscal year.

While there have been instances in the past in which the President has refused to spend funds appropriated by Congress for a particular purpose we know of no such instance involving a statute which by its terms sought to require such expenditure.

Although there is no judicial precedent

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[5] Mandatory, that is, provided that the school district is in compliance with applicable federal statutes and regulations. Where a district is not in compliance, the Commissioner may have authority to withhold or terminate assistance, see *e.g.*, Civil Rights Act of 1964, title VI, 42 U.S.C. 2000d *et seq.*; 45 C.F.R. Part 80. Whether in the event of such a withholding or termination the Commissioner would be required to apply the funds to the unfunded entitlements of other districts is a point we need not decide at this time.

[6] Memorandum of March 29, 1966 from General Counsel Willcox to Assistant Secretary Huitt; Memorandum of August 6, 1958 from General Counsel Bants to the Secretary (HEW files do not indicate whether this memo was actually sent).

squarely in point, *Kendall* v. *United States*, 12 Pet. 524 (1838), appears to us to be authority against the asserted Presidential power. In that case it was held that mandamus lay to compel the Postmaster General to pay to a contractor an award which had been arrived at in accordance with a procedure directed by Congress for settling the case. The court said:

"There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character." 12 Pet. at 610.

It might be argued that *Kendall* is not applicable to the instant situation because the Commissioner of Education's duties are not merely ministerial. *Cf. Decatur* v. *Paulding*, 14 Pet. 497, 515 (1840). On the other hand, while discretion is involved in the computation of the entitlement of the recipient districts, as we have pointed out, the application of the appropriation to the payment of entitlements pursuant to section 5(c) of P.L. 874 might reasonably be regarded as a ministerial duty. In any event, the former distinction between discretionary and ministerial duties has lost much of its significance in view of the broad availability of judicial review of agency actions and of a remedy in the Court of Claims for financial claims against the Government. 28 U.S.C. 1491. Thus, the mere fact that a duty may be described as discretionary does not, in our view, make the principle of the *Kendall* case inapplicable, if the action of the federal officer is beyond the bounds of discretion permitted him by the law.

In an unpublished opinion letter of May 27, 1937 to the President, Attorney General Cummings answered in the negative the question whether the President could legally require the heads of departments and agencies to withhold expenditures from appropriations made. Insofar as the opinion concludes that a Presidential directive may not bind a department head in the exercise of discretionary power vested in him by statute, this opinion appears inconsistent with the views expressed in the opinion of Attorney General Clark previously cited and with constitutional practice in recent years.[1] However, the Cummings opinion also rejects any idea that the President has any power to refuse to spend appropriations other than such power as may be found or implied in the legislation itself.

It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them. Of course, if a Congressional directive to spend were to interfere with the President's authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander-in-Chief of the Armed Forces and his authority over foreign affairs, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–322 (1936), a situation would be presented very different from the one before us. But the President has no mandate under the Constitution to determine national policy on assistance to education independent from his duty to execute such laws on the subject as Congress chooses to pass.

It has been suggested that the President's duty to "take care that the laws be faithfully executed" might justify his refusal to spend, in the interest of preserving the fiscal integrity of the Government or the stability of the economy. This argument carries weight in a situation in which the President is faced with conflicting statutory demands, as, for example, where to comply with a direction to spend might result in exceeding the debt limit or a limit imposed on total obligations or expenditures. See, *e.g.*, P.L. 91–47, title IV. But it appears to us that the conflict must be real and imminent for this argument to have validity, it would not be enough that the President disagreed with spending priorities established by Congress. Thus, if the President may comply with the statutory budget limitation by controlling expenditures which Congress has permitted but not required, he would, in our view, probably be bound to do so, even though he regarded such expenditures as more necessary to the national interest than those he was compelled to make.[2]

If Congress should direct the expenditure of funds in the carrying out of a particular program or undertaking, say, construction of a public building, but without limiting the Executive's discretion in such a way as to designate the recipient of the appropriated funds, a better argument might perhaps be made for a constitutional power to refuse to spend than is available in the formula grant situation presented by P.L. 874. Or this might be viewed simply as a situation in which the duty to spend exists but there is no constitutional means to compel its performance.

As to the availability of a remedy, if our conclusion that section 5 of P.L. 874 requires expenditure of the appropriation is correct, we believe that the recipient school districts will probably have a judicial remedy. It is true that unlike P.L. 815, P.L. 874 has no specific provision for judicial review of a refusal to make a grant. However, absence of such a provision does not imply that no judicial review was intended. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 139–46 (1967). It may be that a suit to compel the Commissioner to apply the appropriation would be inappropriate, see *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), but if the school districts are legally entitled to payment under the statute, they can sue he Government in the Court of Claims. 28 U.S.C. 1491. Such a suit could raise interesting legal problems, for it is clear that "entitlement" under P.L. 874 is not itself equivalent to a legal obligation to pay, and it is doubtful that even entitlement plus appropriation creates a vested right which may not be destroyed by subsequent Congressional action. Accordingly, technical defenses might prevent recovery by a school district even if the court concluded that the Executive branch had a statutory duty to spend the appropriation.

WILLIAM H. REHNQUIST,
Assistant Attorney General Office of Legal Counsel.

MEMORANDUM FOR THE HONORABLE EDWARD L. MORGAN, DEPUTY COUNSEL TO THE PRESIDENT

Re Presidential Authority To Impound Funds Appropriated for Office of Education Programs.

In our memorandum to you of December 1, we considered the authority of the President to impound funds appropriated for assistance to federally impacted schools under P.L. 874, 20 U.S.C. 236 *et seq.* and P.L. 815, 20 U.S.C. 631 *et seq.* We concluded that the President has no constitutional authority to refuse to spend funds appropriated for federal programs for assistance to education where the substantive legislation, read together with the provisions of the appropriation legislation, constitutes a direction that such funds be spent We also considered specifically the terms of P.L. 874 and P.L. 815. We concluded that P.L. 874 constituted a direction to spend but that there was sufficient discretion left in the Executive Branch under P.L. 815 and the appropriations bill to justify at least postponing the obligation of appropriated funds into fiscal 1971.

In this memorandum we will consider the President's authority to impound funds for some of the other items covered in the Joelson Amendment to H.R. 13111, the HEW-Labor Appropriations Bill, 1970. With respect to each item the question we will consider is whether the pertinent legislation compels the obligation and expenditure of the full appropriation or leaves sufficient discretion to the Executive Branch to justify a Presidential directive to impound.

A few general comments are in order. As we stated in our previous memorandum, an appropriation is not in itself ordinarily interpreted as a direction to spend. To determine whether or not there is a duty to spend one must examine the substantive legislation. The substantive legislation for some Office of Education programs clearly gives broad discretion to the Commissioner. For example, section 402 of the Elementary and Secondary Education Amendments of 1967, 20 USC 1222, authorizes appropriation of sums "to be available to the Secretary * * * for expenses, including grants, contracts, or other payments for (1) planning for the succeeding year programs or projects * * * and (2) evaluation of programs or projects so authorized" We have no doubt that the $9.25 million appropriated[1] for this program may be impounded

On the other hand, substantially all sizeable Office of Education programs do not involve such broad grants of discretion to the agency They are formula grant programs, in which the statute provides for the allotment or apportionment of the funds

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[1] See, also, 2 Ops. A. G. 482 (1831).

[2] We understand that the operation of the expenditure limitation imposed by title IV of P.L. 91–47 may require curtailment of certain controllable expenditures. Paradoxically, title IV would not conflict with the increases over budgeted amounts in appropriations provided by the Joelson Amendment, because the expenditure limitation would automatically be adjusted upward. Nevertheless, we are informed that it might prove difficult to comply with title IV without cutting back on expenditure of *budgeted* funds for P.L. 874 and other Office of Education programs. Whether in such a situation title IV could be viewed as conflicting with and thus superseding the requirements of P.L. 874 depends to a large extent on the Executive's spending options at that time. Two considerations cause us to hesitate to infer from title IV a grant of authority to the President to impound appropriations for formula grants for education. First, title IV, as passed by the Senate, contained specific language permitting the impounding of funds appropriated for formula grants and other mandatory programs, but exempting from this authority education programs. The conference report contained neither the grant of authority nor the exemption. Second, section 406 of the Vocational Education Amendments of 1968 (see p. 6, *supra*) would conflict with such a grant of authority, and there is legislative history to the effect that title IV was not intended to alter the effect of section 406. See CONGRESSIONAL RECORD, vol. 115, pt. 14, pp. 18928–18929. Nevertheless, we do not rule out at this time the possibility that in appropriate circumstances title IV might permit the impounding of such funds.

Footnotes at end of article.

appropriated for the program among the States on the basis of population or some other mathematical criteria. Typically, the substantive legislation provides for submission by State authorities of a plan for the use of the funds. If the Commissioner of Education determines that the plan meets the statutory criteria, he must approve it, and the State becomes entitled to its share of the appropriation. There is usually also provision for judicial review of a disapproval of the plan or of action to withhold or terminate assistance on grounds of noncompliance with the plan

Examination of the language and legislative history of these State plan-State grant programs indicates little or no attention by Congress to the question of impounding. The principal purpose of formula grants was presumably to assure equitable distribution of the funds available, and it might reasonably be contended that no clear purpose to deny to the Executive the right to make across-the-board reductions in spending was manifested But neither can it be said that there is evidence of an intent to preserve such a right. Consequently, in each case the question is likely to turn on whether the requisite Executive discretion can be found within the mechanics of the grant distribution scheme rather than whether Congress intended or did not intend to preclude impounding

One further point of general application. Section 406 of the Elementary and Secondary Education Amendments of 1967 ("P.L. 90-247"), as amended, 20 U.S.C. 1226, which we cited in our previous memorandum,[2] provides:

"Notwithstanding any other provision of law, unless expressly in limitation of the provisions of this title, funds appropriated for any fiscal year to carry out any of the programs to which this title is applicable shall remain available for obligation until the end of such fiscal year."

["This title" is Title IV of P.L. 90-247, and it is applicable to all programs of the Office of Education, 20 U.S.C. 1221.]

The purpose of this provision was to deny to the President authority he would otherwise have had under the Revenue and Expenditure Control Act (P.L. 90-364), §§ 202, 203, to reduce obligations and expenditures on Office of Education programs. As we pointed out in footnote 8 of our previous memorandum, the present effect of section 406 may be to prevent such Presidential authority from being inferred from Title IV of P.L. 91-47.

It might be argued that section 406 also prevents the impounding for budgetary reasons of any funds appropriated for Office of Education programs, even where the substantive legislation might otherwise permit impounding. However, section 406 does not, in terms, require that appropriations be expended or obligated; it requires that they remain "available for obligation" until the end of the fiscal year. The prohibition is apparently aimed at the Bureau of the Budget,[3] and seems based on the assumption that Congress can prevent the Bureau of the Budget or the President from impounding funds without requiring the agency to which the funds are appropriated to spend them. But if the Commissioner of Education has the discretionary authority to decline to spend the funds, the President undoubtedly has, in our view, the authority to guide the Commissioner's discretion in this matter by virtue of his constitutional authority to "take care that the laws be faithfully executed." 2 Ops. A.G. 482 (1831). Consequently, if section 406 were read as an attempt to interfere with the President's authority to direct the actions of the Commissioner of Education, it would raise constitutional problems. Accordingly, we think the correct interpretation of section 406 is that it denies to the President any statutory authority to impound appropriations for the mandatory programs of the Office of Education, but that it does not interfere with the President's authority to direct the Commissioner to exercise his discretion, where such discretionary authority exists, to avoid the obligation and expenditure of funds.[4]

We proceed, therefore, to consider the authority to impound funds appropriated to particular Office of Education programs.

TITLE I-A, ELEMENTARY AND SECONDARY EDUCATION ACT

H.R. 13111 appropriates $386,160,700 "for an additional amount for grants under Title I-A of the Elementary and Secondary Education Act of 1965 for the fiscal year 1970." [This sum is additional to appropriations made for this program for fiscal '70 in the Labor-HEW Appropriation Act, 1969, P.L. 90-557, 82 Stat. 969, 975.] It is our conclusion that sums appropriated for this program must be spent in accordance with the terms of the statute and may not be impounded.

Title I of ESEA, 20 U.S.C. 241a *et seq.*, provides for federal financial assistance to local educational agencies for the education of children of low-income families. The statutory formula for computation of payments is fairly complicated, but, basically, local educational agencies are eligible to receive from the Federal Government 50% of the average per pupil expenditure in the State or, if greater, in the United States, multiplied by the number of low-income children in the district. ESEA, § 103(a)(2). In addition, State agencies are eligible to receive direct payments computed on a similar statutory formula for the education of handicapped children, children of migrant laborers, and children in institutions for neglected or delinquent children. ESEA, § 103(a)(5), (6) and (7).[5]

Payments under Title I are made by the Commissioner to the States. Local educational agencies eligible for assistance apply to the State educational agency which determines whether the application meets the statutory and administrative criteria. ESEA, § 105(a). To participate in the program each State must file an application with the Commissioner containing required assurances regarding the State's administration of the program. ESEA, § 106(a). The Commissioner is required to approve a State application which meets the statutory criteria, § 106(b), and disapproval of the application is subject to judicial review, § 133. There is no specific provision for judicial review at the instance of a local educational agency.

Title I is similar to P.L. 874 and P.L. 815 in that there is no specific dollar authorization for appropriations. The authorization consists of the aggregate eligibility computed under the statutory formula, and the Commissioner is directed to apply the appropriations for Title I to the satisfaction of such eligibility.

The language of the statute seems clear as to the mandatory nature of the program. Section 102 provides, "The Commissioner shall, in accordance with the provisions of this part, make payments to State educational agencies for grants to local educational agencies * * *." Section 107(a)(1) provides, "The Commissioner shall * * * pay to each State * * * the amount which it and the local educational agencies of that State are eligible to receive under this part." The State agencies are, in turn, directed to distribute the payments to the local agencies, § 107(a)(2).

Section 108 supplies additional evidence of the mandatory nature of the program. It provides that "if the sums appropriated for any fiscal year * * * are not sufficient to pay in full the total amounts which all local and State educational agencies are eligible to receive under this part for such year," the eligibilities will be paid in accordance with a prescribed formula.[6] Section 108 contemplates no shortfall between the appropriation for making grant payments and sums actually available for that purpose, for if it did the formula would presumably be based on availability and not on appropriations. Furthermore, if funds were to be impounded, the Commissioner would either have to interpret the word "appropriated" in section 108 as if it read "available," *cf.* P.L. 90-218, § 204, or he would have to depart from the Congressional intent with respect to the allocation of funds in the event of shortfall.

For the reasons set forth above we conclude that Title I of ESEA is a mandatory program, and that funds appropriated to it may not be impounded.[7]

TITLES II AND III, ELEMENTARY AND SECONDARY EDUCATION ACT

H.R. 13111 would appropriate $50 million to carry out Title II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 821-27, and $164,876,000 to carry out Title III of that Act, 20 U.S.C. 841-45.

Title II provides for nonmatching grants to States for the acquisition of school library resources, textbooks and other instructional materials. The statutory scheme is a fairly typical State plan-State grant arrangement. The Commissioner is directed to allot the sums appropriated to carry out the title among the States on the basis of total elementary and secondary school enrollment. ESEA, § 202. Each State desiring to participate must submit a plan for the Commissioner's approval. The Commissioner must approve a plan which complies with the statutory criteria, § 203(b), and the State is entitled to obtain judicial review of disapproval of a plan or a determination by the Commissioner that the State has failed to comply with its plan, § 207. Section 204(a) provides, "From the amounts allotted to each State under section 202 the Commissioner shall pay to that State an amount equal to the amount expended by the State in carrying out its State plan."

From this sketch of Title II it appears that the Commissioner has little if any discretionary authority to decline to spend funds appropriated to the program. The allotment is carried out by mathematical formula, the State plan must be approved if it complies with the statute, and payments must be made in the amounts expended by the State in carrying out the plan.

There is, however, one point at which discretion may be exercised. Section 202(b) provides, "The amount of any State's allotment * * * which the Commissioner determines will not be required for such fiscal year shall be available for reallotment from time to time * * * to other States in proportion to the original allotments * * *." It is not entirely clear from the language of the title whether such a determination by the Commissioner must be made in the context of a partial disapproval of the State plan, in which case the determination would presumably be subject to judicial review, or whether such determination is left entirely to the discretion of the Commissioner. (Since allotments must be made annually, while there is no requirement for annual filing of a plan, it appears that the determination to reallot is not part of the process of approving a plan. Office of Education regulations also indicate that reallotment does not occur at the time plans are approved, but at a later time and on the basis of the States' statements of anticipated need, 45 C.F.R. 117.46.) There is legislative history to the effect that the question of reallotment is within the discretion of the Commissioner.[8] Obviously, to withhold funds for reallotment on the basis of a determination of comparative need is quite different from an across-the-board cut in allotments for budgetary reasons, and it does not follow that because the Commissioner is authorized to do the former, he may also do the

Footnotes at end of article.

latter. Nevertheless, this reallotment provision at least supports the argument that a State with an approved plan does not have a "vested right" to its full allotment. Consequently, while on balance we do not believe that Title II funds may be impounded, we believe that there is a better argument for doing so than with respect to either Title I of ESEA or P.L. 874.

Title III of ESEA provides for a program of grants for supplementary educational centers and services. As enacted in 1965 Title III provided for direct grants from the Office of Education to local educational agencies out of sums apportioned among the States. However, the Elementary and Secondary Education Amendments of 1967 ("P.L. 90-247") revised Title III so that it provides for a State grant-State plan program very similar to that in Title II.

Section 302(a) provides for an allotment or the appropriation among the States under a formula based partly on school age population and partly on total population. Section 302(c) provides reallotment authority similar to that in section 202(b). States are required to file plans annually for the use of the funds. The Commissioner shall approve a plan that meets the statutory criteria, § 305(b), and the State may obtain judicial review if the plan is disapproved, § 305(c)(3). The States, in turn, receive and act on grant applications from local educational agencies in accordance with standards prescribed in section 304. The local educational agency is entitled to obtain judicial review of the State agency's action with respect to its application, § 305(f).

Section 307 provides, "From the allotment to each State pursuant to section 302, for any fiscal year, the Commissioner shall pay to each State, which has had a plan approved pursuant to section 305 for that fiscal year, the amount necessary to carry out its State plan as approved."[9]

On the question of authority to impound, we see no significant difference between Title III and Title II, and our conclusion is, therefore, the same.

Vocational education

H.R. 13111 appropriates $488,716,000 for carrying out the Vocational Education Act of 1963, 20 U.S.C. 1241-1391, and section 402 of P.L. 90-247, 20 U.S.C. 1222,[10] of which "not to exceed $356,836,000" shall be for State vocational education programs under Part B of the Act and $40,000,000 shall be for programs under section 102(b) of the Act.

Parts A and B of the Vocational Education Act provide for formula grants to the States for vocational education programs. The basic grants are provided under Part B, while section 102(b) authorizes a separate appropriation for programs for persons with "academic, socioeconomic, or other handicaps" that prevent them from succeeding in regular vocational education programs. The distinction between the two items is not important, for the same allotment formula and other administrative provisions are applicable to both the appropriation for Part B and that for section 102(b).[11]

Section 102(a) of the Act authorizes an appropriation for Parts B and C, of which 90% would be available for B, basic grants, and 10% for C, research and training. However, H.R. 13111 carries "not to exceed $357,836,000" for Part B, making no mention of Part C. Whether or not the full sum must be made available to Part B, a question to which we will return, it is evident that it may be used for Part B, without any deduction for Part C.

Section 103(a) provides that out of sums appropriated pursuant to section 102(a) the Commissioner shall reserve up to $5 million for transfer to the Secretary of Labor to finance certain studies. (This sum, we believe, can be impounded.) The remainder of the sums appropriated under section 102(a) and all sums appropriated under section 102(b) "shall be allotted among the States" under a rather complicated formula based on population in various age groups and per capita income in the States. In other respects the provisions of Parts A and B are similar to those in the Elementary and Secondary Education Act. States must file plans with the Commissioner; the Commissioner shall approve a State plan upon making the prescribed determinations, § 123(a). The State may seek judicial review from unfavorable action by the Commissioner on the plan, § 123(c), and a local educational agency dissatisfied with the State's action on its application may likewise obtain judicial review, § 123(d).

Section 124(a) provides, "The Commissioner shall pay, from the amount available to the State for grants under this part, to each State an amount equal to 50 per centum of the State and local expenditures in carrying out its State plan * * *." As in Titles II and III of ESEA there is provision for reallotment of funds on the basis of the Commissioner's determination that they will not be required. However, the reallotment provision, § 102(c), is more narrowly drawn than its counterparts in the ESEA. Funds shall be available for reallotment "on the basis of criteria established by regulation, *first among programs authorized by other parts of this title within that State* and then among other States, * * *" (emphasis added). In view of Congress' evident concern that a State should not lose funds through the reallotment process, the argument of no vested right we suggested earlier would have less validity here.

One further point needs to be touched upon. Our analysis thus far indicates that the funds appropriated for Part B *must* be made available for that program. However, the appropriation reads "not to exceed $357,836,000," which implies that less may be allocated to that part. We have no explanation for this language, which is apparently deliberate.[12] In the absence of any positive evidence that the intended effect of this language is to permit the Commissioner to allot less than the full sum in accordance with the statutory formula, we would still view these funds as not subject to impounding.

Higher education appropriations

H.R. 13111 appropriates $859,633,000 for various higher education programs. This includes three items for carrying out the Higher Education Act of 1965: $159.6 million for educational opportunity grants under Title IV, Part A; $63.9 million for loan insurance under Title IV, Part B; and $154 million for college work-study programs under Title IV, Part C.

Section 401 of Title IV, Part A, of the Higher Education Act authorizes appropriations for educational opportunity grants. These grants are made by the Office of Education to institutions of higher education, which, in turn, award grants to financially needy full time students. Section 401 authorizes the appropriation of $100 million for initial year grants and such sums as may be necessary for second-, third-, and fourth-year grants.[13]

Section 405 provides that from the sums appropriated for initial year grants the Commissioner shall make an allotment to each State in accordance with its total full time enrollment. Sums appropriated for continuation grants are not allotted according to formula, but presumably in accordance with the need to follow up previous initial year grants.

Although funds are allotted among the States, payments are not made through the States. The Office of Education allocates funds within each State in accordance with "equitable criteria," § 406. Recipient institutions must enter into agreements with the Commissioner in order to be eligible to participate in the program.

Despite the provision for allotments by States, we believe that this program is discretionary. The Commissioner has broad discretion as to which institutions to make grants to and how much each is to receive; there is no provision for judicial review. Furthermore, because of the lump sum appropriation, the Commissioner is also granted discretion in allotting funds between initial year and continuation grants. It is extremely doubtful, therefore, that any institution could claim that it was entitled to a grant. It does not necessarily follow that because there is no designated or ascertainable recipient, there is no duty to spend. However, since there is at least a plausible case for regarding the program as discretionary, and, in our view, little likelihood that such a conclusion could be challenged in court, we believe that as a practical matter these funds may be impounded.

H.R. 13111 appropriates $63.9 million, to remain available until expended, for loan insurance programs under Title IV, Part B of the Higher Education Act. While participation in this program is apparently discretionary with the Commissioner, the major part of this appropriation, according to the budget justification, is for anticipated losses due to the death or disability of borrowers, §437. Therefore, impounding of these funds may not be feasible.

H.R. 13111 appropriates $154 million for work-study programs under Title IV, Part C of the Higher Education Act. These sums are used to provide part-time employment for students. The program is generally similar to Title IV, Part A, in that the Commissioner is required to allot funds among the States on a formula basis, but enters into agreements with institutions of his own selection within the States. For the reasons cited in our discussion of Part A, we believe these funds may be impounded.

H.R. 13111 appropriates $222,100,000 for Federal capital contributions to student loan funds pursuant to section 204 of the National Defense Education Act of 1958, 20 U.S.C. 424.

Title II, NDEA, provides that sums appropriated for this purpose shall be allotted among the States in accordance with total college enrollment figures, § 202(a). Section 204 authorizes the Commissioner to enter into agreements with institutions of higher education for Federal capital contributions to the institution's student loan fund. Section 203 provides that the institutions with which the Commissioner has agreements must file applications for such capital contributions. If the total amount applied for exceeds the State allotment available for the purpose, the contributions are made pro rata, § 203.

Although there is no provision for judicial review in Title II, the terms of the statute appear mandatory, and the recipients are identifiable. Consequently, the statute appears mandatory at least to the extent that eligible institutions apply for the full State allotment. Where a State's allotment has not been applied for,[14] the Commissioner "may" reallot it, but apparently he is not obligated to do so.

Other programs

We have concentrated in this memorandum on a few large-item appropriations in H.R. 13111. Obviously, we have been unable in the time available to examine in detail the smaller items in the Office of Education appropriation, some of which, at least, appear on cursory consideration to be for discretionary programs. We might point out, however, that of the $859.6 million appropriated for higher education programs, $160 million is not earmarked for specific programs. This sum is apparently intended to be available for application in the Commissioner's discretion to those programs to which specific sums were not allocated. These programs appear to us to be discretionary, and the $160 million may, in our view, be impounded.

Footnotes at end of article.

Remedies

We expressed the view in our previous memorandum that where the statute directs expenditures and the recipient is ascertainable, a judicial remedy would probably lie. Whether it would take the form of a suit against the United States in the Court of Claims or an action against the Commissioner of Education is not certain.

Where the statutes provided for judicial review, it is possible that that procedure could be used to challenge an impounding of funds, even though it could be contended that such review is authorized only for actions involving the disapproval of a plan or the withholding of funds for noncompliance with a plan.

The point is that while precedents in this field are few, the trend in the law has been to supply the remedy once the right is recognized. If, therefore, a court can be persuaded that a prospective recipient has been injured by the failure of the Commissioner of Education to comply with the direction of the statute, it will in all likelihood devise a means of relief.

WILLIAM H. REHNQUIST,
Assistant Attorney General, Office of Legal Counsel.

FOOTNOTES

[1] Throughout this memorandum we shall refer to the figures and language contained in H.R. 13111 as it passed the House and assume, for purposes of this discussion, that the bill will be enacted in its present form.

[2] In our previous memorandum we referred to this provision as section 406 of the Vocational Education Amendments of 1968. Actually, section 406 was added to P.L. 90-247 by section 301(b) of the Vocational Educational Amendments of 1968.

[3] Senator Yarborough stated that section 406 "says that if the Appropriations Committee * * * does appropriate the money, it shall remain available. The purpose is to keep the Bureau of the Budget from whacking it to pieces," CONGRESSIONAL RECORD, vol. 114, pt. 22, p. 29155.

[4] This conclusion is consistent with the view taken by the General Counsel of HEW at the time the Vocational Education Amendments bill was before Congress. Memorandum of August 15, 1968 from General Counsel Willcox to the Secretary.

[5] Part A of Title I provides for "basic grants," Part B for "special incentive grants." However, H.R. 13111 carries no funds for Part B grants.

[6] This formula, rather complex as set forth in the statute, is further complicated by the provision in H.R. 13111 that the amounts available to each State shall be no less than 92% of the amounts allocated to local agencies in such State in fiscal 1968.

[7] This conclusion is subject to minor qualifications. Under section 103(a)(1), an amount equal to 3% of the amount appropriated for grants to or through the States shall be allotted among Puerto Rico and the Insular Possessions, and for payments with respect to Indian children. The Commissioner probably has sufficient discretion here to withhold some of the funds available for this purpose. There is similar discretionary authority in other formula grant statutes with respect to the allotment of funds to Puerto Rico and the Possessions, see *e.g.*, ESEA, § 302, 20 U.S.C. 842, but in view of the small sums involved and the undesirability of imposing a burden on those jurisdictions not shared by the States, we will omit further consideration of this possibility.

Our conclusion is also based on the assumption that the Title I funds presently carried in H.R. 13111 will not be sufficient to pay the aggregate eligibility in full. These funds, added to last year's advance funding would bring total fiscal '70 appropriations for Title I to about $1.4 billion, whereas HEW's budget justification estimated the total authorization at $2.36 billion.

[8] In response to a question from Senator Prouty as to whether the Commissioner would have full authority to decide whether a State needs its full allotment, HEW replied in a memorandum that the language in section 202(L) was similar to that found in other education legislation. The memorandum stated further:

"The Office of Education has had experience in administering this provision without any difficulty or cutback on State programs. The Commissioner does have authority to decide whether or not a State needs its full allotment. Administratively, this has been carried out by the Commissioner polling each of the States: (1) whether they will need their full allotment and, if not, how much be [sic] available for reallocation: (2) what additional funds could the State prudently use if they have already used their entire original allotment. On this advice of the States, the Commissioner then carries out his reallotment authority." Hearings on the Elementary and Secondary Education Act of 1965 before a Subcommittee of the Senate Committee on Labor and Public Welfare, 89th Cong., 1st Sess., p. 1190.

[9] P.L. 90-247 provided for a gradual transition from direct Federal grants to local agencies to grants through the States. In fiscal '70 the States are eligible to receive their entire allotments less those sums, not in excess of 25%, necessary for direct grants to complete local projects previously initiated. §§ 305(d), 306(c).

[10] The reference to section 402 is puzzling since $9.25 million is specifically provided for section 402 earlier in the bill.

[11] However, Part B grants are 50% matching grants, while the Commissioner has discretion to waive the matching requirement with respect to section 102(b) funds. § 124(a).

[12] Since Part B is a 50% matching grant program, it may be that Congress anticipates that all the funds will not be used, and wishes to provide that in such event the money will be available for other purposes under the Vocational Education Act.

[13] The appropriation itself does not indicate how much is for initial year and how much for continuation grants. Presumably, Congress assumes that the Commissioner will determine how much is necessary for the continuation grants, and the balance will be available for initial year grants. Since the budget estimate was $175.6 million for both kinds of grants, we assume that at least $75.6 million is expected to be used for continuation grants.

It might be noted that the special programs for low income students authorized by section 408 of Part A are apparently not intended to be funded out of the $159.6 million appropriated for educational opportunity grants, but would be funded, if at all, out of the portion of the $859,633,000 appropriation not earmarked for specific programs.

[14] An applicant institution must put up one dollar for each nine dollars of Federal money, § 204(2).

EXHIBIT 3

COST OF EDUCATION INDEX 1969-70

(By Orlando F. Furno and James E. Doherty)

Inflation is burning up most of this year's record spending increases—the median district is spending 13% more per pupil—and the bulk of what's left goes into higher salaries. The grim conclusion: Drastically increased spending in recent years has probably had little effect on the quality and quantity of education many children receive.

Inflation is roaring through education's fiscal forest like a fire blazing out of control. Dollars spent for books, buildings, salaries and services are going up in smoke. Local districts are attempting to douse the blaze by pouring more and more money into education. But very substantial portions of the increased spending are being consumed in the flames.

This grim analogy is borne out by data in School Management's 1969-70 Cost of Education Index (CEI). Results of the annual survery of current public school spending show that the unprecedented inflationary spiral of the past two years has created a tremendous need for school funds to merely maintain the status quo with respect to purchasing power.

The nation's median school district is spending $582 per elementary pupil and $757 per secondary pupil for Net Current Expenditures (NCE) in 1969-70. Last year, the median school district budgeted $516 and $671 for the same items. In 1967-68, the NCE median stood at $465 per elementary pupil and $605 per secondary student.

This year's increase of nearly 13% over 1968-69 is by all odds the steepest 12-month rise since the CEI's base period (1957-59)[1] and is probably the sharpest school spending rise ever.

The greatest previous single-year increase was last year's 11% jump. But while spending reached record heights in 1968-69, so did inflation, which rose nearly 10 index points, or almost 7%, wiping out much of the 11% increase in spending.

CEI estimates of educational inflation for the current year are, as usual, conservatively pegged. A minimum increase in inflation of 8.4 index points, or 5.6% is indicated. But the general level of inflation could easily match that of last year and, in selected budget categories, inflation can be expected to exceed estimates.

In sum, the prospect for the current school year is gloomy. Until inflation cools down, school districts that increase spending will, in effect, simply be spinning their wheels; school districts that fail to increase spending will face program cutbacks. While many administrators complain bitterly these days, about the adverse effect on education of the Nixon Administration's tough anti-inflation measures, the CEI makes it abundantly clear that inflation itself is far more damaging than any of the attempts to bring it under control.

DIVERGENT SPENDING

The CEI data is based on detailed budget reports collected by school management from 1,200 school districts, carefully controlled for geographical location, student population and expenditure levels. (For a detailed explanation of procedures used to develop the CEI, see SM Jan. '69, page 129.) This year, as in past years, the data shows extremely divergent spending patterns throughout the nation.

The region spending the largest amount per pupil continues to be the middle-Atlantic group—New York, New Jersey and Pennsylvania—with an average NCE of $764 per elementary pupil, 31% above the national average.

At the low end of the scale, the south-central states—Alabama, Mississippi, Tennessee and Kentucky—continue to provide the least dollars for education. Median districts in these states are spending only $386 per elementary pupil and $502 per high school pupil.

The average teachers' salary in the nation's median district increased a thumping $718 this year, a fact of major significance.

The continuing wide diversity in educational expenditures is reflected in teachers'

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[1] The 1957-59 base period includes average annual expenditures during the 1957-58 and 1958-59 school years and expenditures during the last half of 1956-57 school year and the first half of the 1959-60 school year. These have been averaged to give a single figure for the base period.

Todd Brewster

Director of the National Constitution Center's Peter Jennings Project

Can the Constitution Prevent Debt Ceiling Catastrophe?

Posted: 7/27/11 12:00 PM ET
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What role has the Constitution played in the persistent argument over raising the debt ceiling? There is the Republican push for a constitutional amendment requiring a balanced budget (which I will address in a later post) and the Democratic argument, now abandoned, that the Fourteenth Amendment makes it unnecessary for the president to get congressional approval on raising the debt ceiling since, as section four of that amendment reads, "the validity of the public debt of the United States, authorized by law, including debts incurred for the payments of pension and bounties for service in suppressing insurrection or rebellion shall not be questioned."

This Democratic position created one of the more theatrical moments of the months-long debate when, at a Politico breakfast attended by dozens of reporters earlier in the summer, Treasury Secretary Timothy Geithner waved a copy of the Constitution and asked, rhetorically, of the president's Republican opponents: "Have you read the Fourteenth Amendment?"

The statement surprised many in the audience since it was thought that any attempt to shut Congress out of the process would be politically disastrous, and, indeed, despite former President Bill Clinton chiming in to support the position, last Friday President Obama took it off the table. "I have talked to my lawyers," said Obama, of the Fourteenth Amendment reasoning. "They are not persuaded that that is a winning argument."

Why? Truth is, no one knows quite how to understand the fourth section of the Fourteenth Amendment since there is no doctrine to consult. The Supreme Court has not addressed the issue. "It's not clear, it's not been tested," said George Washington University Law Center's Jonathan Turley to Keith Olbermann on Olbermann's Current TV program, *Countdown*. "For a law professor who comes to watch the cars crash, it could be exciting. But I'm not too sure it's good for the country."

Political questions

That last argument -- what is "good for the country" -- would almost certainly be part of any federal court decision on this issue and it would likely look at it this way: no matter how the language reads and no matter how we understand it to be applied in this circumstance, the size, scope, and particulars of the national budget are without a doubt a "political question." In other words, a decision best left to the branches elected by the people, not the judiciary.

High school civics classes may leave us with the impression that the American system of government is split between three co-equal branches. But in fact, there is a priority to the two political branches -- the executive and the Congress -- which the courts have traditionally respected as superior on many matters.

Yes, constitutional doctrine does provide the judiciary with the power to overturn acts of Congress as inconsistent with the Constitution. But especially in areas, like the national budget, where the Constitution clearly establishes the responsibility for action with the political branches, the courts, as the least democratic branch, are loath to intervene.

A lesson from Harry Truman

There is even a hierarchy between the two political branches with Congress holding a slight edge. Consider the Court's landmark 1952 decision in the Steel Seizure case, also known as Youngstown Sheet and Tube Company v. Sawyer. The case, which involved President Harry Truman's decision to take over the steel industry when it was in the midst of a labor dispute that threatened to stall production and create economic instability, ended with a stinging rebuke of the president and the establishment of a formula of sorts by which to judge the relative power positions held by these often competing branches of government.

Justice Hugo Black wrote the majority opinion, siding with the steel industry. But it was Justice Robert Jackson's concurrence which carried forth as a guiding principle. Jackson said that there are three categories of congressional-executive disputes: those where the president is attempting to use power expressing or implicitly established by Congress; those where Congress has said nothing on the issue; and those where Congress has been clearly in opposition to the president. These, he said, should be seen in descending order of legitimacy. In other words, the president needs Congress's assent or, barring that, silence to act within the scope of constitutional authority.

This Congress -- our Congress, that is -- may not, as of today, have spoken on the issue of raising the debt ceiling, but it has been anything but silent, suggesting, in Justice Jackson's formula, that not only is the debt ceiling a "political issue," but the president does not have the authority here to act alone.

For an executive of the world's most powerful nation, that can be bitter medicine. Back in 1952, when the Court told Harry Truman to relinquish his hold over the steel industry, the combative president was stunned. Later that afternoon, Justice Hugo Black invited him over to his home for a drink. "Hugo," the president reportedly said to his host, "I don't much care for your law, by golly this bourbon is good."

This post first appeared on the Constitution Daily.

Supreme Court of the United States.
PERRY
v.
UNITED STATES.

No. 532.
Argued Jan. 10, 11, 1935.
Decided Feb. 18, 1935.

On Certificate from the Court of Claims.

Suit by John M. Perry against the United States. Defendant demurred to the petition, and the Court of Claims certifies certain questions.

One question answered.

See, also, Norman v. Baltimore o.r. c/o., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885; Nortz v. United States, 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907.

Mr. Justice McREYNOLDS, Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER, dissenting in part.

West Headnotes

[1] United States 393 ⚿91

393 United States
393VI Fiscal Matters
393k91 k. Bonds. Most Cited Cases
(Formerly 396k91)

Provision in Liberty Loan gold bond that principal and interest were payable in United States gold coin of "present standard of value"*held* intended to afford protection against loss by setting up standard or measure of government's obligation and to assure obligee that he would not suffer loss through depreciation in medium of payment. Second Liberty Bond Act § 1, as amended by Third Liberty Bond Act § 1, 31 U.S.C.A. § 752.

[2] United States 393 ⚿91

393 United States
393VI Fiscal Matters
393k91 k. Bonds. Most Cited Cases
(Formerly 396k91)

That gold clause in existing government obligations, if permitted to remain in force, would interfere with exercise of constitutional authority of Congress to regulate value of money and fix monetary policy, *held* not to authorize Congress to invalidate such clause, in view of distinction in such respect between power of Congress to control or interdict contracts of private parties and its power to alter or repudiate substance of own engagements incurred under power to borrow money on credit of United States. U.S.C.A. Const. art. 1, § 8, cls. 2, 5.

[3] United States 393 ⚿79

393 United States
393VI Fiscal Matters
393k79 k. Power to Incur Indebtedness or Make Expenditures. Most Cited Cases

Under constitutional power to borrow money on credit of United States, Congress may fix amount to be borrowed and terms of payment and is authorized to pledge credit of United States as assurance of payment as stipulated. U.S.C.A. Const. art. 1, § 8, cl. 2.

[4] United States 393 ⚿79

393 United States
393VI Fiscal Matters
393k79 k. Power to Incur Indebtedness or Make Expenditures. Most Cited Cases

Right to make binding obligation is a power attaching to sovereignty.

[5] Constitutional Law 92 ⚿637

92 Constitutional Law
92V Construction and Operation of Constitutional

Provisions
92V(D) Construction as Grant or Limitation of Powers; Retained Rights
92k636 United States Constitution
92k637 k. In General. Most Cited Cases
(Formerly 92k27)

In United States, sovereignty resides in people, who act through organs established by Constitution.

[6] United States 393 ⚿79

393 United States
393VI Fiscal Matters
393k79 k. Power to Incur Indebtedness or Make Expenditures. Most Cited Cases
(Formerly 396k79, 396k125(1))

United States 393 ⚿125(3)

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(3) k. Necessity of Waiver or Consent. Most Cited Cases
(Formerly 393k125(1))

Where United States has constitutionally and lawfully borrowed money and pledged its credit therefor, the binding quality of the promise is of essence of credit so pledged, and Congress cannot thereafter alter or destroy such obligation, and, while Congress need not provide remedy through courts and United States may not be sued without its consent, essential obligation still exists and remains binding on the conscience of the sovereign. U.S.C.A. Const. art. 1, § 8, cl. 2.

[7] United States 393 ⚿91

393 United States
393VI Fiscal Matters
393k91 k. Bonds. Most Cited Cases

Provision of Fourteenth Amendment, that validity of **public debt** of United States authorized by law shall not be questioned, *held* to apply to government bonds issued after, as well as those before the amendment, and phrase "validity of **public debt**" embraces whatever concerns the integrity of the public obligations. U.S.C.A. Const.Amend. 14, § 4.

[8] Payment 294 ⚿3

294 Payment
294I Requisites and Sufficiency
294k3 k. Constitutional and Statutory Provisions. Most Cited Cases

United States 393 ⚿34

393 United States
393I Government in General
393k34 k. Mints, Assay Offices, Coinage, and Money. Most Cited Cases

Joint Resolution declaring gold clause in obligations to be against public policy, and providing for discharge of such obligations on payment, dollar for dollar, of legal tender coin or currency at time of payment, *held* unconstitutional as applied to pre-existing Liberty Loan gold bond issued by government. Gold Repeal Joint Resolution § 1, 31 U.S.C.A. § 463; U.S.C.A. Const. art. 1, § 8, cls. 2, 5, and Amend. 14 § 4.

[9] United States 393 ⚿91

393 United States
393VI Fiscal Matters
393k91 k. Bonds. Most Cited Cases

As remedy for breach of gold clause in Liberty Loan gold bonds, which clause Congress sought unconstitutionally to abrogate, holder could recover no more than loss actually suffered and of which he might rightfully complain, since he was not entitled to be enriched. Second Liberty Bond Act § 1, as amended by Third Liberty Bond Act § 1, 31 U.S.C.A. § 752; Gold Repeal Joint Resolution § 1, 31 U.S.C.A. § 463.

[10] Federal Courts 170B ⚿1073.1

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(A) Establishment and Jurisdiction
170Bk1073 Particular Claims, Jurisdiction
170Bk1073.1 k. In General. Most Cited

Cases
(Formerly 170Bk1073, 106k449(1))

Court of Claims has no jurisdiction to entertain action for nominal damages.

[11] United States 393 ⚿34

393 United States
393I Government in General
393k34 k. Mints, Assay Offices, Coinage, and Money. Most Cited Cases

Under authority to deal with gold coin as medium of exchange, Congress could authorize the prohibition, by executive order, of exportation of gold coin and placing of restrictions upon transactions in foreign exchange, and restraint thus imposed on holders of gold coin was incident to limitations inhering in the ownership of the coin and gave holders no right of action. Emergency Banking Relief Act § 2, amending Trading with the Enemy Act § 5(b), 12 U.S.C.A. § 95a; Gold Reserve Act of 1934, § 13, 31 U.S.C.A. § 824; Executive Orders, Nos. 6111, 6260, 6560, 12 U.S.C.A. § 95 note.

[12] United States 393 ⚿34

393 United States
393I Government in General
393k34 k. Mints, Assay Offices, Coinage, and Money. Most Cited Cases

Statutes authorizing prohibition, by executive order, of exportation of gold coin and placing of restrictions upon transactions in foreign exchange, *held* not invalid as being arbitrary or capricious. Emergency Banking Relief Act § 2, amending Trading with the Enemy Act § 5(b), 12 U.S.C.A. § 95a; Gold Reserve Act of 1934, § 13, 31 U.S.C.A. § 824; Executive Orders, Nos. 6111, 6260, 6560, 12 U.S.C.A. § 95 note.

[13] Federal Courts 170B ⚿1073.1

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(A) Establishment and Jurisdiction
170Bk1073 Particular Claims, Jurisdiction
170Bk1073.1 k. In General. Most Cited Cases
(Formerly 170Bk1073, 106k449(1))

Holder of Liberty Loan bond, called for redemption April 15, 1934, and presented May 24th, to which holder government refused payment in gold and tendered payment in legal tender currency, *held* not to have suffered actual loss, and was therefore not entitled to recover in Court of Claims legal tender currency in excess of face amount of bonds, notwithstanding devaluation of gold dollar, in view of restrictive use of gold in domestic transactions, and restraints on transactions in foreign exchange or export of gold. Thomas Amend. § 43(b)(2), as amended by Act Jan. 30, 1934, § 12, 31 U.S.C.A. § 821; Proclamation No. 2072, 31 U.S.C.A. § 821 note.

United States 393 ⚿125(3)

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(3) k. Necessity of Waiver or Consent. Most Cited Cases

United States can only be sued by own consent.

****433** ***333** Mr. John M. Perry, of New York City, for Perry.

***341** Messrs. Homer S. Cummings, Atty. Gen., and Angus D. MacLean, Asst. Sol. Gen., of Washington, D.C., for the United States.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The certificate from the Court of Claims shows the following facts:

Plaintiff brought suit as the owner of an obligation of the United States for $10,000, known as 'Fourth Liberty Loan 4 1/4 % Gold Bond of 1933-1938.' This bond was issued pursuant to the Act of September 24, 1917, s 1 et seq. (40 Stat. 288), as amended, and Treasury Department circular No. 121 dated September 28, 1918. The bond ***347** provided: 'The principal and interest hereof are payable in United States gold coin of the present standard of value.'

Plaintiff alleged in his petition that at the time the bond was issued, and when he acquired it, 'a dollar in gold consisted of 25.8 grains of gold .9 fine'; that the bond was called for redemption on April 15, 1934, and, on May 24, 1934, was presented for payment; that plaintiff demanded its redemption 'by the payment of 10,000 gold dollars each containing 25.8 grains of gold .9 fine'; that defendant refused to comply with that demand; and that plaintiff then demanded '258,000 grains of gold .9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars each containing 15 5/21 grains of gold .9 fine, or 16,931.25 dollars in legal tender currency'; that defendant refused to redeem the bond 'except by the payment of 10,000 dollars in legal tender currency'; that these refusals were based on the Joint Resolution of the Congress of June 5, 1933, 48 Stat. 113 (31 USCA ss 462, 463), but that this enactment was unconstitutional, as it operated to deprive plaintiff of his property without due process of law; and that, by this action of defendant, he was damaged 'in the sum of $16,931.25, the value of defendant's obligation,' for which, with interest, plaintiff demanded judgment.

Defendant demurred upon the ground that the petition did not state a cause of action against the United States.

The Court of Claims has certified the following questions:

'1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4 1/4 bond of the United States, of the principal amount of $10,000, issued in 1918, which was payable ****434** on and after April 15, 1934, and which bond contained a clause that the principal is 'payable in United States gold coin of the present standard of value', entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

***348** '2. Is the United States, as obligor in a Fourth Liberty Loan 4 1/4 % gold bond, Series of 1933-1938, as stated in Question One liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?'

[1] First. The Import of the Obligation. The bond in suit differs from an obligation of private parties, or of states or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress. Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, decided this day. The bond now before us is an obligation of the United States. The terms of the bond are explicit. They were not only expressed in the bond itself, but they were definitely prescribed by the Congress. The Act of September 24, 1917, both in its original and amended form, authorized the moneys to be borrowed, and the bonds to be issued, 'on the credit of the United States,' in order to meet expenditures needed 'for the national security and defense and other public purposes authorized by law.' Section 1, 40 Stat. 288, as amended by Act April 4, 1918, s 1, 40 Stat. 503, 31 USCA s 752. The circular of the Treasury Department of September 28, 1918, to which the bond refers 'for a statement of the further rights of the holders of bonds of said series,' also provided that the principal and interest 'are payable in United States gold coin of the present standard of value.'

This obligation must be fairly construed. The 'present standard of value' stood in contradistinction to a lower standard of value. The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the government's obligation. We think that the reasonable import of the promise is that it was intended ***349** to assure one who lent his money to the government and took its bond that he would not suffer loss through depreciation in the medium of payment.

The government states in its brief that the total unmatured interest-bearing obligations of the United States outstanding on May 31, 1933 (which it is understood contained a 'gold clause' substantially the same as that of the bond in suit), amounted to about twenty-one billions of dollars. From statements at the bar, it appears that this amount has been reduced to approximately twelve billions at the present time, and that during the intervening period the **public debt** of the United States has risen some seven billions (making a total of approximately twenty-eight billions five hundred millions) by the issue of some sixteen billions five hundred millions of dollars 'of non-gold-clause obligations.'

[2][3][4][5][6][7][8] Second. The Binding Quality of the Obligation. The question is necessarily presented whether the Joint Resolution of June 5, 1933, 48 Stat. 113 (31 USCA ss 462, 463), is a valid enactment so far as it applies to the obligations of the United States. The resolution declared that provisions requiring 'payment in gold or a particular kind of coin or currency' were 'against public policy,' and provided that 'every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein,' shall be discharged 'upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.' This enactment was expressly extended to obligations of the United States and provisions for payment in gold, 'contained in any law authorizing obligations to be issued by or under authority of the United States,' were repealed.[FN1] Section 1(a), 31 USCA s 463(a).

> FN1 And subdivision (b) of section 1 of the Joint Resolution of June 5, 1933, provided: 'As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.' 31 USCA s 463(b).

***350** There is no question as to the power of the Congress to regulate the value of money: that is, to establish a monetary system and thus to determine the currency of the country. The question is whether the Congress can use ****435** that power so as to invalidate the terms of the obligations which the government has theretofore issued in the exercise of the power to borrow money on the credit of the United States. In attempted justification of the Joint Resolution in relation to the outstanding bonds of the United States, the government argues that 'earlier Congresses could not validly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, or regulate foreign and interstate commerce'; and, from this premise, the government seems to deduce the proposition that when, with adequate authority, the government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient. The government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the government at its discretion, and that, when the government borrows money, the credit of the United States is an illusory pledge.

We do not so read the Constitution. There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority ***351** and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money 'on the credit of the United States,' the Congress is authorized to pledge that credit as an assurance of payment as stipulated, as the highest assurance the government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise; a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our government.

The binding quality of the obligations of the government was considered in the Sinking Fund Cases, 99 U.S. 700, 718, 719, 25 L.Ed. 496. The question before the Court in those cases was whether certain action was warranted by a reservation to the Congress of the right to amend the charter of a railroad company. While the particular action was sustained under this right of amendment, the Court took occasion to state emphatically the obligatory character of the contracts of the United States. The Court said: 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the

repudiator had been a State or a municipality or a citizen.'[FN2]

FN2 Mr. Justice Strong, who had written the opinion of the majority of the Court in the Legal Tender Cases (Knox v. Lee), 12 Wall. 457, 20 L.Ed. 287, dissented in the Sinking Fund Cases, 99 U.S. page 731, 25 L.Ed. 504, because he thought that the action of the Congress was not consistent with the government's engagement, and hence was a transgression of legislative power. And, with respect to the sanctity of the contracts of the government, he quoted, with approval, the opinion of Mr. Hamilton in his communication to the Senate of January 20, 1795 (citing 3 Hamilton's Works, 518, 519), that 'when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.'

***352** When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference, said the Court in United States v. Bank of the Metropolis, 15 Pet. 377, 392, 10 L.Ed. 774, except that the United States cannot be sued without its consent. See, also, The Floyd Acceptances, 7 Wall. 666, 675, 19 L.Ed. 169; ****436**Cooke v. United States, 91 U.S. 389, 396, 23 L.Ed. 237. In Lynch v. United States, 292 U.S. 571, 580, 54 S.Ct. 840, 844, 78 L.Ed. 1434, with respect to an attempted abrogation by the Act of March 20, 1933, s 17, 48 Stat. 8, 11 (38 USCA s 717), of certain outstanding war risk insurance policies, which were contracts of the United States, the Court quoted with approval the statement in the Sinking Fund Cases, supra, and said: 'Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would ***353** be not the practice of economy, but an act of repudiation.'

The argument in favor of the Joint Resolution, as applied to government bonds, is in substance that the government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty.[FN3] In the United States, sovereignty resides in the people who act through the organs established by the Constitution. Chisholm v. Georgia, 2 Dall. 419, 471, 1 L.Ed. 440; Penhallow v. Doane's Administrators, 3 Dall. 54, 93, 1 L.Ed. 507; McCulloch v. Maryland, 4 Wheat. 316, 404, 405, 4 L.Ed. 579; Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220. The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared. The powers conferred upon the Congress are harmonious. The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the government, upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations.***354** The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists, and, despite infirmities of procedure, remains binding upon the conscience of the sovereign. Lynch v. United States, supra, pages 580, 582, of 292 U.S. 54 S.Ct. 840.

FN3 Oppenheim, International Law (4th Ed.) vol. 1, ss 493, 494. This is recognized in the field of international engagements. Although there may be no judicial procedure by which

> such contracts may be enforced in the absence of the consent of the sovereign to be sued, the engagement validly made by a sovereign state is not without legal force, as readily appears if the jurisdiction to entertain a controversy with respect to the performance of the engagement is conferred upon an international tribunal. Hall, International Law (8th Ed.) s 107; Oppenheim, loc. cit.; Hyde, International Law, vol. 2, s 489.

The Fourteenth Amendment, in its fourth section, explicitly declares: 'The validity of the **public debt** of the United States, authorized by law, * * * shall not be questioned.' While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the amendment was adopted. Nor can we perceive any reason for not considering the expression 'the validity of the **public debt**' as embracing whatever concerns the integrity of the public obligations.

We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.

[9][10] Third. The Question of Damages. In this view of the binding quality of the government's obligations, we come to the question as to the plaintiff's right to recover damages. That is a distinct question. Because the government is not at liberty to alter or repudiate its obligations, it does not follow that the claim advanced by the plaintiff should be sustained. The action is for breach of contract. As a remedy for breach, plaintiff can ****437** recover no more than the loss he has suffered and of which he may rightfully complain. He is not entitled to be enriched.***355** Plaintiff seeks judgment for $16,931.25, in present legal tender currency, on his bond for $10,000. The question is whether he has shown damage to that extent, or any actual damage, as the Court of Claims has no authority to entertain an action for nominal damages. Grant v. United States, 7 Wall. 331, 338, 19 L.Ed. 194; Marion & Rye V. Railway Co. v. United States, 270 U.S. 280, 282, 46 S.Ct. 253, 70 L.Ed. 585; Nortz v. United States, 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907, decided this day.

[11][12][13] Plaintiff computes his claim for $16,931.25 by taking the weight of the gold dollar as fixed by the President's proclamation of January 31, 1934 (No. 2072, 31 USCA s 821 note), under the Act of May 12, 1933, s 43(b)(2), 48 Stat. 52, 53, as amended by the Act of January 30, 1934, s 12, 48 Stat. 342, (31 USCA s 821), that is, at 15 5/21 grains nine-tenths fine, as compared with the weight fixed by the Act of March 14, 1900, s 1, 31 Stat. 46 (31 USCA s 314), or 25.8 grains nine-tenths fine. But the change in the weight of the gold dollar did not necessarily cause loss to the plaintiff of the amount claimed. The question of actual loss cannot fairly be determined without considering the economic situation at the time the government offered to pay him the $10,000, the face of his bond, in legal tender currency. The case is not the same as if gold coin had remained in circulation. That was the situation at the time of the decisions under the legal tender acts of 1862 and 1863. Bronson v. Rodes, 7 Wall. 229, 251, 19 L.Ed. 141; Trebilcock v. Wilson, 12 Wall. 687, 695, 20 L.Ed. 460; Thompson v. Butler, 95 U.S. 694, 696, 697, 24 L.Ed. 540. Before the change in the weight of the gold dollar in 1934, gold coin had been withdrawn from circulation.[FN4] The Congress had authorized the prohibition of the exportation of gold coin and the placing of restrictions upon transactions in foreign exchange. Acts of March 9, 1933, ***356** 48 Stat. 1 (Emergency Banking Relief Act, s 2, amending Trading with the Enemy Act, s 5(b), 12 USCA s 95a); January 30, 1934, 48 Stat. 337 (Gold Reserve Act of 1934, s 12, 31 USCA s 824). Such dealings could be had only for limited purposes and under license. Executive Orders of April 20, 1933 (No. 6111), August 28, 1933 (No. 6260), and January 15, 1934 (No. 6560), 12 USCA s 95 note; Regulations of the Secretary of the Treasury, January 30 and 31, 1934. That action the Congress was entitled to take by virtue of its authority to deal with gold coin as a medium of exchange. And the restraint thus imposed upon holders of gold coin was incident to the limitations which inhered in their ownership of that coin and gave them no right of action. Ling Su Fan v. United States, 218 U.S. 302, 310, 311, 31 S.Ct. 21, 23, 54 L.Ed. 1049, 30 L.R.A.(N.S.) 1176. The Court said in that case: 'Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are

due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange. * * * However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin.' The same reasoning is applicable to the imposition of restraints upon transactions in foreign exchange. We cannot say, in view of the conditions that existed, that the Congress having this power exercised it arbitrarily or capriciously. And the holder of an obligation, or bond, of the United States, payable in gold coin of the former standard, so far as the restraint upon the right to export gold coin or to engage in transactions in foreign exchange is concerned, was in no better case than the holder of gold coin itself.

> FN4 In its Report of May 27, 1933, it was stated by the Senate Committee on Banking and Currency: 'By the Emergency Banking Act and the existing Executive Orders gold is not now paid, or obtainable for payment, on obligations public or private.' Sen. Rep. No. 99, 73d Cong., 1st Sess.

***357** In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to assume that he was entitled to obtain gold coin for recourse to foreign markets or for dealings in foreign exchange or for other purposes contrary to the control over gold coin which the Congress had the power to exert, ****438** and had exerted, in its monetary regulation. Plaintiff's damages could not be assessed without regard to the internal economy of the country at the time the alleged breach occurred. The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which 'all forms of money' of the United States were to be 'maintained at a parity' had a controlling influence upon the domestic economy. It was adjusted to the new basis. A free domestic market for gold was nonexistent.

Plaintiff demands the 'equivalent' in currency of the gold coin promised. But 'equivalent' cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used. That equivalence or worth could not properly be ascertained save in the light of the domestic and restricted market which the Congress had lawfully established. In the domestic transactions to which the plaintiff was limited, in the absence of special license, determination of the value of the gold coin would necessarily have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins. And, in view of the control of export and foreign exchange, and the restricted domestic use, the question of value, in relation to transactions legally available to the plaintiff, would require a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On ***358** the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute, not a recoupment of loss in any proper sense, but an unjustified enrichment.

Plaintiff seeks to make his case solely upon the theory that by reason of the change in the weight of the dollar he is entitled to $1.69 in the present currency for every dollar promised by the bond, regardless of any actual loss he has suffered with respect to any transaction in which his dollars may be used. We think that position is untenable.

In the view that the facts alleged by the petition fail to show a cause of action for actual damages, the first question submitted by the Court of Claims is answered in the negative. It is not necessary to answer the second question.

Question No. 1 is answered 'No.'

Mr. Justice STONE (concurring).

I agree that the answer to the first question is 'No,' but I think our opinion should be confined to answering that question, and that it should essay an answer to no other.

I do not doubt that the gold clause in the government bonds, like that in the private contracts just considered, calls for the payment of value in money, measured by a stated number of gold dollars of the standard defined in the clause, Feist v. Socie te Intercommunale Belge d'Electricite , (1934) A.C. 161, 170-173; Serbian and Brazilian Bond Cases, P.C.I.J., series A., Nos. 20, 21, pp. 32-34, 109-119. In the absence of any further exertion of governmental power, that obligation plainly could not be ***359** satisfied by payment of the same number of dollars, either specie or paper, measured by a gold dollar of lesser weight, regardless of their purchasing power or the state of our internal economy at the due date.

I do not understand the government to contend that it is any the less bound by the obligation than a private individual would be, or that it is free to disregard it except in the exercise of the constitutional power 'to coin money' and 'regulate the value thereof.' In any case, there is before us no question of default apart from the regulation by Congress of the use of gold as currency.

While the government's refusal to make the stipulated payment is a measure taken in the exercise of that power, this does not disguise the fact that its action is to that extent a repudiation of its undertaking. As much as I deplore this refusal to fulfill the solemn promise of bonds of the United States, I cannot escape the conclusion, announced for the Court, that in the situation now presented, the government, through the exercise of its sovereign power to regulate the value of money, has rendered itself immune from liability for its action. To that extent it has relieved itself of the obligation of its domestic bonds, precisely as it has relieved the obligors of private bonds in Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, decided this day.

****439** In this posture of the case it is unnecessary, and I think undesirable, for the Court to undertake to say that the obligation of the gold clause in government bonds is greater than in the bonds of private individuals, or that in some situation not described, and in some manner and in some measure undefined, it has imposed restrictions upon the future exercise of the power to regulate the currency. I am not persuaded that we should needlessly intimate any opinion which implies that the obligation may so operate, for example, as to interpose a serious obstacle to the adoption of measures for stabilization of ***360** the dollar, should Congress think it wise to accomplish that purpose by resumption of gold payments, in dollars of the present or any other gold content less than that specified in the gold clause, and by the re-establishment of a free market for gold and its free exportation.

There is no occasion now to resolve doubts, which I entertain, with respect to these questions. At present they are academic. Concededly they may be transferred wholly to the realm of speculation by the exercise of the undoubted power of the government to withdraw the privilege of suit upon its gold clause obligations. We have just held that the Court of Claims was without power to entertain the suit in Nortz v. United States, 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907, because, regardless of the nature of the obligation of the gold certificates, there was no damage. Here it is declared that there is no damage because Congress, by the exercise of its power to regulate the currency, has made it impossible for the plaintiff to enjoy the benefits of gold payments promised by the government. It would seem that this would suffice to dispose of the present case, without attempting to prejudge the rights of other bondholders and of the government under other conditions which may never occur. It will not benefit this plaintiff, to whom we deny any remedy, to be assured that he has an inviolable right to performance of the gold clause.

Moreover, if the gold clause be viewed as a gold value contract, as it is in Norman v. Baltimore & Ohio R. Co., supra, it is to be noted that the government has not prohibited the free use by the bondholder of the paper money equivalent of the gold clause obligation; it is the prohibition, by the Joint Resolution of Congress, of payment of the increased number of depreciated dollars required to make up the full equivalent, which alone bars recovery. ***361** In that case it would seem to be implicit in our decision that the prohibition, at least in the present situation, is itself a constitutional exercise of the power to regulate the value of money.

I therefore do not join in so much of the opinion as may be taken to suggest that the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that, although there is and can be no present cause of action upon the repudiated gold

clause, its obligation is nevertheless, in some manner and to some extent not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds.

Mr. Justice McREYNOLDS, Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND and Mr. Justice BUTLER, dissent. For opinion, see Norman v. Baltimore & O.R. Co., 294 U.S. 240, 55 S.Ct. 407, at page 419, 79 L.Ed. 885.

U.S. 1935.
Perry v. U.S.
294 U.S. 330, 55 S.Ct. 432, 95 A.L.R. 1335, 79 L.Ed. 912

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Effective: February 12, 2010

United States Code Annotated Currentness
Title 31. Money and Finance (Refs & Annos)
Subtitle III. Financial Management
Chapter 31. Public Debt (Refs & Annos)
Subchapter I. Borrowing Authority

→ § 3101. Public debt limit

(a) In this section, the current redemption value of an obligation issued on a discount basis and redeemable before maturity at the option of its holder is deemed to be the face amount of the obligation.

(b) The face amount of obligations issued under this chapter and the face amount of obligations whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) may not be more than $14,294,000,000,000, outstanding at one time, subject to changes periodically made in that amount as provided by law through the congressional budget process described in Rule XLIX of the Rules of the House of Representatives or otherwise.

(c) For purposes of this section, the face amount, for any month, of any obligation issued on a discount basis that is not redeemable before maturity at the option of the holder of the obligation is an amount equal to the sum of--

(1) the original issue price of the obligation, plus

(2) the portion of the discount on the obligation attributable to periods before the beginning of such month (as determined under the principles of section 1272(a) of the Internal Revenue Code of 1986 without regard to any exceptions contained in paragraph (2) of such section).

CREDIT(S)

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 938; Pub.L. 98-34, § 1(a), May 26, 1983, 97 Stat. 196; Pub.L. 98-161, Nov. 21, 1983, 97 Stat. 1012; Pub.L. 98-342, § 1(a), July 6, 1984, 98 Stat. 313; Pub.L. 98-475, Oct. 13, 1984, 98 Stat. 2206; Pub.L. 99-177, § 1, Dec. 12, 1985, 99 Stat. 1037; Pub.L. 99-384, Aug. 21, 1986, 100 Stat. 818; Pub.L. 100-119, § 1, Sept. 29, 1987, 101 Stat. 754; Pub.L. 101-72, § 2, Aug. 7, 1989, 103 Stat. 182; Pub.L. 101-140, § 1, Nov. 8, 1989, 103 Stat. 830; Pub.L. 101-508, Title XI, § 11901, Nov. 5, 1990, 104 Stat. 1388-560; Pub.L. 103-66, Title XIII, § 13411(a), Aug. 10, 1993, 107 Stat. 565; Pub.L. 104-121, Title III, § 301, Mar. 29, 1996, 110 Stat. 875; Pub.L. 105-33, Title V, § 5701, Aug. 5, 1997, 111 Stat. 648; Pub.L. 107-199, § 1, June 28, 2002, 116 Stat. 734; Pub.L. 108-24, May 27, 2003, 117 Stat. 710; Pub.L. 108-415, § 1, Nov. 19, 2004, 118 Stat. 2337; Pub.L. 109-182, Mar. 20, 2006, 120 Stat. 289; Pub.L. 110-91, Sept. 29, 2007, 121 Stat. 988; Pub.L. 110-289, Div. C, Title III, § 3083, July 30, 2008, 122 Stat. 2908; Pub.L. 110-343, Div. A, Title I, § 122, Oct. 3, 2008, 122 Stat. 3790; Pub.L. 111-5, Div. B, Title I, § 1604, Feb. 17, 2009, 123 Stat. 366; Pub.L. 111-123, § 1, Dec. 28, 2009, 123 Stat. 3483; Pub.L. 111-139, Feb. 12, 2010, 124 Stat. 8.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1982 Acts

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3101(a)	31:757b (last sentence)	Sept. 24, 1917, ch. 56, 40 Stat. 288, § 21; added Feb. 4, 1935, ch. 5, § 5, 49 Stat. 21; May 26, 1938, ch. 285, § 2, 52 Stat. 447; July 20, 1939, ch. 336, 53 Stat. 1071; June 25, 1940, ch. 419, § 302, 54 Stat. 526; Feb. 19, 1941, ch. 7, § 2(a), 55 Stat. 7; Mar. 28, 1942, ch. 205, § 2, 56 Stat. 189; Apr. 11, 1943, ch. 52, § 2, 57 Stat. 63; June 9, 1944, ch. 240, § 2, 58 Stat. 272; Apr. 3, 1945, ch. 51, § 2, 59 Stat. 47; June 26, 1946, ch. 501, § 1, 60 Stat. 316; restated Sept. 2, 1958, Pub.L. 85-912, 72 Stat. 1758; June 30, 1959, Pub.L. 86-74, § 1, 73 Stat. 156; June 30, 1967, Pub.L. 90-39, § 1, 81 Stat. 99; Apr. 7, 1969, Pub.L. 91-8, § 1, 83 Stat. 7; June 30, 1970, Pub.L. 91-301, § 1, 84 Stat. 368; Mar. 17, 1971, Pub.L. 92-5, § 1, 85 Stat. 5; Sept. 29, 1979, Pub.L. 96-78, § 202, 93 Stat. 591.
3101(b)	31:757b (1st sentence)	
3101(c)	31:757b-1	June 30, 1967, Pub.L. 90-39, § 2, 81 Stat. 99.

In subsection (a), the words "is deemed to be" are substituted for "shall be considered . . . to be" because a legal fiction is intended.

1983 Acts. House Report No. 98-121, see 1983 U.S. Code Cong. and Adm. News, p. 577.

Senate Report No. 98-279 and House Conference Report No. 98-566, see 1983 U.S. Code Cong. and Adm. News, p. 1475.

1985 Acts. Senate Report No. 99-144, House Conference Report No. 99-433, and Statements by Legislative Leaders, see 1985 U.S. Code Cong. and Adm. News, p. 979.

1986 Acts. House Report No. 99-789, see 1986 U.S. Code Cong. and Adm. News, p. 1829.

1987 Acts. House Conference Report No. 100-313 and Statement by President, see 1987 U.S. Code Cong. and Adm. News, p. 739.

1989 Acts. House Report No. 101-188, see 1989 U.S. Code Cong. and Adm. News, p. 82.

1990 Acts. House Report No. 101-881, House Conference Report No. 101-964, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 2017.

1993 Acts. House Report No. 103-111 and House Conference Report No. 103-213, see 1993 U.S. Code Cong. and Adm. News, p. 378.

1997 Acts. House Report No. 105-149, House Conference Report No. 105-217, and Statement by President, see 1997 U.S. Code Cong. and Adm. News, p. 176.

2008 Acts. House Report No. 110-374(Parts I to III), see 2008 U.S. Code Cong. and Adm. News, p. 1504.

2009 Acts. House Report No. 111-16, see 2009 U.S. Code Cong. and Adm. News, p. 3.

Statement by President, see 2009 U.S. Code Cong. and Adm. News, p. S6.

References in Text

The Rules of the House of Representatives for the One Hundred Sixth Congress were adopted and amended generally by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999. Provisions formerly appearing in Rule XLIX, referred to in subsec. (b), were contained in Rule XXIII, which was subsequently repealed by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

Section 1272(a) of the Internal Revenue Code of 1986, referred to in subsec. (c), is classified to section 1272(a) of Title 26, Internal Revenue Code.

Amendments

2010 Amendments. Subsec. (b). Pub.L. 111-139, struck out the dollar limitation, which read "$12,394,000,000,000" and inserted "$14,294,000,000,000".

2009 Amendments. Subsec. (b). Pub.L. 111-123, § 1, struck out the dollar limitation, which read "$12,104,000,000,000" and inserted "$12,394,000,000,000".

Pub.L. 111-5, Div. B, § 1604, struck out the dollar limitation, which read "$11,315,000,000,000" and inserted "$12,104,000,000,000".

2008 Amendments. Subsec. (b). Pub.L. 110-343, Div. A, § 122, struck out the dollar limitation, which read "$10,615,000,000,000" and inserted "$11,315,000,000,000".

Pub.L. 110-289, Div. C, Title III, § 3803, struck out "$9,815,000,000,000" and inserted "$10,615,000,000,000".

2007 Amendments. Subsec. (b). Pub.L. 110-91, struck out "$8,965,000,000,000" and inserted "$9,815,000,000,000".

2006 Amendments. Subsec. (b). Pub.L. 109-182, struck out "$8,184,000,000,000" and inserted "$8,965,000,000,000".

2004 Amendments. Subsec. (b). Pub.L. 108-415, § 1, struck out "$7,384,000,000,000" and inserted "$8,184,000,000,000".

2003 Amendments. Subsec. (b). Pub.L. 108-24 struck out "$6,400,000,000,000" and inserted "$7,384,000,000,000".

2002 Amendments. Subsec. (b). Pub.L. 107-199, § 1, substituted "$6,400,000,000,000" for "$5,950,000,000,000".

1997 Amendments. Subsec. (b). Pub.L. 105-33, § 5701, substituted "$5,950,000,000,000" for "5,500,000,000,000".

1996 Amendments. Subsec. (b). Pub.L. 104-121, § 301, substituted "$5,500,000,000,000" for "$4,900,000,000,000".

1993 Amendments. Subsec. (b). Pub.L. 103-66, § 13411(a), substituted "$4,900,000,000,000" for "$4,145,000,000,000".

1990 Amendments. Subsec. (b). Pub.L. 101-508, § 11901[a], substituted "$4,145,000,000,000" for "$3,122,700,000,000."

1989 Amendments. Subsec. (b). Pub.L. 101-140 substituted "$3,122,700,000,000" for "$2,800,000,000,000".

Subsec. (c). Pub.L. 101-72 substituted provision that for purposes of this section, the face amount, for any month, of any obligation issued on a discount basis that is not redeemable before maturity at the option of the holder of the obligation is an amount equal to the sum of the original issue price of the obligation, plus the portion of the discount on the obligation attributable to periods before the beginning of such month, as determined under the principles of section 1272(a) of Title 26 without regard to any exceptions contained in paragraph (2) of such section, for provision that the face amount of beneficial interests and participations, except those held by their issuer, issued under section 1717(c) of Title 12, from July 1, 1967, through June 30, 1968, and outstanding at any time be included in the amount taken into account in deciding whether the face amount requirement of subsec. (b) of this section has been exceeded and that this subsection not require a change in the budgetary accounting for beneficial interests and participations.

1987 Amendments. Subsec. (b). Pub.L. 100-119 substituted "$2,800,000,000,000" for "$2,111,000,000,000".

1986 Amendments. Subsec. (b). Pub.L. 99-384, which directed that subsec. (b) be amended by "striking out the dollar limitation contained in such subsection and inserting in lieu thereof '$2,111,000,000,000,'" was executed by substituting "$2,111,000,000,000," for "$1,847,800,000,000, or $2,078,700,000,000 on and after October 1, 1985," as the probable intent of Congress.

1985 Amendments. Subsec. (b). Pub.L. 99-177 substituted "$1,847,800,000,000, or $2,078,700,000,000 on and after October 1, 1985" for "$1,575,700,000,000, or $1,823,800,000,000, on and after October 1, 1984".

1984 Amendments. Subsec. (b). Pub.L. 98-475 substituted "$1,575,700,000,000, or $1,823,800,000,000 on and after October 1, 1984," for "$1,573,000,000,000".

Pub.L. 98-342 substituted "may not be more than $1,573,000,000,000 outstanding at one time" for "may not be more than $1,389,000,000,000, or $1,490,000,000,000 on and after October 1, 1983, outstanding at one time".

1983 Amendments. Subsec. (b). Pub.L. 98-161 inserted ", or $1,490,000,000,000 on and after October 1, 1983," after "$1,389,000,000,000".

Pub.L. 98-34 substituted "1,389,000,000,000" for "$400,000,000,000".

Treatment of Certain Obligations of the United States

Pub.L. 104-115, § 1(a) to (c), Mar. 12, 1996, 110 Stat. 825, provided that:

"(a) In general.--In addition to any other authority provided by law, the Secretary of the Treasury may issue to each Federal fund obligations of the United States under chapter 31 of title 31, United States Code [this chapter], before March 30, 1996, in an amount not to exceed the sum of--

"(1) the amounts deposited in such fund on or after the earlier of--

"(A) the date on which such Secretary would not otherwise be able to issue such obligations to such fund, or

"(B) March 15, 1996,

and before March 30, 1996, and

"(2) the face amount of obligations held by such fund which mature during such period.

"(b) Obligations exempt from public debt limit.--

"(1) In general.--Obligations issued under subsection (a) shall not be taken into account in applying the limitation in section 3101(b) of title 31, United States Code [subsec. (b) of this section].

"(2) Termination of exemption.--Paragraph (1) shall cease to apply on the earlier of--

"(A) the date of the enactment of the first increase in the limitation in section 3101(b) of title 31, United States Code, after the date of the enactment of this Act [Mar. 12, 1996], or

"(B) March 30, 1996.

"(c) Federal fund.--For purposes of this section, the term 'Federal fund' means any Federal trust fund or Government account established pursuant to Federal law to which the Secretary of the Treasury has issued or is expressly authorized by law directly to issue obligations under chapter 31 of title 31, United States Code [this chapter], in respect of public money, money otherwise required to be deposited in the Treasury, or amounts appropriated."

Timely Payment of March 1996 Social Security Benefits Guaranteed

Pub.L. 104-103, § 1, Feb. 8, 1996, 110 Stat. 55, as amended Pub.L. 104-115, § (1)(d), Mar. 12, 1996, 110 Stat. 825, provided that:

"(a) Findings.--

"(1) Congress intends to pass an increase in the public debt limit before March 1, 1996.

"(2) In the interim, social security beneficiaries should be assured that social security benefits will be paid on a timely basis in March 1996.

"(b) Guarantee of social security benefit payments.--In addition to any other authority provided by law, the Secretary of the Treasury may issue under chapter 31 of title 31, United States Code [this chapter], obligations of the United States before March 1, 1996, in an amount equal to the monthly insurance benefits payable under title II of the Social Security Act [Title II of Act Aug. 14, 1935, c. 531, 49 Stat. 620, as amended, which is classified to subchapter II (section 401 et seq.) of chapter 7 of Title 42, The Public Health and Welfare] in March 1996.

"(c) Obligations exempt from public debt limit.--

"(1) In general.--Obligations issued under subsection (b) shall not be taken into account in applying the limitation in section 3101(b) of title 31, United States Code [subsec. (b) of this section].

"(2) Termination of exemption.--Paragraph (1) shall cease to apply on the earlier of--

"(A) the date of the enactment of the first increase in the limitation in section 3101(b) of title 31, United States Code [subsec. (b) of this section], after the date of the enactment of this Act [Feb. 8, 1996], or

"(B) March 30, 1996."

Temporary Increases in Public Debt

The public debt limit set forth in this section was temporarily increased for limited periods by the following Acts:

April 6, 1993, Pub.L. 103-12, 107 Stat. 42--

Increase public debt limit to $4,370,000,000,000 during period beginning on April 6, 1993, and ending on September 30, 1993.

Oct. 28, 1990, Pub.L. 101-467, § 106, 104 Stat. 1087--

Increase public debt limit to $3,230,000,000,000 during period beginning Oct. 28, 1990, and ending on Nov. 5, 1990.

Aug. 9, 1990, Pub.L. 101-350, § 1, 104 Stat. 403, as amended, Oct. 2, 1990, Pub.L. 101-405, § 1, 104 Stat. 878; Oct. 9, 1990, Pub.L. 101-412, § 114, 104 Stat. 897; Oct. 19, 1990, Pub.L. 101-444, § 114, 104 Stat. 1033; Oct. 25, 1990, Pub.L. 101-461, § 114, 104 Stat. 1078--

Increase public debt limit to $3,195,000,000,000 during period beginning on Aug. 9, 1990, and ending on Oct. 27, 1990.

Aug. 7, 1989, Pub.L. 101-72, § 1, 103 Stat. 182--

Increase public debt limit by $70,000,000,000 during period beginning on Aug. 7, 1989, and ending on Oct. 31, 1989.

Aug. 10, 1987, Pub.L. 100-84, § 1, 101 Stat. 550--

Increase public debt limit to $2,352,000,000,000 during the period beginning on Aug. 10, 1987, and ending on Sept. 23, 1987.

May 15, 1987, Pub.L. 100-40, § 1(a), 101 Stat. 308, as amended July 30, 1987, Pub.L. 100-80, § 1(a), 101 Stat. 542--

Increase public debt limit to $2,320,000,000,000 during the period beginning May 15, 1987, and ending August 6, 1987.

[Section 1(b) of Pub.L. 100-80 provided that: "The amendment made by subsection (a) [amending section 1(a) of Pub.L. 100-40 by substituting "August 6, 1987" for "July 17, 1987"] shall take effect on the date of the enactment of this Act [July 30, 1987]."]

Oct. 21, 1986, Pub.L. 99-509, Title VIII, § 8201, 100 Stat. 1968--

Increase of $189,000,000,000 for the period Oct. 21, 1986 to May 15, 1987.

Nov. 14, 1985, Pub.L. 99-155, § 1, 99 Stat. 814--

Increase by an amount determined by the Secretary of the Treasury as necessary to permit the United States to meet its obligations, but not resulting in a public debt limit in excess of $1,903,800,000,000.

Sept. 30, 1982, Pub.L. 97-270, 96 Stat. 1156--

Increase of $890,200,000,000 for the period Oct. 1, 1982 to Sept. 30, 1983.

June 28, 1982, Pub.L. 97-204, 96 Stat. 130--

Increase of $743,100,000,000 for the period June 28, 1982 to Sept. 30, 1982.

Sept. 30, 1981, Pub.L. 97-49, 95 Stat. 956--

Increase of $679,800,000,000 for the period Oct. 1, 1981 to Sept. 30, 1982.

Repeal of Permanent Increase in Public Debt Limit

Pub.L. 98-302, § 1, May 25, 1984, 98 Stat. 217, which had permanently increased the public debt limit by $30,000,000,000 effective May 25, 1984, was repealed by Pub.L. 98-342, § 1(b), July 6, 1984, 98 Stat. 313, effective on and after July 6, 1984.

Repeal of Temporary Debt Limit Increase

Pub.L. 103-12, Apr. 6, 1993, 107 Stat. 42, providing for a temporary increase of $4,370,000,000 for the period Apr. 6, 1993, to Sept. 30, 1993, was repealed by Pub.L. 103-66, Title XIII, § 13411(b), Aug. 10, 1993, 107 Stat. 565, effective Aug. 10, 1993.

Pub.L. 99-509, Title VIII, § 8201, Oct. 21, 1986, 100 Stat. 1968, providing for a temporary increase of $189,000,000,000 for the period Oct. 21, 1986, to May 15, 1987, was repealed by Pub.L. 100-40, § 1(b), May 15, 1987, 101 Stat. 308, effective May 15, 1987.

Pub.L. 97-270, Sept. 30, 1982, 96 Stat. 1156, providing for a temporary increase of $890,200,000,000 for the period Oct. 1, 1982, to Sept. 30, 1983, was repealed by Pub.L. 98-34, § 1(b), May 26, 1983, 97 Stat. 196, effective May 26, 1983.

Pub.L. 97-204, June 28, 1982, 96 Stat. 130, providing for a temporary increase of $743,100,000,000 for the period June 28, 1982, to Sept. 30, 1982, was rendered inapplicable under the terms of parenthetical provisions set out in Pub.L. 97-270, Sept. 30, 1982, 96 Stat. 1156.

Pub.L. 97-49, Sept. 30, 1981, 95 Stat. 956, providing for a temporary increase of $679,800,000,000 for the period Oct. 1, 1981, to Sept. 30, 1982, was rendered inapplicable under the terms of parenthetical provisions set out in Pub.L. 97-204, June 28, 1982, 96 Stat. 130.

Pub.L. 97-48, Sept. 30, 1981, 95 Stat. 955, providing for a temporary increase of $599,800,000,000 for the period Sept. 30, 1981 to Sept. 30, 1981, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 97-2, Feb. 7, 1981, 95 Stat. 4, providing for a temporary increase of $585,000,000,000 for the period Feb. 7, 1981 to Sept. 30, 1981, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 96-556, § 1, Dec. 19, 1980, 94 Stat. 3261, providing for a temporary increase of $535,100,000,000 for the period Oct. 1, 1980 to Sept. 30, 1981, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 96-286, § 1, June 28, 1980, 94 Stat. 598, providing for a temporary increase of $525,000,000,000 for the period June 28, 1980 to Feb. 28, 1981, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 96-78, Title I, § 101(a), Sept. 29, 1979, 93 Stat. 589, as amended Pub.L. 96-256, May 30, 1980, 94 Stat. 421; Pub.L. 96-264, § 1, June 6, 1980, 94 Stat. 439, providing for a temporary increase of $479,000,000,000 for the period Sept. 29, 1979 to

June 30, 1980, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 96-5, § 1, Apr. 2, 1979, 93 Stat. 8, providing for a temporary increase of $430,000,000,000 for the period Apr. 2, 1979 to Sept. 30, 1979, was repealed by Pub.L. 96-78, Title I, § 101(b), Sept. 29, 1979, 93 Stat. 589 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 95-333, § 1, Aug. 3, 1978, 92 Stat. 419, providing for a temporary increase of $398,000,000,000 in the public debt limit for the period Oct. 3, 1978 to Mar. 31, 1979, was repealed by Pub.L. 96-5, § 2, Apr. 2, 1979, 93 Stat. 8 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 95-120, § 1, Oct. 4, 1977, 91 Stat. 1090, as amended, providing for a temporary increase of $352,000,000,000 in the public debt limit for the period Oct. 4, 1977 to July 31, 1978, was repealed by Pub.L. 95-333, § 2, Aug. 3, 1978, 92 Stat. 419 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 94-334, § 1, June 30, 1976, 90 Stat. 793, providing for a temporary increase of $300,000,000,000 in the public debt limit for the period Apr. 1, 1977 to Sept. 30, 1977, was repealed by Pub.L. 95-120, § 2, Oct. 4, 1977, 91 Stat. 1090 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 94-232, § 1, Mar. 15, 1976, 90 Stat. 217, providing for a temporary increase of $227,000,000,000 for the period Mar. 15, 1976 to June 30, 1976, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 94-132, § 1, Nov. 14, 1975, 89 Stat. 693, providing for a temporary increase of $195,000,000,000 in the public debt limit for the period Nov. 14, 1975 to Mar. 15, 1976, was repealed by Pub.L. 94-232, § 2, Mar. 15, 1976, 90 Stat. 217 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 94-47, § 1, June 30, 1975, 89 Stat. 246, providing for a temporary increase of $177,000,000,000 in the public debt limit for the period June 30, 1975 to Nov. 15, 1975, was repealed by Pub.L. 94-132, § 2, Nov. 14, 1975, 89 Stat. 693 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 94-3, § 1, Feb. 19, 1975, 89 Stat. 5, providing for a temporary increase of $131,000,000,000 in the public debt limit for the period Feb. 19, 1975 to June 30, 1975, was repealed by Pub.L. 94-47, § 2, June 30, 1975, 89 Stat. 246 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 93-325, § 1, June 30, 1974, 88 Stat. 285, providing for a temporary increase of $95,000,000,000 in the public debt limit for the period June 30, 1974 to Mar. 31, 1975, was repealed by Pub.L. 94-3, § 2, Feb. 19, 1975, 89 Stat. 5 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 93-173, § 1, Dec. 3, 1973, 87 Stat. 691, providing for a temporary increase of $75,700,000,000 in the public debt limit for the period of Dec. 3, 1973 to June 30, 1974, was repealed by Pub.L. 93-325, § 2, June 30, 1974, 88 Stat. 285, eff. June 30, 1974 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 92-599, Title I, § 101, Oct. 27, 1972, 86 Stat. 1324, as amended Pub.L. 93-53, § 1, July 1, 1973, 87 Stat. 134, providing for a temporary increase of $65,000,000,000 in the public debt limit for the period of Nov. 1, 1972 to Nov. 30, 1973, was repealed by Pub.L. 93-173, § 2, Dec. 3, 1973, 87 Stat. 691, eff. Dec. 3, 1973 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 92-250, Mar. 15, 1972, 86 Stat. 63, as amended Pub.L. 92-336, Title I, § 1, July 1, 1972, 86 Stat. 406, providing for a temporary increase of $20,000,000,000 for the period Mar. 15, 1972 to Oct. 31, 1972, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 92-5, Title I, § 2(a), Mar. 17, 1971, 85 Stat. 5, as amended July 1, 1972, Pub.L. 92-336, Title I, § 1, 86 Stat. 406, providing for a temporary increase of $30,000,000,000 for the period of Mar. 17, 1971 to Oct. 31, 1972, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 91-301, § 2, June 30, 1970, 84 Stat. 368, providing for a temporary increase of $15,000,000,000 in the public debt limit for the period of June 30, 1970 to June 30, 1971, was repealed by Pub.L. 92-5, Title I, § 2(b), Mar. 17, 1971, 85 Stat. 5, eff. Mar. 17, 1971 and by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 91-8, § 2, Apr. 7, 1969, 83 Stat. 7, providing for a temporary increase of $12,000,000,000 for the period Apr. 7, 1969 to June 30, 1970, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 90-3, Mar. 2, 1967, 81 Stat. 4, providing for a temporary increase from $285,000,000,000 to $336,000,000,000 for the period Mar. 2, 1967 to June 30, 1967, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 89-472, June 24, 1966, 80 Stat. 221, providing for a temporary increase from $285,000,000,000 to $330,000,000,000 for the period July 1, 1966 to June 30, 1967, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 89-49, June 24, 1965, 79 Stat. 172, providing for a temporary increase from $285,000,000,000 to $328,000,000,000 for the period July 1, 1965 to June 30, 1966, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 88-327, June 29, 1964, 78 Stat. 255, providing for a temporary increase from $285,000,000,000 to $324,000,000,000 for the period June 29, 1964 to June 30, 1965, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 88-187, Nov. 26, 1963, 77 Stat. 342, providing for a temporary increase from $285,000,000,000 to $309,000,000,000 for the period Dec. 1, 1963 to June 30, 1964 and a further increase of $6,000,000,000 for the period Dec. 1, 1963 through June 29, 1964 because of variations in the timing of revenue receipts, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 88-106, Aug. 27, 1963, 77 Stat. 131, providing for a temporary increase from $285,000,000,000 to $309,000,000,000 for the period Sept. 1, 1963 to Nov. 30, 1963, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 88-30, § 1(2), May 29, 1963, 77 Stat. 50, providing for a temporary increase from $285,000,000,000 to $309,000,000,000 for the period July 1, 1963 to Aug. 31, 1963, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 88-30, § 1(1), May 29, 1963, 77 Stat. 50, providing for a temporary increase from $285,000,000,000 to $307,000,000,000 for the period May 29, 1963 to June 30, 1963, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 87-512, § 1(3), July 1, 1962, 76 Stat. 124, providing for a temporary increase from $285,000,000,000 to $300,000,000,000 for the period June 25, 1963 to June 30, 1963, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 87-512, § 1(2), July 1, 1962, 76 Stat. 124, providing for a temporary increase from $285,000,000,000 to $305,000,000,000 for the period Apr. 1, 1963 to June 24, 1963, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 87-512, § 1(1), July 1, 1962, 76 Stat. 124, providing for a temporary increase from $285,000,000,000 to

$308,000,000,000 for the period July 1, 1962 to Mar. 31, 1963, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 87-414, Mar. 13, 1962, 76 Stat. 23, providing for a temporary increase from $285,000,000,000 to $300,000,000,000 for the period Mar. 13, 1962 to June 30, 1962, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 87-69, June 30, 1961, 75 Stat. 148, providing for a temporary increase from $285,000,000,000 to $298,000,000,000 for the period July 1, 1961 to June 30, 1962, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 86-564, Title I, § 101, June 30, 1960, 74 Stat. 290, providing for a temporary increase from $285,000,000,000 to $293,000,000,000 for the period July 1, 1960 to June 30, 1961, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 86-74, § 2, June 30, 1959, 73 Stat. 156, providing for a temporary increase from $285,000,000,000 to $295,000,000,000 for the period July 1, 1959 to June 30, 1960, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Pub.L. 85-336, Feb. 26, 1958, 72 Stat. 27, providing for a temporary increase from $275,000,000,000 to $280,000,000,000 for the period Feb. 26, 1958 to June 30, 1959, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

July 9, 1956, c. 536, 70 Stat. 519, providing for a temporary increase from $275,000,000,000 to $278,000,000,000 for the period July 1, 1956 to June 30, 1957, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Aug. 28, 1954, c. 1037, 68 Stat. 895, as amended by Act June 30, 1955, c. 256, 69 Stat. 241, providing for a temporary increase from $275,000,000,000 to $281,000,000,000 for the period Aug. 28, 1954 to June 30, 1956, was repealed by Pub.L. 97-258, § 5(b), Sept. 13, 1982, 96 Stat. 1068.

Restoration of Trust Fund Investments

Provisions in the following Acts required the Secretary of the Treasury to restore certain Federal trust funds and Government accounts to the position such funds and accounts would have reached if delays in the increase of the debt limitation under subsec. (b) of this section had not prevented such funds and accounts from making investments during such periods of delay:

Pub.L. 101-508, Title XI, § 11901(b), Nov. 5, 1990, 104 Stat. 1388-560.

Pub.L. 101-140, Title III, §301, Nov. 8, 1989, 103 Stat. 8333.

Pub.L. 99-177, Title II, § 272, Dec. 12, 1985, 99 Stat. 1095.

LAW REVIEW COMMENTARIES

Beyond truth-in-lending--federal regulation of debt collection. R. Glen Ayers, Jr., 16 St.Mary's L.J. 329 (1985).

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West's Federal Administrative Practice § 2412, Where to Find the Law.

NOTES OF DECISIONS

1. Debts

Former § 757b of this title was only concerned with debt that arose from borrowing. 1967, 42 Op.Atty.Gen., Feb. 3.

2. Obligations

Many guaranties which created valid and binding obligations of the United States, entitled to its full faith and credit, were not obligations within the more limited meaning of former § 757b of this title. 1967, 42 Op.Atty.Gen., February 3.

Participation certificates issued under § 1717 of Title 12 were not included among the government "obligations" whose aggregate amount did not exceed the ceiling set by former § 757b of this title, as modified by Pub.L. 89-472, June 24, 1966, 80 Stat. 221. 1967, 42 Op.Atty.Gen., February 3.

3. Registration

Treasury Department properly construed the term "registration" as being the date upon which Federal Reserve Board indicated creation of account within its computer system for Federal Housing Administration (FHA) general insurance fund debentures; Treasury Department's long standing practice of treating debentures as registered from time they are posted to its bookkeeping system was reasonable, given the generality of statute and regulatory definitions of term, the enormous volume of transactions, and the inherent ambiguity of awaiting manual act to signal liability. Meridian Mortg. Corp. v. U.S., Cl.Ct.1992, 24 Cl.Ct. 811, affirmed 980 F.2d 745. United States 53(9)

31 U.S.C.A. § 3101, 31 USCA § 3101

Current through P.L. 112-23 approved 6-29-11

END OF DOCUMENT

PRESIDENTIAL IMPOUNDMENT PART I: HISTORICAL GENESIS AND CONSTITUTIONAL FRAMEWORK

RALPH S. ABASCAL* AND JOHN R. KRAMER**

Presidential impoundment provides a focus for the contest between the Executive and Congress over control of the federal budget. In the first part of a two-part article, the authors analyze the history of the federal budgetary system and demonstrate that the Executive cannot derive impoundment authority from any of the statutes establishing budget procedures or appropriation authorization. Impoundment results in a shift of budget power from Congress to the President; throughout history Congress has refused to authorize this diminution of its power. In a subsequent issue, Part II will analyze the judicial and legislative response to impoundment.

During the closing months of 1972 and the early months of 1973, the President of the United States, exercising what he termed his "absolutely clear" "constitutional right," [1] refused to spend billions of dollars in funds appropriated or otherwise provided for obligation, allotment, or allocation by Congress.[2] Disturbed at what many members viewed as an infringement upon its power to make the laws,[3] Congress sought to recapture its threatened budgetary authority.[4] Almost overnight, "impoundment" of funds, a practice that had occurred and recurred throughout 170 years of conflict between the Executive and Congress

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1 9 WEEKLY COMPILATION OF PRES. DOC. 109-110 (1973) (press conference of Jan. 31, 1973).

2 Pursuant to the reporting requirements of the Federal Impoundment and Information Act, the Office of Management and Budget (OMB) has transmitted six reports to Congress detailing the status of budgetary reserves. *See* 31 U.S.C. § 581c-1 (1970); 38 Fed. Reg. 3474-96 (1973) (as of Jan. 29, 1973, reserves totalled $8.723 billion); 38 Fed. Reg. 12137-42 (1973) (as of Apr. 14, 1973, reserves totalled $8.456 billion); 38 Fed. Reg. 19582-602 (1973) (as of June 30, 1973, reserves totalled $7.732 billion); 38 Fed. Reg. 29390-98 (1973) (as of Sept. 30, 1973, reserves totalled $7.446 billion); 39 Fed. Reg. 7708-49 (1974) (as of Feb. 4, 1974, reserves totalled $11.813 billion); 39 Fed. Reg. 17371-421 (1974) (as of Apr. 20, 1974, reserves totalled $10.384 billion).

The budgetary reserves set forth in these OMB reports focus exclusively upon the Executive's withholding of appropriations and of contract authority for temporary or prolonged periods. Appropriations derive from statutes specifically permitting federal agencies to incur obligations, which the Treasury will pay, within the limits set by the legislation authorizing particular programs. *See* OMB, THE BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1975, at 275, 278 (1974). Contract authority, another form of budgeting authority, permits government agencies to incur obligations by entering into long term contracts that will require later appropriations to liquidate the obligations that fall due. Such authority does not authorize actual expenditure of monies. *See id.* at 278-79.

OMB specifically excludes from its calculation of budgetary reserves, and thus from its definition of the term "impoundment," funds provided by Congress that are "either outside the apportionment process or require Executive determination before they become subject to apportionment." 39 Fed. Reg. 17372 (1974). Thus, the April 20, 1974, total of $10.384 billion in impounded funds does not include $6 billion in unallotted funds appropriated for water pollution control in fiscal years 1973 and 1974 pursuant to the Federal Water Pollution Control Act Amendments of 1972. 86 Stat. 816 (codified in scattered sections of 12, 15, 31, 33 U.S.C.).

3 Congress derives authority over the expenditure of funds from various provisions of the Constitution. *See, e.g.*, U.S. CONST. art. I, § 1 ("all legislative powers herein granted shall be vested in a Congress of the United States . . ."); *id.* art. I, § 7, cl. 2 ("Every Bill which shall have passed" becomes a law subject to the President's veto); *id.* art. I, § 7, cl. 3 (all orders, resolutions, and votes requiring concurrence of Senate and House take effect subject to the President's veto); *id.* art. I, § 8, cl. 1 ("Power to lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the Common Defense and general welfare of the United States . . ."); *id.* art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."); *id.* art. II, § 3, (the President "shall take Care that the laws be faithfully executed . . .").

4 In addition to establishing the reporting requirements of the Federal Impoundment and Information Act, Congress sought to apply specific limitations to the President's impoundment of funds for the Departments of Labor and Health, Education and Welfare to mandate expenditures in a variety of programs by employing the term "shall" wherever possible, to tie certain expenditures to the release of impounded funds, and to include in at least one statute a "sense of Congress" provision stating, "under existing law no part of any sums authorized to be appropriated for expenditure which has been apportioned pursuant to the provisions of this title shall be impounded or withheld for obligation. . . ." Federal-Aid Highway Act of 1970, 23 U.S.C. § 101(c) (1970); *see* Act of Dec. 18, 1973, Pub. L. No. 93-192, 87 Stat. 746 (impoundment "not to exceed $400 million . . . may be withheld from obligation and expenditure," but no individual appropriation provision, activity, program, or project could be cut by more than five percent); H.R. 3298, 93d Cong., 1st Sess. (1973) (Secretary of Agriculture "shall" carry out programs of planning and development grants in water and waste disposal); S. 1440, 93d Cong., 1st Sess. (1973) (Secretary of Housing and Urban Development "shall" expend funds for housing); 119 CONG. REC. S. 12625-27 (daily ed. June 30, 1973) (Senate amendment prohibiting use of any funds by the Secretary of Housing and Urban Development unless he made funds available for obligation under contract authority for four terminated housing programs).

over control of the nation's budget,[5] became a prominent term in the American political vocabulary.[6] Impoundment of funds was the subject of a multitude of academic commentaries,[7] law suits,[8] and legislative

[5] In the first historical incident of note, President Jefferson deferred for one year the expenditure of $500,000 appropriated by Congress for the construction of gunboats for use on the Mississippi River because the Louisiana Purchase gave both banks of the river to the United States and thus rendered "an immediate execution of that law unnecessary." *See* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 360, 372 (J. Richardson ed. 1897); Cooper, *Analysis of Alleged 1803 Precedent for Impoundment Practice in Nixon Administration*, in *Joint Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 676-77 (1973) [hereinafter cited as *Ervin Hearings II*].

[6] Most commentators—legal or political—grapple with a definition of the term "impoundment," but any attempt to define it in the abstract is futile. Louis Fisher concludes that "[d]espite the volume of commentary . . . no one can say precisely what 'impoundment' is." Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFF. L. REV. 141, 144 (1973). For some efforts that prove the validity of Fisher's assessment see *Campaign Clean Water v. Train* and Note, *Presidential Impoundment: Constitutional Theories and Political Realities*. 489 F.2d 492, 496 n.9 (D.C. Cir. 1974); 61 GEO. L.J. 1295, 1295-97 (1973).

The definitional quest is futile because it depends upon legal conclusions about the permissibility of the act which, in turn, depend upon assessment of the circumstances surrounding each executive action (or inaction) to be analyzed. Thus, all that can be achieved by way of definition is a tautology: "impoundment" is an unauthorized executive refusal to spend appropriated funds or, in the words of section 1011 of the Congressional Budget and Impoundment Control Act of 1974, "withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities" or "any other type of Executive action or inaction which effectively precludes the obligations or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law." Act of July 12, 1974, Pub. L. No. 93-344, § 1011, 88 Stat. 297.

[7] *See, e.g.*, Baade, *Mandatory Appropriations of Public Funds: A Comparative Study*, 60 VA. L. REV. 393, 611 (1974); Fisher, *supra* note 6; Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROB. 135 (Winter 1972); Levinson & Mills, *Impoundment: A Search For Legal Principles*, 26 U. FLA. L. REV. 191 (1974); Pine, *The Impoundment Dilemma: Crisis in Constitutional Government*, 3 YALE REV. OF LAW & SOC. ACTION 99 (1973); Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1 (1974); Stanton, *The Presidency and The Purse: Impoundment 1803-1973*, 45 U. COLO. L. REV. 25 (1973); Note, *The Impoundment Question—An Overview*, 40 BROOK. L. REV. 342 (1973); Note, *The Limits of Executive Power: Impoundment of Funds*, 23 CATH. U. L. REV. 359 (1973); Note, *Presidential Impoundment: Constitutional Theories and Political Realities*, 61 GEO. L. J. 1295 (1973); Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973); Note, *Separation of Powers—Impoundment of Funds*, 6 IND. L. REV. 523 (1973); Note, *The Likely Law of Executive Impoundment*, 59 IOWA L. REV. 50 (1973); Note, *President and Congress: Impoundment of Domestic Funds*, 3 N.Y.U. REV. OF LAW &

hearings,[9] and the contending forces appeared headed inevitably for a confrontation before the Supreme Court.[10]

Then, like the comet Kohoutek, the issue of impoundment disappeared from sight as quickly as it had arisen, displaced in the public eye by the more seductive issues of Watergate, executive privilege, and impeachment. When, in mid-June 1974, the House Judiciary Committee considered impoundment as possible grounds for impeachment, the staff of the Committee cautioned against transforming into a charge of "high crime and misdemeanor" the attempt by one branch of government to exercise its power to the fullest extent and to "temporarily abrade the powers or prerogatives of another branch." [11] By that time, Congress had acted to reassert its budgetary control by enacting im-

SOC. CHANGE 93 (1973); Note, *Impoundment of Funds Appropriated by Congress*, 34 OHIO ST. L.J. 416 (1973); Note, *Jurisdictional and Constitutional Questions Concerning Judicial Relief From Impoundments: Eighth Circuit Holds Substantive Content of Appropriation Laws is the Dispositive Factor*, 27 RUTGERS L. REV. 201 (1973); Note, *Executive Impoundment of Congressionally Appropriated Funds*, 20 WAYNE L. REV. 187 (1973); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636 (1973); Comment, *Presidential Impounding of Funds: The Judicial Response*, 40 U. CHI. L. REV. 328 (1973).

[8] The largest single group of cases involved funds appropriated for Department of Health, Education and Welfare programs. *See* 120 CONG. REC. S 4443 (daily ed. Mar. 26, 1974) (citing at least 23 cases). The pleadings in nine of the initial impoundment cases are reprinted in the Ervin Hearings transcripts. *See Ervin Hearings II*, *supra* note 5, at 908-1010.

[9] *See, e.g., 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) [hereinafter cited as *Ervin Hearings I*]; *Ervin Hearings II*, *supra* note 5; *Hearings on Impoundment Reporting and Review Before the House Comm. on Rules*, 93d Cong., 1st Sess. (1973); *Hearings on H.R. 2107 Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. (1973) (Rural Environmental Assistance Program); *Hearings on Impoundment of Funds for Farm and Rural Programs Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 1st Sess. (1973); *Hearings on H.R. 3219, H.R. 3298 Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. (1973) (sewer and water grants); *Hearings on H.R. 2276, H.R. 5683, S. 394 Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. (1973).

[10] The Supreme Court on October 9, 1973 refused to grant the State of Georgia leave to file a bill of complaint invoking the Court's original jurisdiction over three causes of action by the state against the President and others for impounding funds appropriated under the Federal-Aid Highway Act, title III-A of the National Defense Education Act of 1958, and the Federal Water Pollution Control Act. *See* State of Georgia v. Nixon, 414 U.S. 810 (1973); Federal-Aid Highway Act of 1970, 23 U.S.C. §§ 101-44 (1970); Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-75 (1970).

[11] Impeachment Inquiry Staff, House Comm. on the Judiciary, Memorandum—The Impeachment Inquiry—Report on Impoundment of Funds 90, June 12, 1974. The staff's memorandum contains a full review of the interaction between the Legislature and the Executive over impoundment in 1973 and 1974.

poundment control provisions in title 10 of the Congressional Budget and Impoundment Control Act of 1974.[12] In addition, the courts almost universally had resolved impoundment cases against the Executive,[13] which had obeyed final court decrees directing the release of funds. Impoundment was almost a dead issue.

The finality of the resolution of the impoundment issue was, however, greatly exaggerated. Its meteoric fall in public attention does not accurately reflect its continuing economic and legal significance. While the House Judiciary Committee was invited to overlook impoundment, however unjustified, sustained, or deliberate, as a basis for the exercise of Congress's removal power, the Office of Management and Budget reported a grand total of $10.384 billion held in budgeting reserves for fiscal year 1974.[14] The cascade of litigation in this area undoubtedly is diminishing,[15] but the Supreme Court apparently is now prepared to entertain the issue, or at least a part of it; the Court has agreed to review two cases relating to the alleged impoundment of $6 billion and of $11 billion allotted under the Water Pollution Control Act.[16] However, a definitive and comprehensive Supreme Court answer to the question of executive impoundment power is by no means certain. While both cases involve threshold executive claims of sovereign immunity,

[12] *See* Act of July 12, 1974, Pub. L. No. 93-344, 88 Stat. 297.

[13] Only four cases have upheld any of the Executive's arguments. *See* Brown v. Ruckelshaus, 364 F. Supp. 258 (C.D. Cal. 1973) (failure to allot Federal Water Pollution Control Act funds); Local 2816, Am. Fed'n of Gov't Employees v. Phillips, 360 F. Supp. 1092 (N.D. Ill. 1973) (phasing out of activities of Office of Economic Opportunity); Housing Authority v. HUD, 340 F. Supp. 654 (N.D. Cal. 1972) (failure to release urban renewal funds); San Francisco Redevelopment Agency v. Nixon, 329 F. Supp. 672 (W.D. Cal. 1971) (failure to allot housing funds).

[14] 39 Fed. Reg. 17371-421 (1974).

[15] Only five substantial cases have been filed in 1974. *See* State of Arkansas *ex rel.* Tucker v. Train, Civil No. 74-Z-150 (E.D. Ark., filed May 22, 1974) (refusal to allot three billion dollars in fiscal year 1975 water pollution control funds); Congressional Rural Caucus v. Ash, Civil No. 74-745 (D.D.C., filed May 16, 1974) (impoundment of $4½ billion appropriated under a collection of nine agricultural, housing, and highway programs); Illinois v. Butz, Civil No. 74c-908 (N.D. Ill., filed Apr. 11, 1974) (failure to spend $120 million for waste disposal and water systems; funds released by Secretary on May 6, 1974); Washington v. Brinegar, Civil No. 74-655 (D.D.C., filed Apr. 1, 1974) (withholding of highway fund apportionments); Texas v. Train, Civil No. A-74 CA004 (W.D. Tex., filed Jan. 14, 1974 (failure to allot water pollution control monies).

[16] *See* Train v. City of New York, 494 F.2d 1033 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3606 (U.S. Apr. 29, 1974) (No. 73-1377); Train v. Campaign Clean Water, Inc., 489 F.2d 492 (4th Cir. 1973), *cert. granted*, 42 U.S.L.W. 3607 (U.S. Apr. 29, 1974) (No. 73-1378); 33 U.S.C. §§ 1151-75 (1970).

they ultimately raise questions only of statutory construction.[17] The Court's decisions thus are likely to resolve the statutory question of the existence of a congressional mandate denying executive power to impound Water Pollution Control Act funds but not the constitutional issues involved. The Court could offer broader guidance for lower courts but only by overstepping its self-imposed rule limiting opinions to the narrowest issues before the Court.[18] Few of the remaining cases are likely to reach the Supreme Court,[19] and even if one or more do, the parties and the Court may not explore the constitutional controversy outside of the factually limited question of whether Congress intended to order the Executive to expend the entire amount of the particular appropriation.

Neither the constitutional issues nor the cases dealing with impoundment can be analyzed meaningfully without extensive historical examination of the evolution of the federal budgetary system. The inquiry

[17] In *City of New York v. Train* the United States Court of Appeals for the District of Columbia Circuit emphasized that the case presented no constitutional question and further stressed that the only question before the court was whether the Federal Water Pollution Control Act contained authority to impound. 494 F.2d 1033, 1050 n.39 (D.C. Cir. 1973). The United States Court of Appeals for the Fourth Circuit in *Campaign Clean Water, Inc. v. Train* viewed the case as calling for a determination of whether the plaintiff had satisfied his burden of establishing that the Executive had acted arbitrarily in excess of the discretion granted to him by Congress "under a particular spending bill." 489 F.2d 492, 499, 501 (4th Cir. 1973). The focus is on the limits of executive authority under a particular piece of legislation and under the Anti-Deficiency Act rather than on a question of constitutional interpretation, although the court did suggest that "an issue of constitutional dimensions" was involved. *See* 31 U.S.C. § 665 (1970). *Compare* 489 F.2d 492, 498 n.20 (4th Cir. 1973) *with id.* at 499 n.21.

[18] *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 346, 347 (1936) (Brandeis, J., concurring); United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971). *Compare* Mayor v. Educational Equality League, 94 S. Ct. 1323, 1337 (1974) *with id.* at 1340-41 (White, J., dissenting). *But see* Curtis v. Loether, 94 S. Ct. 1005, 1007 n.6 (1974) (deciding constitutional question where issue clearly settled by prior decisions rather than relying upon statutory construction); Hagans v. Lavine, 94 S. Ct. 1372, 1387, 1393 n.11 (1974) (Rehnquist, J., dissenting) (Court should not use statutory ground as a preferred ground of decision where constitutional claim was primarily pleaded to confer jurisdiction).

[19] The large group of cases involving funds granted to the Secretary of the Department of Health, Education and Welfare (HEW) for various programs has been rendered moot by the compromise reached by the President and Congress in a 1974 Department of Labor-HEW appropriation bill. *See* note 8 *supra*; Act of Dec. 18, 1973, Pub. L. No. 93-192, 87 Stat. 746. Congress granted authority to the President to impound up to five percent of any single appropriation in the bill, the aggregate impoundment not to exceed $400 million. *See id.* In return, the President agreed to abide by the decisions in the several HEW impoundment cases. 9 WKLY. COMPILATION OF PRES. DOC. 1973-74 (remarks of Deputy Press Secretary Gerald Warren).

that follows will include an exposition of the theory of the separation of powers and an examination of the nature of the power of the purse and of how that power is shared by the Legislature and the Executive in Anglo-American governmental systems. The arguments propounded by the Executive in defense of impoundment will be analyzed in light of the two-part test delineated by the Supreme Court in the controlling case of *Youngstown Sheet & Tube Co. v. Sawyer*.[20] In a subsequent article, a suggested judicial approach to statutory construction in impoundment cases, necessary since a universal threshold question is the extent of impoundment authority conferred in the particular appropriation or authorization statutes, will conclude the analysis; the various judicial and legislative solutions thus far suggested will be critiqued in arriving at a resolution of the issues raised by presidential impoundment.

CONSTITUTIONAL ISSUES

THE PRINCIPLE OF SEPARATION OF POWERS

The Constitution did not create a separation of powers among the three institutions of government; rather, it created "a government of separated institutions *sharing* powers."[21] Yet this characterization affords few fruitful insights because, like the simplistic theory of separation of powers, it is a generalization.[22] A genuinely illuminating theory requires a more precise inquiry into the distribution of any specific power among the three institutions and into the limitations upon the exercise of that power.

Few powers are vested exclusively in one institution.[23] In foreign affairs, for example, "the President alone has the power to speak or

[20] 343 U.S. 579 (1952).

[21] R. NEUSTADT, PRESIDENTIAL POWER 33 (1960) (emphasis in original). *See also* S. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 109-12, 115-21 (1968).

[22] Among those who took a more literal view of the separation doctrine, Alexander Hamilton asked rhetorically, "Will it not be more safe, as well as more simple . . . to examine each power by itself, and to decide, on general principles, where it may be deposited with the most advantage and least inconvenience?" THE FEDERALIST No. 66, at 403 (Rossiter ed. 1960).

[23] One of the few exclusive powers is the President's power to receive ambassadors. U.S. CONST. art. II, § 3. That power is "more a matter of dignity than of authority," and thus, no fear was felt in reposing it exclusively in one branch; giving it exclusively to the President was far more convenient than "convening the legislature . . . upon every arrival of a foreign minister . . . ." THE FEDERALIST No. 69, at 420 (Rossiter ed. 1960) (A. Hamilton).

Another exclusive power is the President's "Power to grant Reprieves and Pardons for Offences against the United States, except in cases of Impeachment." U.S. CONST. art. II, § 2. That power, according to the Supreme Court in *Ex parte Garland*, "is

listen as the representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates."[24] The creative aspect of the treaty power, in the sense of choice from among a wide range of alternatives, resides with the President. While the Senate does have some treaty power, its options are much more limited; it may reject or accept the President's proposals, but it cannot develop or shape treaties of its own.[25] Essentially, the Senate possesses veto power over treaties negotiated by the President. The entire treaty power then does not rest with either the President or the Senate; it rests in their conjunctive act, in the exercise of their different but complementary roles.

This pattern is repeated in the President's nominating power: "[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . ."[26] The creative part of the appointive power, selecting the appointee from among many candidates, rests with the President, and he restricts the scope of the Senate's exercise of its appointive power. That power, as in the case of the treaty power, is a negative one. However, in contrast to the Senate's veto power over treaties, which can be implemented by a vote of only one-third plus one, the appointment veto demands a simple majority. The quantum of presidential power is, therefore, greater in appointments than in treaties since 17 fewer Senators than are required to block appointments can defeat treaty decisions. Both powers, treaty and appointment, ultimately are shared and are controlled by neither the President nor the Senate exclusively, but by their mutual accommodation.

Common to the treaty and appointive powers is the breadth of choice and formulative potential possessed by the President. The initiative or creative element in each of the powers belongs to the President, while the Senate can only approve or disapprove his final decision. The Sen-

unlimited, with the exception stated. It extends to every offence known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control." 71 U.S. (4 Wall.) 333, 380 (1866). Congress does, however, retain the ability to pass acts of general amnesty, which amount to class pardons. *See* Brown v. Walker, 161 U.S. 591, 601 (1896).

[24] United States v. Curtiss-Wright Export Corp., 229 U.S. 304, 319 (1936) (dictum) (emphasis in original). Justice Sutherland's dictum has been criticized. *See* Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972). On the basis of an extensive historical analysis, Berger argues that the advice of the Senate was to be sought throughout the entire negotiation phase so that the Senate could have a significant effect on the final product. *Id.* at 4-33.

[25] U.S. CONST. art. II, § 2.

[26] *Id.* cl. 2.

ate's negative veto power, however, can become creative by virtue of a threat, real or perceived, to exercise it. The threat will circumscribe the area of initial choice by the Executive.[27] In this general sense, the "distinction between positive and negative [power] collapses" [28] and becomes a relative distinction,[29] with both President and Senate enjoying an element of positive choice in the exercise of their respective powers. The differences are of degree, not of kind, since the distinction relates to the extent of choice that each has.[30]

The sharing of almost any given power is the primary characteristic of our governmental structure, although in each instance one institution has the predominant share of the power. The fact that the remainder is lodged elsewhere provides the system of checks and balances propounded by James Madison.[31] This balance and counterpoint inevitably produce conflict between Senate and House, President and Congress, President and Judiciary, and Congress and Judiciary. In the end, it is compromise, often the product of institutionalized friction, that brings together the institutions that share a particular power and makes the exercise of the shared power possible.[32] The system may not be efficient, but, as the Supreme Court has noted, "[T]he Constitution recognizes higher values than speed and efficiency." [33] Justice Brandeis once observed: "The purpose which guided the construction of the system was not to avoid friction and to promote efficiency but rather to use the friction to protect the people from autocracy." [34] The process of governing that produces acrimony and conflict among the officeholders should not be disparaged, for those who designed the system created it "as a bulwark against tyranny," [35] and concurrently believed that such governmental machinery would prove reliable and reasonably workable.[36]

The legislative power of Congress, like the treaty and appointive powers of the President, is shared. In this context, however, Congress fills the primary creative role. The President, through the veto granted in article I, section seven of the Constitution, has a negative and, indirectly, a creative legislative function. As courts and scholars have recognized, the essence of the executive veto is legislative, and the Framers did not by accident place the veto power in article I rather than in article II.[37] Edward Mason concluded that "it appears as a matter of historical development as well as of theory that the veto is a legislative power," [38] and Woodrow Wilson as a student writer believed that the President's legislative power in the form of the veto was greater than his executive power.[39]

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[27] Alexander Hamilton felt that the concurrence of the Senate "would have a powerful, though . . . silent operation. It would be an excellent check on the spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters . . . ." THE FEDERALIST No. 76, at 457 (Rossiter ed. 1960).

[28] Franklin, *The Roman Origin and the American Justification of the Tribunitial or Veto Power in the Charter of the United Nations*, 22 TUL. L. REV. 24, 57 (1947).

[29] *Id. See also* Franklin, *Problems Relating to the Influence of the Roman Idea of the Veto Power in the History of Law*, 22 TUL. L. REV. 443, 448-50 (1947).

[30] *Cf.* 5 WRITINGS OF JAMES MADISON 26 (G. Hunt ed. 1904) (the powers "though in general so strongly marked in themselves consist in many instances of mere shades of difference"). Justice Holmes wrote, "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other." Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

[31] THE FEDERALIST x (Rossiter ed. 1960) Rossiter, *Introduction* to; *see id.* Nos. 47-51, at 333-35 (J. Madison).

[32] Justice Jackson noted that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see* Myers v. United States, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting) (all governmental branches dependent upon each other).

[33] Stanley v. Illinois, 405 U.S. 645, 656 (1972). *See also* United States v. Brown, 381 U.S. 437, 443 (1965).

[34] Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting); *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 613-14 (1952) (Frankfurter, J., concurring); *id.* at 629 (Douglas, J., concurring).

[35] United States v. Brown, 381 U.S. 437, 443 (1965); *see* THE FEDERALIST No. 51, at 322 (Rossiter ed. 1960) (J. Madison) ("Ambition must be made to counteract ambition").

[36] *See* note 33 *supra*.

[37] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952); *id.* at 655 (Jackson, J., concurring); La Abra Mining Co. v. United States, 175 U.S. 423, 453 (1899); Mills v. Porter, 69 Mont. 325, 330-31, 222 P. 428, 430 (1924).

[38] E. MASON, THE VETO POWER 112 (1890). Mason cautioned against losing sight of the essentially legislative nature of the veto power. *See id.* at 124.

[39] W. WILSON, CONGRESSIONAL GOVERNMENT 260 (1885). Hamilton had recognized that "[a] power of this nature in the executive will often have a silent and unperceived, though forcible, operation. When men, engaged in unjustifiable pursuits, are aware that obstructions may come from a quarter which they cannot control, they will often be restrained by the bare apprehension of opposition . . . ." THE FEDERALIST No. 73, at 446 (Rossiter ed. 1960). As Professor Herman Finer noted, the veto is "an ever-present, if unuttered, threat to promoters of bills . . . and tend[s] to become an instru-

Louis Fisher has argued that the Framers viewed efficiency as a fundamental goal and thought of a strong, separate Executive as the necessary means for achieving that goal, thereby making efficiency the end product of separated powers rather than a casualty thereof. *See* L. FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 253-70, 332-34 (1972); Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUDIES 113 (1971).

The President wields enormous legislative influence through the formal means of introducing bills[40] and through informal means such as expressing disagreement or desires at various stages as legislation moves from proposal to committee to the floor to final vote. The President's influence is enhanced by his unique position of leadership, by the magnitude of the respect that the position inspires.[41] Legislative influence that has accrued extraconstitutionally to the President should not be confused, however, with his constitutional legislative power, the veto. The scope of that formally granted power has generated a constant struggle between President and Congress since the beginning of the Republic, and nowhere more intensely or persistently than in the battle for control over the power of the purse.[42]

CONGRESSIONAL DENIAL OF THE ITEM VETO AND THE EXECUTIVE BUDGET

The Function of the Item Veto in a Government of Shared Powers.
In its continuing struggle for legislative supremacy Congress utilizes

ment of bargaining for other legislation—an instrument to be propitiated by timely and obvious surrenders." H. FINER, 2 THEORY AND PRACTICE OF MODERN GOVERNMENT 1033 (1949). *See also* A. HOLCOMBE, STATE GOVERNMENT IN THE UNITED STATES 355-57 (3d ed. 1931) (effect of development of veto power).

[40] *See* U.S. CONST. art. II, § 3 ("He shall . . . recommend to their Consideration such Measures as he shall judge necessary and expedient").

[41] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 633 (1952) (Douglas, J., concurring). Justice Jackson characterized the President's power in terms similar to those used by Justice Douglas:

> Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion, he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.
>
> Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he may win, as a political leader, what he cannot command under the Constitution.

Id. at 653-54 (Jackson, J., concurring). *See also* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1948, at 119-69 (4th ed. 1957) (extensive discussion of the President's legislative powers).

[42] *Cf.* 2 W. STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND 599 (4th ed. 1896). In describing early fourteenth century England, Bishop Stubbs emphasized that control over the purse produced the greatest conflict; "money was indispensable to all." *Id.*

many devices to gain the advantage. Under one important procedure, Congress combines diverse subjects of legislation into one bill in order to allow one provision, which alone probably would not survive a veto, to "ride the coat-tails" of another item whose passage is so immediately necessary that its inclusion ensures enactment of the entire bill.[43] The objective is to constrict the degree of legislative choice the President can exercise since he can reject the bill only as a whole.

Congress often uses this ancient device of combination and inhibition of presidential veto with substantive legislation and invariably uses it in appropriation bills. That the combination of measures inhibits the President's exercise of his veto power has, for over 100 years, prompted proposals to break the nexus between the good and the bad or the necessary and the extravagant appropriation. Such proposals generally have advocated a presidential item veto or changes in congressional appropriation procedures. Regardless of their details, the proposals have had one common objective: to break the efficacy of combination, to eliminate the ability of Congress to curtail presidential freedom in exercising the veto, and to increase the President's legislative power.[44]

[43] A recent extension for four months of the temporary level of the public debt limitation contained an example of a rider. *See* Act of July 1, 1972, Pub. L. No. 92-386, 86 Stat. 406. The rider provided for a 20 percent increase in social security benefits. The President signed the bill even though he strongly criticized the social security increase and decried the use of a legislative technique that he viewed as a means of "attach[ing] a whole collection of seemingly attractive, political popular but fiscally irresponsible riders to [crucial] bill[s] . . . ." 8 WEEKLY COMPILATION OF PRES. DOC. 1122 (1972). On October 27, 1972, when the initial four-month extension expired, Congress again extended the debt ceiling and attached the Federal Impoundment and Information Act as well as other riders to the bill. Act of Oct. 27, 1972, Pub. L. No. 92-599, § 402, 86 Stat. 1325; *see* 31 U.S.C. § 581c-1 (Supp. II, 1972). *See also* H.R. REP. No. 1606, 92d Cong., 2d Sess. (1972); H.R. REP. No. 1614, 92d Cong., 2d Sess. (1972). *See generally* 7 J.D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 523-32 (1898) (veto message of President Hayes containing excellent summary of this legislative practice). The use of the combinatorial device to enact as one bill a number of measures that individually do not command sufficient votes but that, when combined, can obtain adequate support is called "log-rolling." *Ex Parte* Conner, 51 Ga. 571, 573 (1873), *quoted in* Christie v. Miller, 128 Ga. 412, 414, 57 S.E. 697, 698 (1907). *See generally* Note, *The Legislative Rider and the Veto Power*, 26 GEO. L. J. 954, 958-62 (1938). A similar process may occur more subtly with a single piece of legislation when proponents of a bill obtain majority support by promising to other Congressmen their support on other bills. This practice is called compromise, or, in more analytical terms, "partisan mutual adjustment." *See* Lindblom, *Decision-Making in Taxation and Expenditures*, in PUBLIC BUDGETING AND FINANCE: READINGS IN THEORY AND PRACTICE 295-307 (Golembiewski ed. 1968). *See generally id.* at 287-309; C. SCHULTZE, THE POLITICS AND ECONOMICS OF PUBLIC SPENDING 26 (1968) (description of "mutual adjustment" process from the perspective of the Executive).

[44] *See, e.g.*, STAFF OF THE SENATE COMM. ON GOVERNMENT OPERATIONS, FINANCIAL MANAGEMENT IN THE FEDERAL GOVERNMENT, S. Doc. No. 11, 87th Cong., 1st Sess. 248-49

The House Judiciary Committee in 1886 cogently stated the possible importance of the interdependence among items of an appropriation bill when the Committee reported out adversely several proposals for a constitutional amendment to provide the President with an item veto over appropriation bills.[45] The Committee's report stressed the following concern:

> [Allowing the President to sever items of a single appropriation bill by giving him an item veto] would give the President the right by the veto of one [conditional appropriation] and the approval of the other [conditional grant], to exercise the function of giving to one an appropriation independent of the other, when Congress has only given it conditioned upon the appropriation to the other. . . . The President takes the initiative—proposes an independent appropriation; and the independent appropriation, upon which Congress has expressed no purpose, becomes law by the President's will, unless overruled by two-thirds of each House of the legislative department.[46]

Briefly, the item veto is a method whereby a chief executive can isolate an appropriation for a specific governmental function and can prevent the specific appropriation from being enacted unless it commands a two-thirds vote in both legislative houses. An item veto thus would permit the President to propose to Congress that an individual item of appropriation, standing alone, be enacted into law. If more than one-third of the members of *one* House accepted his proposal by refusing to override his veto of the remainder, the President's action would become law.

The Committee report clearly recognized that the system of checks and balances in the Constitution institutionalizes conflict and its analogue, compromise, in order to achieve stability.[47] Within the system, however, one institution must possess the primary authority to establish

(1961) [hereinafter cited as FINANCIAL MANAGEMENT I]; *Hearings on H.J. Res. 15 Before the House Comm. on the Judiciary*, 63d Cong., 1st Sess. 7-15 (1913); *Hearings on H.R. 8054, the Budgetary Practices Reorganization Act of 1950 Before the House Comm. on Expenditures in the Executive Departments*, 81st Cong., 2d Sess. 1-8, 14-17, 23-24, 32-33, 59-61, 77, 83, 99-100 (1950); *Hearings on Organization and Operation of Congress Before the Senate Comm. on Expenditures in Executive Departments*, 82d Cong., 1st Sess. 354, 356-61, 495-96 (1951).

45 *See* H.R. REP. No. 1879, 49th Cong., 1st Sess. 1-3 (1886).

46 *Id.* at 3.

47 *See id.* at 1.

priorities with respect to each power exercised:[48] "In reality the problem comes down to this: In which branch of the government shall we place our greatest trust, and hence fortify with increased powers?"[49] As the House Judiciary Committee viewed the matter, once the choice of institution has been made, the people within the institution possessing decisional power, rather than the institution itself, must be changed when the institution makes poor choices.[50] The item veto places the bulk of decisional authority with the President.

The Origin and History of the Item Veto and of the Executive Budget in the United States. The origin of the item veto and of the executive budget demonstrates the extent to which these practices alter the balance of power between the Executive and the Legislature. Provision for an item veto first appeared in the United States in article I, section seven of the Confederate constitution.[51] In urging Alabama to ratify that constitution, Robert H. Smith, the draftsman of the veto provision,[52] noted that the item veto power was granted to allow the Confederate President "to arrest corrupt or illegitimate expenditures, by vetoing particular clauses in an appropriation bill, and at the same time approving other parts of the bill."[53] But Smith believed the item veto was inadequate. Because of a fear that in the hands of a weak or

48 *Id.* Referring to the establishment of priorities as the "discriminating functions," the Committee reported that Congress, which represents the people by districts and by states, could more appropriately and safely perform the discriminating functions as to local needs and, therefore, could better handle appropriations. *Id.* at 1-2.

49 E. HERRING, PRESIDENTIAL LEADERSHIP 76 (1940).

50 H.R. REP. No. 1879, *supra* note 45, at 2.

51 The Confederate constitution provided that "[t]he President may approve any appropriation and disapprove any other appropriation in the same bill. In such case he shall, in signing the bill, designate the appropriations disapproved; and shall return a copy of such appropriations, with his objections, to the House in which the bill shall have originated." CONFEDERATE CONST. art. I, § 7, cl. 2. The Confederate President's general veto power also was provided in article I, section seven, which used both the numeration and the language of the United States Constitution. Except where specifically changed, the two constitutions are quite similar and often use the same phraseology. *See* R. QUYNN, THE CONSTITUTIONS OF ABRAHAM LINCOLN AND JEFFERSON DAVIS 242-79 (1959) (sections side by side for ease of comparison).

52 *See* Wells, *The Item Veto and State Budget Reform*, 18 AM. POL. SCI. REV. 782 n.4 (1924).

53 Address by Robert H. Smith, Mobile, Ala., Mar. 30, 1861. Smith's argument proceeded as follows: "There is hardly a more flagrant abuse of it's [sic] power, by the Congress of the United States than the habitual practice of loading bills which are necessary for Governmental operations with reprehensible, not to say venal dispositions of the public money, and which only obtain favor by a system of combinations among members interested in similar abuses upon the treasury." *Id.* at 7-8.

partisan President the item veto might but mitigate and not cure the problem of illicit expenditures, the Confederate States "wisely determined that the Executive was the proper department to know and call for the moneys necessary for the support of Government, and that here the responsibility should rest." [54] Hence article I, section nine provided for what later became known as an executive budget.[55]

The executive budget provision of the Confederate constitution achieved a shift of power by providing that the President's proposed expenditures needed only a simple majority to carry, while any proposals made independently by the legislature, including proposals that no appropriation be made, could carry only with a vote of two-thirds of both houses. Smith acknowledged that this provision and one other were derived from the British system,[56] but did not acknowledge that in a parliamentary government such a budget system does not increase the power of the executive over that of the legislature since the executive branch is formed from the membership of the majority party in the legislature. When the executive's term is fixed and the executive's party may be the minority party in the legislature, the executive budget works an enormous shift in power since only a two-thirds vote can overcome the minority executive will. Where reduction of the discord between branches is the goal, however, as it was for the draftsman of the Confederate constitution,[57] the goal can be achieved only by shifting power one way or the other.

The chief executives of most of the states have item veto power,[58] but various veto provisions differ in important respects. In only four states may the executive reduce an appropriation,[59] a power often called the

[54] *Id.* at 8.

[55] CONFEDERATE CONST. art. I, § 9, cl. 9. Article I, section nine stated, "Congress shall appropriate no money from the treasury except by a vote of two-thirds of both houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of departments and submitted to congress by the President . . . ." *Id.*

[56] Address by R. Smith, *supra* note 53, at 9; *see* Standing Order 66, English House of Commons (1706) (House of Commons will not proceed on motions for grants or charges upon the public revenue except upon recommendation from the Crown, that is, from the majority party in the House of Commons); A. LOWELL, THE GOVERNMENT OF ENGLAND 279 (1908). *See generally id.* at 279-82, 288.

[57] Smith maintained that "[b]y refusing to a mere majority of Congress unlimited control over the treasury . . . we have, I trust, greatly purified our Government, and, at the same time, placed its different parts in nearer and more harmonious relations." Address by R. Smith, *supra* note 53, at 10-11.

[58] *See* Note, *Item Veto Amendment to the Iowa Constitution*, 18 DRAKE L. REV. 245 & n.8 (1969) (referring to 43 states where the item veto power exists).

[59] *See* ALAS. CONST. art. 2, § 15; CAL. CONST. art. 4, § 10; MASS. CONST. art. 63, § 5; TENN. CONST. art. 3, § 18.

"partial" item veto. Obviously, the total elimination of an item, which in most states is the Governor's only alternative to acquiescence, is more likely to draw ire from legislatures than is a reduction, so long as the reduction is not large. The partial item veto conveys the highest degree of legislative power to an executive since it permits him to determine the exact amount of funds to be devoted to a governmental activity and, therefore, the importance of that activity. This choice will be sustained if the executive can obtain the agreement of only one greater than one-third of the members of one house. For this reason, most state legislatures hesitate to enlarge the Governor's power in this respect; such an enlargement would be too complete a surrender of the control of the purse, a power which historically belongs to the legislative branch.[60]

During the first quarter of this century, Governors attempted several times to interpret their ordinary item veto as a partial item veto. The early cases that arose out of the clashes between Governors and legislatures can be attributed to the efforts of the legislatures to limit the use of the item veto by combining items into lump-sum appropriations that, according to the legislators, the Governor could only approve or disapprove in their entirety and could not reduce. Faced with lump-sum appropriations, Governors sought to reduce as well as to completely veto appropriations.[61] However, courts construed item veto provisions strictly and rejected the Governors' interpretations of item veto provisions as partial item veto provisions.[62] In *Regents v. Trapp*,[63] for example, the court held that what might have appeared to be "items" were not and found the total appropriation to be a single item. All component allocations merely constituted directions on how the total appropriation, the item, was to be apportioned and spent.[64] Thus a legislature facing

[60] H. BLACK, THE RELATION OF THE EXECUTIVE POWER TO LEGISLATION 104-05 (1919).

[61] A. HOLCOMBE, *supra* note 39, at 361.

[62] In only one case did a court accept a Governor's interpretation of the item veto as a partial item veto. *See* Commonwealth v. Barnett, 199 Pa. 161, 49 A. 979 (1901). At the time *Barnett* was decided, there were no decisions in other states. *Barnett* now stands alone, however, its result having been rejected by all other courts that have considered the issue. *See, e.g.*, Fairfield v. Foster, 25 Ariz. 146, 214 P. 319 (1923); Wood v. Riley, 192 Cal. 293, 219 P. 966 (1923); Stong v. People, 74 Colo. 283, 220 P. 999 (1923); Fergus v. Russel, 270 Ill. 304, 110 N.E. 887 (1915); Nowell v. Harrington, 122 Md. 487, 89 A. 1098 (1914); Wood v. State Admin. Bd., 255 Mich. 220, 238 N.W. 16 (1931); Mills v. Porter, 69 Mont. 325, 22 P. 428 (1924); Peebly v. Childers, 95 Okla. 40, 217 P. 1049 (1923); Regents v. Trapp, 28 Okla. 83, 113 P. 910 (1911); Fulmore v. Lane, 104 Tex. 499, 140 S.W. 405 (1911); State *ex rel.* Jamison v. Forsyth, 21 Wyo. 359, 133 P. 521 (1913). *See also* Wells, *supra* note 52, at 783-85.

[63] 28 Okla. 83, 113 P. 910 (1911).

[64] *Id.* at 92-93, 113 P. at 913.

a possible executive item veto could provide the entire appropriations for the operation of the government in 10 to 15 bills, and only the total apportioned within each bill would be an "item" of appropriation. The resulting balance of budgetary power between the executive and legislative branches would be the same as that which obtains in the absence of impoundment in the federal government; the legislative tool of combination would remain the principal controlling factor that could weaken or defeat the item veto power.

In all but two states the item veto as it currently exists applies only to items in appropriation bills and not to parts of bills, appropriation or otherwise, enacting general law.[65] The item veto is not applicable to language within an appropriation bill that qualifies an appropriation or directs the method of its use,[66] nor is it applicable to riders to appropriations or other bills.[67] Yet even though so limited, the item veto was labeled by the United States Supreme Court, in *Bengzon v. Secretary of Justice*,[68] an "exceptional power." [69]

The first federal proposal to provide the President with an item veto occurred on December 1, 1873, when President Grant recommended a constitutional amendment that would have dealt not only with appropriation bills but with all legislation.[70] Since 1873 at least 157 legislative proposals have been made to achieve the basic end of breaking the nexus

[65] The State of Washington is one of the two exceptional states; its constitution permits the veto of "sections or items" of "any bill." WASH. CONST. art. 3, § 12; *see* Cascade Tele. Co. v. Tax Comm., 176 Wash. 616, 30 P.2d 976 (1934). The other exception is South Carolina. *See* S.C. CONST. art. 4, § 23. *See generally* Bengzon v. Secretary of Justice, 299 U.S. 410, 412-15 (1937) (interpreting the Organic Act of the Philippine Territory); Patterson v. Dempsey, 152 Conn. 431, 207 A.2d 739 (1965) (Governor's power to veto "item or items" of appropriation bill did not imply power to veto three sections of general legislation in appropriation bill).

[66] Bengzon v. Secretary of Justice, 299 U.S. 410, 414 (1937).

[67] This fact frequently is overlooked in discussions of the item veto. *See* SENATE COMM. ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, AMENDING THE LEGISLATIVE REORGANIZATION ACT OF 1946 TO PROVIDE FOR MORE EFFECTIVE EVALUATION OF THE FISCAL REQUIREMENTS OF THE EXECUTIVE AGENCIES OF THE GOVERNMENT OF THE UNITED STATES, S. REP. No. 576, 82d Cong., 1st Sess. 7-8 (1951) (discussing item veto as means of preventing riders); SENATE COMM. ON RULES AND ADMINISTRATION, INCLUDING ALL GENERAL APPROPRIATION BILLS IN ONE CONSOLIDATED APPROPRIATIONS BILL, S. REP. No. 391, 80th Cong., 1st Sess. 2 (1947) (discussing item veto as means of preventing riders).

[68] 299 U.S. 410 (1937).

[69] *Id.* at 413; *see* Note, *Veto—What Constitutes an Item of an Appropriation Bill*, 50 HARV. L. REV. 843, 844 (1937) (*Bengzon* decision in accord with trend of state decisions restricting scope of item veto).

[70] *See* 7 J.D. RICHARDSON, *supra* note 43, at 242. Five other Presidents also have recommended the item veto amendment. *See* FINANCIAL MANAGEMENT I, *supra* note 44, at 238-40 (Presidents Hayes, Arthur, F.D. Roosevelt, Truman, and Eisenhower).

of provisions within a bill.[71] These proposals have differed in scope and detail. Some applied to all legislation although most were limited to appropriation bills and several were confined specifically to rivers and harbors bills; others permitted the partial item veto, the power of reduction.[72] Only once, in 1884, did an item veto proposal receive even committee approval.[73]

Congress has considered the Confederacy's second method of achieving a shift of legislative power from Congress to the President—the executive budget. During debate on the Budget and Accounting Act of 1921, an attempt was made to institute an executive budget similar to that contained in article I, section nine of the Confederate constitution.[74] Although the several alternative proposals that were forwarded differed in detail, they all required in some way a two-thirds majority vote for passage of any appropriation with which the President disagreed. One proposal prohibited any increases above the amounts requested in the President's proposed budget, unless each increase was made the subject of a separate bill, so that each increase or new appropriation would stand alone in facing the possible veto under the existing article I, section seven power. This proposal obviated the need for a constitutional amendment to provide an item veto, yet the sole difference between this proposal and the item veto is one of form; in substance, they are equivalent. Congress rejected both proposals.

IMPOUNDMENT: UNCONSTITUTIONAL ASSUMPTION OF LEGISLATIVE POWER

Applicable Standards. During one of the most intense periods of the Korean War, labor-management relations in the steel industry

[71] The figure of 157 comprehends only formally introduced measures as opposed to floor amendments and similar informal proposals. Up to 1929, 70 measures had been proposed. M. MUSMANNO, PROPOSED AMENDMENTS TO THE CONSTITUTION, H. Doc. No. 551, 70th Cong., 2d Sess. 69-70 (1929). Between 1929 and 1963, the figure was 78. SENATE LIBRARY STAFF, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. No. 163, 87th Cong., 2d Sess. 261 (1963). A review of the *Congressional Record* for the 87th through the 92d Congresses reveals nine additional measures.

[72] *See generally Hearings on S. 373 Before the Ad Hoc Subcomm. on the Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 110-11 (1973) (General Accounting Office item veto memo); Note, *The Item Veto In The American Constitutional System*, 25 GEO. L.J. 106, 107-12 (1936) (summary of legislative history of item veto, including representative arguments of proponents and opponents); FINANCIAL MANAGEMENT I, *supra* note 44, at 236-44.

[73] *See* 15 CONG. REC. 3164 (1884) (remarks of Senator Logan).

[74] *See* notes 253-256, 259-60, 280 *infra* and accompanying text.

so deteriorated that a nationwide strike was called. Scarcely hours before the strike was to begin, President Truman ordered the seizure of the steel mills on the ground that the "proposed work stoppage would immediately jeopardize our national defense . . . ." [76] A suit brought by the companies reached the Supreme Court, which in *Youngstown Sheet & Tube v. Sawyer*[76] considered claims similar to those now raised in support of impoundment. In defending the seizure, the Government argued that the action was within the President's inherent power implied from "provisions in Article II which say that 'The executive power shall be vested in a President . . .'; that 'he shall take care that the laws be faithfully executed'; and that he 'shall be Commander-in-Chief . . .' " [77] The Supreme Court rejected the Executive's attempt to use the Commander-in-Chief clause as authorization for the action because the seizure did not take place in a theater of war.[78] Obviously, this clause also cannot serve as justification for impoundment.

The Executive contended in *Youngstown* and now contends that its actions are necessary responses to emergency situations. Conceding that an emergency exists, however, does not resolve the basic issue of which institution is empowered to respond. Justice Frankfurter argued in *Youngstown* that although the Government might have had the authority to act, presidential authority was not coextensive governmental power and that the need for action alone could not authorize it.[79] Justice Jackson cautioned that powers finding their genesis only in necessity are potentially limitless[80] and warned against using a result-oriented approach:

> The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is intended to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced structure of the Republic.[81]

Youngstown established a two-pronged test for the validity of asserted executive authority. A court must first look to past congressional

[75] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952).
[76] 343 U.S. 579 (1952).
[77] *Id.* at 587.
[78] *Id.*
[79] *Id.* at 603-34 (Frankfurter, J., concurring).
[80] *See id.* at 649-50 (Jackson, J., concurring).
[81] *Id.* at 634.

action to determine whether Congress has denied the President the authority to act as he has.[82] Second, the court examines the courses of action authorized by existing statutes that the Executive could employ to achieve the desired goal.[83] In *Youngstown* the Court found both congressional denial of authority and the existence of other, though less efficacious, congressionally-supplied alternatives.

Congressional Denial of Impoundment Power. In his opinion for the Court in *Youngstown*, Justice Black particularly emphasized Congress's rejection in 1947 of an amendment to the Taft-Hartley Act that would have provided the President with the power of seizure to prevent labor strife.[84] Justice Black recognized that Congress unquestionably possessed the power to adopt the policies asserted by the President in the order of seizure and found the fact that Congress had not done so dispositive.[85] Noting that the Constitution has lodged the legislative power in Congress, Justice Black asserted that Congress could not lose its power to the President by a process akin to prescriptive easement.[86] Justice Frankfurter, in a concurring opinion, expanded upon this aspect of the majority's reasoning, for he felt that by rejecting legislation giving the President the power of seizure, "Congress has expressed its will to withhold this power from the President as though it had said so in so many words. The authoritatively expressed purpose . . . could not be more decisive if it had been written into [the Taft-Hartley Act]." [87] Four of the concurring Justices in *New York Times Co. v. United States*,[88] the "Pentagon Papers" case, employed a similar analysis to find that Congress had denied the President the power he asserted. In analyzing the Government's claim, Justices White, Marshall, Black, and Douglas each focused on Congress's deliberations on a bill enacted in 1927, during which Congress had rejected an amendment that would

[82] *Id.* at 586.
[83] *Id.* at 585-86.
[84] *Id.* at 586.
[85] *Id.* Justice Black commented:
> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws that he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. . . .

Id. at 587-88. *See also id.* at 633 (Douglas, J., concurring).
[86] *Id.* at 588-89.
[87] *Id.* at 602 (Frankfurter, J., concurring); *see id.* at 598-610.
[88] 403 U.S. 713 (1971).

have conferred the authority claimed in 1971.[89] Thus, rejection of a particular policy by Congress, which possesses exclusive legislative power, precludes the President from independently instituting that policy.

Expenditure control was granted to the President by Congress during fiscal years 1969, 1970, and 1971.[90] In each of those years Congress mandated spending ceilings that permitted reductions in program levels below the amounts appropriated. Those legislatively authorized impoundments must be distinguished, however, from the impoundments that have occurred since July 1, 1971, for Congress has conferred no impoundment authority since that date.

In 1972, the President sought an expenditure ceiling of $250 million that would have provided him full discretion to reduce expenditures below congressional appropriation levels, the same power granted him by Congress during the three previous fiscal years.[91] The House passed the administration bill[92] and the Senate Finance Committee reported it out,[93] but the Senate, although in agreement with the level of the ceiling, opposed granting impoundment authority to the President without specific limitations. Instead of agreeing to the House bill, the Senate adopted an amendment offered by Senator Jordan of Idaho.[94] The

[89] *See id.* at 718-19 (Black, J., concurring); *id.* at 721-22 (Douglas, J., concurring); *id.* at 733-40 (White, J., concurring); *id.* at 745-47 (Marshall, J., concurring).

[90] *See* Second Supplemental Appropriations Act, Pub. L. No. 91-305, §§ 401, 501, 84 Stat. 405-07 (1970) (fiscal years 1970 and 1971); Second Supplemental Appropriations Act, Pub. L. No. 91-47, § 401, 83 Stat. 82 (1969) (fiscal year 1969); Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, §§ 202-03, 82 Stat. 271-72 (fiscal year 1969). *See generally* L. FISHER, *supra* note 33, at 106-10, 296-97.

[91] Letter from President Richard Nixon to Representative Gerald Ford, Oct. 3, 1972, *printed in* 118 CONG. REC. H 9377 (daily ed. Oct. 10, 1972). The letter was read into the House debate to gain support for the passage of House bill 16180 without crippling restrictions. Section 201 of this bill would have given the President unchecked discretion to allocate and to impound appropriations regardless of the provisions of any other law. *See* H. R. 16810, 92d Cong., 2d Sess. §§ 201(b), (c) (1972). *See also* H.R. REP. No. 1456, 92d Cong., 2d Sess. (1972).

[92] 118 CONG. REC. H 9402 (daily ed. Oct. 10, 1972) (vote of 221-163).

[93] S. REP. No. 1292, 92d Cong., 2d Sess. 3-11 (1972). The actual sentiment of the Finance Committee is unclear. Senator Long, Chairman of the Committee, voted with the Committee majority only to get the bill to the floor. Because he did not support the bill, he did not believe he could manage it on the floor, and Senator Bennett, the ranking minority member of the Committee, assumed its management. 118 CONG. REC. S 18506 (daily ed. Oct. 17, 1972). Only seven of the 10 Committee members who voted in favor of the House bill in Committee did so on the floor of the Senate. *Compare* S. REP. No. 1292, *supra* at 15 *with* 118 CONG. REC. S 18528-29 (daily ed. Oct. 17, 1972) (Senator Jordan of Idaho voted nay; Senators Curtis and Miller were absent).

[94] 118 CONG. REC. S 18082 (daily ed. Oct. 13, 1972).

Jordan amendment proposed to permit impoundment for fiscal purposes, but only on a proportional basis applicable to all programs and activities,[95] and would have further limited the President's authority by providing that "no amount specified in any appropriation or any activity, program or item within an appropriation may be reduced by more than 10 per centum."[96]

In contrast to the administration bill, the Jordan amendment withheld authority for the termination or for the reduction beyond 10 percent of any program within an appropriation. Had the administration bill prevailed, the impoundments that have occurred with respect to dozens of programs would have been permitted. Reflecting the prevalent congressional mood, Senator Cranston declared that the power granted the President in the administration-House bill greatly exceeded that necessary to halt inflation and taxes: "It strikes at the very heart of our constitutional balance of power [and] would strip Congress of its powers to alter national spending priorities and substitute spending by presidential decree regardless of laws, appropriations, and programs established by Congress."[97]

The Jordan amendment carried the Senate by a vote of 46 to 28.[98] Senate and House conferees reached a compromise that permitted the President to effect spending reductions by reducing budget outlays for certain broad functional categories up to 20 percent of the revised budget estimate and that did not limit the amount he could cut from a specific program within a category.[99] The Senate rejected the compromise reached by the conferees.[100] Several Senators voted against it primarily because they objected to the authority it would have given the President to eliminate programs completely.[101] When it became

[95] The proportional impoundment did not apply to certain minor fixed items such as interest, food stamps, and judicial salaries. *See id.* at S 18051.

[96] *See id.*

[97] *Id.* at S 18053. *See also id.* at S 18053-56 (remarks of Senator Nelson); *id.* at S 18056 (remarks of Senator Chiles); *id.* at S 18061-62 (remarks of Senator Bayh); *id.* at S 18063-78 (remarks of Senator Packwood); *id.* at S 18078 (remarks of Senator McClellan); *id.* at S 18081 (remarks of Senator Buckley).

[98] *Id.* at S 18082.

[99] *See* H.R. REP. No. 1606, *supra* note 43, at 1-2. Senator Long explained that the Senate conferees tried to reduce the percentage as low as possible and to increase the categories to which it applied in order to limit the reduction that could be made in any one program. *See generally* 118 CONG. REC. S 18506-08 (daily ed. Oct. 13, 1972).

[100] *Id.* at S 18529 (vote of 39-27).

[101] For example, Senator Jordan of Idaho stated:

> The key word of the Jordan amendment was proportional. That word has been removed from the conference version. . . . The President is permitted to cut up to 20 percent from a number of functionally grouped

apparent that the Senate would not grant the authority requested by the President, the conferees dropped the spending ceiling and passed the remainder of the bill.[102] Both the House and Senate reports, even those favoring the President's bill, had denied that the President could use the spending limitation proposal to terminate a program completely.[103] In light of this clear congressional rejection of presidential program termination, the impoundment of any appropriation constitutes legislative action by the Executive, which clearly contravenes both the doctrine of separation of powers and the first part of the *Youngstown* test.

Existence of Statutory Mechanisms Other Than Impoundment. In the second portion of its decision in *Youngstown*, the Supreme Court invalidated the seizure of the steel mills because statutory procedures for the control of labor strife were available to the President.[104] As Justice Burton concluded: "The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency." [105] Similarly, in the budget area Congress provided the President with broad powers effective until April 30, 1974, under section 203(a) of the Economic Stabilization Act Amendments

programs. But, when one reads the fine print he learns that the President could eliminate some programs entirely by applying the 20 percent group limitation against a single program within that grouping.

Id. at S 18510. *See also id.* at S 18512-14 (remarks of Senator Humphrey); *id.* at S 18512-13 (remarks of Senator Moss); *id.* at S 18519, 18522 (remarks of Senator Taft); *id.* at S 18523-24 (remarks of Senator Nelson); *id.* at S 18526 (remarks of Senator Cranston); *id.* at S 18526-27 (remarks of Senator Mondale); *id.* at S 18527-28 (remarks of Senator Kennedy).

[102] *See* H.R. REP. No. 1614, *supra* note 43, at 1 (second conference report).

[103] The House Ways and Means Committee reported:

It is sometimes said that an expenditure limitation gives the President an item veto over the budget. While an expenditure ceiling of necessity places increased responsibilities on the President to bring the expenditure total for a year down to the expenditure ceiling level set by Congress, it does not result in the cancellation of appropriations as would happen in the case of item vetos. In the case of an expenditure limitation, funds which are reserved generally remain available for expenditure in subsequent years; with an item veto the appropriations are cancelled.

H.R. REP. No. 1456, *supra* note 91, at 8-9; *see* S. REP. No. 1292, *supra* note 93, at 3-11.

[104] *See* 343 U.S. 579, 586 (1952); *id.* at 599-603 (Frankfurter, J., concurring); *id.* at 656 (Burton, J., concurring); *id.* at 662-66 (Clark, J., concurring). Similarly, in *New York Times Co. v. United States* two Justices rejected the Government's requested injunction because Congress apparently had chosen to rely on other statutory provisions to achieve the result the Government sought to achieve by injunction. *See* 403 U.S. 713, 740 (1971) (White, J., concurring); *id.* at 743 (Marshall, J., concurring).

[105] 343 U.S. at 660 (Burton, J., concurring).

of 1971.[106] In that section Congress granted the President broad authority to regulate prices, rents, wages, salaries, interest rates, and corporate dividends and similar transfers[107] in order to stabilize the economy, reduce the rate of inflation, minimize unemployment, improve the country's competitive position in world trade, and protect the purchasing power of the dollar.[108] Realizing that a need for prompt and decisive legislative action frequently clashes with the slow and deliberative legislative process, Congress noted in section 202: "The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government. The President is in a position to implement promptly and effectively the program authorized by this title." [109] Thus, Congress has authorized mechanisms and alternative schemes to impoundment for presidential control of inflation, just as it had authorized alternatives to seizure for control of labor strife.

Congressionally enacted alternatives may not be as efficacious as impoundment since impoundment controls the rate of governmental expenditures rather than the pricing system of economic markets.[110] However, in *Youngstown* and in *New York Times*, the Supreme Court determined that the most efficacious action was not synonymous with a

[106] Pub. L. No. 92-210, § 203(a), 85 Stat. 744 (1971), *as amended*, Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, § 2(a), 87 Stat. 27. The foregoing amendments completely superseded the original Economic Stabilization Act of 1970. Pub. L. No. 91-379, §§ 201-06, 84 Stat. 799-800 (1970). *See also* Exec. Order No. 11695, 35 Fed. Reg. 1473 (1973); Exec. Order No. 11730, *id.* at 19435 (together the executive orders supersede all previous related orders).

[107] Pub. L. No. 92-210, § 203(a), 85 Stat. 744 (1971) (unchanged by the 1973 amendment). The original act contained similarly broad language. *See* Pub. L. No. 91-379, § 202, 84 Stat. 799 (1970).

[108] Pub. L. No. 92-210, § 202, 85 Stat. 744 (1971) (unchanged by the 1973 amendment).

[109] *Id.* Senator Ervin has indicated a crucial difference between the President and Congress: "The President, of course, can act with one mind and Congress has 535 minds. It is hard to develop a consensus in the Congress. I have noticed that often I cannot get Congress to accept the sound views I have retained on a particular question." *Ervin Hearings I*, *supra* note 9, at 24.

[110] Deputy Attorney General Sneed, in his written reply to the Senate Committee on Government Operations, supported presidential impoundment power as one of the President's most effective means of maintaining fiscal control and of coordinating fiscal policies and argued that presidential fiscal authority would be rendered ineffective if the President could not in some manner control expenditures. *Ervin Hearings II*, *supra* note 5, at 839. The Government in both *Youngstown* and *New York Times* similarly argued that the action under review was the most efficacious means of dealing with the respective problems. 403 U.S. 713, 718-19 (1971) (Black, J., concurring); 343 U.S. 579, 603-04, 609 (1952) (Frankfurter, J., concurring).

necessary or an authorized action.[111] In 1972, Justice Rehnquist, then Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel, offered a still more restrained view of the constitutional powers of the President. In a memorandum to Edward L. Morgan, Counsel to the President, Assistant Attorney General Rehnquist stated, "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent." [112] Rehnquist's analysis has been repudiated by the Government as "erroneous," [113] but it is consistent with earlier analyses presented to prior Presidents[114] and with over 180 years of the history and evolution of the power of the purse.

THE EXECUTIVE VIEWPOINT

No President has specifically claimed the right to item veto appropriation bills[115] or to require Congress either to approve every appropriation bill by a majority of two-thirds or else to accept the President's uncontrollable power to ignore the provisions of the bills at will. The Executive has couched its assertions of power more carefully than that. A statement by the President at a January 31, 1973, news conference contained perhaps the clearest declaration of right. President Nixon proclaimed that the President has an absolutely clear constitutional right to impound funds and defined impoundment as, "not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people." [116] The essence of the claimed right

111 *See* 403 U.S. at 714; *id.* at 719 (Black, J., concurring); 343 U.S. at 589; *id.* at 609-10 (Frankfurter, J., concurring). In *Youngstown* Justice Douglas commented on the efficiency of the exercise of executive power compared with legislative power, but rejected an efficiency standard as a hallmark of tyranny. *See id.* at 629 (Douglas, J., concurring).

112 *Ervin Hearings I*, *supra* note 9, at 282.

113 *See Ervin Hearings II*, *supra* note 5, at 380-81.

114 The same view was taken by Attorney General Cummings in a 1937 memorandum to President Roosevelt and was also presented in a Bureau of the Budget memorandum to President Kennedy in 1961. *See id.* at 283 (reprinting memorandum to President Roosevelt); *id.* at 338-40 (reprinting Bureau of the Budget memorandum to Kennedy in part). Significantly, President Roosevelt requested an item veto seven months after receiving the memorandum. *See* 83 CONG. REC. 388 (1938) (quoting message from the President).

115 Representative Gerald Ford, however, in defending executive impoundment in 1971, did state, "I admit that in effect it's a line-item veto, but there is no question that [the President] has the final authority to impound." *See* Glass, *Impoundment Policy Fuels Political Struggle With Congress*, 3 NAT'L. J., May 15, 1971, at 1027, 1029.

116 9 WEEKLY COMPILATION OF PRES. DOC. 109-10 (1974).

is clear—it is the right, if not the duty, of the President and his subordinates to review levels of spending in light of current economic conditions, and then to reduce or to terminate federal programs in light of the social and economic goals and preferences of the Executive. The President's order to eliminate $6½ billion from the 1974 budget necessitated the examination and evaluation of each federal program. "Ineffective activities and those that had already served their purposes had to be terminated, marginal activities reduced or slowed, and excessively costly ones restructured." [117]

In hearings before the Ervin Committee in February 1973, Office of Management and Budget (OMB) Director Roy Ash along with several other Cabinet officers offered testimony revealing the process used by the Executive to determine which program funds it would impound.[118] Director Ash claimed that the Administration was drawing lines between "good programs and sometimes better programs." [119] Recognizing that Congress had appropriated $261 billion, the Executive believed that no more than $250 billion should be spent. According to Ash, "That [whether the total appropriated should be spent] is really the issue at stake here, not the process and consequence of any particular issue." [120] However, the process used by the Executive and the consequences of that process clearly are the essential issues. Impoundment is a legislative, decisionmaking process, and the Executive's refusal to carry out Congress's enactments invades the most fundamental constitutional prerogative of Congress. The Constitution does not distinguish between "good" and "bad" or "good" and "better" legislative programs.[121]

The basic issue became clearer when Director Ash explained the guidelines used by the OMB in its determination of whether or not a

117 *Program Reductions and Terminations*, in OMB, THE BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1974, at 49 (1973). In accordance with these guidelines, housing programs approved by Congress were frozen because they did not provide results commensurate with the cost to the taxpayer, the Rural Environmental Assistance Program was eliminated because it had a low priority and could be cut without serious economic consequences, and the Office of Economic Opportunity was to be phased out because it was no longer necessary. *See id.* at 122; OMB, THE BUDGET OF THE UNITED STATES GOVERNMENT: APPENDIX, FISCAL YEAR 1973, at 475 (1972); H.R. REP. No. 49, 93d Cong., 1st Sess. (1973).

118 *See Ervin Hearings II*, *supra* note 5, at 279-87.

119 *Id.* at 287.

120 *Id.* at 288.

121 As Judge Flannery said in *Guadamuz v. Ash*, "Nowhere does our Constitution extol the virtue of efficiency and nowhere does it command that all our laws be fiscally wise. It does most clearly, however, state that laws, good or bad, be enacted by the Congress and enforced by the President." 368 F. Supp. 1233, 1243 (D.D.C. 1973).

program should be eliminated or funded partially.[122] In a written statement submitted to the Committee after the hearings, Ash outlined three criteria used in impoundment determinations:

> 1. Does the need which brought about the enactment of the Federal program still exist?[123]
> 2. Does the program achieve its intended goal?[124]
> 3. Is the program meeting its objectives in a reasonably efficient way?[125]

The report concluded with summary descriptions of the principal criteria used in deciding to reduce or eliminate funds. The summary mentioned a fourth criteria not given in the outline: "In some instances, funds for programs have been reduced or eliminated because, in the President's judgment, the relative importance of the objective . . . places them at a point where, in light of limited resources, they seemed to rank lower than other programs." [126] Thus, the President established priorities and eliminated programs that ranked low on his priority list.

In his appearance before the Ervin Committee, Deputy Attorney General Joseph T. Sneed elaborately propounded the full scope of the President's argument.[127] Sneed noted that Congress couches typical appropriations in discretionary language and general terms and that the statutes traditionally do not require the Government to spend the full amount appropriated.[128] Inferring congressional intent to give the Executive spending discretion, Sneed argued that Congress must clearly mandate spending all sums in order to override the direct and indirect sources of the President's control of spending.[129] In his second major contention, Sneed claimed that the failure of Congress to protect purchasing power and to avoid inflation has forced modern Presidents to use their veto power and, ultimately, to impound appropriations.[130] Sneed argued that article II of the Constitution vests in the President discretion to refrain from spending funds where necessary to prevent harmful economic consequences[131] and summarized additional arguments and political realities necessitating a presidential impoundment power as follows:

> Once established, spending programs become entrenched in the federal bureaucracy and develop powerful political relationships in the Congress and among special interest groups. In short, they acquire a self-perpetuating momentum, regardless of their logical relationships to other programs, and to changing national needs. In these circumstances, the President is authorized, for example, to merge essentially duplicative programs, and to eliminate programs which are no longer needed.[132]

The basic complaints and consequent justifications for a presidential impoundment power, then, focus on the antiquated legislative machinery in the appropriations process, the duplication of self-perpetuating spending programs that survive only because of an entrenched bureaucracy and special interest groups, and the unresponsiveness of Congress to changing national needs, inflation, waste, and inefficiency. However, the President's veto power, provided in article I, section seven, was designed to meet and avert exactly these failings in the legislative process. The Constitution did not provide for impoundment, the item veto, and the executive budget, which are functionally equivalent in that all three seek to isolate each appropriation not desired by the President and to subject it to a two-thirds vote. All three thereby deny the legislature the power of combination. To contemplate such a fundamental shift in power from the legislative to the executive branch of government is to contemplate a major revision in the Constitution; the Constitution makes Congress the ultimate judge of whether or not a particular program is necessary.

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122 *Ervin Hearings II*, *supra* note 5, at 524.

123 *Id.* at 528. Ash further stated:

> The needs of the Nation change continually, and with them the needs for specific Federal programs. In some cases the needs are transitory, and pass; in others, Federal programs intended to fulfill a specific need become redundant when these needs are met with new, broader programs. We are continually called upon to identify and correct inequities created by providing excessive benefits to some by virtue of overlapping programs and insufficient benefits to others because of funding limitations of the broader program." *Id.*

124 *Id.* The paragraph continues: "Many Federal programs, particularly those in the social welfare area, are essentially large-scale social experiments . . . As a consequence, some of the efforts simply fail to accomplish the objectives that they are intended to serve." *Id.*

125 *Id.* "Many programs fulfill the intended objectives but at costs that far outweigh the benefits likely to be derived from the program. In some instances the 'real' beneficiaries of the program are not the beneficiaries toward which the program [originally] was directed." *Id.*

126 *Id.*

127 *See id.* at 358-402.

128 *Id.* at 360.

129 *Id.* at 361-62.

130 *Id.* at 361.

131 *Id.* at 838.

132 *Id.* at 841.

THE PRESENT BUDGETARY SYSTEM OF THE FEDERAL GOVERNMENT AND ITS EVOLUTION

Over the years, the Executive has made several arguments in support of impoundment of funds.[133] One of the major arguments has been the claim that in the absence of language in authorizing or appropriating legislation requiring all appropriated funds to be expended, none need be spent. Thus, the absence of an express mandate allegedly permits the exercise of discretion to withhold funds where other statutes, principally the Anti-Deficiency Act,[134] the ceiling on the public debt,[135] and the Employment Act of 1946,[136] confer that discretion. These statutes must be examined to determine whether they grant such discretion.

The nature of an appropriation is such that all funds need not be spent, but the absence of an express mandate that all funds be expended does not necessarily mean that no funds need be expended. Appropriations are estimates of funds needed to attain the objectives expressed in substantive law. Congress attempts to appropriate no more and no less than necessary, but absolute congressional precision is unattainable and Congress has established two statutory mechanisms by which the Executive can contribute to the achievement of this goal. The first is the Budget and Accounting Act of 1921[137] in which Congress directed the President to submit to it a comprehensive annual budget with estimates of receipts and of expenditures and necessary appropriations.[138] With the aid of this working document, Congress determines the amount of funds to be devoted to each of the competing and alternative demands expressed by the citizenry through its representatives and thereby establishes the Government's priorities.[139]

Through the second statute, the Anti-Deficiency Act,[140] Congress has extended its control over appropriations beyond the period of enactment

133 *See generally* notes 115-132 *supra* and accompanying text.

134 31 U.S.C. § 665 (1970).

135 Second Liberty Bond Act, 31 U.S.C. § 757b (Supp. II, 1972).

136 15 U.S.C. § 1021 (1970).

137 Ch. 18, 42 Stat. 20, *as amended*, ch. 946, 64 Stat. 832, *as amended*, Pub. L. No. 91-510, 84 Stat. 1140, *codified at* 31 U.S.C. §§ 1, 2, 11, 13-24, 41-44, 46-50, 52-57 (1970).

138 31 U.S.C. §§ 11(a)(5), (6) (1970).

139 *See generally* OMB, THE UNITED STATES BUDGET IN BRIEF: FISCAL YEAR 1974, at 57-59 (1973). The budget process involves four phases: "(1) Executive formulation and submission; (2) congressional authorization and appropriation; (3) budget execution and control; and (4) review and audit." *Id.* at 57.

140 Ch. 1484, § 4, 33 Stat. 1257 (1905), *as amended*, Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, *as amended*, General Appropriation Act of 1950, ch. 896, § 1211, 64 Stat. 595, *codified at* 31 U.S.C. § 665 (1970).

by two principal methods. First, Congress has directed the OMB to apportion each appropriation over the period of time for which it is granted so that a spending agency cannot run out of funds before the end of the fiscal year.[141] To prevent requests for deficiency appropriations, specific statutorily defined circumstances limit OMB's authority to apportion funds at such a rate in the early part of the fiscal year that additional appropriation will be required later in the year.[142] Under the second method of control mandated by the Anti-Deficiency Act, the OMB must review the operations of each agency and, if the provision of the level of services originally contemplated requires less funds than originally estimated, must withhold the excess funds from the agency to prevent the agency from expending the funds on congressionally unauthorized objects.[143]

The historical foundations and legislative history of these acts illuminate two key facts. First, reductions in expenditures from the amount appropriated are permissible only if the objectives intended to be realized by use of the appropriated funds can be accomplished by expenditure of a lesser amount. Second, any reductions below the levels necessary to accomplish Congress's objectives are tantamount to item vetoes. Congress must enact subsequent specific legislation to coerce the spending of impounded funds,[144] and the specific legislation is easily subject to the ordinary veto, which Congress can override only by a two-thirds vote of both Houses. In terms of the legislative power, then, impoundment achieves the same end as the item veto by forcing every appropriation with which the Executive disagrees to command a two-thirds vote in both legislative chambers. Functionally, impoundment and the item veto equally shift the balance of power over the budget from Congress to the Executive.

ITEMIZATION

Probably the oldest and most persistent though generally unsuccessful means of exercising legislative control over expenditures is specificity in appropriation. Itemization first appeared in acts of Parliament in the

141 31 U.S.C. § 655(d)(2) (1970).

142 *Id.* § 655(e).

143 *Id.* § 655(c)(2).

144 If an inherent power to impound is asserted and its invalidity is not conceded, then subsequent legislation is irrelevant, and the President has an absolute veto, an untenable result. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-23, 94-105 (M. Farrand ed. 1966); Note, *supra* note 6, at 1297-99.

mid-seventeenth century.[145] In the United States, itemization creates a greater degree of legislative control of the budget, since article I, section nine of the Constitution effectively prohibits the use of funds appropriated for one purpose to accomplish another purpose.[146] Usually called specific or itemized appropriation, itemization contrasts with lump-sum or in-gross appropriations that expand executive discretion by leaving to the Executive the determination of the precise allocation of funds.

During the first three years of Alexander Hamilton's tenure as Secretary of the Treasury, from 1789 to 1791, lump-sum appropriations for the entire Government were made in one bill usually consisting of a single paragraph.[147] By 1793, strong congressional criticism of the degree of discretion afforded by lump-sum appropriations had developed.[148] In reaction the 1793 appropriation acts detailed minutiae such as an item of $450 for "firewood, stationery, printing and other contingencies in the treasurer's office."[149] The executive departments in turn responded to itemization by stretching the interpretation of the highly itemized acts. As one scholar, Lucias Wilmerding, wrote: "[F]rom 1795 to 1801 it was not upon the will of Congress that the application of the public moneys depended but upon the rules of interpretation which Wolcott [Hamilton's successor at the Treasury] had formed with a just regard, as he put it, for the welfare of Congress and the people."[150] Throughout his tenure as Secretary of the Treasury, Wolcott encountered strong opposition from Albert Gallatin, then a member of the House from Pennsylvania and later Jefferson's Secretary of the Treasury,[151] but in the end Wolcott prevailed: "When the Republicans took office in 1801 the transfer of [funds between] appropriations was recognized as settled custom, proper though illegal."[152]

145 4 M. THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND—1642 to 1801, at 206 (1938).

146 U.S. CONST. art. I, § 9.

147 *See* Act of Feb. 11, 1791, ch. 6, 1 Stat. 190; Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Sept. 29, 1789, ch. 23, 1 Stat. 95.

148 *See* L. WILMERDING, THE SPENDING POWER 24-26 (1943).

149 Act of Feb. 28, 1793, ch. 18, § 1, 1 Stat. 325; *see* L. FISHER, *supra* note 33, at 111.

150 L. WILMERDING, *supra* note 148, at 28.

151 *See* V.J. BROWNE, THE CONTROL OF THE PUBLIC BUDGET 37-39 (1949); L. WILMERDING, *supra* note 148, at 20-49. Writing to Hamilton on April 5, 1798, Wolcott complained that "[t]he management of the Treasury becomes more and more difficult. The legislature will not pass laws in gross. Their appropriations are minute; Gallatin, to whom they yield, is evidently intending to break down this department, by charging it with an impracticable detail." 2 G. GIBBS, MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 45 (1846).

152 L. WILMERDING, *supra* note 148, at 48.

President Jefferson, seeking itemization in his first address to Congress, argued: "[I]t would be prudent to multiply barriers against [the] dissipation [of public funds] by appropriating specific sums to every specific purpose susceptible of definition . . . ."[153] Although Jefferson's address met with a bitter attack by Alexander Hamilton, who conceded the theory of specific appropriation but denounced its application to every specific purpose susceptible of definition,[154] Congress responded by enacting the itemization theory into general law in 1809.[155] The law provided that funds appropriated could be expended only for the purpose for which appropriated.[156]

Too much specificity breeds administrative circumvention, and human limitations ensure that appropriations requested by executive agencies are, at best, loose estimates for many objects of expenditure. As the theory of specificity was being codified, two administrative practices developed to circumvent the theory and to provide flexibility. One was the practice of transferring unexpended balances in one item of appropriation to another item that had become deficient in funds. The 1809 act that codified the theory of specificity sanctioned this practice to a limited extent by authorizing the President, during any recess of Congress, "to direct, if in his opinion necessary for the public service, that a portion of the monies appropriated for a particular branch of expenditure in [a] department be applied to another branch of expenditure in the same department . . . ."[157] The second practice increasing flexibility was that of requesting deficiency appropriations. An agency would spend an initial appropriation at a rate that would exhaust the funds before the end of the fiscal year. When the funds were exhausted, the agency would request a deficiency appropriation from

153 1 J.D. RICHARDSON, *supra* note 43, at 329.

154 Wilmerding describes Hamilton's argument:

> Taking a familiar example, transportation of the army, he proceeded to show that oats and hay for the subsistence of horses were each susceptible of definition and so, by the terms of the message, should be appropriated for separately; but what, he asked, if, as frequently happens, more than a sufficient quantity of one article be provided and not a sufficient quantity of the other? Are the horses to starve because the officer who is to make provision cannot divert money from one appropriation to another? And, mayhap, is the army to starve also by a failure in the means of transportation? Such a view he deemed an excess of theory possible only in a man enveloped all his life in a speculative mist.

L. WILMERDING, *supra* note 148, at 51.

155 Act of Mar. 3, 1809, ch. 28, 2 Stat. 535.

156 *See id.*

157 *Id.*

Congress so that it could continue operations until the beginning of the next fiscal year. Congress might balk, "but the money was exhausted, the need was indisputable, and they found their hands forced," [158] hence the term "coercive deficiencies."

Soon after Congress gave express legislative sanction to appropriation transfers, congressional opposition to the practice surfaced.[159] In 1816 Representative Calhoun sought to repeal the transfer authority granted in 1809.[160] Secretary of the Treasury Crawford argued in response that the repeal would not enforce economy but rather would lead the agencies to increase their initial estimates;[161] the reduction of flexibility would exacerbate the agencies' tendency to overestimate in order to provide a cushion.[162]

Congress took no immediate action to prevent the transfer of funds; indeed, the 1820's saw the collapse of specific appropriation, due in part to the impossibility of accurately estimating needs under numerous appropriation headings.[163] However, only the control collapsed; the practice continued and raised questions of how specific Congress would be and how imaginative agencies could be in evading that specificity.[164] Moreover, Congress subsequently did restrict transfer authority. Al-

158 R. HAWTREY, THE EXCHEQUER 8-9 (1921).

159 *See* L. WILMERDING, *supra* note 148, at 78-81. Opposition persists to this day. *See Ervin Hearings II*, *supra* note 5, at 695-98.

160 *See* L. WILMERDING, *supra* note 148, at 78-81.

161 30 ANNALS OF CONG. 421 (1817).

162 An agency naturally tends to overestimate for strategic purposes in dealing with Congress. John Quincy Adams during his presidency suggested padding the estimates because Congress would, according to Adams, "retrench something from the estimates presented to them; and if some superfluity be not given them to lop off, they will cut into the very flesh of the public necessities." *See* L. FISHER, *supra* note 33, at 90. Agencies have followed this advice persistently, and the deliberate overestimation combined with the imprecision of appropriations form the historical explanation for the belief that an appropriation is not a mandate to spend every cent thereof.

163 L. WILMERDING, *supra* note 148, at 99. Wilmerding quotes an 1829 letter to John Branch, Secretary of the Navy, as an articulate and perceptive observation by an administrator in the field:

> Yet, after all, they are but *estimates*: and until it shall be given us to foresee the events of futurity, the fluctuations in the markets of the world, and the casualties of the ocean, we shall never arrive at precise accuracy in our calculations as to the expense of a navy employed in every known sea, and experiencing the vicissitudes of every known climate.

Id. at 100-01.

164 *See id.* Specificity varied according to the subject of appropriation and the nation's needs. Lump-sum appropriations became particularly prevalent during periods of war and national depression when the demand for flexibility was greatest. *See id.* at 162, 180-81. Lucius Wilmerding concluded his survey of 150 years of itemization by warning against the belief that the retreat from specificity indicates laxity on the part

though the authority was broadened in 1842, it was contracted again in 1852[165] and finally repealed in 1868.[166]

With the repeal of transfer authority, only coercive deficiencies could be used to avoid the strict system of specific itemized appropriations.[167] Congress attempted to eliminate this avenue with the Act of July 12, 1870, originally codified as Revised Statute section 3679,[168] which prohibited any agency from spending during one fiscal year a sum in excess of its appropriations for that year or to contract for the future payment of money in excess of such appropriations. While the purpose underlying this statute was to halt coercive deficiencies, the statute did not accomplish the goal.[169] In 1879, for example, the Postmaster General requested a $2 million deficiency appropriation,[170] $1.7 million of which was to satisfy contracts already entered into for the latter part of the fiscal year. This appeared to violate directly section 3679 of the Revised Statutes, but the Postmaster General disagreed and claimed:

> [The postal authorities] had not yet spent money in excess of their appropriations, nor would they do so; if Congress failed to appropriate the $1,700,000 needed to fulfill their contracts, they would annul those contracts, pay the contractors one month's pay as usual in cases of reduction or termination of contract, and stop the mails; the country might be inconvenienced, but Section 3679, Revised Statutes, would be inviolate.[171]

Notwithstanding acrimonious criticism from members in both Houses,[172] Congress granted the appropriation,[173] and a pattern of extensive item-

of Congress or unfaithfulness on the part of the Executive and by cautioning against extreme specification of appropriations as incompatible with the needs of administration. *Id.* at 194.

165 *Id.* at 108-10.

166 Act of Feb. 12, 1868, ch. 8, § 2, 15 Stat. 35; *see* L. WILMERDING, *supra* note 148, at 118-21. *See generally* L. FISHER, *supra* note 33, at 116-19; *Ervin Hearings II*, *supra* note 5, at 696-98.

167 L. WILMERDING, *supra* note 148, at 137.

168 Ch. 251, § 7, 16 Stat. 251, *as amended*, Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257, *as amended*, Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48, *as amended*, General Appropriation Act of 1950, ch. 896, § 1211, 64 Stat. 765, *codified at* 31 U.S.C. § 665 (1970). While the effort has had only limited success, the evolution of the statute reveals both the importance of the attempt and the relationship between coercive deficiencies and the concept that an appropriation is not a mandate to spend. The statute formed the prototype for the subsequently enacted Anti-Deficiency Act.

169 *See* L. WILMERDING, *supra* note 148, at 137-39.

170 *See id.* at 137.

171 *Id.* at 138.

172 *See* 10 CONG. REC. 1129 (1880).

173 Act of June 16, 1880, Pub. L. No. 46-234, 21 Stat. 249. A strikingly similar de-

ization, prohibition of transfers, and the resulting extensive use of deficiencies was established.[174]

THE HISTORICAL FOUNDATIONS OF THE BUDGET AND ACCOUNTING ACT OF 1921 AND ANTI-DEFICIENCY ACT OF 1906

The congressional practice of extensive itemization led to widespread use of deficiency appropriations to provide flexibility, which in turn led to the enactment of section 3679 of the Revised Statutes. A later version of this act divided appropriations into quarterly allotments, "the rudiments of appropriation reserves, the *sine qua non* of the impounding process."[175] A second requisite of impoundment is the existence of a control agency independent of the spending agency. Because the Office of Management and Budget satisfies that requisite and thereby makes impoundment possible, the OMB's historical roots must be explored.

Congress viewed with apprehension the power that Alexander Hamilton, the nation's first Secretary of the Treasury, might exercise.[176] In addition, recognition of the fact that Congress would have a more intimate relationship with the Treasury than with the Departments of State and War led the first Congress to devote much of its energy to the organization of the Treasury Department.[177] Congress first faced the critical issue of whether the Department should be run by a commission, in order to disburse power, or by a single executive with concentrated power. Although Representative Gerry, who favored the commission form and who argued that a single Secretary of the Treasury would have "greater influence than the President of the United States

ficiency request from the Post Office in the late 1940's led to the revision of the Anti-Deficiency Act into its present form. *See* notes 312-350 *infra* and accompanying text.

174 Lucias Wilmerding describes the widespread use of deficiencies:

> It became, therefore, the object of each department head and, more particularly of each bureau chief to establish as a system what had been begun as an anomaly. The records show that in this effort they succeeded. During the next quarter century (1880-1905) their disregard of Congressional action upon their estimates became habitual and finally came to be taken as a matter of course. Soon it could be said that the departments had become the appropriating authorities and that Congress had sunk to be the mere register of their determinations . . . [The departments spent money] in perfect confidence that Congress would appropriate supplementary sums when they were requested rather than stop the service.

L. WILMERDING, *supra* note 165, at 140.

175 Williams, *The Inter University Case Program, Number 28: The Impounding of Funds by the Bureau of the Budget*, in *Ervin Hearings I*, *supra* note 9.

176 J. BURNS, PRESIDENTIAL GOVERNMENT 6-7, 9-10 (Sentry ed. 1973).

177 *See generally* V.J. BROWNE, *supra* note 151, at 29-32; J. HART, THE AMERICAN PRESIDENCY IN ACTION: 1789, at 214-39 (1948).

has and more than is proper for any person to have in a republican form of government,"[178] garnered considerable support, Congress ultimately decided to place control in the hands of a single Executive.[179]

When Congress turned to the consideration of the powers of the Treasury Secretary, debate centered around whether the Secretary would digest and report plans or rather would digest and prepare plans for expenditures and revenue. Many feared that the former would diminish congressional power,[180] so Congress struck out the word "report" and inserted the word "prepare" in the enumeration of the Secretary's duties.[181] The debate clearly established that although the Secretary might submit proposed expenditures, the final authority to reduce or augment the proposed amounts lay with Congress.[182] Madison spoke with considerable prescience when he voiced the minority view:

> [C]ompare the danger likely to result from [a Secretary bent upon influencing policy] with the danger and inconvenience of not having well-formed and digested plans, and we shall find infinitely more to apprehend. Inconsistent, unproductive, and expensive schemes, will be more injurious to our constituents than the undue influence which the well-digested plans of a well-informed officer can have.[183]

When Hamilton assumed office, he quickly made known that he did not share the restrictive views of his duties and powers held by certain House members.[184] Operating under the supposedly narrow duties prescribed by Congress, he successfully assumed the broad powers of a finance minister; he scrutinized and revised the agencies' requests for appropriations and presented to Congress systematic budgets that ex-

178 1 ANNALS OF CONG. 387 (1789).

179 *Id.* at 396; *see* Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65.

180 *See* V.J. BROWNE, *supra* note 168, at 30-31; 1 ANNALS OF CONG. 592 (1789) (remarks of Representative Page).

181 1 ANNALS OF CONG. 607-11789).

182 *See id.* at 594 (remarks of Representative Benson); *id.* at 602-03 (remarks of Representative Lawrence).

183 1 ANNALS OF CONG. 604 (1789). Madison's argument that Congress would benefit from centralized control in the Treasury Department was repeated by the committee that drafted the Budget and Accounting Act of 1921. *See* H.R. REP. No. 362, 66th Cong., 1st Sess. 9-10 (1919). The fears that existed in Madison's time existed 130 years later, and Congress no longer could resist the change. *See* notes 243-280 *infra* and accompanying text.

184 *See* J. BURNS, *supra* note 176, at 9-12; L. FISHER, *supra* note 33, at 87-88; Ford, *Budget Making and the Work of Government*, 62 ANNALS 1, 4-5 (1915).

pressed his judgments on revenue and expenditure needs.[185] After Hamilton's opponents forced his resignation in 1795, his successor, Oliver Wolcott, and Wolcott's successor, Albert Gallatin, continued the Hamiltonian model, though perhaps less forcefully.[186] With Gallatin's departure, comprehensive budgeting and central control by the Executive ceased except for the years from 1845 to 1849, during the presidency of James Polk.[187] Congress finally amended the Treasury Act of 1789, which Hamilton had construed as giving him power to revise estimates, expressly to deny the Secretary any power of revision.[188] The Secretary's role became purely the ministerial one of collating each agency's estimates and passing them on to Congress.[189]

Aside from the brief interlude of Polk's presidency, the 100-year period from Gallatin's resignation to 1921 is known as the era of the "congressional system." [190] The ascendancy of the House Ways and Means and the Senate Finance Committees marked the first half of the period. Each Committee had full responsibility over both revenue and appropriations measures and, until the Civil War, could fairly easily handle the nation's finances.[191] However, after 1861 the magnitude of the war budget placed too great a burden on the Committees,[192] and immediately after the Civil War the appropriations jurisdiction of both

185 W. WILLOUGHBY, THE NATIONAL BUDGET SYSTEM 5 (1927). The submission of systematic budgets has occurred since 1921 under the Budget and Accounting Act of 1921. Ch. 18, § 207, 42 STAT. 22, *codified at* 31 U.S.C. § 16 (1970). Although frequently called executive budgets, "executive budget" properly is not applicable since the term originally was used to describe proposals modeled on the English budget system, those in which the legislature's power to augment executive appropriation proposals is denied or diminished. The term "executive" or "legislative" is used to designate which of the two institutions has the primary decisionmaking role, a crucial distinction. *See* H.R. REP. No. 362, 66th Cong., 1st Sess. 7 (1921); notes 254-264 *infra* and accompanying text.

186 *See* V.J. BROWNE, *supra* note 151, at 37; L. FISHER, *supra* note 33, at 89.

187 Polk exerted active central control, for as a former chairman of the House Ways and Means Committee he well knew the bureau chiefs' tendency to request large and sometimes extravagant sums. 4 THE DIARY OF JAMES K. POLK—1845-1849, at 174-75 (1910). Polk instructed his Cabinet to eliminate padding from the estimates and personally intervened to reduce or eliminate items from the bureau estimates when cabinet action appeared too timid. *Id.* at 181. *See also* 3 *id.* at 212-13, 215-16, 218-22.

188 W. WILLOUGHBY, *supra* note 185, at 6-7.

189 *Cf.* D. SELKO, THE FEDERAL FINANCIAL SYSTEM 79 (1940).

190 A congressional system is, according to V.J. Browne, "a financial system in which Congress, so to speak, called the tune," maintaining "omnipotence" to the exclusion of the Executive. V.J. BROWNE, *supra* note 151, at 69.

191 *See* L. FISHER, *supra* note 33, at 88.

192 *Id.* at 92. *See also* V.J. BROWNE, *supra* note 151, at 50-51.

was splintered off into new appropriations committees in both the House and the Senate.[193]

For the next 20 years the House and Senate Appropriations Committees struggled to increase their power and thereby incurred the enmity of many other members. In 1875 the Holman amendment to House rule XXI substantially aggravated the tension in the House by permitting appropriation bills to carry amendments to the substantive authorizing legislation so long as the amendments retrenched expenditures.[194] The new emphasis on retrenchment greatly enlarged the jurisdiction of the House Appropriations Committee,[195] and other committees that had jurisdiction over substantive authorizing legislation felt that the Appropriations Committee was encroaching upon their jurisdiction. Further, the attachment to appropriation bills of amendments to substantive legislation so overloaded the Committee that its members could not devote sufficient attention to appropriations.[196]

Consequently, the House Appropriations Committee lost jurisdiction over rivers and harbors appropriations in the 1870's, over agriculture and forestry appropriations in 1880, and over six additional appropriations areas in 1885.[197] The resulting balkanization of the appropriations process can be summarized as follows:

> [T]he grasp which the Committee on Appropriations alone could keep upon the purse strings was relaxed; the spending committees, having intimate and for the most part cordial relations each with a particular department, launched out into an unrestrained competition for appropriations, the one striving to surpass the other in securing greater recognition and more money for its special charge. In these circumstances it is not surprising that executive dereliction passed almost unnoticed and that the department heads and bureau chiefs came to look upon themselves rather than upon Congress as the ultimate arbiters of expenditure.[198]

193 L. FISHER, *supra* note 33, at 92-93.

194 *See generally* V.J. BROWNE, *supra* note 151, at 54-55.

195 Rules of the House of Representatives, R. XXI(2); IV HIND'S PRECEDENTS § 3578, at 382 (1907).

196 L. WILMERDING, *supra* note 148, at 143. Four years after the Holman amendment passed, Representative James A. Garfield accurately predicted that its consequence would be the dispersion of appropriations responsibility to several committees, which ultimately would result in the complete absence of "any general and comprehensive plan." Garfield, *National Appropriations and Misappropriations*, 128 N. AM. REV. 572, 585-86 (1879).

197 L. FISHER, *supra* note 33, at 93.

198 L. WILMERDING, *supra* note 148, at 143-44.

That requests for deficiency appropriations remained within the jurisdiction of the Appropriations Committee aggravated the lack of central and consistent control.[199]

While the fragmentation of the congressional appropriations process was fostering extravagance, the high tariff policy created an embarrassment of riches. From 1866 through 1893 the nation amassed the enviable record of 28 straight years of federal surpluses. The federal debt, standing at an astonishing level of almost $2.7 billion at the end of the Civil War, was reduced by two-thirds to $961 million by 1893.[200] Speaking of the financial state of the nation at the close of the nineteenth century, Lord Bryce concluded that "under the system . . . here described America wastes millions annually. But her wealth is so great, her revenue so elastic, that she is not sensible of the loss."[201] In the following years, however, severe recession struck the nation and caused six straight years of huge deficits.[202] Although preceded by four straight years of surpluses, a decline in customs revenue in 1904 and a sharp rise in expenditures, reflecting a $50 million right-of-way payment for the Panama Canal, produced a substantial deficit.[203] The nation no longer could afford its wasteful, fragmented appropriations procedure.

ENACTMENT OF THE ANTI-DEFICIENCY ACT

Congress's growing recognition of the ineffectiveness of extant statutory controls over deficiencies and the increasing demand for restraint in government expenditures caused Congress to amend section 3679 of the Revised Statutes in 1905. The House Appropriations Committee proposed legislation, later known as the Anti-Deficiency Act, to end abuses that had continued for many years—the use of monies appropriated for one purpose for a different purpose and the use of coercive deficiencies to obtain mid-year increases in financing.[204] Congress believed that the amendment would solve the deficiency problems by requiring (1) monthly or other apportionment of the initial appropriation so as to spread it out over the entire fiscal year, (2) adherence to such apportionment unless waived in writing by the top-ranking agency official, (3) transmittal of the reasons for all waivers to Congress with any deficiency request, and (4) the imposition of the sanctions of summary removal from office and punishment by fine or imprisonment for failure to adhere to the requirements.[205] Experience during the following few months proved the expectations wrong.

199 *See id.* at 145.

200 CENSUS BUREAU OF THE UNITED STATES DEP'T OF COMMERCE, THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO 1957, at 711 (1960) [hereinafter cited as STATISTICAL HISTORY].

201 J. BRYCE, 1 AMERICAN COMMONWEALTH 184 (1924 ed.). Lord Bryce described the disarray of the appropriations system and the extraordinary friction and delay caused by the legislative structure as well as by the separation of powers between Congress and the Executive. *See id.* at 177-90, 216-28.

202 STATISTICAL HISTORY, *supra* note 200, at 711.

203 L. FISHER, *supra* note 33, at 98.

204 39 CONG. REC. 3780 (1905). *See also id.* at 3689-93, 3780-83.

In presenting the Urgent Deficiency Bill of 1906,[206] the House Appropriations Committee urged further amendments to section 3679 of the Revised Statutes. The debates indicate that Congress was far more concerned about the budgetary process than during previous years[207] and provided a forum for exploring broad, troublesome problems, both executive and congressional, with the budgetary process.[208] Placing the blame on both Congress and the bureau chiefs,[209] Representative Littauer identified as major problems the inadequate preparation of initial estimates, agency exploitation of House-Senate rivalry, Appropriations Committee failures, and simple defiant overexpenditure by bureau chiefs.[210] Representative Tawney, Chairman of the Appropriations Committee, identified as the defect in the existing law its failure to define the grounds upon which the right of waiver could be exercised.[211] To remedy this defect, Congress altered section 3679 of the Revised Statutes to permit a department head to waive the monthly apportionment

205 Act of Mar. 3, 1905, ch. 1484, 33 Stat. 1257, *codified at* 31 U.S.C. § 665 (1970).

206 *See* Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48, *codified at* 31 U.S.C. § 665 (1970).

207 *See* 40 CONG. REC. 1273-91, 1316-24, 1376-96 (1906).

208 An undercurrent of intense congressional frustration and outrage at the seeming impossibility of obtaining adherence to limitations and controls on expenditures constantly ran through the debates. *See id.* at 1290 (remarks of Representative Fitzgerald). Representative Fitzgerald, a member of the Appropriations Committee and later its Chairman, expressed incredulity over the degree of avoidance of the prior year's amendment of section 3769 and over the apparent belief of each department official that the amendment was intended to apply to all except himself. *Id.*

209 *Id.* at 1274 (remarks of Representative Littauer). The identification of bureau chiefs as the principal villains was not merely an indirect way of attacking the President; it is a continuing theme, voiced not infrequently by Presidents, in discussions of the budget process. *See, e.g.*, 119 CONG. REC. 1404 (daily ed. Jan. 29, 1973) (President Nixon's 1973 budget message); notes 266-287 *infra* and accompanying text (congressional debates over Budget and Accounting Act of 1921). *See also* C. SCHULTZE, *supra* note 43, at 94.

210 *Id.* at 1273. The remarks by Representative Fitzgerald provide an excellent summary of the reasons for the expenditure overruns. *Id.* at 1289-90.

211 *Id.*; *see id.* at 1316-17 (Bureau of Steam Engineering's use of ambiguity regarding waiver).

only upon the happening of unexpected, extraordinary emergencies or unusual circumstances.[212] Unfortunately, Congress did not correct the critical flaw in the statute, which remained until 1933; the waiver power had to be placed in officials who would ensure its proper exercise and who would control the bureau chiefs' tendency to spend every penny they could obtain.[213]

Coercive deficiencies, in the sense of the simple duress or compulsion they imposed on Congress, did not form the crux of the problem but were symptomatic of deeper problems. When Congress enacted the Anti-Deficiency Act it moved toward greater itemization in appropriation legislation. Acting out of distrust of the executive departments, Congress sought to leave as little as possible to executive discretion.[214] At the same time, population growth and more complex industrial institutions placed more and more demands on the federal government. Increasingly, the fragmented appropriations system in Congress was breaking down under unbearable demands.

PRELUDE TO THE BUDGET AND ACCOUNTING ACT OF 1921

The Smith Amendment. Shortly after the enactment of the Anti-Deficiency Act, Congress attempted to correct other defects in the congressional budget system by enacting the Smith amendment.[215] Congress expected the amendment to force the President to use the power of his office to compel reductions in budget estimates so that the estimates would fall within the anticipated revenues; because the amendment focused attention on the President, the onus of deficits or increased taxes would fall upon him.[216] Congress's action was not motivated by hostility to President Taft but merely evidenced the recogni-

212 Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48, *codified at* 31 U.S.C. § 665 (1970).

213 *See* 40 CONG. REC. 1317 (1906) (Representative Palmer's colloquy with Representative Tawney); *id.* at 1282 (remarks of Representative Fitzgerald).

214 L. WILMERDING, *supra* note 148, at 149.

215 Act of Mar. 4, 1909, ch. 299, § 7, 35 Stat. 1027; L. FISHER, *supra* note 33, at 98-99. The essence of the Smith amendment has been codified in the Budget and Accounting Act of 1921. § 202, 31 U.S.C. § 13 (1970).

216 43 CONG. REC. 3310 (1909) (remarks of Representative Smith). The statute required the Secretary of the Treasury to estimate revenues for the next fiscal year immediately after he received the estimates of appropriations requested by each of the bureaus and departments; if the appropriations requests exceeded estimated revenues, the Secretary was required to apprise the President so that the President could advise Congress on how the estimated appropriations could be reduced to bring them within estimated revenues or on what loans or new taxes would be necessary to remedy the deficiency. Act of Mar. 4, 1909, ch. 299, § 7, 35 Stat. 1027.

tion that only the President possessed authority sufficient to control the appetites of the bureaucracy.[217] Representative Sherley and Representative Tawney, chairman of the Appropriations Committee, focused upon two clearly related and important points. Sherley pointed out that a comprehensive budget prepared by the President would bring the competing priorities of governmental functions sharply into focus,[218] and Chairman Tawney recognized that Congress was unable to determine effectively the sums minimally necessary for each program.[219] Chairman Tawney thus expressed the growing recognition that the increasing complexity of government required new organizational structures in both branches. Although Representative Finely, expressing institutional jealously shared by many of his colleagues, did not wish to consider executive branch reform because he considered cutting appropriations to fit revenues to be Congress's, not the President's, job,[220] Representative Smith, in response, reemphasized that Congress sorely needed the help of the President to control the bureaucracy's budgetary appetite.[221]

The Budget Movement. Although brief, the debate on the Smith amendment touched upon nearly all of the defects of the appropriation process that were to receive widespread inquiry, debate, and recognition during the next decade. Concern became so widespread that it was labelled the "Budget Movement." The Movement developed

217 43 CONG. REC. 153 (1908). Representative Livingston had suggested that the Secretary of the Treasury be mandated to reduce appropriation estimates to fit revenues. Representative Smith pointed out the practical political problem that would be created by such a provision since the Secretary was not superior to other Cabinet officers. *Id.*

Congress also was aware that its own house was not in perfect order. Representative Smith, as he began his explanation to the House of the Smith amendment, placed substantial blame on the decentralized chaos of the then existing congressional structure. Congressman Smith pointed out that prior to 1861, when both the revenue and the appropriation powers were lodged in the Ways and Means Committee, Congress had a means to prevent expenses from exceeding revenues. He emphasized that the executive and legislative splintering of the appropriations function severely exacerbated the problems. *See id.* at 152. *See also* L. WHITE, THE REPUBLICAN ERA: A STUDY IN ADMINISTRATIVE HISTORY, 1869-1901, at 87-90 (1958). Presidents from Grant through McKinley exercised minimal centralized control and supervision over the budget function. The contours of the Administration's policies, as determined by the budgetary process, were developed in the interplay between the bureau chiefs and their respective appropriations committees. *Id.*

218 43 CONG. REC. 3310 (1909).

219 *Id.* at 153.

220 43 CONG. REC. 3310 (1909).

221 *Id.*

two policy issues in addition to those raised in the brief 1909 debate. The first focused on whether the President should have a budgetmaking staff to exploit his prestige and power over the bureaucracy to reduce estimates. The second concerned whether the primary appropriation power should shift to the President under some form of executive budget, which would restrict congressional power to increase the amounts proposed in the President's budget or to add appropriations. Congress easily agreed to give the President a budget staff but forcefully rejected the second proposal, which embodied a fundamental shift in the system of checks and balances. The second proposal was based on the premise that Congress could not make proper choices because of a combination of ineptitude, corruption, and regional or district, rather that national, perspective. Those who made the proposal argued that, in contrast, the President had the national interest much more firmly in mind because of the nature of his constituency. Other important economic factors influenced this debate. From 1897 to 1913 federal expenditures doubled[222] and further increased sevenfold between 1913 and 1921.[223] World War I caused a 25-fold increase in the national debt. Finally, changes in the tax system increased the voting public's interest in governmental economy; the elimination of the liquor tax[224] and the authorization of the income tax[225] gave the public a greater stake in the Government's finances.

The congressional leaders who were responsible for the Budget and Accounting Act of 1921 continually emphasized in their committee reports and in their debates in Congress that the Act would leave unaltered the existing distribution of powers between the President and Congress. They spoke to an opposition that was primarily though not completely outside the halls of Congress. Part of that opposition passionately sought to effect a redistribution of institutional powers. The fact that Congress refused to enact the redistribution is quite relevant to the resolution of the impoundment issue since the proposal made and rejected then would have provided the power the Executive now asserts. A full understanding of Congress's opposition to the proposal and of the foundations of the arguments on both sides is essential, therefore, to the comprehension of the impoundment issue in 1974, as well as of the Budget and Accounting Act of 1921.

222 STATISTICAL HISTORY, *supra* note 200, at 711.

223 *Id.*

224 U.S. CONST. amend. XVIII.

225 *Id.* amend. XVI. From 1913 to 1917, the number of individuals paying income taxes increased tenfold, from 358,000 to 3,473,000. 58 CONG. REC. 7083 (1919).

The Budget Movement arose during the Progressive Era and was but a natural part of the broader political means and ends of the Progressives, who worked to institutionalize clean, efficient, and disinterested government.[226] Over a period of 15 years, beginning in 1906, the Budget Movement to some degree altered the budget systems of nearly every state and most major cities.[227] In 1910, President Taft requested and received a substantial appropriation to create the first major commission of experts to study the structure and operation of the Government, a commission that later was identified as the largest single contributor to the promotion of public interest in the budget system.[228] Congress directed the commission to adopt new or to change old methods of transacting the public business in order to attain greater efficiency and economy therein.[229] During its existence, the Commission on Economy and Efficiency (unofficially called the Cleveland Commission because its chairman was Dr. Frederick A. Cleveland) issued 110 reports recommending substantial reorganization of agencies, elimination of duplicative functions, adoption of new accounting techniques, and numerous other managerial reforms.[230] The Commission's 568-page report, "The Need For A National Budget," [231] recommended that the President each year submit a comprehensive budget showing estimated revenues and expenditures together with a budgetary message highlighting the budget, and that a comprehensive auditing system independent of the

226 *See* R. HOFSTADTER, THE AGE OF REFORM 257 (Vintage ed. 1955). This view of the larger goals of the Progressive Era was reflected in the contemporaneous work of a leader in the Budget Movement, Dr. Frederick A. Cleveland. F. CLEVELAND & A. BUCK, THE BUDGET AND RESPONSIBLE GOVERNMENT 36 (1920).

227 *See* A. BUCK, PUBLIC BUDGETING 10-24 (1929).

228 *Id.* at 13-14.

229 Act of June 25, 1910, ch. 384, 36 Stat. 703.

230 J. DAHLBERG, THE NEW YORK BUREAU OF MUNICIPAL RESEARCH: PIONEER IN GOVERNMENT ADMINISTRATION 86-87 (1966). *See generally* F. CLEVELAND & A. BUCK, *supra* note 226, at 82-88; J. DAHLBERG, *supra* at 81-92.

One of the other two principal Commissioners was Frank J. Goodnow, then professor of Administrative Law at Columbia University Law School and later president of Johns Hopkins University. Professor Goodnow is generally regarded as the "father" of public administration. *See* D. WALDO, THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF PUBLIC ADMINISTRATION 23 (1948). The third Commissioner was William Willoughby, then professor of Political Science at Johns Hopkins University and, in 1916, the first director of the Institute for Government Research, later the Brookings Institution, in Washington. Cleveland, Goodnow, and Willoughby were among the major theoreticians of the new field of applied political science, public administration.

231 H.R. Doc. No. 854, 62d Cong., 2d Sess. (1912). *See generally* V.J. BROWNE, *supra* note 151, at 74-79.

executive branch be instituted. Although the Commission primarily focused on the executive branch of the Government, it did recommend a reduction in itemization of appropriations to allow agency officials broader spending discretion in the interest of economy.[232] The Commission deliberately made no other proposals regarding the structure of Congress or the details of congressional budget procedure.[233]

Although the Commission's report remained silent on congressional procedures, the reformers of the Progressive Era, including members of the Commission, did not. From 1907 to 1918, the reformers and academicians, with apparent unanimity, pressed for enlargement of executive power as a necessary component of a budget system; they ardently supported the enhancement of executive and the diminution of legislative power.[234] Taking a negative approach, some reformers argued that far too much control over the budgetary process resided in a far too politicized Congress.[235] In a more positive vein, historian Charles A. Beard suggested that proposals for a more executive-oriented budget process provided the basis for a thoroughgoing reconstruction of the budgetary machinery in other governmental structures.[236] To achieve the shift in the power of the purse, the reformers sought the adoption of an executive budget similar to that of the Confederacy or of the English system. After the President submitted his budget, the only permissible legislative action would have been the reduction of appropriations.[237]

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232 V.J. BROWNE, *supra* note 151, at 75-77. The Commission viewed itemization as depriving administrative officers of the power and responsibility to eliminate waste and inefficiency. *Id.* at 77.

233 Chairman Cleveland later explained that "the temper of Congress at the time was such that the subject was purposely avoided." F. CLEVELAND & A. BUCK, *supra* note 226, at 340.

234 *See generally* D. WALDO, *supra* note 230, at 35-36.

235 *See, e.g.*, Ford, *supra* note 184, at 1; Miles, *The Budget and the Legislature*, 62 ANNALS 36 (1915). *See also* F. CLEVELAND & A. BUCK, *supra* note 226, at 57-58.

236 Beard, *The Budgetary Provisions of the New York Constitution*, 62 ANNALS 64, 65 (1915).

237 The proposal of one particularly influential group provided for such an executive budget. During 1914 and 1915, a staff of 20 from the New York Bureau of Municipal Research prepared over 3,500 pages of reports to the State Constitutional Convention Commission. *See generally* J. DAHLBERG, *supra* note 230, at 93-112. The Bureau recommended a system under which the legislature could have acted only to reduce appropriations proposed by the Governor. The legislature would have been required to enact any increases or new appropriations one by one so that each would have been independently subject to the Governor's veto. Any "swollen" appropriation would have stood out like a sore thumb, and any possibility of legislative combination would

A break opened in 1918 on the theretofore solid academic front. In a book published that year, Edward A. Fitzpatrick presented the first extended criticism of the Budget Movement's theories.[238] Fitzpatrick's criticism zeroed in on the executive budget. Concluding that in a democracy the placement of such a power in the executive would be anomalous,[239] Fitzpatrick stated: "The main reliance of popular government must be on the 'many' in the legislature rather than on the executive for the declaration and control of public policy."[240] In the same year another prominent leader in the Budget Movement, William F. Willoughby, indicated a softening in his earlier views favoring an executive budget and sought to emphasize that budget reform need not mean any diminution in congressional powers.[241] This break in the academic front, in conjunction with the rejection of executive budget

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have been foreclosed. The proposed provision, as reprinted in the 1919 congressional hearings on the national budget system, read as follows:

> The legislature may not alter an appropriation bill submitted by the Governor except to strike or reduce items therein; . . . .
>
> Neither house shall consider further appropriation until the appropriation bills submitted by the Governor shall have been finally acted upon by both houses, nor shall such further appropriations be then made except by separate bills *each for a single work or object*, which bills shall be subject to the governor's approval . . . . (emphasis added)

Hearings on the National Budget System Before the House Select Comm. on the Budget, 66th Cong., 1st Sess. 522 (1919) [hereinafter cited as *1919 House Budget Hearings*]. The New York Constitutional Convention adopted the Bureau proposal, but the November 1915 election defeated it by an 80 percent vote. F. CLEVELAND & A. BUCK, *supra* note 226, 521. *See also* A. BUCK, *supra* note 227, at 21-24.

Practitioners and historians generally trace modern budgetary techniques and theory to this New York Bureau. Among others, Professor William F. Willoughby, who, next to the Bureau's first director, Dr. Frederick Cleveland, was the nation's foremost authority in the field, acknowledged the Bureau's preeminence. W. WILLOUGHBY, THE MOVEMENT FOR BUDGETARY REFORM IN THE STATES 154-55 (1918). *See also* A. BUCK, *supra* note 227, at 13-14. The establishment of the Bureau was "an event of such great importance for later developments that not even the briefest sketch of the history of public administration could fail to note its significance." D. WALDO, *supra* note 230, at 31-32. The history of the formation of the Bureau has been recorded by Jane S. Dahlberg. J. DAHLBERG, *supra* note 230, at 3-48.

238 E. FITZPATRICK, BUDGET MAKING IN A DEMOCRACY (1918).

239 *Id.* at 122.

240 *Id.* Fitzpatrick also criticized the internal organization of Congress. *Id.* at 163-204. He differed from the previous consensus within the Budget Movement, however, in urging reform, rather than circumvention of Congress.

241 W. WILLOUGHBY, THE PROBLEM OF A NATIONAL BUDGET 145 (1918). *See also 1919 House Budget Hearings*, *supra* note 237, at 47-48, 68, 73-74 (testimony of William F. Willoughby).

proposals in several states, led to a much greater willingness on the part of Congress to consider budgetary reform.[242]

THE BUDGET AND ACCOUNTING ACT OF 1921

Shortly after the Commission on Economy and Efficiency transmitted its report to Congress, the House began to consider various budget proposals,[243] and in 1915 a general debate on budget reform occurred in the House.[244] Congressmen recognized that fault for the lack of budgetary restraint rested with both the Executive and Congress because each department head wanted all he could get and each committee tended to give its correlative department all it could give.[245] Some, however, expressed belief that a budget system might solve the age-old, hitherto unsolvable problem of bureaucratic gluttony if agency heads were "brought together and made to bring the estimates of appropriations within the estimates of receipts, and then leave something over." [246] Representative Cullop expressed hope that an interested staff agency

[242] *See* A. BUCK, *supra* note 227, at 23-24.

[243] On February 28, 1913, Representative Sherley, ranking majority member of the Appropriations Committee, proposed the centralization of all appropriation power in a new committee consisting of the chairman and highest ranking majority and minority members of the principal committees having revenue and expenditure power. 49 CONG. REC. 4349-55 (1913).

On March 4, 1913, Representative Fitzgerald, Chairman of the Appropriations Committee, proposed consolidation of all appropriation power within the existing Appropriations Committee. *Id.* at 4847 (1913). Representative Fitzgerald discussed the subject more broadly in June of 1913. *See* 50 CONG. REC. 2154-62 (1913). He began by emphasizing two developments, "the rapid increase in the cost of Federal government [that] was attracting universal attention" and the agreement of close students of the subject "that radical change is imperatively required in the Federal system if evils of alarming proportions are to be avoided." *Id.* at 2154. After briefly surveying the history of the spending power from 1789, he discussed the question of the diminution of congressional spending power. *Id.* at 2157. While personally somewhat in favor of such a diminution, he acknowledged: "[T]he time is not ripe even for the consideration of such radical and fundamental changes in our institutions, [so] it is necessary to consider the changes that are advisable as well as possible under the existing order." *Id.* He then proceeded to quote facts and opinions recited by many past congressmen in support of his proposal to reconsolidate all appropriation power within the House Appropriations Committee. *Id.* at 2157-62.

[244] *See* 52 CONG. REC. 3579-92 (1915).

[245] *Id.* at 3579 (remarks of House Minority Leader Gillett); *id.* at 3591 (remarks of Representative Borland).

[246] *Id.* at 3586 (remarks of Representative Mann). Then, "instead of Congress being forever engaged in refusing appropriations . . . we ought to be engaged in considering the advisability of granting appropriations which are not asked by the executive departments." *Id.*

aiding the President could cabin the ambitions of the spending agencies.[247] In 1915, House Appropriations Committee Chairman Fitzgerald made it clear that he had completely reversed his early fondness for diminution of congressional power. He recognized that when Congress and the President are of the same party, Congress generally, though not always, reflects and acquiesces in executive desires. Beyond that, the system clearly contemplates that Congress and the Executive may be of different political complexions.[248] Fitzgerald concluded that when Congress and the President do disagree, expenditure policies should be determined by Congress regardless of the desires of the Executive,[249] and the following year argued that the American theory of government and American institutions would not permit adoption of the executive budget.[250]

By 1916, all three party platforms sought the adoption of some budget system, but none raised the question of the expansion of executive power.[251] Between 1915 and 1918, several resolutions introduced in each Chamber called for establishment of a select committee or commission that would hold hearings and propose specific legislation,[252] and considerable discussion of budgetary reform, much of it still in support of an executive budget, took place in Congress.[253] Finally, in 1918, just days before the end of the session, Representative Medill McCormick introduced the first specific budget legislation, along with extensive supporting data and argument.[254] The legislation provided for presidential submission of a budget, creation of an independent auditing system and of a single committee on appropriations in each House, and a slightly modified executive budget.[255] Legislative augmentation of the President's budget could occur only upon a two-thirds vote of the

[247] *Id.* at 3592.

[248] *Id.* at 3589.

[249] *Id.* at 3588.

[250] 53 CONG. REC. 14163 (1916). Fitzgerald distinguished between the American system and the British system. The executive budget was easily workable in England where the executive and the parliamentary majority were always members of the same party.

[251] *See* W. WILLOUGHBY, *supra* note 237, at 155-56.

[252] *Id.* at 150-53.

[253] *See, e.g.*, 56 CONG. REC. 329-36 (1917) (remarks of Representative Frear); *id.* at 1736-43 (remarks of Representative Dyer); *id.* at 11315-21 (remarks of Senator Kenyon); 57 CONG. REC. 214-18 (1918) (remarks of Representative Borland).

[254] *See* PLAN FOR A NATIONAL BUDGET SYSTEM, H.R. DOC. NO. 1006, 65th Cong., 2d Sess. (1918). *See also* Mayr, *The Bureau of the Budget: Its Evolution and Present Role I*, 39 AM. POL. SCI. REV. 653, 655-56, 658-59 (1945).

[255] H.R. Doc. No. 1006, *supra* note 254, at 13.

Appropriations Committees and no floor amendments adding or increasing any item would be allowed.[256] Thus, in the absence of overwhelming support for a particular appropriation, Congress would be empowered only to reduce the levels of the President's proposed appropriations.

On May 20, 1919, the second day of the next session of Congress, two resolutions were introduced in the Senate calling for select committees on the budget.[257] On the same day, Representative Good, the new chairman of the House Appropriations Committee, introduced a bill calling for a legislative budget.[258] Representative Frear, a longtime proponent of an executive budget system, introduced legislation providing for such a system[259] and later made an impassioned speech in support of his plan.[260] At the end of June, Representative Green introduced a resolution to establish a Select Budget Committee,[261] which the Rules Committee reported out favorably and the House passed. Representative Good became chairman of the Select Budget Committee.[262]

The Select Budget Committee held lengthy hearings and then reported out a bill that closely resembled Chairman Good's earlier bill.[263] It clearly created a legislative budget, a point that was emphasized repeatedly in the report, which began with an emphatic statement that budget theory must be subservient to both political realities and constitutional limitations.[264] The Committee's description of the then existing system and its defects strikingly paralleled the criticisms and observations made between 1905 and 1906, when Congress enacted the Anti-Deficiency Act, and during 1909, when the Smith amendment passed. The problems were the same; only the solutions were different.[265] The report identified as the key sources of excessive expenditures the diffusion of executive responsibility and the independence and constantly expanding demands of the bureau chiefs.[266] The Select Budget Committee

256 *Id.* at 26-27.
257 S.J. Res. 11, 66th Cong., 1st Sess. (1919); S.J. Res. 12, 66th Cong., 1st Sess. (1919).
258 H.R. 1201, 66th Cong., 1st Sess. (1919).
259 H.R. 4061, 66th Cong., 1st Sess. (1919); H.R.J. Res. 83, 66th Cong., 1st Sess. (1919).
260 58 CONG. REC. 1694-1702 (1919).
261 H.R. Res. 168, 66th Cong., 1st Sess. (1919).
262 58 CONG. REC. 3431, 3437 (1919).
263 *See* H.R. REP. No. 362, *supra* note 185.
264 *Id.* at 1.
265 *Id.* at 4. The Select Budget Committee identified as the basic defects in the system its failure to consider expenditures in relation to revenues and the lack of effective supervision, coordination, and control of the agencies' estimates by the President. *Id.*
266 *Id.* at 4.

commented: "[A]s a result, a great deal of the time of the committee of Congress is taken up in exploding the visionary schemes of bureau chiefs for which no administration would be willing to stand responsible." [267]

The Select Budget Committee proposed, as had been proposed in 1909, to make the President responsible for duplication, waste, extravagance, and inefficiency.[268] Only in this way could the appetites of the bureau chiefs be controlled.[269] The bill gave the President a staff that was to pare down the estimates and relieve the President of some of the burden. This staff, the Bureau of the Budget, was to act something like a filter.[270] The Committee anticipated that the final budget package presented to Congress would contain "bare-bones" requirements and that Congress could concentrate its attention on big issues and discard the responsibility for details.[271]

To strengthen congressional power further, the legislation devised an auditing department responsible to Congress, not to the Executive, and thus ended the practice of using executive branch auditors, which had existed from 1789. Since the Executive had the power to initiate the budget, an independent audit was believed necessary.[272] The Committee's report concluded with a repetition of two main themes—the new budget system would aid Congress by relieving it of the impossible task of controlling the voracious bureau chiefs, and the allocation of congressional-executive powers would remain unaltered.[273]

When Chairman Good introduced the Select Budget Committee's bill to the House, he first reviewed the nation's fiscal history since the

267 *Id.* The theme of the uncontrolled and visionary schemes of the bureau chiefs appears repeatedly throughout the hearings; nearly all witnesses testified that this was a problem of considerable magnitude. *See, e.g., 1919 House Budget Hearings, supra* note 237, at 8-9, 22 (testimony of Governor Lowden); *id.* at 67-69, 80-81 (testimony of Professor Willoughby); *id.* at 272 (testimony of Charles D. Norton, former Assistant Treasury Secretary); *id.* at 467-69, 483-84 (testimony of former President Taft). Even proponents of an executive budget attempted to blame the bureaucracy. *See id.* at 155 (testimony of Charles A. Beard); *id.* at 351 (testimony of Frank J. Goodnow); *id.* at 538 (testimony of Frederick A. Cleveland).
268 H.R. REP. No. 362, *supra* note 185, at 6.
269 *Id.* at 5.
270 *1919 House Budget Hearings, supra* note 237, at 160 (remarks of Representative Temple).
271 *Id.* at 71 (testimony of Professor Willoughby, Chairman Good's principal consultant).
272 H.R. REP. No. 362, *supra* note 185, at 8. *See also* L. WILMERDING, *supra* note 148, at 199-249 (pre-1921 legislative attempts to exercise postexpenditure control by audit and legislative oversight); *id.* at 250-83 (analysis of audit provisions in 1921 Act).
273 H.R. REP. No. 362, *supra* note 185, at 9-10.

Civil War and emphasized that budgetary reform was inevitable because the combination of the loss of the indirect tax on liquor, the 500 percent increase in peacetime expenditures since 1914, and the 25-fold increase in the national debt resulting from World War I operated to place substantial demands on the taxpayers through the direct income tax recently authorized by the Sixteenth Amendment.[274] Good characterized the proposed Budget Bureau as a very important aid to Congress since it would give the committees the assistance in arriving at correct budgetary conclusions that they lacked under the extant system[275] and emphatically rejected any belief that a budget should restrict or limit congressional power in any way.[276] In order to satisfy the other side of the aisle, Representative Byrns, the ranking minority member of the Select Budget Committee, emphasized that the budget submitted by the President should be viewed as no more than a representation of the Administration's "*wishes*." [277]

Senate concern with the Versailles Treaty and the League of Nations somewhat delayed Senate action on the House bill. Brief hearings were held in January 1920, and the bill was reported out in April of that year without any changes of substance.[278] During the brief debate, the Senators repeated the themes raised in the House.[279] Only Senators Smoot and Thomas spoke in favor of increasing presidential power.[280] On May 20, 1920, the bill passed unanimously and, after Congress overrode the veto by President Wilson, finally became law on June 10, 1921.[281]

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274 58 CONG. REC. 7083 (1919).

275 *Id.* at 7085.

276 *Id.* at 7084.

277 *Id.* at 7100 (emphasis added). *See also* Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 73 (D.D.C. 1973) ("the budget is nothing more than a proposal to Congress for Congress to act upon as it may please").

278 S. REP. No. 524, 66th Cong., 2d Sess. (1920).

279 *See, e.g.*, 59 CONG. REC. 6268-69 (1920) (remarks of Senator McCormick) (President would control appetites of bureau chiefs); *id.* at 6268 (remarks of Senator McCormick) (no alteration in existing executive-legislative power relationships would result); *id.* at 6389-90 (remarks of Senator King) (President should be given power and responsibility for controlling bureau chiefs); *id.* at 6393-94 (remarks of Senator Smoot) (President should control appetites of bureau chiefs).

280 *Id.* at 6394.

281 Act of June 10, 1921, 42 Stat. 20 (codified in scattered sections of 5, 6, 7, 10, 14, 18, 28, 31, 35, 39, 43 U.S.C.). President Wilson vetoed the bill on June 4, 1920, objecting to the quasi-judicial status of the Comptroller General that placed that office beyond the President's removal power. *See* 59 CONG. REC. 8609-10 (1920). After President Harding's inauguration, the bill was reintroduced, passed the Senate by voice vote and the House by a vote of 353-3, and became law. Act of June 10, 1921, 42 Stat. 20 (codified in scattered sections of 5, 6, 7, 10, 14, 18, 28, 31, 35, 39, 43 U.S.C.).

EARLY YEARS OF THE BUREAU OF THE BUDGET

President Harding chose Brigadier General Charles B. Dawes as the first Director of the Bureau of the Budget. During the next few months, Dawes issued a series of regulations interpreting the Anti-Deficiency Act from which grew the practice of establishing "general reserves" in each appropriation. A certain portion of an appropriation was set aside and made available only under certain circumstances, and then only upon the authorization of the Bureau of the Budget. The purpose and meaning of the Dawes interpretations form an important link in the historical chain, and the diary kept by Dawes provides invaluable insight into the purpose and meaning of his acts.[282]

In the first entry in his diary, Dawes gave expression to one of the major themes of Congress's consideration of the 1921 Act, the need to restrain the bureau chiefs.[283] Dawes assumed that there was "fat" in the appropriations for the upcoming fiscal year since the appropriations had resulted from the old method of preparing estimates and the cat-and-mouse game that the bureau chiefs had played with Congress. Accordingly, he began an economy campaign, which he initiated by drafting a press release, issued on June 27, 1921, in the name of the President. The release stated: "President [Harding] does not assume, as has been the custom under the old system with individual departments, that the minimum of governmental expenditures in the year is the amount fixed by Congress in its appropriations." [284] According to Dawes, this marked the passing of the old system under which the departments considered themselves derelict if they failed to spend their entire appropriation.[285] On June 29, 1921, in his second act inaugurating the economy campaign, Dawes addressed the first semiannual meeting of the Business Organiza-

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282 *See* C. DAWES, THE FIRST YEAR OF THE BUDGET OF THE UNITED STATES (1923). This book is Dawes's diary in which he included his "official orders and statements" with an eye to history in order to give "a much clearer picture of what was done and the reasons therefor than it would be possible to draw after the facts." *Id.* at IX. Dawes later became Vice President in the Coolidge Administration.

283 *Id.* at 1.

284 *Id.* at 4.

285 *Id.* at 2. For example, during the "June rush" of each fiscal year, agencies would enter into obligations just before the close of the fiscal year to ensure that their appropriations were fully exhausted. *See id.* at 416.

tion of the Government, called by the President.[286] Speaking directly to the bureau chiefs and proclaiming that the bureau chiefs were the officials who would be principally relied upon to reduce the "terrible cost of governmental administration," [287] Dawes signaled the beginning of a new era of efforts to reduce expenditures.[288]

On July 1, 1921, the new era was formalized in Bureau Circular Number Four, "First Budget Regulations." [289] The regulations required each bureau chief to designate the amount of his appropriation for fiscal 1922 that was indispensable to his bureau.[290] These estimates, as modified by the Cabinet Secretary, the Budget Bureau Director, or the President, would then become the maxima available for obligation although subject to further study and revision during the course of the fiscal year.[291] The difference between a bureau's estimates and the stated appropriation would be designated a "general reserve." [292]

Although the legal basis for these regulations was not set forth, subsequent regulations identified the Anti-Deficiency Act as their basis. Each regulation circular prescribed details for establishing reserves from appropriations and stated two qualitatively different purposes: to meet emergencies not anticipated at the time of apportionment and to effect savings where possible without damage to the service in question.[293]

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[286] *Id.* at 7-19. Over 1,200 persons, including the President and Vice President, many members of Congress, the Cabinet, and the administrative hierarchy of the Government attended. *Id.* at 3-4; Marx, *supra* note 254, at 671-72.

[287] C. DAWES, *supra* note 282, at 13.

[288] *Id.* at 13-14. Dawes declared that the old system had been characterized by the bureau chiefs' belief that initial congressional appropriations constituted only the minimum of expenditures for the fiscal year. *Id.*

[289] *Id.* at 22-23. *See generally* Ramsey, *Impoundment By the Executive Department of Funds Which Congress Has Authorized is To Spend Or Obligate* 1-4 (Library of Congress Legislative Reference Service, May 10, 1968), in *Ervin Hearings I*, *supra* note 9, at 291-92.

[290] Regulation No. 1, C. DAWES, *supra* note 282, at 22-23.

[291] Regulation No. 3, *id.*

[292] Regulation No. 2, *id.*

[293] Ramsey, *supra* note 289, at 292. One other aspect of section of 3679 of the Revised Statutes, as amended, deserves emphasis. Act of Feb. 27, 1906, ch. 510, 34 Stat. 48, *codified at* 31 U.S.C. § 665 (1970). The statute lodged the apportionment power in the department or agency heads, not in the Budget Bureau. If the Budget Bureau disagreed with the amount reserved, it could only appeal to the President to use his power of persuasion. *Id.*

On June 10, 1933, pursuant to Public Law 72-428, the President transferred the power to make, waive, and modify apportionments of appropriations to the Budget Bureau. Exec. Order No. 6166, 77 CONG. REC. 5708 (1933); *see* Pub. L. No. 72-428, ch. 3, § 16, 47 Stat. 1517 (1933). This gave the Budget Bureau far more effective control over apportionments.

In both instances, part of the appropriated funds are withheld from those who make the day-to-day expenditures from the fund, but there the similarity ceases. The first purpose dictates that a "rainy-day" fund be established from each appropriation to serve as a cushion; unpredictable demands arising after Congress has provided the agencies their life blood can be met from such reserves. A request for a deficiency appropriation to meet unpredictable needs would not arouse the ire of Congress. Thus, the general reserves for emergencies were established in addition to the apportionment contemplated by Congress when it enacted the Anti-Deficiency Act and were fully consistent with Congress's original purpose in enacting section 3679 of the Revised Statutes. On the other hand, reserves for "savings" seek to prevent expenditure of that part of an appropriation that proves greater than needed. The practical justification for such reserves exists in the fact that appropriations generally are estimates of expenditure needs. If the premises upon which the estimates are based subsequently change or prove wrong and costs are reduced, the difference should not be available for expenditure because any expenditure would be for items not intended by Congress.

Clearly, if an appropriation is considered a mandate to spend the entire amount, apportionments could only be made in simple aliquot shares or in accordance with some known seasonal pattern; no reserves could be established to allow for unanticipated needs or emergencies. Such a view would contradict both the spirit and letter of section 3679 of the Revised Statutes since it would tend to produce deficiency appropriations because of limits on the ability to accurately predict the need for funds. Similarly, reserves representing savings could not be established. Surely, in light of commonsense and of the repeatedly expressed views that the voracious appetites of the bureau chiefs constituted a fundamental and constant budget problem, an assertion that Congress mandates the expenditure of every penny of every appropriation regardless of need is absurd. It hardly needs to be said that Congress is unlikely to object to the return of funds to the Treasury if a project is completed or a function performed for less than the amount originally estimated.

Reserves for savings also can be viewed as the result of a process of continual review of the premises underlying the original estimate of expenditures. This review forms the third stage of the "budget cycle," what the OMB now refers to as "budget execution and control." [294] The key factor, however, remains that if an appropriation were considered a

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[294] *See* OMB, THE U.S. BUDGET IN BRIEF: FISCAL YEAR 1970, at 59 (1970).

mandate to spend, funds in excess of needs for programs authorized by Congress would have to be expended for purposes determined by an administrator, not by Congress. The primary purpose of itemization is to prevent such spending discretion. Thus, it would appear that Dawes was acting within the law when he sought to prohibit the expenditure of funds representing savings. Moreover, Dawes placed great emphasis on assuring that the drive to reduce expenditures not redound to the detriment of the service in question. Dawes's diary clearly demonstrates that he was engaged in a crusade against waste, inefficiency, and parochialism in the bureaucracy and *not* against the policies of Congress.[295] Dawes clearly was not unmindful of Congress's determination to prevent the diminution of its spending power, so forcefully asserted during the debate over the Budget and Accounting Act of 1921.[296]

Dawes's interpretation of the Anti-Deficiency Act excited no congressional opposition, since it was fully consistent with Congress's historical concern for economy in the operation of the Government, its historical distrust of the bureaucracy's estimates, and the widespread demand for governmental economy during the decade following World War I.[297] Indeed, Dawes took pains in his first official report to reassure Congress that the purpose of reserves was to confine expenditures to the smallest amount on which the business of the Government could be efficiently administered under Congress's programs.[298] Finally, the amounts reserved each year demonstrated the limited compass of reserves and must have further reassured Congress that its programs were not being undercut. During the 1920's, the following amounts were reserved:[299]

[295] *See, e.g.*, C. DAWES, *supra* note 282, at 24-35, 88, 174, 175, 222-23. In his address before the second meeting of the Business Organization of the Government, Dawes said that if Congress, "in its omnipotence over appropriations and in accordance with its authority over policy," passed a law requiring garbage to be placed on the White House steps, the Budget Bureau would adhere to its duty to advise "how the largest amount of garbage could be spread in the most expiditious and economical fashion . . . ." *Id.* at 178. *See also id.* at 95, 118, 132. The Budget Bureau's first annual report reiterated Dawes's assurances to Congress. *Id.* at 118, 133, 136, 141-42, 143-44.

[296] *Id.* at 95-96 (memo by Dawes to President recognizing Congress's right to increase appropriation beyond presidential recommendations).

[297] *See generally* L. KIMMELL, FEDERAL BUDGET AND FISCAL POLICY: 1789-1958, at 88-98 (1959).

[298] C. DAWES, *supra* note 282, at 100, 143.

[299] ANNUAL REPORTS OF THE DIRECTOR OF THE BUREAU OF THE BUDGET TO THE PRESIDENT OF THE UNITED STATES, 1922-30, at 3, 6, 8, 11, 26 (1922-30).

FISCAL YEAR	*AMOUNT RESERVED* (millions)
1922	135
1923	82
1924	21
1925	25
1926	46
1927	47
1928	61
1929	17
1930	25

Clearly, the reserve power was originated in response to the imperfections of estimating future needs, not in response to the imperfections of Congress.

WORLD WAR II EXPANSION AND CONGRESSIONAL REACTION

On January 8, 1941, President Roosevelt transmitted his fiscal year 1942 budget to Congress. His budget message announced, "[T]he Government has embarked on a program for the total defense of our democracy," [300] and declared that during the period of national emergency, construction projects that diverted manpower and materials from the defense program would be deferred.[301] Although for the duration of the war the President and Congress engaged in a struggle over directives delaying or deferring expenditure of appropriations for domestic construction projects, Congress statutorily authorized many of the deferrals and expressly recognized the higher priority of military mobilization.[302] In only two instances during the war did the Budget Bureau have to defend its deferrals of projects. In January 1943 a subcommittee of the Senate Appropriations Committee chaired by Senator Pat Mc-

[300] 87 CONG. REC. 67 (1941).

[301] *Id.* at 68.

[302] *See* Rural Post Roads Act of 1943, ch. 236, § 9, 57 Stat. 563. *See also* Rivers and Harbors Bill, ch. 19, § 2, 59 Stat. 11 (1945) (statutory deferral until six months after cessation of hostilities); Rivers and Harbors Bill, ch. 665, § 10, 58 Stat. 891 (1944) (project initiation after existing "critical situation"); Rivers and Harbors Bill, ch. 377, § 3, 55 Stat. 639 (1941) (projects to be "prosecuted as speedily as may be consistent with budgetary requirements under the direction of the Secretary of War"). The 1941 Rivers and Harbors Bill appropriated funds for two Oklahoma flood control projects cited by Professor Williams as examples of the political process in relation to deferral of public works projects. Williams, *supra* note 175, at 381-86. The practice of delay sharply contrasts with that which completely denies Congress's objectives by refusing to spend all or part of an appropriation.

Carran asked L.C. Martin, Assistant Director of the Bureau of the Budget, to testify on the justification for the Bureau's deferral of construction of two small airports in Nevada.[303] In his testimony, Martin freely conceded that the law did not specifically authorize the Bureau of the Budget to place in a budget reserve any part of an appropriation made available to any department or agency of the Government, but he asserted that the well-established practice of setting up reserves "to prevent a deficiency or to effect savings under programs where the requirements have materially changed since the submission of the appropriation estimate to Congress" validated the Bureau's challenged deferrals.[304] This assertion rather neatly evaded the issue since the Bureau had not established the reserve to prevent a deficiency or to effect savings, but rather had simply placed the entire amount in reserve to delay its expenditure. Martin informed the Senate Committee that the Budget Bureau was establishing reserves on the basis of whether the public works for which funds were appropriated were necessary to the war effort[305] and justified the actions on the grounds that "[a]n appropriation is considered an authorization to expend and not a mandate to expend." [306] The Committee was clearly unconvinced.

In November 1943 Harold D. Smith, Director of the Bureau of the Budget, testified before a subcommittee of the Senate Appropriations Committee chaired by Senator McKellar.[307] The Committee directed its inquiry to the practice of delaying programs unnecessary to the war effort, not to a particular appropriation, and its members did not hesitate to equate this impoundment with an item veto.[308] Smith acknowledged that opinions differed on the legality of the practice; he urged Congress to enact legislation to clarify and define the Budget Bureau's authority.[309] Pursuant to the Committee's request, Smith subsequently prepared and filed a memorandum setting forth the Budget Bureau's legal position.[310] The memorandum reviewed the history of the practice of establishing reserves and acknowledged that the fund apportionment

303 *Hearings on Departments of State, Justice and Commerce, Appropriations Bill for 1944, Before the Subcomm. of the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 56-61 (1943).
304 *Id.* at 56.
305 *Id.* at 57.
306 *Id.* at 60.
307 *Hearings on H.R. 3598 Before the Subcomm. of the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 321-44 (1943).
308 *Id.* at 341.
309 *Id.* at 337-38, 342.
310 *Id.* at 738-41.

system is not a substitute for item or blanket veto power and should not be used to counter the expressed will of Congress.[311]

The next event that produced a modification in the relative positions of Congress and the Executive occurred in 1947. The Post Office Department, whose highly coercive deficiency request had prompted the initial enactment of section 3679 of the Revised Statutes,[312] was the culprit again, contributing to the next major amendment of section 3679 in 1950. The actions of the Department in 1947 were very similar to those that had outraged Congress in 1870. The Department had spent its annual appropriation of $1.15 billion at such a rate that it had only $10 million left for fourth quarter operations.[313] Many local postmasters engaged in a fairly widespread publicity campaign in which they blamed Congress for providing insufficient funds and claimed that Congress's action had forced the curtailment of services.[314] As a consequence, after reviewing many of the defects in the Anti-Deficiency Act with the Comptroller General and the Director of the Bureau of the Budget, Senator Styles Bridges requested the Budget Bureau and the General Accounting Office to file a joint report suggesting an appropriate legislative solution.[315]

In three weeks, the agencies submitted a lengthy report, together with a draft bill, that provides the basic legislative history of the extensive budget amendments of 1950.[316] The introduction began by noting that even if it were humanly possible to ensure that no officers would ever exceed their authority under an appropriation, deficiency or supplemental appropriations still would sometimes be necessary since appropriations were based on estimates of projected needs sometimes made two years in advance of actual expenditure.[317] Those who prepared the report perceived the problem as "one of establishing control of the rate of obligation of appropriations, while maintaining sufficient flexibility to provide for the most efficient and economical use of ap-

311 *Id.* at 739-40.
312 *See* notes 168-174 *supra* and accompanying text.
313 *Hearings on H.R. 3245 Before the Subcomm. of the Senate Comm. on Appropriations*, 80th Cong., 1st Sess. 125 (1947).
314 *Id.* at 43-44, 113-14.
315 *Id.* at 141-42.
316 REPORT AND RECOMMENDATIONS BY THE DIRECTOR OF THE BUREAU OF THE BUDGET AND THE COMPTROLLER GENERAL OF THE UNITED STATES WITH RESPECT TO THE ANTI-DEFICIENCY ACT AND RELATED LEGISLATION AND PROCEDURES (1947) (on file in the offices of the *Georgetown Law Journal*) [hereinafter cited as 1947 BOB-GAO REPORT].
317 *Id.* at 2, 3-4.

propriations, under constantly changing conditions, for the purposes prescribed by Congress."[318] The report also asserted that the Bureau of the Budget had to be authorized to conserve money appropriated when developments subsequent to the making of appropriations rendered the use of some or all of the money unnecessary;[319] otherwise, the spending agency would engage in unfettered spending of the excess. Bureaucratic fiscal gluttony, the theme so prevalent during the initial enactment of the Budget and Accounting Act of 1921 and its implementation by General Dawes, again received prominent emphasis.[320]

The report suggested a thoroughgoing revision of section 3679 of the Revised Statutes because the 1906 version was antiquated, vague, and unworkable.[321] The report specifically contended that section 3679 did not impose effective obligations on the lower level bureaucrats who really caused deficiencies, did not specifically authorize apportionment by seasonal, as opposed to aliquot, rates, and did not provide for early warning to Congress of expenditure rates indicative of a forthcoming deficiency.[322] In each of these particulars, the Budget Bureau was seeking stronger authority than it currently could assert in its dealings with its natural enemy, the bureaucracy. In addition, and for the same reason, it sought specific authority to implement Dawes's doctrine of reserves to prevent deficiencies and to capture savings.

The report made it quite clear that the requested authority would be exercised with considerable care in order to avoid usurping congressional power.[323] The Bureau of the Budget also sought authority to defer obligation of "no-year" appropriations—appropriations made without fiscal year limitations and designed to remain available until expended—but only to the degree necessary to ensure efficiency and economy in the implementation of the purposes for which Congress granted appropriations and authorizations.[324] Finally, the report assured Congress that the possibility of erroneous Budget Bureau determinations of amounts unnecessary to the achievement of congressional purposes was minimized because, as a final safeguard, the Bureau would seek legisla-

318 *Id.* at 5.
319 *Id.* at 7.
320 *Id.* at 14.
321 *Id.* at 9-10.
322 *Id.* at 10-13.
323 *Id.* at 20.
324 *Id.* The draft bill submitted in the *1947 BOB-GAO Report* was enacted virtually verbatim as section 1211 of the General Appropriation Bill of 1952, the present version of the Anti-Deficiency Act. *Compare* 1947 BOB-GAO REPORT, *supra* note 316, at 1-6 *with* General Appropriation Act of 1951, 64 Stat. 595, 765 (1950).

tion providing for rescission of the excess of any appropriation, and Congress thus could review the proposed reservation of funds.[325]

The Senate took no action on the report, for one month later Congress established the Commission on Organization of the Executive Branch of the Government (commonly known as the "Hoover Commission" because its chairman was former President Herbert Hoover), which planned to investigate and to recommend improvements in the budgetary and fiscal operations of the Government.[326] The Hoover Commission suggested in its Recommendation Number Four that Congress clarify the authority to impound because current law and practice left unclear whether the Budget Bureau and the President had the right to reduce appropriated amounts during the year for which they were provided.[327] The Commission further suggested that the President should have authority to reduce expenditures below appropriations if the purposes intended by Congress could still be implemented.[328]

On June 13, 1949, Senator Joseph McCarthy introduced eight bills, all drafted by Hoover Commission counsel, to implement many of the Commission's recommendations.[329] Among these bills, Senate bill 2054 incorporated all of the Hoover Commission budget recommendations except those contained in Recommendation Number Four.[330] Companion bills were introduced in the House by Representative Clare Hoffman.[331] Senators Hunt, Withers, and Lodge introduced Senate bill 2161 for the sole purpose of incorporating Recommendation Number Four.[332] In response to a suggestion from the Budget Bureau,[333] the

325 1947 BOB-GAO REPORT, *supra* note 316, at 1-6.
326 Act of July 7, 1947, ch. 207, § 1, 61 Stat. 246.
327 A REPORT TO CONGRESS BY THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT 16 (1949). There was sharp disagreement within the Budget Bureau over the wisdom of seeking this legislative clarification. In particular, substantial doubt was expressed that the Bureau retained authority to impound funds in peacetime. On the other hand, some Bureau officials feared that Congress's definition of the terms under which impoundment was authorized would limit them to the enumerated situations. Williams, *supra* note 175, at 392-93. *See also* Fisher, *Presidential Power*, in *Ervin Hearings II*, *supra* note 5, at 397.
328 *Id.* at 17.
329 *See* S. 2054-2061, 81st Cong., 1st Sess. (1949); 95 CONG. REC. 7569 (1949).
330 *See* S. 2054, 81st Cong., 1st Sess. (1949). Nothing can be found in the legislative history to explain this exclusion.
331 H.R. 5178, 81st Cong., 1st Sess. (1949); H.R. 5823, 81st Cong., 1st Sess. (1949); 95 CONG. REC. 7783 (1949) (introducing H.R. 5178); 95 CONG. REC. 10526 (1949) (introducing H.R. 5823).
332 S. 2161, 81st Cong., 1st Sess. (1949); 95 CONG. REC. 8580 (1949).
333 *See Hearings on S. 2054 Before the Senate Comm. on Expenditures in the Executive Departments*, 81st Cong., 2d Sess. 45 (1950).

McCarthy bill was amended to include the Hunt-Withers-Lodge bill and thus Recommendation Number Four.[334] Section 32 of the amended bill authorized the President to reduce expenditures below appropriations when he determined that the purposes intended by Congress could be accomplished by the expenditure of amounts less than the amounts appropriated.[335]

The McCarthy bill, Senate bill 2054, and the Hunt-Withers-Lodge bill, Senate bill 2161, differed sharply, however. Senate bill 2161 provided that any item of appropriation or portion of an item whose expenditure the President determined not to be in the public interest would not be available for expenditure or obligation unless reappropriated by the Congress. In other words, Senate bill 2161 provided an item veto subject to override by a simple majority rather than by a greater than two-thirds vote. It allowed the President to pass judgment on each item in an appropriation bill independent of any other item within that bill and thus broke the nexus between items of appropriation. Section 32 of Senate bill 2054, on the other hand, required accomplishment of "the purposes intended by Congress."

In early 1950, hearings began on Senate bill 2054 before the Senate Committee on Expenditures in the Executive Departments.[336] During the hearings, Frederick J. Lawton, the assistant director and co-author of the 1947 General Accounting Office-Bureau of the Budget report, testified, and a revealing colloquy took place between Senator Karl Mundt and Lawton. Mundt asked Lawton if there was "anything in the legislation that moves in the direction of giving the President an item veto on the budget?"[337] Lawton, replying that section 32 did move somewhat toward an item veto, stated clearly that section 32 "would simply spell out the present practice"; the Budget Bureau could not withhold funds unless it determined that "the purposes intended by the Congress will be accomplished by the expenditure of a lesser amount."[338] Even that did not satisfy Senator Mundt who did "not want to see anything in here that would move [toward an item veto] surreptitiously."[339] Lawton assured Senator Mundt that section 32 would not have the effect of granting item veto authority because an item veto is unlimited while section 32 contained the limitation re-

[334] *Id.* at 16.
[335] *Id.* at 20.
[336] *Id.*
[337] *Id.* at 41.
[338] *Id.*
[339] *Id.* at 42.

quiring the Budget Bureau to determine whether the congressional intent would be accomplished by the expenditure of an amount less than that originally estimated.[340]

Because of disagreement by several members of the Senate Committee on Expenditures in the Executive Department with several other provisions in Senate bill 2054, the Committee reported out a "clean" Committee bill drafted by the Budget Bureau, the General Accounting Office, and Committee staff.[341] Section 203 of the new bill provided express authority for the establishment of reserves in language similar to that of section 32 of Senate bill 2054.[342] The Committee report stated that section 203 "clarifies the President's authority to secure economy and reduce expenditures" by establishing reserves, but the authority to establish reserves could only be exercised when a determination was made "that the objectives of the appropriations made by Congress can be accomplished by the expenditure of an amount smaller than the appropriation."[343]

Less than a week after the Committee reported out its bill, an identical bill was introduced in the House, House bill 9038.[344] Hearings on the House bill began nine weeks after the House had approved the General Appropriation Act of 1951.[345] The General Appropriation Act of 1951, managed by the Deficiency Subcommittee of the House Appropriations Committee, had contained the revision of the Anti-Deficiency Act of 1906 suggested in the General Accounting Office–Bureau of the Budget report.[346] In the House, the Bureau of the Budget suggested striking section 203 from House bill 9038 because the authority therein granted to establish reserves "has been enacted by the House in *substantially similar form*" in section 1211(c)(2) of the Gen-

[340] *Id.* Senator Mundt and Mr. Lawton did agree that Senate bill 2161 contained an item veto proposal. *Id.*
[341] S. 3850, 81st Cong., 2d Sess. (1950); S. REP. No. 2031, 81st Cong., 2d Sess. (1950); 96 CONG. REC. 9969 (1950).
[342] S. 3850, 81st Cong., 2d Sess. § 203 (1950). The section provided:

> To promote economy and to reduce expenditures, the President is authorized to establish and to modify from time to time reserves from appropriations for the executive branch of Government to the extent that he determines that the purposes intended by the Congress will be accomplished by the expenditure of amounts less than the amounts appropriated.

Id.
[343] S. REP. No. 2031, *supra* note 341, at 17 (1950).
[344] H.R. 9038, 81st Cong., 2d Sess. (1950); 96 CONG. REC. 9672 (1950).
[345] *Hearings on H.R. 9038 Before the House Comm. on Expenditures in the Executive Departments*, 81st Cong., 2d Sess. (1950).
[346] *See* notes 316-323 *supra* and accompanying text.

eral Appropriation Act.[347] The General Accounting Office concurred in the request and in the characterization.[348] Accordingly, the House Government Operations Committee, which had jurisdiction over Budget and Accounting Act amendments, struck section 203.[349]

The impoundment in 1949 of $735 million of an Air Force appropriation prompted the "intrusion" by the House Appropriations Committee into the Budget and Accounting Act jurisdiction of the House Government Operations Committee.[350] The 1949 impoundment was the culmination of a struggle between the President and Congress over the final control of the size of the Air Force. During the years following World War II, a congressional majority supported the view of military leaders that the defense capabilities of the nation should be expanded while President Truman generally opposed such expansion.[351] In 1948, Congress added $822 million to the amount requested in the President's budget for military aircraft, electronic equipment, and detection and warning systems. The statute, however, conditioned the use of these additional funds on a finding by the President that use of the funds was necessary to the interests of the national defense.[352] The funds went unspent since President Truman made no such finding.

[347] *Hearings on H.R. 9038*, *supra* note 345, at 48; *see* General Appropriation Act of 1951, ch. 896, § 1211(c)(2), 64 Stat. 695, 765 (1950), *codified at* 31 U.S.C. § 665(c)(2) (1970). The section reads:

> In apportioning any appropriation, reserves may be established 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. Whenever it is determined . . . that any amount so reserved will not be required to carry out the purposes of the appropriation concerned [the officer having administrative control of such appropriation] shall recommend the rescission of the such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations.

Id.

[348] *Hearings on H.R. 9038*, *supra* note 345, at 34.

[349] 96 CONG. REC. 13775 (1950).

[350] *See generally* E. HUZAR, THE PURSE AND THE SWORD 178-98, 362-73 (1950); Fisher, *The Politics of Impounded Funds*, in *Ervin Hearings I*, *supra* note 9, at 108-09.

[351] Fisher, *supra* note 350, at 109.

[352] Supplemental National Defense Appropriation Act of 1948, ch. 333 § 2, 62 Stat. 259; *see* PUBLIC PAPERS OF THE PRESIDENTS, HARRY S. TRUMAN, 1948, at 272 (1964). Truman's effective impoundment of Air Force funds may be compared with President Nixon's treatment of the Office of Economic Opportunity. *See* Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973), *aff'd*, 482 F.2d 669 (D.C. Cir. 1973); Local 2677, Am. Fed. of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973). Such a comparison should satisfy both conservatives and liberals that the existence of the power to impound should not be judged by the results of a particular impoundment.

In the following year, Congress was more insistent. The President's budget sought funds sufficient to maintain a 48-group Air Force. The Secretary of the Air Force, Stuart Symington, personally favored a 70-group Air Force, and the House agreed to 58. Congress increased the President's proposal to provide for 58 groups only after a conference deadlock was broken one day before adjournment by reluctant concurrence of the Senate with the House on the understanding that the bill conferred discretion on the Secretary of Defense to use only so much of the funds as he wished.[353] In a statement issued on October 29, 1949, the President complained that "one item" of the bill presented a sharp increase in authorizations and represented "a major shift in the direction and emphasis of our defense program."[354] Only after directing the Secretary of Defense "to place in reserve the amounts provided by the Congress . . . for increasing the structure of the Air Force"[355] did the President sign the bill.

In the House Appropriations Committee's report on the General Appropriation Act,[356] the Committee stated: "Congress, in providing funds for the Air Force in excess of budget estimates, had not intended to establish or to permit the President or the Secretary of Defense to establish reserves from military appropriations."[357] The Committee unmistakably viewed the President's action as an item veto, a power not possessed by the President.[358] While conceding that economies and savings should be effected, the Committee reiterated that economies could not justify contravention of the will of Congress, especially where that will represented congressional resolution of a major policy question.[359] The Committee report also favorably reported the 1950 amendments to the Anti-Deficiency Act.[360] That the Committee intended section 1211(c)(2) of those amendments to vest an item veto power in the President is inconceivable.

In 1973, when the Office of Management and Budget first had to

[353] 95 CONG. REC. 12315, 14136-38, 14352-55, 14434, 14858 (1949); *cf. id.* at 14921 (contrary House view); *id.* at 14927 (colloquy between Representatives Mahon and Rivers). *See also id.* at 14844-56 (colloquy between Senators Ferguson and Saltonstall).

[354] PUBLIC PAPERS OF THE PRESIDENTS, HARRY S. TRUMAN, 1949, at 538 (1964).

[355] *Id.* at 539.

[356] H.R. REP. No. 1797, 81st Cong., 2d Sess. 309-12 (1950).

[357] *Id.* at 309.

[358] *Id.* at 310.

[359] *Id.* at 311.

[360] *See id.* at 9. The Committee's report makes clear that the amendments were designed merely to encourage savings and more efficient management of funds to effect the programs Congress itself had designed.

provide Congress with an interpretation of its power under section 1211(c)(2) to establish reserves, it argued that the clause should be construed broadly so as to "encompass any circumstances which arise after an appropriation becomes available for use, which would reasonably justify the establishment of a reserve." [361] Such a view is not only completely at variance with the abundant legislative history; it also completely contradicts the interpretation of the statute during both the Eisenhower and Kennedy Administrations. In the 1952 edition of the Budget Bureau's Examiners' Handbook, the limitation was stated clearly and simply: "Reserves must not be used to nullify the intent of Congress with respect to specific projects or level of programs." [362] During President Kennedy's Administration, a memorandum drafted by the Bureau of the Budget reached a similarly restrained conclusion.[363]

In light of this extensive history it should be clear that a reserve under section 1211(c)(2), the *only* statute that even approaches justifying executive impoundment, properly reflects only the difference between the amount originally estimated to do a job Congress wishes to be done and the amount actually required to do that job. It merely recognizes that human error is inherent in the process of estimating funding needs.[364] To construe it otherwise would realize Senator Mundt's fears by creating an item veto "surreptitiously." The legislative power conferred by an item veto, the power of choice, is so very fundamental that one must resolve every doubt against it.

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[361] *Ervin Hearings II*, *supra* note 5, at 529.

[362] Comptroller General of the United States, *The Anti-Deficiency Act: Types of Executive Action in Withholding or Reserving Appropriated Funds Which May Be Consistent Therewith*, in *Ervin Hearings II*, *supra* note 5, at 109 [hereinafter cited as *GAO 1973 Anti-Deficiency Act Memo*].

[363] Bureau of the Budget, *Memorandum to the President: Authority to Reduce Expenditures* (Oct. 1961), in *Ervin Hearings I*, *supra* note 9, at 338-40 (no authority to prevent execution of congressional projects or programs and no authority to "prevent the use of appropriations because of overall fiscal considerations").

[364] The views expressed here on the scope of the 1950 Anti-Deficiency Act amendments expand the analysis of the principal commentators on that statute. *See GAO 1973 Anti-Deficiency Act Memo*, *supra* note 362, at 105-10. Comptroller General Staats's familiarity with the operation of the Bureau of the Budget is notable. Prior to his appointment, he was employed by Budget Bureau for 26 years; President Truman appointed him Deputy Director of the Budget Bureau and he remained in that position under Presidents Eisenhower, Kennedy, and Johnson. *Id.* at 114. His opinions therefore are entitled to considerable weight. *See also* Church, *Impoundment of Appropriated Funds, The Decline of Congressional Control over Executive Discretion*, 22 STAN. L. REV. 1240, 1245 (1970); Davis, *Congressional Power to Require Defense Expenditures*, 33 FORDHAM L. REV. 39, 54 (1964); Goostree, *The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-In-Aid to Segregated Activities*, 11 AM. U.L. REV. 32, 43-36 (1962); Ramsey, *supra* note 289, at 291, 295-96; Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons Systems Appropriations*, 57 GEO. L. J. 1159, 1178-79 (1969); Williams, *supra* note 175, at 393.

THE PERFORMANCE BUDGETING SYSTEM

The second significant budgetary amendment in 1950 was the adoption of "performance" or "program" budgeting, which ended the 160-year practice of itemization.[365] Recommendation Number One of the Hoover Commission had suggested that "the *whole* budgetary concept of the federal government should be refashioned by the adoption of a budget based upon function, activities and projects: this we designate a 'performance budget.'" [366] The Commission explained that "the performance method of budgeting focuses congressional and executive action on the scope and magnitude of the work to be done . . . rather than upon the specific items to be acquired . . . ." [367] In performance budgeting, legislative concern centers around questions of the desirable magnitude of any major government program and the least cost for the work to be performed.[368]

In adopting performance budgeting, Congress abandoned the historic system of itemization, with its narrow focus on detail, for lump-sum appropriation, and thus broadened executive discretion to determine the details of achieving an objective.[369] The level of funds devoted to each program reflects Congress's decision on the proper magnitude of the program. Under the performance budgeting system Congress formulates the major budgetary policy and priority decisions. "Such is the idea involved in the so-called 'legislative budget,' which had so far not succeeded mainly because of the budgetary approach." [370] By providing for performance budgeting as it bestowed authority upon the Executive

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[365] Budget and Accounting Procedures Act of 1950, ch. 946, 64 Stat. 832, *codified at* 31 U.S.C. § 11 (1970).

[366] Recommendation No. 1, A REPORT TO CONGRESS BY THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, H.R. Doc. No. 84, 81st Cong., 1st Sess. 8 (1949).

[367] *Id.*

[368] *Id.* at 11-12.

[369] S. REP. No. 2031, *supra* note 341, at 7.

[370] TASK FORCE REPORT ON FISCAL, BUDGETING, AND ACCOUNTING SYSTEMS OF THE FEDERAL GOVERNMENT 76 (1949) [hereinafter cited as TASK FORCE REPORT]. The *Task Force Report* was prepared by A.E. Buck, Frederick Cleveland's co-author in 1920 and one of the most outspoken advocates of the executive budget during the period of the Budget Movement. Buck knew quite well that the significant distinguishing feature of the legislative budget, as contrasted with the executive budget, was that the legislature, not the executive, would decide the basic issue of priorities each year.

to establish reserves if program purposes could be achieved at lesser cost, Congress basically defined an appropriation as a congressional direction that a certain amount of work actually be performed whether by the expenditure of the sum appropriated or of a lesser sum. This is the core meaning of an appropriation as a "ceiling" and establishes the framework for analyzing the legal plausibility and justification of all executive impoundments.

THE EMPLOYMENT ACT OF 1946

The Executive has claimed that the Employment Act of 1946[371] contravenes any contention that the Executive must carry out Congress's programs because it granted to the Executive the authority to determine how much, or how little, of any appropriation would be spent. A brief review of the Employment Act of 1946 and its development refutes such a contention. In response to widespread fears of a return to the economic conditions of the 1930's, President Roosevelt, in his 1945 Annual Message to Congress, set forth the necessity of a "full employment" program for the peacetime reconversion period.[372] The President's program would have established a national policy of federal intervention in business cycles by adopting, in the words of the opposition, the Keynesian-Beveridge "compensatory spending theory."[373] The final enacted version differed substantially from the President's proposal,[374] but the change is not critical to the Executive's claim of impoundment authority under the Act. That claim is predicated essentially on the declaration of policy that emerged in section two of the Act.[375] Proponents of presidential impoundment authority assert that

[371] Ch. 33, 60 Stat. 23, *codified at* 15 U.S.C. § 1021 (1970).

[372] 91 CONG. REC. 70 (1945).

[373] S. REP. No. 583, 79th Cong., 1st Sess. 4 (1945). While the President's proposal regarding a declaration of a compensatory spending policy was rejected in 1946, Presidents have adopted the policy, in practice, through the budget. The policy essentially calls for deficit spending to stimulate increased employment in the private economy; the amount of deficit spending depends upon the acceptable rate of unemployment. A budget based on the policy is called a "full employment" budget. *See Budget Message of the President*, in OMB, *supra* note 117, at 1, 5-7; P. SAMUELSON, ECONOMICS 339-45 (7th ed. 1967). Obviously, disagreement as to the acceptable rate of unemployment will alter the extent of deficit spending. *See Ervin Hearings II*, *supra* note 5, at 292-99 (dialogue of Senator Muskie and OMB Director Ash).

[374] *See* H.R. REP. No. 1334, 79th Cong., 1st Sess. (1945); H.R. REP. No. 1520, 79th Cong., 2d Sess. (1946) (conference report); 92 CONG. REC. 1136, 1139 (remarks of Senators Bartley and Taft). *See generally* L. FISHER, *supra* note 33, at 156-60, 309-10.

[375] Employment Act of 1946, § 2, 15 U.S.C. § 1021 (1970). Section two reads as follows:

> 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.

Id.

one of the goals expressed in section two, the maintenance of maximum purchasing power, was intended to authorize presidential impoundment in order to prevent inflation.[376]

This assertion is unfounded. Section two is merely a declaration of policy and neither added to nor detracted from the powers of any branch under any existing law.[377] The only provisions then enacted for implementing the policy of section two were those creating the Council of Economic Advisors, requiring the President to submit to Congress an annual economic report[378] and creating the Joint Economic Committee of Congress to study the President's annual recommendations and to report thereon to both Houses.[379] Then Congress, through its committees, would consider the recommendations according to its ordinary procedures and would adopt or reject each recommendation as it saw fit; the bill merely provided a means for presidential study and report to Congress of economic dislocations.[380]

The legislative history of the Employment Act fails to provide positive support for impoundment; if anything, it serves to bolster the case against impoundment because the President was unsuccessful in his attempt to obtain broader authority than he now finds in the Act. Section six of the President's original proposal would have empowered him to vary "the rate of federal investment and expenditure . . . to whatever extent and in whatever manner the President may determine

[376] *Ervin Hearings II*, *supra* note 5, at 372 (testimony of Deputy Attorney General Sneed); *id.* at 282-83 (testimony of OMB Director Ash).

[377] *See* H.R. REP. No. 1334, *supra* note 374, at 13; H.R. REP. No. 1520, *supra* note 374, at 7.

[378] 15 U.S.C. § 1022(a)(4) (1970). The report was to include a program for implementing the policy of section two and recommendations for legislation the President believed necessary or desirable. *Id.*

[379] *Id.* § 1025.

[380] *See* 92 CONG. REC. 977 (1946) (remarks of Representative Bender). *See also id.* at 981 (remarks of Representative Patman); *id.* at 985-86 (remarks of Representative Whittington, one of the three House conferees); *id.* at 1136-37 (remarks of Senator Barkley, manager of the Senate conferees).

to be necessary for the purpose of assisting in assuring continuing full employment, with due consideration being given to [the rest of the economy]." [381] Although the exercise of this power was to be subject to principles and standards set forth in applicable appropriations acts and other statutes,[382] the House rejected the section when it was proposed as an amendment to the House version of the Act.[383] The President thus was denied even this limited freedom to act within the confines of congressional dictates.

THE DEBT CEILING

The amount of the national debt currently is limited by statute to $495 billion.[384] The Executive argues that, by limiting the debt, Congress meant to give the Executive authority to refuse to spend the entire amount of any appropriation in order to stay within the limit.[385] In 1972, however, one proposed bill contained both the debt ceiling and the $250 billion expenditure ceiling; the latter was rejected.[386] Thus, the Executive's claim amounts to a contention that the rejection of the power to impound, contained in the expenditure ceiling provision, necessarily implies that it was granted by enactment of the debt ceiling.

The second test of *Youngstown Sheet & Tube Co. v. Sawyer*[387] compels a far better resolution of this conundrum.[388] Another existing statute, the Budget and Accounting Act of 1921, deals with the proper presidential response to overexpenditure and provides that if expenditures exceed receipts, the President in the budget shall recommend "new taxes, loans, or other appropriate action to meet the estimated deficiency." [389] The statute contemplates that recommendation to and acceptance by Congress must precede any presidential action. In fact, the recommendation procedure required by the Budget and Accounting Act of 1921, now section 13 of title 31 of the *United States Code*, pre-

[381] 92 CONG. REC. 12084 (1945).
[382] *Id.*
[383] *Id.* at 12094.
[384] Act of June 30, 1974, Pub. L. No. 93-325, 88 Stat. 285.
[385] *See Ervin Hearings II*, *supra* note 5, at 278, 282-83, 292 (testimony of OMB Director Ash); *id.* at 532 (testimony of Agriculture Secretary Butz); *id.* at 372 (testimony of Deputy Attorney General Sneed).
[386] Only the debt ceiling was enacted. Act of Oct. 27, 1972, Pub. L. No. 92-599, 86 Stat. 1326 (codified in scattered sections of 26, 31 U.S.C.)
[387] 343 U.S. 579 (1952).
[388] *See id.* at 585.
[389] Budget and Accounting Act of 1921, ch. 18, § 202, 42 Stat. 21, *codified at* 31 U.S.C. § 13 (1970).

sents a striking parallel that President Truman should have followed in 1952 when he faced the steel mill strikes. In 1947, Congress, in rejecting the amendment granting power to seize private industries in emergencies, had expressed its view that it would prefer to deal with such problems itself on an ad hoc basis pursuant to presidential recommendation.[390] Congress expressed precisely the same policy in section 13. The same result thus should obtain; the President should be unable to do unilaterally that which Congress has authorized him only to recommend.

CONCLUSION

The Supreme Court in *Youngstown* clearly enunciated the test for reviewing the validity of asserted executive authority: an action by the Executive is invalid if Congress has both denied the Executive the authority to so act and provided alternative methods to achieve the desired goals. The Executive has claimed that the Anti-Deficiency Act, the debt ceiling enactments, and the Employment Act of 1946 evidence congressional approval of presidential impoundment. A review of the history and background of this legislation belies such an assertion. Throughout the history of the budgetary system and its development, both commentators and Congress have consistently recognized Congress's final authority over appropriations.

Of course, the congressional appropriation system is imperfect; accurate estimates of expected needs can never be made. Therefore, the Executive should and does have the authority to withhold funds that are unnecessary for the completion of an envisaged project. While congressional appropriations are not mandates to spend the entire amount appropriated, they are mandates to accomplish the programs for which Congress has provided funds. Presidential determinations that certain projects approved by Congress are unworthy or unnecessary cannot justify impoundment of funds. The Constitution and the history of legislative enactment rejecting the item veto and limiting executive discretion to spend preclude unilateral executive determinations of which federal projects will be implemented.

(Part II of this article will appear in a subsequent issue of Volume 63.)

[390] *See* 343 U.S. at 599-600 (Frankfurter, J., concurring).

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PRESIDENTIAL IMPOUNDMENT PART II: JUDICIAL AND LEGISLATIVE RESPONSES

RALPH S. ABASCAL* AND JOHN R. KRAMER**

In part two of a two-part article examining presidential impoundment of funds appropriated by the Congress, the authors assess the judicial and legislative response to impoundment. The authors demonstrate that the courts, while invalidating specific impoundments, usually adopted a mode of analysis that effectively shifted the budget power from the Congress to the President. To recapture its budget primacy, the Congress enacted the Congressional Budget and Impoundment Control Act of 1974. The new Act will force the courts to direct their attention to the issue that should always have been the central issue in cases challenging impoundment—whether the President's action prevents the fulfillment of program objectives established by the Congress. The Act should enable the Congress to reassert its control over the establishment of the nation's budgetary policies and priorities.

RECENT DEVELOPMENTS

THE IMPOUNDMENT DECISIONS

The impoundment decisions, with inconsequential exceptions, have rejected the Executive's position that an appropriation, or other law providing budgetary authority, is merely a ceiling upon expenditure or obligation and leaves the Executive free to spend all, some, or none of the funds provided. The decisions seem to signal the demise of the viability of the executive budget and its corollary, the right to impound, as substitutes for the denied item veto. Beneath the gloss of the cases' results, however, lies an analytical approach that points toward the return of the primary power of choice to the Executive.

Courts begin with the assumption that an appropriation constitutes a blank check upon which the Executive can write any number up to a congressionally established maximum. Courts then ascertain whether, in the legislation considered, the Congress altered the discretionary quality of the appropriation by statutorily mandating a given level of expenditure or obligation or by expressing legislative intent to that effect. The result is the placement of the burden of proof on the Congress. The Congress must prove, by evidence beyond the simple enactment and funding of a program, that it meant to require the expenditure of a particular appropriation. Each case is sui generis; the compulsion upon the President to implement the objectives and full scope of a program depends upon the presence of a mandate in each statute involved, or in its legislative history. Opponents of impoundment cannot compel the Executive to act unless they can demonstrate that in the particular statute before the court, the Congress sought to deny the Executive a right to reduce spending. Only such a showing overcomes the implicit presumption that the Executive acts within the law whenever it impounds. Most courts do not require the Executive to prove that an impoundment is designed to promote the ends of the program whose funds are withheld.

This allocation of the burden of proof has generated congressional efforts to establish mandates to spend either in clear statutory language or in positive statements in legislative history. The recent history of such congressional efforts reveals the Congress's failure to pass legislation or to override vetoes of legislation containing such mandates.[1] Occasionally, the branches have compromised and the

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1. *See* H.R. 3298, 93d Cong., 1st Sess. (1973) (bill directing that Secretary of Agriculture shall carry out programs of planning and development grants in water and waste disposal); 119 CONG. REC. H 2454 (daily ed. Apr. 5, 1973) (House bill 3298 vetoed and not overridden). *Compare* S. 394, 93d Cong., 1st Sess. (1973) (bill requiring that the Administrator of Rural Electrification Administration be directed to make insured loans) *with* Act of May 11, 1973, Pub. L. No. 93-32, 87 Stat. 65 (requirement did not appear in Act as passed). The Congress's failure to override the veto of House bill 3298 undoubtedly led to the sudden freezing of efforts to pass a similar "shall" provision relating to the Rural Environmental Assistance Program (REAP). Although both the House and Senate REAP bills contained the term "shall," no bill ever emerged from conference. *See* S. REP. No. 49, 93d Cong., 1st Sess. (1973) (Senate version); H.R. REP. No. 6, 93d Cong., 1st Sess. 11 (1973) (House version); H.R. REP. No. 101, 93d Cong., 1st Sess. (1973) (conference report).

Many "sense of Congress" provisions expressing mandates were included in simple resolutions, but none were approved by the Senate or the House of Representatives. *See, e.g.*, S. Res. 131, 92d Cong., 1st Sess. (1971) (urban programs); S. Res. 134, 92d Cong., 1st Sess. (1971) (health and environmental protection); S. Res. 135, 92d Cong., 1st Sess. (1971) (medical training); H.R. Res. 440, 92d Cong., 1st Sess. (1971) (public works projects); H.R. Res. 942, 92d Cong., 2d Sess. (1672) (waste water facility grants and farm operating loans); H.R. Res. 962, 92d Cong., 2d Sess. (1972) (rural electrification).

The Congress has included fund carryover provisions in both continuing and supplemental appropriations in an effort to prevent the termination of the availability of impounded funds at the close of a fiscal year. Termination might render suits to compel the expenditure of impounded funds moot. *See* Act of June 30, 1974, Pub. L. No. 93-324, § 111, 88 Stat. 281 (continuing appropriation for fiscal year 1975); Supplemental Appropriations Act, Pub. L. No. 93-245, § 501, 87 Stat. 1077 (1974) (supplemental appropriations for fiscal year 1974); Act of July 1, 1973, Pub. L. No. 93-52, § 111, 87 Stat. 134 (continuing appropriation for fiscal year 1974).

Executive has agreed to comply with reduced program spending or guarantee levels.[2] The central effect of the impoundment decisions, however, was to place the onus upon the Congress to override executive refusal to expend funds for a given program and thus to grant the controlling power over the purse to the Executive. The executive budget is created and nurtured by the same case law that ostensibly rejects executive impoundment authority. By losing in the courts, the President has effectively achieved what he could not accomplish through a myriad of statutory proposals.

Water Pollution Control. The Federal Water Pollution Control Act Amendments of 1972[3] were vetoed by President Nixon because he considered the legislation unnecessarily costly.[4] The Congress overrode the veto[5] and authorized an $18 billion appropriation for fiscal years 1973, 1974, and 1975.[6] The President then directed the Administrator of the Environmental Protection Agency to allot to the states only $2 billion of the $5 billion authorized for 1973 and only $3 billion of the $6 billion for 1974.[7]

All courts but one that confronted the refusal to allot the appropriated funds were unwilling to assume that the Congress had set the obligational authority level at an amount it deemed necessary

Doubt whether appropriated funds can lapse or revert to the general fund and become unrecoverable pursuant to section 701(a)(2) of title 31 of the *United States Code* arises because a provision in that section permits the restoration to the appropriate accounts of any portion of an unobligated balance that the head of the agency in question determines is needed to liquidate obligations. *See* Act of July 25, 1956, § 1(a)(2), 31 U.S.C. § 701(a)(2) (1970). Apparently, "obligations" could include legally established obligations to expend funds in a given fiscal year. *See* Louisiana v. Weinberger, 369 F. Supp. 856, 860 (E.D. La. 1973).

2. *Compare* Act of Dec. 18, 1973, Pub. L. No. 93-192, 87 Stat. 746 (Labor-HEW appropriations for fiscal year 1974) *and* Act of May 11, 1973, Pub. L. No. 93-32, 87 Stat. 65 (Rural Electrification Administration direct loan program) *with* H.R. 8877, 93d Cong., 1st Sess. (1973) (Labor-HEW bill prior to compromise) *and* S. 394, 93d Cong., 1st Sess. (1973) (Rural Electrification Administration bill before compromise).

3. Pub. L. No. 92-500, 86 Stat. 816 (codified in scattered sections of 12, 15, 31, 33 U.S.C.).

4. *See* 118 CONG. REC. 36859 (1972) (veto message of Oct. 17, 1972). The President stated that he was compelled to withhold his approval from the bill because its laudable inteet was "outweighed by its unconscionable $24 billion price tag." *Id.* The President also noted that "my proposed legislation, as reflected in my budget, provided sufficient funds to fulfill that same intent in a fiscally responsible manner. Unfortunately the Congress ignored other vital national concerns and broke the budget with this legislation." *Id.*

5. *Id.* at 37060-61 (1972) (House vote of 247 to 23); *id.* at 36879 (1972) (Senate vote of 52 to 12).

6. Federal Water Pollution Control Act Amendments of 1972, § 2, 33 U.S.C. § 1287 (Supp. II, 1972).

7. Letter from Richard M. Nixon to William D. Ruckleshaus, Nov. 22, 1972, in *Hearings on the Federal Budget for 1974 Before the House Comm. on Appropriations*, 93d Cong., 1st Sess. 194-95 (1973).

to assure effective water pollution control and that any effort by the Executive to reduce that amount would have to be justified.[8] Instead, several courts ignored the mere fact of authorization and searched 1,700 pages of legislative history to determine that the word "shall" in the allotment section of the Act[9] probably meant that the full values specified at least had to be allotted, if not necessarily obligated and spent.[10] Other courts found no directive in the word "shall" because the word "all" had been removed from the provision, which originally had stated that "all sums authorized to be appropriated . . . shall be allotted,"[11] and because the phrase "not to exceed" had been inserted in the section describing the amounts authorized for appropriation.[12] These courts found that at least a limited executive discretion to impound extended to the allotment process.[13] The decision in *Brown v. Ruckelshaus*[14] uphold-

8. *See* City of New York v. Train, 494 F.2d 1033 (D.C. Cir.), *cert. granted*, 416 U.S. 969 (No. 73-1377) (1974); Campaign Clean Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1378); Brown v. Ruckelshaus, 364 F. Supp. 258 (C.D. Cal. 1973); Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689 (E.D. Va.), *remanded sub nom.* Campaign Clean Water, Inc. v. Train, *supra;* City of New York v. Ruckelshaus, 358 F. Supp. 669 (D.D.C. 1973), *aff'd sub nom.* City of New York v. Train, *supra;* Texas v. Fri, Civil No. A-73-CA-38 (W.D. Tex., Oct. 2, 1973), *reprinted in* JOINT COMM. ON CONGRESSIONAL OPERATIONS, 93d CONG., 2d SESS., COURT CHALLENGES TO EXECUTIVE BRANCH IMPOUNDMENTS OF APPROPRIATED FUNDS 529 (Comm. Print 1974) [hereinafter cited as COURT CHALLENGES]; Martin-Trigona v. Ruckelshaus, Civil No. 72-C-3044 (N.D. Ill., June 29, 1973), *reprinted in* COURT CHALLENGES 389; Maine v. Fri, Civil No. 14-51 (D. Me., June 29, 1973), *reprinted in* COURT CHALLENGES 459. The district court of Minnesota was the only court that considered the level set by the Congress binding on the Executive. *See* Minnesota v. EPA, Civil No. 4-73 Civ. 133 (D. Minn., June 25, 1973), *reprinted in* COURT CHALLENGES 461, 472-73.

A reduction by the Executive could be justified by reference to the purpose of improving water quality or to the applicability of the provisions of other statutes permitting the establishment of reserves in certain circumstances. *See* Anti-Deficiency Act, 31 U.S.C. § 665(c)(2) (1970).

9. Federal Water Pollution Control Act Amendments of 1972, § 2, 33 U.S.C. § 1285(a) (Supp. II, 1972).

10. *See* City of New York v. Train, 494 F.2d 1040, 1043 (D.C. Cir.), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1377), *aff'g sub nom.* City of New York v. Ruckelshaus, 358 F. Supp. 669, 676-77 (D.D.C. 1973); Texas v. Fri, Civil No. A-73-CA-38 (W.D. Tex., Oct. 2, 1973), *reprinted in* COURT CHALLENGES 529, 533; Martin-Trigona v. Ruckelshaus, Civil No. 72-C-3044 (N.D. Ill., June 29, 1973), *reprinted in* COURT CHALLENGES 389, 397; Minnesota v. EPA, Civil No. 4-73 Civ. 133 (D. Minn., June 25, 1973), *reprinted in* COURT CHALLENGES 461, 469.

11. Federal Water Pollution Control Act Amendments of 1972, § 2, 33 U.S.C. § 1285(a) (Supp. II, 1972).

12. *Id.*, 33 U.S.C. § 1287 (Supp. II, 1972); *see* Brown v. Ruckelshaus, 364 F. Supp. 258, 266-67, 269-70 n.13 (C.D. Cal. 1973); Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689, 699-700 (E.D. Va.), *remanded sub nom.* Campaign Clean Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1378).

13. *See* Brown v. Ruckelshaus, 364 F. Supp. 258, 266-67, 269-70 n.13 (C.D. Cal. 1973) (discretion not to allot); Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689, 699-700 (E.D. Va.), *remanded sub nom.* Campaign Clean

ing the Executive's refusal to allot the entire $11 billion is the most extreme decision because it constitutes an unequivocal endorsement of the unfettered prerogatives of the President.[15]

The sole water pollution case to adopt an approach compatible with this article's historical analysis of the federal budgetary system is *Minnesota v. Environmental Protection Agency*.[16] The court's opinion advanced the proposition that an appropriation is a mandate to fulfill every congressional purpose behind the program by spending whatever portion of the appropriated funds is required to perform that task. The court also approved the subsidiary proposition that if specific provisions of other statutes such as the Anti-Deficiency Act[17] do not apply, the program administrator must ground his refusal to obligate in the provisions of the law he is allegedly implementing[18] and not in matters outside the purposes and provisions of the appropriation legislation.[19] The administrator must demonstrate statutory authority for his actions; his critics need not show statutory disapproval. In analyzing the statutory language of the Federal Water Pollution Control Act Amendments of 1974[20] to determine whether the Administrator of the Environmental Protection Agency was given discretion to refuse allocation in accordance with his own sense of national priorities,[21] the court found no such discretion and held that by failing to allot the total sum authorized, the Administrator was

Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1378) (Congress intended executive branch to exercise some discretion at allotment stage).

14. 384 F. Supp. 258 (C.D. Cal. 1973).

15. *See id.* at 270. The judge in *Brown* closed with a quotation from a letter by President Franklin Roosevelt stating that an appropriation was not mandatory given sound fiscal necessity for preventing deficiencies or effecting savings. *Id.* President Roosevelt, however, carefully pointed out that, while refusal to expend might be a "sound business management" practice to which the Congress would take no exception, such refusal "should not be used to set aside or nullify the expressed will of Congress." Letter from Franklin D. Roosevelt to Richard Russell, Aug. 18, 1942, in *Hearings on First Supplemental National Defense Appropriation Bill for 1944 Before the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 739 (1943).

16. Civil No. 4-73 Civ. 133 (D. Minn., June 25, 1973), *reprinted in* COURT CHALLENGES 461; *see* Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1577-1618 (1974).

17. 31 U.S.C. § 665(c)(2) (1970).

18. *Id.*, *reprinted in* COURT CHALLENGES 467-69. *See also* State Highway Comm'n v. Volpe, 479 F.2d 1099, 1188 (8th Cir. 1973) (Anti-Deficiency Act inapplicable; Secretary of Transportation must ground refusal to spend in provisions of Federal-Aid Highway Act).

19. Civil No. 4-73 Civ. 133, *reprinted in* COURT CHALLENGES 468.

20. Pub. L. No. 92-500, 86 Stat. 816 (codified in scattered sections of 12, 15, 31, 33 U.S.C.).

21. Civil No. 4-73 Civ. 133, *reprinted in* COURT CHALLENGES 472.

"acting in express violation of the Act itself as well as in violation of the purposes of the Act as set forth by Congress."[22]

While there may be sufficient program-related or other statutory grounds for not ultimately obligating the entire $11 billion for water pollution control over the three-year period,[23] such grounds must be carefully distinguished from grounds that essentially amount to either executive disagreement with congressional enactments or executive reordering of priorities. The reasons proffered by the Executive were based not upon intrinsic program purposes, but upon extrinsic economic projections, such as the alleged lack of sufficient technical capacity to handle all of the construction[24] and the purported inability of the construction industry to absorb the full amounts authorized by the Congress without experiencing substantial inflation.[25] These rationales for impoundment are alien to the legislative purposes of the act at stake. To superimpose them upon the legislation would grant authority to the Executive to rewrite the findings and purposes clause of every law.

Highway Aid. In two reported decisions dealing with the substantive validity of the impoundment of funds under the Federal-Aid Highway Act of 1956,[26] courts denied that the Secretary of Transportation had the authority to forbid the state of Missouri from obligating over $80 million of its fiscal year 1973 highway apportion-

22. *Id.*, *reprinted in* COURT CHALLENGES 473. In an alternative holding the court found that even if the Administrator had some discretion, he clearly abused it by refusing to allot nearly half of the funds. *Id.*, *reprinted in* COURT CHALLENGES 473. *See also* Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689, 700 (E.D. Va.), *remanded sub nom.* Campaign Clean Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1378).

23. Valid program-related justifications for reserving funds appropriated for the construction of water pollution facilities might include a reduction in construction costs or the states' inability to commit the funds allotted while they are available. *See* Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 500 (4th Cir. 1973), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1378) (EPA Administrator asserted without contradiction that "as of August 31, 1973, all of the States had utilized all but 73 percent of their 1973 allotments and 8 percent of their 1974 allotments"). An appropriate intervening statutory ground for reducing expenditure might be a particular project's inability to meet environmental standards. *See* City of New York v. Train, 494 F.2d 1033, 1047 (D.C. Cir.), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1377) (referring to example given by Senator Muskie).

24. *See* Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 499 (4th Cir. 1973), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1378) (quoting Administrator).

25. *Id.* at 499-500. Urging that the President sign the bill, Mr. Ruckelshaus thought that "the potential inflationary impact upon the entire construction sector would be minimized." *See* Letter from William D. Ruckelshaus to the Office of Management and Budget, Oct. 11, 1972, *reprinted in* STAFF OF SENATE COMM. ON PUBLIC WORKS, 93d CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 155 (Comm. Print 1973).

26. 23 U.S.C. §§ 101-512 (1970).

ment[27] and rejected the Secretary's claim of "unfettered discretion as to when and how the monies may be used."[28] The United States Court of Appeals for the Eighth Circuit affirmed a district court decision requiring the Secretary to identify a statutory provision either giving him explicit authority to exercise his discretion to impound or establishing standards and purposes compatible with and supportive of his decision to withhold funds.[29] The district court found "the prevention of inflation of wages and prices in the national economy" to be "impermissible reasons for action which frustrates the purposes and standards of the Act."[30] Noting that the Act circumscribed the Secretary's discretion, the court of appeals analyzed the Act not to search for indications of congressional intent to mandate expenditure, as courts did in the water pollution cases, but to uncover any evidence of congressional intent to permit the Secretary to set his own priorities in deciding to defer obligation authority.[31]

Health and Education. Courts confronted with health and education program impoundments have vacillated between actively seeking a congressional mandate to spend and requiring the Executive to prove that his conduct is in keeping either with purposes of the program or with an explicit statutory grant of spending discretion. Several decisions define the primary legal issue as whether the Congress mandated that the appropriated funds be apportioned or disbursed.[32] While some courts have stopped short after resolving that question,[33] most also have considered whether impoundment

27. State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973), *aff'g* 347 F. Supp. 950 (W.D. Mo. 1972). The procedural issues of sovereign immunity and political question surfaced in another case involving impoundment of Federal-Aid Highway Act funds. *See* State Highway Comm'n v. Volpe, Civil No. T-5273 (D. Kan., Oct. 1, 1973), *reprinted in* COURT CHALLENGES 325 (order overruling motion to dismiss).

28. State Highway Comm'n v. Volpe, 479 F.2d 1099, 1109 (8th Cir. 1973).

29. *See id.* at 1114, *aff'g* 347 F. Supp. 950, 953-54 (W.D. Mo. 1972).

30. State Highway Comm'n v. Volpe, 347 F. Supp. 950, 954 (W.D. Mo. 1972), *aff'd*, 479 F.2d 1099 (8th Cir. 1973).

31. State Highway Comm'n v. Volpe, 479 F.2d 1099, 1111, 1114 (8th Cir. 1973).

32. *See, e.g.*, People *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 725 (N.D. Ill. 1973) (title III-A of the National Defense Education Act; equipment funds); Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1379 (D.D.C. 1973) (title V of the Elementary and Secondary Education Act of 1965; grants to strengthen state departments of education); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 901 (D.D.C. 1973) (community mental health center grants).

33. *See, e.g.*, National League for Nursing v. Ash, Civil No. 1316-73 (D.D.C., Nov. 19, 1973), *reprinted in* COURT CHALLENGES 223, 225 (grants to nursing schools); Association of Am. Medical Colleges v. Weinberger, Civil No. 1830-73 (D.D.C., Oct. 26, 1973), *reprinted in* COURT CHALLENGES 227, 229 (National Institutes of Health research grants, research training grants, and fellowships); Association of Am. Medical Colleges v. Weinberger, Civil No. 1794-73 (D.D.C., Oct. 26, 1973), *reprinted in* COURT CHALLENGES 231, 233 (special project grants to medical schools); People *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 726 (N.D. Ill. 1973) (funds to purchase equipment for schools).

furthers program purposes or is consistent with the relevant statute.[34]

One group of health program cases concentrated on the meaning of section 601 of the Medical Facilities Construction and Modernization Amendments of 1970.[35] Courts that have considered the section have viewed it as a directive to the President to spend funds appropriated for fiscal year 1973.[36] Additionally, courts have found that the reasons given by the Executive for terminating the various health programs covered by section 601 were either completely unrelated to the purposes of the Act[37] or inconsistent with the Act[38] since the statute did not encompass discretion simply to end the program totally.[39]

34. *See, e.g.*, National Ass'n for Mental Health, Inc. v. Weinberger, Civil No. 1812-73 (D.D.C., Feb. 7, 1974), *reprinted in* COURT CHALLENGES 253, 259, 260-61 (findings of fact no. 30 and conclusions of law no. 10) (alcoholism programs); National Ass'n of Regional Medical Programs, Inc. v. Weinberger, Civil No. 1807-73 (D.D.C., Feb. 7, 1974), *reprinted in* COURT CHALLENGES 201, 211-12 (findings of fact and conclusions of law no. 15) (regional medical program funds); Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1381-82 (D.D.C. 1973) (grants to strengthen state departments of education); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 902 (D.D.C. 1973) (community mental health centers grants); Massachusetts v. Weinberger, Civil Nos. 1308-73 & 1322-73 (D.D.C., July 26, 1973), *reprinted in* COURT CHALLENGES 149, 153-54 (title III-A of the National Defense Education Act).

35. Pub. L. No. 91-296, § 601, 84 Stat. 353 (funds appropriated for any fiscal year ending prior to July 1, 1973, to carry out any program for which appropriations are authorized by the Public Health Service Act or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 shall remain available for obligation and expenditure until the end of such fiscal year).

36. *See* National Ass'n for Mental Health, Inc. v. Weinberger, Civil No. 1812-73 (D.D.C., Feb. 7, 1974), *reprinted in* COURT CHALLENGES 253, 264 ($354 million ordered obligated); National Ass'n of Regional Medical Programs, Inc. v. Weinberger, Civil No. 1807-73 (D.D.C., Feb. 7, 1974), *reprinted in* COURT CHALLENGES 201, 213 ($150 million ordered obligated); Association of Am. Medical Colleges v. Weinberger, Civil No. 1794-73 (D.D.C., Oct. 26, 1973), *reprinted in* COURT CHALLENGES 231, 233 (defendant enjoined from failing to obligate $28 million); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 902 (D.D.C. 1973) ($52 million released).

37. National Ass'n for Mental Health, Inc. v. Weinberger, Civil No. 1812-73 (D.D.C., Feb. 7, 1974), *reprinted in* COURT CHALLENGES 253, 260; National Ass'n of Regional Medical Programs, Inc. v. Weinberger, Civil No. 1807-73 (D.D.C., Feb. 7, 1974), *reprinted in* COURT CHALLENGES 201, 211-12.

38. National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 902 (D.D.C. 1973).

39. *Id.* Three other reported cases dealt with health programs, but not under section 601. *See, e.g.*, American Ass'n of Colleges of Podiatric Medicine v. Ash, Civil No. 1244-73 (D.D.C., June 27, 1973), *reprinted in* COURT CHALLENGES 215, 217 (district judge ordered approximately $14 million obligated, but not necessarily expended, for capitation grants to qualified and approved pharmacy and podiatry colleges); National League for Nursing v. Ash, Civil No. 1316-83 (D.D.C., Nov. 19, 1973), *reprinted in* COURT CHALLENGES 223, 225 (district court found statutory mandate for obligation and expenditure of $16.8 million for capitation grants to

The education cases reveal a similar approach. Four of the cases deal with title III-A of the National Defense Education Act of 1958,[40] which provides for federal financial assistance to public schools for the purchase of special equipment and the remodeling of laboratories or other space utilized for such equipment.[41] Before the courts forced spending, the Executive had allotted only $2 million of the program's $50 million appropriation.[42] Two of the courts, stating that the issue presented was whether the Congress had granted the defendant administrators unlimited discretion to allot and disburse,[43] concluded that the Congress had granted discretion to the Executive to establish reserves of up to 16 percent of the appropriated funds for designated program purposes[44] but that "the Commissioner was obligated to allot" the remainder.[45] A third court's approach was more mandate-seeking than discretion-searching; the court considered the allotment among states a "ministerial, mechanical, non-discretionary act."[46]

The library services and administrative support cases, sharing the quest for a mandate, interpreted a statutory "shall" as forbidding executive impoundment unless the states fail to satisfy certain statutory prerequisites.[47] One court did not read even the discretionary language "may" appearing in the statutory description of the Commissioner of Education's duties[48] to allow the Commissioner to limit severely a program for an unrelated reason, such as fighting inflation.[49]

qualified schools of nursing); Seafarers Int'l Union, AFL-CIO v. Weinberger, 363 F. Supp. 1053, 1059 (D.D.C. 1973) (HEW officials enjoined from implementing proposed plan to close and transfer the in-patient and research facilities of six of the eight Public Health Service hospitals; a conference committee report explicitly rejected the plan as not meeting the Public Health Service hospital system law).

40. §§ 301-05, 20 U.S.C. §§ 441-45 (1970).

41. *Id.* § 303, 20 U.S.C. § 443 (1970); *see* Louisiana v. Weinberger, 369 F. Supp. 856 (E.D. La. 1973); People *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721 (N.D. Ill. 1973); Massachusetts v. Weinberger, Civil Nos. 1308-73 & 1322-73 (D.D.C., July 26, 1973), *reprinted in* COURT CHALLENGES 149; Alabama v. Weinberger, Civil Nos. 4101-N, 4103-N, & 4104-N (M.D. Ala., July 18, 1973), *reprinted in* COURT CHALLENGES 175.

42. *See* Louisiana v. Weinberger, 369 F. Supp. 856, 863 (E.D. La. 1973).

43. *Id.* at 862; *see* Massachusetts v. Weinberger, Civil Nos. 1308-73 & 1322-73 (D.D.C., July 26, 1973), *reprinted in* COURT CHALLENGES 149, 151.

44. *See* Louisiana v. Weinberger, 369 F. Supp. 856, 863 (E.D. La. 1973); Massachusetts v. Weinberger, Civil Nos. 1308-73 & 1322-73 (D.D.C., July 26, 1973), *reprinted in* COURT CHALLENGES 149, 152. *See also* People *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 726 (N.D. Ill. 1973) (title III-A permits reserves up to 16 percent).

45. Louisiana v. Weinberger, 369 F. Supp. 856, 863 (E.D. La. 1973); Massachusetts v. Weinberger, Civil Nos. 1308-73 & 1322-73 (D.D.C., July 26, 1973), *reprinted in* COURT CHALLENGES 149, 152.

46. People *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 726 (N.D. Ill. 1973).

47. *See* Louisiana v. Weinberger, 369 F. Supp. 856, 862 (E.D. La. 1973); Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1381 (D.D.C. 1973); Oklahoma v. Weinberger, 360 F. Supp. 724, 726 (W.D. Okla. 1973).

48. Act of Apr. 13, 1970, § 531(c), 20 U.S.C. § 867(c) (1970).

49. *See* Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1381 (D.D.C. 1973).

The Commissioner could only "accept, review, and approve or disapprove *for program-related reasons*, applications for grant-awards up to the full amounts appropriated by Congress and apportioned to the states."[50]

Housing. Early in 1973, the Nixon Administration took several steps to freeze or terminate all housing subsidy programs. The Administration placed an 18-month moratorium on processing applications for low-rent public housing, rent supplements, home ownership assistance, and rental housing assistance,[51] refused to expend funds for low-cost loans to rehabilitate homes in federally assisted code enforcement areas,[52] and ceased to provide interest credit loans for rural housing.[53] The resulting law suits seeking to overturn these actions, unlike predecessor suits brought in 1971 and 1972 to require the Executive to allot urban renewal project funds,[54] were successful, but at least one of the earlier, unsuccessful urban renewal cases shaped the method of analysis adopted in the 1973 decisions.

In *Housing Authority v. HUD*[55] the district court dismissed an action seeking release of impounded urban renewal funds because sovereign immunity and the presence of a political question deprived the court of jurisdiction.[56] The need to resolve the issues of sovereign immunity and political question spurred the court's search for some

50. *Id.* at 1382 (emphasis added). Two other cases challenging refusal to fund education programs terminated without significant opinions on the impoundment issue, although in both cases the Office of Education was compelled to publish guidelines and issue application forms for grants. *See* National Ass'n of Collegiate Veterans v. Ottina, Civil No. 349-73 (D.D.C., Mar. 19, 1973) (veterans' education); Minnesota Chippewa Tribe v. Carlucci, Civil No. 175-73 (D.D.C. May 8, 1973) (consolidated with *Redman v. Ottina*), *reprinted in* COURT CHALLENGES 195, 195-98 (Indian education).

51. On January 8, 1973, Housing and Urban Development Secretary Romney issued orders to all regional offices terminating these programs. *See* Pennsylvania v. Lynn, 362 F. Supp. 1363, 1366 (D.D.C. 1973).

52. This refusal was officially disclosed in the January 29, 1973, Office of Management and Budget (OMB) impoundment report. OFFICE OF MANAGEMENT AND BUDGET, REPORT UNDER FEDERAL IMPOUNDMENT AND INFORMATION ACT, *reprinted in* 38 FED. REG. 3474, 3485 (1973); *see* Guadamuz v. Ash, 368 F. Supp. 1233, 1237 (D.D.C. 1973).

53. On January 8, 1973, the Farmers Home Administration announced the cessation of interest credit loans in conjunction with the Department of Housing and Urban Development (HUD) 18-month housing moratorium. *See* Pealo v. Farmers Home Administration, Civil No. 1028-73 (D.D.C., July 31, 1973), *reprinted in* COURT CHALLENGES 123, 126.

54. *See* Housing Authority v. HUD, 340 F. Supp. 654, 655-57 (N.D. Cal. 1972) (suit to compel release of impounded urban renewal funds dismissed because of sovereign immunity and political question doctrine); San Francisco Redevelopment Agency v. Nixon, 329 F. Supp. 672 (N.D. Cal. 1971) (motion to quash service of President granted because good cause for order compelling President to act not shown).

55. 340 F. Supp. 654 (N.D. Cal. 1972).

56. *Id.* at 655-57.

statutory indication that the Congress required the Executive to spend the designated funds. The existence of a mandate to spend, not found in *Housing Authority*, would have made the Executive's failure to adhere to it action in excess of statutory power, an exception to sovereign immunity,[57] and would have supplied the judicially manageable standards and guidelines needed to avoid the political question barrier.[58]

The statutory mandate sought in *Housing Authority* was treated as pivotal in two of the four housing impoundment cases in 1973. In *Pennsylvania v. Lynn*,[59] for example, the district court ordered the Secretary of Housing and Urban Development to process existing and new applications for the basic housing subsidy programs and to approve or disapprove them in accordance with existing statutory and regulatory criteria because the court concluded that a congressional mandate to operate the programs on a continuing basis existed.[60] This mandate rendered the Secretary's expressed dissatisfaction with aspects of the program relating to the equitable distribution of housing benefits nationwide and the nature of the target income groups immaterial.[61] The court did allow the Secretary to exercise some discretion in using his own regulations to decide which applications to approve[62] and noted that the mandate compelled only program operation, not the expenditure of all appropriated funds.[63] Similarly, in *Pealo v. Farmers Home Administration*,[64] the court held that the Secretary of Agriculture had no discretion to cut off the interest credit portion of a rural housing loan program when there was evidence of congressional intent that the program be carried out.[65] The interest credit aspect of the program was an integral part of the whole, and its suspension was in derogation of that program.[66]

Perhaps the most productive method of examining an impoundment of housing funds surfaced in *Guadamuz v. Ash*,[67] a case involving

57. *Id.* at 656.
58. *See id.*
59. 362 F. Supp. 1363 (D.D.C. 1973).
60. *Id.* at 1369-72.
61. *Id.* at 1369; *see id.* at 1371.
62. *Id.* at 1371-72.
63. *Id.* at 1371. On appeal the District of Columbia Circuit held that the Executive had acted reasonably in suspending and ultimately terminating the operation of three housing subsidy programs because evidence demonstrated that the programs, as structured by the Congress, were working to undermine the Congress's own purposes in authorizing the programs. Pennsylvania v. Lynn, 501 F.2d 848, 867 (D.C. Cir. 1974).
64. Civil No. 1028-73 (D.D.C., July 31, 1973), *reprinted in* COURT CHALLENGES 123.
65. *Id.*, *reprinted in* COURT CHALLENGES 129-30.
66. *Id.*, *reprinted in* COURT CHALLENGES 129.
67. 368 F. Supp. 1233 (D.D.C. 1973).

the failure of the Secretary of Housing and Urban Development to continue making slum rehabilitation loans available in code enforcement areas.[68] The court rejected the Executive's claim that it was free to terminate a program in the absence of a contrary mandate. Having scrutinized the legislation and its history, the judge determined that the statute gave the Secretary no "authority to decline to exercise . . . discretion" to determine which loan applicants were qualified.[69] The *Guadamuz* decision stands as the only housing decision to reject the Executive budget perspective.

Agriculture. The court in *Guadamuz* also enjoined the withholding of all funds from the Rural Environmental Assistance Program (REAP).[70] The court indicated that while the Secretary of Agriculture might possess some discretion to limit the size of the REAP,[71] he had no power to terminate the program on the basis of reasons remote and unrelated to its functions.[72] The understanding of the problem evidenced in *Guadamuz* also was reflected in *Sioux Valley Empire Electric Association, Inc. v. Butz*,[73] which overturned the Secretary of Agriculture's termination of the two percent interest loan program for rural electric cooperatives.[74] As a predicate to negating the jurisdictional barriers of sovereign immunity and political question and to finding mandamus jurisdiction, the court in *Sioux Valley* thoroughly reviewed the statute to determine whether the Congress intended to confer upon the Secretary the power to end the program.[75] Finding no such grant of discretionary power to terminate,[76] the court declared that conceding that the Executive could impound to implement fiscal policy or to disapprove of a particular program would, in effect, pass to the Executive "the very

68. *See id.* at 1237-38; Housing Act of 1949, § 2, 42 U.S.C. § 1441 (1970); Housing Act of 1964, § 312, 42 U.S.C. § 1452b (1970).
69. 368 F. Supp. at 1242; *see id.* at 1239. The court further concluded that the policy of the act would "not be promoted by restricting the source of admittedly inadequate funds" and that the restriction could not be justified as necessary to satisfy existing tax laws and the ceiling on the national debt since these were "extraneous considerations totally unrelated to the purposes of the program." *Id.* at 1243.
70. *Id.* at 1244; *see* Soil Conservation and Domestic Allotment Act of 1936, §§ 7-15, 16(a), 17, 16 U.S.C. §§ 590g-590o, 590p(a), 590q (1970).
71. 368 F. Supp. at 1240 n.31. The court noted that states were guaranteed that their proportional share of the REAP funds would not be less than 85 percent of their share in the preceding program year. The 85 percent guarantee suggested some room for program reduction. *Id.*
72. *Id.* at 1240, 1243.
73. 367 F. Supp. 686 (D.S.D. 1973).
74. *Id.* at 698; *see* Rural Electrification Act of 1936, 7 U.S.C. §§ 901-24 (1970), *as amended*, (Supp. III, 1973).
75. 367 F. Supp. at 690-91.
76. *Id.* at 696.

nucleus of Congressional power" and emasculate the system of checks and balances.[77]

In *Berends v. Butz*[78] a Minnesota district court, reviewing the cutoff of a similar loan program,[79] emphasized the ministerial duty imposed by the statute upon the Secretary of Agriculture to accept and consider applications, to fund qualifying ones,[80] and to request an apportionment of funds from the Office of Management and Budget (OMB) sufficient to satisfy the loan needs of those qualified.[81] After holding that the statutory language precluded discretionary application of loan funds to designated emergency loan areas,[82] the court warned program administrators that they, like courts, should not engage in the practice of passing upon the "necessity or soundness of a duly-promulgated law."[83]

Poverty. In his 1974 budget message presented to the Congress on January 29, 1973, President Nixon proposed that there be no new federal funding of community action agencies after June 30, 1973.[84] In response to this budget submission, Howard Phillips of the Office of Economic Opportunity (OEO) issued a memorandum to all OEO regional offices warning of the upcoming cessation of funding for community action agencies.[85] This warning was followed by an instruction limiting the use of existing funds to phasing out activities by June 30.[86] The result of these orders and similar actions was to stifle ongoing community action operations.

77. *Id.* at 698.
78. 357 F. Supp. 143 (D. Minn. 1973).
79. *See id.* at 145-49; Agricultural Act of 1961, § 321, 7 U.S.C. § 1961 (1970) (program granting emergency loans for agricultural credit in event of natural disasters).
80. 357 F. Supp. at 151, 156-57.
81. *Id.* at 156. The court analyzed the issue from the perspective of the scope of the Secretary's discretion rather than in light of the extent of the statute's mandate. *Id.* at 150. The Executive apparently relied upon the existence of discretion in the Secretary rather than on the lack of command in the statute, which had been the Executive's focus in every other case. *Id.* at 149-50.
82. *Id.* at 150.
83. *Id.* at 156. Two additional cases appear in the area of agricultural programs. In one the court determined that the Secretary of Agriculture had to make all the appropriated funds available because the Congress had "*directed* the Secretary" to use the money. Dotson v. Butz, Civil No. 1210-73 (D.D.C., Aug. 3, 1973), *reprinted in* COURT CHALLENGES 111, 117-19. The other decision did not resolve any legal issues relating to impoundment. *See* Bennett v. Butz, Civil No. 4-73 Civ. 258 (D. Minn., June 25, 1973), *reprinted in* COURT CHALLENGES 75.
84. *See* OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1974, at 122 (1973). Although the President considered the cessation of funding of community action agencies a request, he did inform the Congress that "[e]ffective July 1, 1974, new funding for . . . [the agencies] will be at the discretion of local communities." *Id. See also* Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 65 (D.D.C. 1973).
85. *See* Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 65-66 (D.D.C. 1973).
86. *See id.* at 66.

Although several suits were instituted challenging Phillips's actions,[87] only two decisions issued. The District of Columbia district court in *Local 2677, American Federation of Government Employees v. Phillips*[88] held Phillips's actions illegitimate.[89] Although the court's conclusion was based in part upon "the clear Congressional intent of the multiple year authorization,"[90] the court approached the issue by questioning Phillips's assertion of authority to terminate the programs rather than by seeking a legislative mandate forbidding termination.[91] The court rejected Phillips's attempt to rely on the budget message as a basis for termination because the message was "nothing more than a proposal to the Congress for the Congress to act upon as it may please."[92] Phillips's claim that he had to terminate the agency in order to avoid waste of funds was disapproved as an attempt to create an implicit veto.[93] Finally, the court was unwilling to require the Congress to appropriate in order to assure program continuity; the Congress had already decreed, through passage of long term authorization, that the program remain in existence.[94]

In the second case, *Local 2816, American Federation of Government Employees v. Phillips*,[95] the court refused to grant a preliminary injunction against Phillips because the court was not convinced that Phillips was in fact terminating the program.[96] Suggesting that early termination would have violated the OEO statute and would have justified an injunction, the court stated that the commencement of a phase-out and the placement of the burden on the Congress to appropriate in order to keep the program alive did not warrant injunctive relief.[97] Even though the timing of relief was critical, the court placed the onus of post-June 30th action upon the Congress

87. *See id.* (consolidated with *West Central Mo. Rural Dev. Corp. v. Phillips* and *National Council of OEO Locals, Am. Fed'n of Gov't Employees v. Phillips*); Local 2816, Am. Fed'n of Gov't Employees v. Phillips, 360 F. Supp. 1092 (N.D. Ill. 1973).
88. 358 F. Supp. 60 (D.D.C. 1973).
89. *See id.* at 74. The court focused on the statutory authorization for the continuation of the Office of Economic Opportunity (OEO) program. *See id.* at 66, 71. Section 3(c)(2) of the Economic Opportunity Amendments of 1972 authorizes the funding of the community action program through fiscal year 1974 at not less than $328.9 million, while section 2(a) of the Amendments authorizes all OEO programs to continue through the end of fiscal year 1975. 42 U.S.C. §§ 2837, 2702b (Supp. II, 1972); *see* 358 F. Supp. at 66 & n.5, 71 & n.19.
90. 358 F. Supp. at 75; *see* note 89 *supra.*
91. *See id.* at 68, 77.
92. *Id.* at 73.
93. *Id.* at 73-74.
94. *See id.* at 74-76.
95. 360 F. Supp. 1092 (N.D. Ill. 1973).
96. *Id.* at 1103.
97. *See id.* at 1100.

rather than upon the Executive, which apparently was free to disregard the legal impact of the program authorization.[98]

In *Community Action Program Executive Directors Association v. Ash*,[99] the only other reported decision examining impoundment of OEO program funds, the New Jersey district court moved further toward congressional control of the budget than was necessary on the facts. Confronted with a refusal of the Executive to obligate and spend some $270.7 million in appropriated summer Neighborhood Youth Corps funds, the court stated that "once Congress has appropriated funds for a specific program, the Executive Branch has a duty to spend them. It has no authority under the Constitution to refuse to spend those funds, and performs only a ministerial function."[100] In acknowledged dictum the court indicated that "the only discretion retained by the Executive Branch after a legislative appropriation is that over how and where to spend the funds."[101] No other court has read an appropriation as such an unqualified command.

THRESHOLD JURISDICTIONAL PROBLEMS AND THE STATUTORY MANDATE

In almost every impoundment case the Executive has raised at least three threshold objections to the court's entertainment of the action. The Executive has alleged that the court is without jurisdiction under article III because the issue is a nonjusticiable political question,[102] that the court lacks article III jurisdiction because the suit is a legal action against the sovereign to which the sovereign has not consented,[103] and that the court does not have subject matter jurisdiction pursuant to the mandamus jurisdiction grant[104] because the duty of the Executive to spend appropriations is totally, or significantly, discretionary.[105]

98. *See id.* at 1103.
99. 365 F. Supp. 1355 (D.N.J. 1973).
100. *Id.* at 1361.
101. *Id.* at 1361 n.9. The court also relied on the Congress's clear intent to have the money spent. *See id.* at 1362-63; Economic Opportunity Amendments of 1972, § 2(a), 42 U.S.C. § 2771 (Supp. II, 1972) (program extended through 1975).
102. *See, e.g.*, Louisiana v. Weinberger, 369 F. Supp. 856, 861-62 (E.D. La. 1973); Seafarers Int'l Union, AFL-CIO v. Weinberger, 363 F. Supp. 1053, 1059 (D.D.C. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 900-01 (D.D.C. 1973).
103. *See, e.g.*, City of New York v. Train, 494 F.2d 1033, 1038-39 (D.C. Cir.), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1377); Louisiana v. Weinberger, 396 F. Supp. 856, 861-62 (E.D. La. 1973); Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1361-62 (D.N.J. 1973).
104. 28 U.S.C. § 1651 (1970).
105. *See, e.g.*, State Highway Comm'n v. Volpe, 479 F.2d 1099, 1104-08 (8th Cir. 1973); Community Action Program Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1363 (D.N.J. 1973); Minnesota v. Weinberger, Civil No. 4-73 Civ. 139 (D. Minn., June 7, 1973), *reprinted in* COURT CHALLENGES 285, 288-89.

A court can overcome each of these bars readily if it first finds that the Congress ordered the President to spend the funds appropriated. To locate a mandate to spend, a court would construe the statute and interpret the legislative history, classic judicial tasks for which courts have a wealth of historically developed standards that are peculiarly within their competence to apply. The same process would be used to find the legislation sufficient to satisfy the political question problem.[106] In responding to the recitation of *Baker v. Carr*,[107] however, courts need not have employed techniques of statutory construction to seek a mandate to spend; courts, instead, could have utilized the same judicial instruments to ascertain whether the Congress had ever given the Executive the discretion he claims he was empowered to exercise. The latter approach could have circumvented the political question difficulties without effectively creating an executive budget and removing fiscal initiative and control from the Congress.

Unfortunately, the district court in *Housing Authority v. HUD*[108] in 1972 set a pattern that persuaded courts to avoid examination of the existence of discretion in the Executive. The court noted that "[t]he legislature appears to have created much of the executive's discretion to withhold funds and would also appear to be able to limit that discretion if it so desired."[109] Avoiding delineation of guidelines for the Executive's exercise of discretion, the court placed the responsibility upon the Congress to reenact the law, and, in the reenactment, to express congressional intent and purposes to limit the Executive's authority to impound appropriated funds.[110] Thus, the court in effect sanctioned an item veto and compelled the Congress to act twice.

In contrast, the *Campaign Clean Water* cases[111] offer an excellent example of a court's careful scrutiny of standards. The district court found discretion in the Executive not to allot all funds authorized for water pollution control but concluded that the discretion had been flagrantly abused.[112] The circuit court quarreled only with the district court's failure to conduct more than a superficial evidentiary inquiry into the Executive's standards for impoundment

106. *See, e.g.*, State Highway Comm'n v. Volpe, 479 F.2d 1099, 1106 (8th Cir. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1238 (D.D.C. 1973); Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 724-25 (N.D. Ill. 1973).
107. 369 U.S. 186, 217 (1962).
108. 340 F. Supp. 654 (N.D. Cal. 1972).
109. *Id.* at 656.
110. *See id.* at 656-67.
111. Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689 (E.D. Va.), *remanded sub nom.* Campaign Clean Water v. Train, 489 F.2d 492 (4th Cir. 1973), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1378).
112. *Id.* at 699-700.

before deciding whether the impoundment was an abuse of executive power.[113] The circuit court in no way disapproved judicial review of discretion; its concern was that the reviewing court consider everything before concluding that the Executive had relied upon proper or improper standards in exercising its discretion.[114] The determination of whether discretion was exercised properly was unquestionably a judicial task, though injudiciously performed.

Inquiry into the legislative mandate to the Executive has enabled courts to avert dismissal of the case under the political question doctrine.[115] If the Congress mandates expenditure and the Executive refuses to spend the funds, the resulting issue clearly is within the judicial domain since courts traditionally have compelled the Executive "to stay within the limits prescribed by the legislative branch."[116] Further, direct conflict between the Congress and the Executive over an issue about which the Congress has legislated raises no "textually demonstrable constitutional commitment of the issue to a coordinate political department,"[117] because it is to the courts that articles III and VI of the Constitution commit such issues.[118] Requiring that the Executive prove the existence of his discretion and then finding him unable to fulfill that burden places the parties in the same position as does requiring the Congress to mandate expenditure and does not compel the Congress either to legislate in a specific, directive fashion or to relinquish budget hegemony to the Executive.

If a mandate exists and the Executive refuses to obey it, the Executive is acting unconstitutionally, as well as outside of the scope of his statutory authority. Such action by the Executive meets the requirements of two well-developed exceptions to precluding suits against the sovereign without his consent.[119] The existence of a legislative mandate ignored by the Executive vitiates the sovereign

113. *See* Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 501 (4th Cir. 1973), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1378).

114. *See id.*

115. *See* National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 695 (D.C. Cir. 1971); Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1359-60 (D.N.J. 1973).

116. *See, e.g.*, Louisiana v. Weinberger, 369 F. Supp. 856, 862 (E.D. La. 1973); Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1360 (D.N.J. 1973); Massachusetts v. Weinberger, Civil Nos. 1308-73 & 1322-73 (D.D.C., July 26, 1973), *reprinted in* COUNT CHALLENGES 149, 151.

117. Baker v. Carr, 369 U.S. 186, 217 (1962).

118. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-80 (1803).

119. The exceptions permit suit where an official acts beyond his statutory powers or where an official acts pursuant to authority or in a manner that is constitutionally void. Dugan v. Rank, 372 U.S. 609, 621-22 (1963), *citing* Malone v. Bowdoin, 369 U.S. 643, 647 (1962); *see* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949).

immunity defense.[120] By the same token, "[i]f it is determined that Congress *did not* confer upon the Secretary [of Agriculture] the power to terminate the . . . program, then the government's consent to be sued is not a jurisdictional prerequisite to federal question jurisdiction."[121] Exceeding discretionary authority undermines the bar of sovereign immunity as effectively as does claiming power where none at all is granted.[122]

The sovereign immunity bar also may affect a court's choice of remedy. Ordering the cessation of illegal or unconstitutional conduct by the Executive poses no problem,[123] but requiring "affirmative action by the sovereign or the disposition of unquestionably sovereign property" does.[124] Where there is a mandate to spend, however, the sovereign is required only to cease unauthorized nonexpenditure. It may be said that where there is a mandate to spend, the court requires nothing on its own but merely enforces a requirement established by the Congress.[125] Nevertheless, the finding of a mandate is surplusage; mere passage of the appropriation should suffice so long as the Executive cannot show successfully that the Congress desired to have less than the full amount made available in keeping with the goals of the program.

120. *See* Dugan v. Rank, 372 U.S. 609, 621-22 (1963). Several of the courts found, as the main or alternative ground for rejecting the claims of sovereign immunity, that the application of section 10 of the Administrative Procedure Act results in a waiver of sovereign immunity. *See* 5 U.S.C. §§ 701-06 (1970) (person suffering legal wrong because of agency action is entitled to judicial review); *e.g.*, Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 724 (N.D. Ill. 1973); Pennsylvania v. Lynn, 362 F. Supp. 1363, 1368 (D.D.C. 1973); Local 2816, Am. Fed'n of Gov't Employees v. Phillips, 360 F. Supp. 1092, 1096 (N.D. Ill. 1973).

121. Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 690 (D.S.D. 1973) (emphasis in original).

122. *See* Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 498 (4th Cir. 1973), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1378). In *Housing Authority v. HUD* the court refused to find any exception to the sovereign immunity bar because the plaintiffs had not shown that the Executive had exceeded his statutory discretion in not spending appropriated funds. 340 F. Supp. 654, 656 (N.D. Cal. 1972).

123. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 n.11 (1949), *citing* North Carolina v. Temple, 134 U.S. 22 (1890).

124. *Id.*

125. *See, e.g.*, State Highway Comm'n v. Volpe, 479 F.2d 1099, 1123 (8th Cir. 1973); Louisiana v. Weinberger, 369 F. Supp. 856, 862 (E.D. La. 1973); Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1361 (D.N.J. 1973); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 68-69 (D.D.C. 1973). Some courts have sought to sidestep the relief issue by understating the relief requested as not involving any command to expend funds. *See, e.g.*, Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 724 (N.D. Ill. 1973) (allotment only); Brown v. Ruckelshaus, 364 F. Supp. 258, 261 (C.D. Cal. 1973) (seeking allotment only); City of New York v. Ruckelshaus, 358 F. Supp. 669, 675 (D.D.C. 1973), *aff'd sub nom.* City of New York v. Train, 494 F.2d 1033 (D.C. Cir.), *cert. granted*, 416 U.S. 969 (1974) (No. 73-1377) (requiring only that Executive make authorized sums available for obligation).

If a plainly defined and indisputable mandate exists,[126] and the Executive refuses to comply, mandamus jurisdiction is available to enforce nondiscretionary, ministerial duties.[127] The circuit court in *State Highway Commission v. Volpe*,[128] while focusing on "whether the Secretary has been delegated any discretion to [impound] . . . in the first place,"[129] avoided assuming mandamus jurisdiction because of possible difficulties and found that issue to be moot.[130] In contrast, the district court in *Community Action Programs Executive Directors Association v. Ash*[131] had no compunctions about its ability to issue a writ of mandamus since it found no discretion of any sort accorded to the executive branch in the appropriation.[132] Nor did the district court in *Minnesota v. Weinberger*[133] entertain any doubts about the propriety of mandamus jurisdiction because it construed the "shall" in the statute providing for federal reimbursement of states for services supplied to needy families with children[134] as making reimbursement mandatory, not discretionary.[135]

One impoundment case accepting mandamus jurisdiction focused on the Executive's discretion rather than upon a manifestation of congressional intent to compel expenditure of all funds appropriated. The court in *Sioux Valley Empire Electrical Association v. Butz*[136] indicated that a statutory duty owing to the plaintiff could be found in the absence of a congressional delegation to the Executive of power to terminate a program; because the absence of conferred discretion leaves the Secretary of Agriculture no choice but to continue to operate the program, mandamus lies.[137] All appropriations that do not contain an explicit grant of authority to do otherwise

126. Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 218-19 (1930), *cited in* Prairie Band of Pottawatomie Tribe v. Udall, 355 F.2d 364 (10th Cir.), *cert. denied*, 385 U.S. 831 (1966) (no duty found).

127. *See* Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 218 (1930); Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1361 (D.N.J. 1973). The writ of mandamus will issue "only where the duty to be performed is ministerial and the obligation to act peremptory and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable." United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414, 420 (1931); *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 158, 168-76 (1803).

128. 479 F.2d 1099 (8th Cir. 1973).

129. *Id.* at 1107.

130. *Id.* at 1104-05 & n.6. The Secretary of Transportation had removed contract controls during the pendency of the action. *See id.* at 1104 n.5.

131. 365 F. Supp. 1355 (D.N.J. 1973).

132. *See id.* at 1361.

133. 359 F. Supp. 789 (D. Minn. 1973).

134. Social Security Act § 403, 42 U.S.C. § 603(a) (1970). *See also id.* § 1603, 42 U.S.C. §1383(a) (1970) (program for state plans for the aged and blind; "Secretary shall pay").

135. 359 F. Supp. at 791.

136. 367 F. Supp. 686 (D.S.D. 1973).

137. *Id.* at 690.

imply a clear executive duty to spend the funds, and in the absence of contrary authority, the act of expenditure is merely a ministerial function that can be enforced judicially by means of mandamus.[138]

Although most courts considering impoundment have felt compelled to find some congressional mandate in order to bypass the threshold issues of political question, sovereign immunity, and mandamus jurisdiction, a mandate is not a prerequisite to justiciability. Measuring the Executive's statutorily granted discretion and finding that it does not justify executive refusal to spend renders the case amenable to judicial resolution pursuant to article III of the Constitution. Significantly, this approach would remove from the Congress the burden of having to reenact already effective laws to incorporate prescribed formulae forcing the Executive to heed the legislative will. This approach therefore would negate the ability of the Executive to exercise an item veto by way of impoundment If the Congress succeeds in overturning impoundments by demonstrating congressional mandates, the Congress wins individual battles but ultimately loses the war for control of the purse.

THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974

By enacting the Congressional Budget and Impoundment Control Act of 1974,[139] the Congress sought to recapture the essential role of determining spending policies and the prerogative to decide the magnitude of every federal program.[140] The Congress utilized the judicial machinery to enhance its supremacy in fiscal affairs by empowering the Comptroller General to bring a civil action for a judicial order to require that budget authority be made available for obligation should the Executive fail to comply with the legislation.[141] Although recognizing that the courts generally had disagreed with the Executive's position that it was entitled to withhold funds in order to rearrange program priorities, control inflation, or further

138. Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1361 (D.N.J. 1973); *see* Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 218-19 (1929).

139. Pub. L. No. 93-344, 88 Stat. 297.

140. *See* S. REP. No. 579, 93d Cong., 1st Sess. 3-4 (1973); H.R. REP. No. 658, 93d Cong., 1st Sess. 16 (1973); 120 CONG. REC. H 5195 (daily ed. June 18, 1974) (remarks of Representative Randall); *id.* at H 5178 (daily ed. June 18, 1974) (remarks of Representative Ullman); *id.* at S 3995 (daily ed. Mar. 20, 1974) (remarks of Senator Muskie); *id.* at S 3847 (daily ed. Mar. 19, 1974) (remarks of Senator Brock); 119 CONG. REC. H 10577-78 (daily ed. Dec. 4, 1973) (remarks of Representative Bolling).

141. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1016, 88 Stat. 330; S. REP. No. 924, 93d Cong., 2d Sess. 77 (1974).

other policies it deemed desirable,[142] the Congress was not content to rely upon the uncertain pace of the courts as the primary method of asserting and obtaining its control over budgetary allocations.[143]

Nor was the Congress willing to rely primarily upon its ability to insert an explicit expenditure mandate into every authorization and appropriation. Although the Congress did preserve that ability by stating that nothing in the Act should be construed to supersede any laws that required obligation of budget authority or expenditures,[144] the Congress knew that attempts to insert directory language in each statute would encounter substantial political difficulty in both Houses.[145] In addition, reliance on that method would require the Congress to reenact what it had considered and passed,[146] would relieve the President of any duty to carry out the law, and would offer him a double opportunity to exercise his veto power—once when the underlying law was approved and a second time when the mandatory language rider was added.

Accordingly, the Congress attempted to devise mechanisms to relieve the Congress of the burden of reenacting laws and to shift the onus to the Executive to implement existing law unless and until the Congress gave him express authority to retard that implementation or to terminate the program entirely.[147] Whether the anti-impoundment law approved by the Congress can be implemented adequately without significant judicial intervention and whether the law will eliminate the need for the Congress to take action that invites veto when it seeks to assure the Executive's adherence to the Congress's spending policy decisions is not clear, but such questions are suggested by the Act and its legislative history and deserve exploration.

Budget Control. The Congress did not hesitate to emphasize its central objective in enacting the law: to recapture its constitutional role as guardian of the treasury.[148] The Act opens with a

142. *See* S. REP. No. 688, 93d Cong., 2d Sess. 73-74 (1974); 120 CONG. REC. S 4091-92 (daily ed. Mar. 21, 1974) (remarks of Senator Muskie); *id.* at S 3836 (daily ed. Mar. 19, 1974) (remarks of Senator Ervin).

143. *See* 120 CONG. REC. S 4092 (daily ed. Mar. 21, 1974) (remarks of Senator Percy).

144. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1001(4), 88 Stat. 332; *see* 120 CONG. REC. S 11222 (daily ed. June 21, 1974) (remarks of Senator Ervin).

145. *See* note 1 *supra* and accompanying text.

146. *See* H.R. REP. No. 658, *supra* note 140, at 42-43.

147. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1012, 88 Stat. 333; 120 CONG. REC. S 11222 (daily ed. June 21, 1974) (remarks of Senator Ervin); *cf. id.* at S 4090-91 (daily ed. Mar. 21, 1974) (remarks of Senator Muskie).

148. S. REP. No. 579, *supra* note 140, at 3-4; H.R. REP. No. 658, *supra* note 140, at 19.

declaration of purposes that emphasizes congressional control over the budgetary process and congressional determination of annual revenues and expenditures.[149] The law is designed to restrain the Executive by providing a system of impoundment control,[150] and the Act's central theme is the establishment of a congressional budget process that will obviate all justification for the President's refusal to adhere to the Congress's expressed spending priorities.[151]

The core of the revised legislative budget process is the concept that the Congress rather than the President should make the major economic decisions.[152] These include decisions on the appropriate levels for total outlays and total new budget authority, for new budget authority and estimated outlays in various budget categories, for the budget surplus or deficit, and for the public debt, as well as recommendations on federal revenue levels and the amount by which they should be increased or decreased.[153] Because of the splintering of the appropriations process among a minimum of 13 distinct appropriation bills and countless "backdoor" spending bills,[154] the Congress in recent years has not made most of these decisions. Normally, it has permitted the Executive to set overall budget figures; rarely has it attempted major functional allocations within the budget, selected the proper ceiling for the public debt, or reviewed revenue levels in the light of budget outlays and authority.[155] All of these major economic decisions either have been relegated to the President by default or simply have been made on an ad hoc basis.[156] The Congress has not developed a comprehensive or consistent budget framework.[157]

149. Congressional Budget and Impoundment Control of 1974, Pub. L. No. 93-344, § 2, 88 Stat. 289.

150. *Id.* § 2(3).

151. H.R. REP. No. 658, *supra* note 140, at 21-25; CONG. REC. S 3832 (daily ed. Mar. 19, 1974) (remarks of Senator Ervin); *see id.* at H 5180 (daily ed. June 18, 1974) (remarks of Representative Bolling).

Several members of the Congress expressed the belief that the adoption of a better budgetary procedure would end the need for presidential impoundment because many of the President's objections focus on the current procedure whereby the Congress sets appropriation levels on a program-by-program basis without regard to the overall impact on the budget. H.R. REP. No. 658, *supra* note 140, at 10; 119 CONG. REC. H 10577 (daily ed. Dec. 4, 1973) (remarks of Representative Bolling); *see* 120 CONG. REC. H 5185 (daily ed. June 18, 1974) (remarks of Representative Veysey).

152. S. REP. No. 579, *supra* note 140, at 6-7; *see* JOINT STUDY COMM. ON BUDGET CONTROL, 93D CONG., 1ST SESS., RECOMMENDATIONS FOR IMPROVING CONGRESSIONAL CONTROL OVER BUDGETARY OUTLAY AND RECEIPT TOTALS 7-8 (Comm. Print 1973) [hereinafter cited as JOINT STUDY].

153. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 301(a), 88 Stat. 300.

154. *See* JOINT STUDY, *supra* note 152, at 10-11, 14.

155. *See id.* at 10, 13-16.

156. *See id.* at 1, 8.

157. *See id.* at 10-11.

Diagnosing the illness was relatively easy, but prescribing the cure was not. In addition to the administrative concerns of devising new committees to be responsible for coordinating spending and revenue policy[158] and of expanding the staff to provide budgetary expertise,[159] the central question of how far the Congress should move toward an absolute legislative budget remained. The Congress had had some experience on which it could draw in determining what form of legislative budget it should construct. The purest model for a legislative budget was that suggested in the Legislative Reorganization Act of 1946.[160] The Act provided that the maximum amount for appropriations in the budget jointly proposed by the stated committees could not be surpassed.[161]

The legislative budget was never successful.[162] In 1947 the Congress was unable to adopt a ceiling on appropriations;[163] in 1948 a ceiling was firmly fixed but then ignored and exceeded by more than $6 billion.[164] In 1949 the deadline for the committees' report of recommendations for expenditure ceilings was extended from February 15 to May 1,[165] and the report was never issued.[166] Thereafter, the Congress failed to take any action to implement the law, and it remained dormant until repealed by the Legislative Reorganization Act of 1970.[167]

The simplicity and rigidity of the 1946 Act had doomed it to failure.[168] The President may have been prevented from indulging in excess spending, but the Congress was restrained even more because it lacked the time, information, and staff necessary to make reasoned and responsible judgments on total spending and because it had no machinery either to assure its own compliance with the budget or to modify that budget in light of changed economic conditions.[169]

158. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 101-02, 88 Stat. 299.
159. *See id.* §§ 201-02.
160. Pub. L. No. 79-601, 60 Stat. 812.
161. *Id.* § 138; *see* H.R. REP. No. 658, *supra* note 140, at 26-27. Section 138 of the Legislative Reorganization Act of 1946 provided that the Congress could raise the ceiling on the public debt if expected expenditures exceeded receipts. *See* Pub. L. No. 79-601, § 138, 60 Stat. 833.
162. H.R. REP. No. 658, *supra* note 140, at 27.
163. *Id.*; *see* S. REP. No. 579, *supra* note 140, at 11; JOINT STUDY, *supra* note 152, at 14.
164. JOINT STUDY, *supra* note 152, at 14; *see* S. Con. Res. 42, 80th Cong., 2d Sess. (1948); H.R. REP. No. 658, *supra* note 140, at 27.
165. H.R. Con. Res. 22, 81st Cong., 1st Sess. (1949); *see* 95 CONG. REC. 889, 1127 (1949).
166. S. REP. No. 579, *supra* note 140, at 11.
167. Pub. L. No. 91-510, § 242(b)(1), 84 Stat. 1172; H.R. REP. No. 1215, 91st Cong., 2d Sess. (1970).
168. H.R. REP. No. 658, *supra* note 140, at 27.
169. *See id.*; S. REP. No. 579, *supra* note 140, at 11-12; JOINT STUDY, *supra* note 152, at 14.

In 1950 the Congress attempted to restore its control of the budget through the adoption of a single appropriation act that encompassed all of the regular appropriation bills.[170] This succeeded in 1950, but it was abandoned thereafter because of concern that a budgetary breakdown would result if the President vetoed the entire bill to protest a single feature and because of the feelings of Congressmen that they had inadequate opportunity to review program merits and details.[171]

The Joint Study Committee and Legislation. The catalyst for the 1973-1974 effort to avoid the defects of these earlier legislative budget approaches was the creation of a Joint Study Committee on Budget Control[172] after the Senate's refusal to surrender impoundment-type enforcement powers to the President resulted in the Congress's failure to enact a debt ceiling.[173] The Joint Study Committee, which was formed to recommend procedures for improving congressional control over budgetary outlay and receipt totals,[174] concluded that effective implementation of a congressional system of priorities depended on the establishment of stringent floor procedures to prohibit the Congress from exceeding its own budget proposals; an alteration in the Congress's initial fiscal year allocation could not be made without the support of either a two-thirds vote in either House or a majority in both Houses.[175]

The Joint Study Committee proposed to enforce budgetary discipline by erecting six distinct hurdles.[176] First, the two concurrent resolutions—the first enacted early in the session and the second late in the session—[177] setting overall budget outlay limitations and potentially making specific allocations to programs could not be amended on the floor to increase funds for one category or program unless either an equal decrease were made in other categories[178] or an increase in the overall limitation and an increase in the debt ceiling or taxes were enacted.[179] This restriction was termed the "rule of consistency."[180] Second, until the first concurrent resolution was adopted

170. Act of Sept. 6, 1950, Pub. L. No. 81-759, 64 Stat. 595; S. REP. No. 579, *supra* note 140, at 12; *see* H.R. REP. No. 658, *supra* note 140, at 28.
171. H.R. REP. No. 658, *supra* note 140, at 28; *cf.* S. REP. No. 579, *supra* note 140, at 12.
172. Act of Oct. 27, 1972, Pub. L. No. 92-599, § 301, 86 Stat. 1324.
173. *See* Abascal & Kramer, *supra* note 16, at 1369-71.
174. *See* Act of Oct. 27, 1972, Pub. L. No. 92-599, § 301(b), 86 Stat. 1324.
175. JOINT STUDY, *supra* note 152, at 5-6, 25-27. If a majority in both Houses were willing to change the allocation, it could do so by passing another bill, subject of course to presidential veto.
176. *Id.* at 4-6.
177. *Id.* at 3, 19-20.
178. *Id.* at 5.
179. *Id.* at 25-26.
180. *Id.*

by the Congress it could consider no appropriation bill or other bill involving budget outlays or new budget authority.[181] Third, the concurrent resolutions containing the outlay and budget authority limitations could not be amended in or by any bill other than a concurrent resolution.[182] Fourth, after the passage of such a resolution, no appropriation or similar measure could be entertained if it called for more to be spent or appropriated than was provided for in the preceding concurrent resolution.[183] Fifth, expenditure limitations could be imposed on an individual bill basis to guarantee that the Congress as well as the President would adhere to those limitations.[184] Finally, any committee report on a spending measure would have to correlate the appropriations with the estimated current-year spending that the appropriations would cause and with the applicable spending limit in the governing concurrent resolution.[185] The report would also have to contain a statement by the appropriate Committee on the Budget that the appropriation was consistent with expenditure limits.[186] Failure to comply with any of these rules would render the defaulting measure subject to a point of order so that the measure would be terminated legislatively unless amended to comply or unless two-thirds of the appropriate chamber agreed to override the point of order.[187]

These strict proposals of the Joint Study Committee were embodied in bills introduced in both legislative bodies,[188] but neither bill was finally accepted as originally written.[189] In reporting out its budget act in November 1973, the House Rules Committee found the Joint Study Committee's objectives deserving of approval but sought a more workable process.[190] In order to keep the budget process flexible and responsive to changing economic circumstances and to

181. *Id.* at 26; *see id.* at 4-6. After May 1, however, appropriation or authorization bills could be considered, subject to the President's budget allocations and estimates. *Id.* at 4, 26. The Joint Study Committee considered the prohibition of pre-concurrent resolution appropriation bills necessary to assure that individual spending bills that might conflict with the ceilings would not be acted upon before the Congress determined its overall priorities. *Id.* at 26.

182. *Id.* at 6, 26.

183. *Id.*

184. *Id.* at 6, 27.

185. *Id.*

186. *Id.*

187. *Id.* at 6, 26-27.

188. S. 1541, 93d Cong., 1st Sess. (1973); H.R. 7130, 93d Cong., 1st Sess. (1973).

189. *See* 120 CONG. REC. S 4291-92 (daily ed. Mar. 22, 1974) (remarks of Senator Percy). *Compare* S. 1541, 93d Cong., 1st Sess. (1973) *and* H.R. 7130, 93d Cong., 1st Sess. (1973) *with* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297.

190. H.R. REP. No. 658, *supra* note 140, at 28-29. The House Rules Committee did not want the budget method to inhibit the proper functioning of the Congress or to prevent the Congress from expressing its will on spending policy. *Id.* at 29.

maintain the value and meaning of the appropriation process, the Committee substituted spending targets for binding ceilings.[191] The Committee did require that no appropriation bills providing for expenditures exceeding the figures contained in the first resolution could be enrolled or sent to the President pending conformance with the second budget resolution but postponed final reconciliation of overall spending and individual appropriations until adoption of the second budget resolution late in the year.[192] The Committee abandoned the remainder of the constricting rules and procedures proposed by the Joint Study Committee to enforce spending limits.[193]

Similarly emphasizing workability, the Senate Committee on Government Operations eliminated the ceilings approach in favor of recommended targets and made the rule of consistency inapplicable to amendments offered by individual members.[194] The Committee shifted the burden of maintaining budgetary consistency from individual members to the entire House or Senate by requiring that the session's initial overall resolution achieve a consistent balance of outlays and revenues or be recommitted to the Committee on the Budget to assure such consistency.[195]

The Senate Committee's version provided for enforcement of budget discipline at a time later than the initial budget resolution and in a manner similar to that proposed in the House. The Congress could enact appropriation bills even if they did not adhere to the limitations of the first concurrent resolution, but each bill would contain a clause preventing it from becoming effective until activated by the passage of a "ceiling enforcement" bill.[196] A ceiling enforcement bill could be reported only if the total amounts of new budget authority and outlays contained in the appropriation bills did not exceed the amounts permitted by the first budget resolution or if the Appropriations Committees rescinded enough new budget authority to bring the new totals below the resolution's ceiling.[197] Failure of the ceiling enforcement bill to come within the expenditure level of the first budget resolution would cause the bill's recommitment pending the

191. *Id.* at 31-32.

192. H.R. 7130, 93d Cong., 1st Sess. §§ 127, 132-33 (1973); H.R. REP. No. 658, *supra* note 140, at 38-40.

193. *See* H.R. 7130, 93d Cong., 1st Sess. §§ 132-33 (1973); H.R. REP. No. 658, *supra* note 140, at 39-40.

194. S. REP. No. 579, *supra* note 140, at 27, 41-42; *see* notes 177-180 *supra* and accompanying text.

195. S. 1541, 93d Cong., 1st Sess. § 304 (1973); S. REP. No. 579, *supra* note 140, at 41-42.

196. S. 1541, 93d Cong., 1st Sess. §§ 308(b), 309(b) (1973); S. REP. No. 579, *supra* note 140, at 21, 47.

197. S. 1541, 93d Cong., 1st Sess. §§ 309(b), (c) (1973); S. REP. No. 579, *supra* note 140, at 21-22, 47-48.

Congress's enactment of the second budget resolution. In the second resolution the Congress could raise the limit on new budget authority and outlays and suggest a greater deficit and higher debt ceiling in order to accommodate the new appropriations.[198] The recommitted ceiling enforcement bill then would be reconsidered in light of the second budget resolution.[199] Failure to reconcile the ceiling enforcement bill with the second resolution might result in pro rata reductions of controllable expenditures.[200] This two-tiered procedure was devised both to curtail spending within the limits set as part of a comprehensive budget outlook and to make certain that any effort to exceed those limits would be reviewed as part of an overall budget review and revision.[201]

The Senate bill that emerged from the Committee on Rules and Administration in February 1974[202] lacked stringent consistency requirements, called for ascertainment of "appropriate" levels of new budget authority and outlays rather than limitations,[203] and was silent on ceiling enforcement processes. Because the Committee was concerned about creating an overly rigid situation, it permitted appropriation bills to become law even if inconsistent with the first budget resolution.[204] The Congress could rescind new budget authority to come within the first budget resolution but was not required to do so.[205] The time for reporting the second budget resolution became most significant; at that time the Congress could order rescission legislation from the authorizing committees, could increase the spending levels set by the resolution, or could direct the House Ways and Means or the Senate Finance Committee to adjust the public debt limit or change revenues.[206] Outlay ceilings in spending bills were replaced by congressional rescission authority in order to preclude the President's use of the ceilings to withhold spending from prior years' budget authority.[207] The somewhat rigid structure of the earlier bill was considerably loosened as its impracticality became clear.

198. S. 1541, 93d Cong., 1st Sess. § 309(d) (1973); S. REP. No. 579, *supra* note 140, at 22, 49-50.
199. S. 1541, 93d Cong., 1st Sess. § 309(e) (1973); S. REP. No. 579, *supra* note 140, at 22; *see id.* at 50.
200. S. 1541, 93d Cong., 1st Sess. § 309(f) (1973); S. REP. No. 579, *supra* note 140.
201. S. REP. No. 579, *supra* note 140, at 22.
202. S. 1541, 93d Cong., 2d Sess. (1974).
203. *Id.* § 301(a); S. REP. No. 688, *supra* note 142, at 6.
204. S. REP. No. 688, *supra* note 142, at 18.
205. *Id.* at 17.
206. S. 1541, 93d Cong., 2d Sess. § 310(c) (1974); S. REP. No. 688, *supra* note 142, at 6, 18-19, 52.
207. *See* S. REP. No. 688, *supra* note 142, at 20.

The New Legislative Budget Process. The law as passed differed substantially from the original Joint Study Committee version. Budget and appropriation decisions would be coordinated since individual appropriation bills for the fiscal year under consideration would not be in order on the floor prior to the adoption of the first budget resolution,[208] but flexible levels of total budgetary authority and outlays would only guide, not bind the Congress in its consideration of individual appropriation bills.[209] Further, the House did not have to consider the internal mathematical consistency of the first budget resolution, although the Senate did.[210] The Congress could provide in the first resolution that no new budget or spending authority could become law until the adoption of the second concurrent resolution or the completion of reconciliation, which would be necessary if the second budget resolution directed a change in budget authority, entitlements, total revenues, or the public debt limits.[211]

The resulting system differs greatly from a pure legislative budget process because it allows the Congress to reverse itself and overturn prior budget decisions with relative ease; the Congress usually does not have to take special steps or obtain the large majorities generally required to repeal what has already been enacted. Only at the time of the second budget resolution do the Congress's budget decisions become firm. Then the Congress is forbidden to undermine its self-imposed maximum on total new budget authority or budget outlays.[212] This system prevents resort to major supplemental and deficiency appropriations unless the Congress is willing to prepare a third budget resolution for the fiscal year.[213]

The critical element, of course, is that the Congress, rather than the President, possesses the power to change the budget. The

208. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 303(a), 88 Stat. 309; S. REP. No. 924, *supra* note 141, at 60; 120 CONG. REC. H 5181 (daily ed. June 18, 1974) (remarks of Representative Bolling). The bill also bound the House Appropriations Committee to complete, "to the extent practicable," action on all regular appropriation bills before reporting the first such bill to the House floor. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 307, 88 Stat. 313.
209. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 301, 310, 88 Stat. 308; 120 CONG. REC. H 5181 (daily ed. June 18, 1974) (statement of Representative Bolling); *id.* at H 5191 (daily ed. June 18, 1974) (remarks of Representative Whitten); *id.* at S 3833-34 (daily ed. Mar. 19, 1974) (remarks of Senator Ervin).
210. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 305(e), 88 Stat. 312; S. REP. No. 924, *supra* note 141, at 61.
211. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 301(b)(1), 88 Stat. 306; S. REP. No. 924, *supra* 141, at 57-58, 63.
212. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 311, 88 Stat. 316; S. REP. No. 924, *supra* note 141, at 64.
213. *See* S. REP. No. 924, *supra* note 141, at 64-65; S. REP. No. 579, *supra* note 140, at 23.

prescribed procedures leave no room for the President to adopt a silent budget resolution that contravenes the one approved by the Congress.[214] No provision grants the Executive power to rescind new authority and thereby terminate or cripple previously enacted programs; the legislation bestows that power exclusively upon the Congress. The President's role is limited to the submission of two documents to the Congress—his continuation of existing level services budget, which sets forth estimates of the outlays required to maintain the programs and activities already in operation,[215] and his traditional budget containing his line item recommendations.[216]

If the strand of *Youngstown Sheet & Tube Co. v. Sawyer*[217] that focuses on the authority actually granted to the Executive by the Congress is applied, the Executive is entitled to recommend budget limitations but has no power to go beyond that specific, narrow, and consciously bestowed authority. The Executive acts in a manner the Congress has not authorized when he implements his suggested levels of total budget outlays and total new budget authority by withholding funds from particular programs. The Executive's exercise of such power transcending the congressionally granted authority and contravening contrary congressional actions involving a particular program flouts the *Youngstown* standard and constitutes action both unconstitutional and violative of the budget control statute.

The budget control provisions of the law, therefore, themselves supply a negative inference against impoundment. If the President can take certain actions while the Congress is entrusted with others, the President is not entitled to usurp the functions allocated to the Congress. Rescission authority is vested solely in the Congress; the President must restrict himself to recommending. The budget control provisions of the new law, therefore, add considerable support to the legal attack upon impoundment.

Impoundment Control. That title X of the new law directly confronts control of impoundment suggests that the second part of the *Youngstown* test, the determination of whether the Congress has forbidden the Executive to do precisely what he has done, is met.[218] The impoundment control provisions, however, are more ambiguous than are those dealing with budget control. The ambiguity results

214. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 2, 301-11, 1002, 1012, 1023, 88 Stat. 298, 306, 332.

215. *See id.* § 605(a).

216. *See id.* § 601, *amending* Budget and Accounting Control Act of 1921, § 201, 31 U.S.C. § 11 (1970).

217. 343 U.S. 579, 586 (1951).

218. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-86 (1951); *id.* at 609 (Frankfurter, J., concurring); Abascal & Kramer, *supra* note 16, at 1566-68.

from the need of the branches to compromise and reconcile their individual approaches to impoundment.[219]

In July and December 1973, the House passed bills containing anti-impoundment features that gave the President the authority to take action delaying or effectively precluding the obligation or expenditure of authorized budget authority, so long as he reported such action to both Houses within 10 days and ceased the impoundment if either chamber passed a simple resolution disapproving the impoundment within 60 days after the President reported his action.[220] The House labelled this a negative mechanism and justified it as permitting the Congress to focus on critical impoundments without becoming submerged in a host of trivial ones.[221]

In July 1973 the House refused to support an amendment designed to transform the negative mechanism into a positive one denying the President authority to impound unless the Congress, by concurrent resolution, approved an impoundment,[222] and the amendment was not reoffered in December. The Senate, on the other hand, four times supported anti-impoundment proposals that would have placed the burden on the Executive to obtain congressional approval of

219. *See* 120 CONG. REC. S 11222 (daily ed. June 21, 1974) (remarks of Senator Ervin); *id.* at H 5182-83 (daily ed. June 18, 1974) (remarks of Representative Bolling).

220. *See* H.R. 8480, 93d Cong., 1st Sess. §§ 101-02 (1973); H.R. 7130, 93d Cong., 1st Sess. §§ 201-02 (1973). Sixty days can stretch to five months across two sessions since adjournments to a specified date are excluded from the count and a new session retriggers the 60 days. *Cf.* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1011(5), 88 Stat. 333.

Proposed amendments that would have required disapproval by concurrent resolution passed by both Houses rather than by a simple resolution passed by one were rejected. *See* 119 CONG. REC. H 6574-77 (daily ed. July 24, 1973) (Representative Anderson's amendment); *id.* at H 6625 (daily ed. July 25, 1973) (Representative Anderson's motion to recommit); *id.* at H 10705-06 (daily ed. Dec. 5, 1973) (Representative Anderson's amendment). Opponents of the amendments warned that the President could veto a congressional negation of an executive impoundment if the negation were delivered in the form of a concurrent resolution. *See* 119 CONG. REC. H 10705 (daily ed. Dec. 5, 1973) (remarks of Representative Eckhardt). According to section 396 of *Jefferson's Manual*, a concurrent resolution is not legislative in nature, and thus is not sent to the President for approval. Rather, it represents a means "of expressing fact, principles, opinions, and purposes of the two Houses," not an order to the President. L. DESCHLER, JEFFERSON'S MANUAL § 396, in H. DOC. No. 402, 90th Cong., 2d Sess. 179-80 (1969). Senator Ervin advised the House Rules Committee, however, that any resolution passed by both the House and the Senate and carrying legislative effect must be sent to the President for his approval or his veto. Senator Ervin commented, "[R]egardless of whether you called it a concurrent resolution or a joint resolution—no resolution of the two houses can be given any legislative effect if it has not been approved by the President or passed by the required majority over his veto." CONG. QUARTERLY 2067 (July 28, 1973). If the disapproving resolution were to have the legislative effect of preventing the President from impounding funds, it would have to be subject to his veto.

221. *See* H.R. REP. No. 658, *supra* note 140, at 41.

222. *See* 119 CONG. REC. H 6598-6603 (daily ed. July 25, 1973) (Representative Pickle's amendment).

impoundment of funds.[223] The first three bills considered would have required the Executive to secure passage of a concurrent resolution supporting the impoundment within 60 days to prevent the expiration of the authority to impound.[224] This still conferred limited impoundment power on the Executive.[225] In the fourth bill the Senate declined to yield the Executive even that much power and required the Executive to obtain, prior to impoundment, actual legislation from the Congress rescinding or reducing a particular appropriation.[226] This final Senate version of impoundment control did not delineate any procedures for handling rescission of budget authority[227] and was silent about whether deferrals of budget authority were to be considered rescissions or reductions, although the broad thrust of the bill's term establishment of "reserves" indicated that it was intended to cover all executive actions that had the effect of delaying obligation or expenditure of funds.[228]

The version of the impoundment control measures that emerged from conference combined features of both the House and Senate bills. The object was to maintain the Executive's capability to manage the federal bureaucracy while eliminating the need for the Congress to reaffirm its past decisions in the face of an Executive's exercise of a nonexistent impoundment power.[229] The complex solution was to divide all executive actions that resulted in withholding, delaying, or precluding the obligation or expenditure of budget authority into the following three categories: the establishment of routine reservations of budget authority by apportionment of an appropriation pursuant to the Anti-Deficiency Act as modified,[230] the

223. *See* S. 929, 93d Cong., 1st Sess. (1973); S. 373, 93d Cong., 1st Sess. (1973); H.R. 8410, 93d Cong., 1st Sess. (1973); S. 1541, 93d Cong., 2d Sess. (1974); 119 CONG. REC. S 6740-42 (daily ed. Apr. 5, 1973) (S. 929); *id.* at S 8871-75 (daily ed. May 10, 1973) (S. 373); *id.* at S. 12169, 12220 (daily ed. June 27, 1973) (H.R. 8410); 120 CONG. REC. S 4319-20 (daily ed. Mar. 22, 1974) (S. 1541).

224. *See* S. 373, 93d Cong., 1st Sess. § 102 (1973); S. 929, 93d Cong., 1st Sess. (1973); H.R. 8410, 93d Cong., 1st Sess. (1973).

225. *See* 120 CONG. REC. S 3836 (daily ed. Mar. 19, 1974) (remarks of Senator Ervin).

226. *See* S. 1541, 93d Cong., 2d Sess. § 1001 (1974); 120 CONG. REC. S 4089-93 (daily ed. Mar. 21, 1974) (Senator Roth's amendment).

227. *See* 120 CONG. REC. H 5179 (daily ed. June 18, 1974) (remarks of Representative Bolling).

228. *See* S. 1541, 93d Cong., 2d Sess. § 1001 (1974); S. REP. No. 688, *supra* note 142, at 72-75; 120 CONG. REC. S 4295 (daily ed. Mar. 22, 1974) (remarks of Senators Ervin and Magnuson); *id.* at S 3835-36 (daily ed. Mar. 19, 1974) (remarks of Senator Ervin).

229. *See* 120 CONG. REC. S 11222 (daily ed. June 21, 1974) (remarks of Senator Ervin); *id.* at H 5180, 5182 (daily ed. June 18, 1974) (statement of Representative Bolling).

230. *See* Anti-Deficiency Act, 31 U.S.C. § 665(c)(2) (1970), *as amended*, Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1002, 88 Stat. 332.

recommendation of and request for rescission of all or part of any budgetary authority for program or policy reasons,[231] and the deferral of budget authority for a period not to exceed the end of the fiscal year in which the deferral occurs.[232] The significance of the delineation of these categories lies in the fact that each category triggers different limitations upon the President and different congressional procedures to determine the viability of a particular executive action.

Routine reservations fall under the terms of the Anti-Deficiency Act.[233] In the impoundment control act, the Congress amended the Anti-Deficiency Act to continue the authority to make reservations "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations," but to delete the existing authority to establish reserves in light of "other developments."[234] The amendment was intended to obviate executive reliance upon that vague clause as authority for the establishment of reserves in response to economic or policy developments; the establishment of reserves to meet economic or policy objectives, according to the Congress, represented an abuse of impoundment authority and an encroachment upon the congressional power to determine national financial policies and priorities.[235]

Temporary deferrals of budget authority for less than a full fiscal year are effective if not disapproved by a vote of one of the Houses of Congress.[236] In contrast, presidential recommendations to rescind budget authority do not take effect until both Houses by majority vote approve them by enacting a rescission bill or a joint resolution.[237] The President must transmit to the House and Senate a special message detailing the nature of each proposed rescission, its purpose, and its fiscal, economic, and budgetary effect.[238] Thereafter,

231. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1012, 88 Stat. 333.

232. *See id.* § 1013. *See generally* 120 CONG. REC. S 11222 (daily ed. June 24, 1974) (remarks of Senator Ervin).

233. 31 U.S.C. § 665(c)(2) (1970).

234. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1002, 88 Stat. 332, *amending* Anti-Deficiency Act, 31 U.S.C. § 665(c)(2) (1970).

235. S. REP. No. 688, *supra* note 142, at 72-73; H.R. REP. No. 658, *supra* note 140, at 19-20; 120 CONG. REC. S 4092 (daily ed. Mar. 21, 1974) (remarks of Senator Muskie); *id.* at S 3835 (daily ed. Mar. 19, 1974) (remarks of Senator Ervin).

236. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 1013(a), (b), 88 Stat. 335.

237. *See id.* § 1012(b); 120 CONG. REC. S 11228 (daily ed. June 21, 1974) (remarks of Senator Metcalf); *id.* at S 11222, 11230 (daily ed. June 21, 1974) (remarks of Senator Ervin); *id.* at H 5182 (daily ed. June 18, 1974) (statement of Representative Bolling).

238. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1012(a), 88 Stat. 333.

the Congress has 45 days within which to give effect to the President's recommendations in whole or in part by eliminating or reducing the appropriation in question.[239] In the interim the President must continue to spend the appropriation in accordance with the program objectives fixed by the Congress.[240] Should the Congress fail to act, the recommendation falls, the full appropriation previously approved remains in effect, and the President is limited to making routine reservations for that appropriation under the tightened provisions of the Anti-Deficiency Act.[241]

Since the authority of the President to rescind is more severely circumscribed by the Act than is his power to make routine reservations or his right to make temporary deferrals, it is not surprising to find that the chief sponsor of the measure in the Senate asserted that all executive failures to spend or delays in spending that had the effect of retarding the implementation of all or part of enacted programs were to be treated as rescission recommendations.[242] The broad sweep of this concept of rescission, including within it all deferrals that would extend to or beyond the end of a fiscal year or that would have an adverse effect on a program,[243] is essential if prior congressional approval of any executive attempt not to utilize appropriations is to be assured. The critical problem is that the vital distinction between rescission and deferral is blurred in the statute because the phrase "deferral of budget authority" is utilized as the generic equivalent of impoundment and is defined to encompass both rescissions, which demand concurrent approval, and deferrals, which are effective if not disapproved. In an exchange between Senators

239. *See id.* §§ 1011(3), 1011(5), 1012(b), 1017.

240. *See* 120 CONG. REC. S 11228 (daily ed. June 21, 1974) (remarks of Senator Metcalf).

241. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1012, 88 Stat. 333; *see* Anti-Deficiency Act, 31 U.S.C. § 665(c)(2) (1970), *as amended*, Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1002, 88 Stat. 332.

242. *See* 120 CONG. REC. S 11223, 11229-30 (daily ed. June 21, 1974) (remarks of Senators Ervin, chief sponsor, and McClellan) (comparing situations in which sections 1012 and 1013 are triggered).

For example, if the President were to review a REAP appropriation of $225 million in January and announce that $150 million would be made immediately available for obligation but that $85 million would be held back until the fall and released then if necessary as an incentive for farmers to undertake land conservation and anti-pollution practices, the action of withholding $85 million from obligation arguably would constitute a rescission of budget authority. Farmers would plan their conservation efforts in light of the reduced funds available in the spring, rather than count on the additional availability of $85 million in the fall. Delayed release of the appropriation would cut the program's impact by approximately one-third and thereby undercut full achievement of the goals the Congress had in mind when it enacted the REAP. However short-lived the actual delay, its programmatic impact would be permanent. The delay therefore would be deemed a rescission, not a deferral.

243. *See id.* at S 11229-30.

Ervin and McClellan on the Senate floor, the hardcore definitional distinctions between the two categories emerged. Rescission was viewed as the broad, residual category, while deferral was defined more narrowly to cover only withholdings of multiyear appropriations for no longer than the fiscal year in which they were made or other temporary withholdings that could not impair the achievement of authorized program goals.[244] The two Senators agreed, however, that the law contained possible ambiguities relating to this distinction between rescission and deferral.[245]

The fundamental ambiguity of the law means that the Executive still has considerable room to maneuver; he can label as a deferral an action Senators Ervin and McClellan would deem to be a rescission. Both the House and the Senate viewed the legislation as a workable law that, by restricting the Executive's budget role and by restoring the Congress to its traditional position as spending policy decision maker, would constitute a final solution to the impoundment problem.[246] The Act, however, still allows the Executive to compel the Congress either to act to disapprove what he terms a deferral, or to resort to the courts to challenge his interpretation of the law.[247]

Procedure in the Courts. The Congress will be represented in court by the Comptroller General,[248] who will bear the responsibility for determining that the President has abused his authority by sending up a deferral special message when a rescission special message is appropriate and for informing the Congress of the circumstances surrounding the President's confusion of rescission with deferral or the President's failure to notify the Congress in any way of the deferral of budget authority.[249] After a lapse of 25 calendar days from the time the Comptroller General first explains the situation in a statement to the Congress, the Comptroller General can bring a civil suit in the United States District Court for the District

244. *See id.*

245. *Id.* at S 11230 (remarks of Senators Ervin and McClellan). Senator McClellan, suggesting language that might have been added to clarify the situation, stated that "[i]f the Senator [Ervin] had the bill back on the drafting board, I think maybe that language [narrowing the "deferral" concept] should have been inserted." Senator Ervin responded, "It might have been better to put it in, but I think it is implied." *Id.*

246. *See id.* at S 11222 (remarks of Senator Ervin); *id.* at H 5182 (daily ed. June 18, 1974) (statement of Representative Bolling).

247. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 1013(b), 1016, 88 Stat. 335, 336.

248. Any other party could initiate litigation, however. 120 CONG. REC. S 11222 (daily ed. June 21, 1974) (remarks of Senator Ervin) (the authority of the Comptroller General "is not intended to infringe upon the right of any other party to initiate litigation").

249. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1015, 88 Stat. 336.

of Columbia to assure the availability of the budget authority for obligation.[250] The suit will take precedence over all other civil cases.[251]

The differences between the burden of proof the Comptroller General will have to meet in a suit under the Act and the burden litigants now must carry and between the issues a court will concentrate on in a suit under the new law and the questions the courts now deem crucial suggest that the new impoundment control law will have a significant impact upon future decisions. In court the Comptroller General will have to prove the existence of the underlying authorization, the appropriation, either the Congress's completion of the reconciliation process with the appropriation intact or the Congress's unwillingness to halt implementation of the appropriation pending reconciliation, and the President's refusal to expend the appropriation in full.[252] The Comptroller General also will have to prove as more reasonable than not his contention that the President's action or inaction effectively will undermine achievement of the program's stated purposes and thereby frustrate the Congress's intent.[253]

The President in reply can argue only that his delay of spending actually is a deferral because it is temporary, does not have substantial impact on program goals, and is not in derogation of his congressionally delegated authority.[254] The President cannot argue that other statutory policies such as inflation control support his action or that the program is in some way defective and harmful to the public interest.[255] The new law also forecloses the President from asserting in court that all or part of the budget authority "will not be required to carry out the full objectives or scope" of the program,[256] although the President can make this argument to the Congress when he presents his rescission recommendation.[257] If there is no question that an appropriation exists and that the President is

250. *Id.* § 1016.
251. *See id.*
252. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 301(b), 310(a), (c), 88 Stat. 306-07, 315-16; *cf.* Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1379 (D.D.C. 1973) (whether Congress had mandated that a specific amount of funds be apportioned and disbursed under the applicable statute); Pennsylvania v. Lynn, 362 F. Supp. 1363, 1309 (D.D.C. 1973) (whether Congress had delegated to the Executive the power to withhold appropriated funds); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 901, 903 (D.D.C. 1973) (whether specific funds had been appropriated with the affirmative direction that they be spent within the fiscal year).
253. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 1012(a), 1013(a), 88 Stat. 333, 334.
254. *See id.* § 1013.
255. *See id.* § 1012.
256. *See id.*
257. *See id.* § 1012(a).

withholding or delaying the obligation or expenditure of budget authority, the court and the parties will focus solely on the issue of whether the withholding or delaying of budget authority frustrates program purposes. If the court finds that it does, the court will have to declare the President's act a rescission and order the President to spend the appropriation as enacted unless and until the Congress reduces or terminates the appropriation.[258]

The new law would accomplish what the cases until now have failed to achieve—a shift of the courts' attention from whether the Congress specifically mandated the President to spend the full amount of a particular appropriation. The quest for a mandate placed the onus on the Congress; if the President impounded a program's funds and a court found that the authorization or appropriation did not contain a mandate to spend, the Congress had to reenact the legislation to add a mandate. Reenactment would break the appropriation nexus and permit the President to exercise a second veto over the reenacted program in isolation. Under the new impoundment control law a court will direct itself to what should always have been the central issue—whether the President's impoundment action prevents fulfillment of the program's stated purposes or merely is a temporary deferral that will not affect substantially the program or the implementation of the Congress's goals. Even if the court concludes that the President's action is only a deferral, the Congress can override the President's deferral through one chamber's reconfirmation of its prior decision that the funds should be made available.[259]

CONCLUSION

The disclaimer provisions of the Congressional Budget and Impoundment Control Act of 1974 state that the law does not assert or concede the President's constitutional right to impound;[260] nor does the law ratify or approve any impoundment executed by the President unless pursuant to existing statutory authorization.[261] In reality, however, the 1974 Act is the final nail in the coffin of the constitutional prerogative to impound and leaves for judicial resolution only the statutory question of where rescission ends and deferral begins. The only previously viable statutory authority for presidential reservation of part of an appropriation, the Anti-Deficiency Act, has been severely circumscribed as a basis for impoundment.[262] By rejecting the execu-

258. *See id.* § 1016.
259. *See id.* § 1013(b).
260. *Id.* § 1001(1).
261. *Id.* § 1001(2).
262. *See id.* § 1002, *amending* Anti-Deficiency Act, 31 U.S.C. § 665(c)(2) (1970).

tive budget in 1921,[263] the item veto at least 157 times,[264] any provision of flexible spending authority during the enactment of the Employment Act of 1946,[265] and a spending ceiling in 1972,[266] and by enacting amendments to the Anti-Deficiency Act in 1950[267] and in 1974,[268] the Economic Stabilization Act of 1970,[269] and the Congressional Budget and Impoundment Control Act of 1974,[270] the Congress has both rejected the notion that the President has any inherent, emergency power to impound and provided alternative, even if less efficacious, means for avoiding the adverse economic consequences of federal spending. If *Youngstown Sheet & Tube Co. v. Sawyer*[271] retains any force, then the Congress has had and must continue to have the last word. As Justice Jackson remarked in concluding his concurring opinion in *Youngstown*:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.[272]

263. *See* Abascal & Kramer, *supra* note 16, at 1566, 1595-1604.
264. *See id.* at 1562-64.
265. 15 U.S.C. §§ 1021-24; *see* Abascal & Kramer, *supra* note 16, at 1615-17.
266. *See* Abascal & Kramer, *supra* note 16, at 1569-71.
267. Act of Sept. 6, 1950, § 1211, 31 U.S.C. § 665 (1970), *amending* Anti-Deficiency Act, ch. 510, § 3, 34 Stat. 49 (1906); *see* Abascal & Kramer, *supra* note 16, at 1606-10.
268. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1002, 88 Stat. 332, *amending* Anti-Deficiency Act, 31 U.S.C. § 665(c)(2) (1970); *see* notes 233-235 *supra* and accompanying text.
269. Pub. L. No. 91-379, 84 Stat. 799, *as amended*, Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 744, *as amended*, Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, 87 Stat. 27; *see* Abascal & Kramer, *supra* note 16, at 1571-73.
270. Pub. L. No. 93-344, 88 Stat. 297.
271. 343 U.S. 579 (1952).
272. *Id.* at 655 (Jackson, J., concurring).

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FOIA ID and Segment:
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Hartnett, Kathleen - Subject Files

FOLDER TITLE:
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FRC ID:
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OA Num.:
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23-39824-F

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TUESDAY, JULY 19, 2011

Borrowing, Spending, and Taxation: Further Thoughts on Professor Tribe's Reply

-- Posted by Neil H. Buchanan

Over the weekend, Professor Laurence H. Tribe posted some thoughts here on Dorf on Law, responding to my July 11 column on Verdict and my July 12 and July 15 posts on this blog. In turn, my column and posts had been largely written in response to Professor Tribe's influential op-ed in *The New York Times*, in which he argued that President Obama lacks constitutional authority (under the 14th Amendment, and more generally under separation-of-powers principles) to ignore the debt limit, should Congress fail to raise the limit before the Treasury loses its ability to pay all of its legal obligations.

I continue to agree with Professor Tribe that the best solution would be for Congress and the President to find a way forward through standard political procedures, resolving a political crisis that is completely avoidable. Even in light of Professor Tribe's additional arguments, however, we continue to disagree about what the President's options are, should the crisis not be resolved.

Professor Tribe's arguments can be placed into three categories. First, there is a preliminary matter regarding the authority to borrow under existing budgetary law. Second, there is the question of the applicability of Section 4 of the Fourteenth Amendment, and whether it should be read to invalidate the debt-limit statute. Finally, he offers a constitutional argument that the President -- when presented with a collection of laws that cannot be simultaneously executed (because they are mutually contradictory) -- can and must make spending cuts at his (limited) discretion, rather than ordering Treasury to borrow more money to cover the government's obligations.

As a threshold matter, Professor Tribe says that he is "at a loss to see why Professor Buchanan assumes" that the spending laws currently in effect include the authority to increase borrowing. He walks readers through a quick tutorial regarding the various ways that the law might authorize borrowing, allowing that "[s]ome spending laws might conceivably be written in a way that includes such authority." Saying that he has not "personally seen any spending laws written in a way that includes such authority and certainly can't accept the premise that each spending law necessarily contains its own built-in borrowing authorization," he then describes the role that spending laws and taxing laws serve in the budget.

None of this says anything about the current situation. It merely says that Professor Tribe

does not know whether or how current law enables the government to borrow money. Yet he ignores my actual argument, which is that the current political crisis is premised on the fact that the debt limit will be binding. That is, the only way for the current standoff to have any meaning is if, on August 3, the Treasury would otherwise be legally authorized to borrow money in excess of the current debt ceiling. If that is not true, then there is no reason to have this debate, because the federal government would not be on the brink of engaging in spending that exceeds the debt limit. Indeed, the Treasury could not even try to borrow money, and if it did, it would be violating not the debt-limit statute but its legal authority to issue debt.

Furthermore, the solution to the current crisis could not be to raise the debt-limit, because doing so would not provide the statutory authority to increase the debt. I am fully aware that there are times when every political player in Washington seems to share a common delusion, but it would be rather astonishing if this entire political crisis were based on the false belief that the government was about to exceed its borrowing authority. If I were writing a law review article, I would dutifully detail the statutory scheme under which borrowing authority has been vested in the Treasury, but honestly, I do not see how we are even having this debate if any of us thinks that current law does not authorize borrowing that would push the government past the current debt ceiling.

Tribe further asserts that I am incorrect to describe the debt limit as preventing the government from paying for its authorized spending commitments, because the debt limit "merely limits *one source of revenue* that the government might use to pay its bills. Similarly, the tax code limits a *different* source of revenue—taxation—that the government might also use to cover its expenditures." Obviously, my statement about the debt limit is premised on the existing structure of both spending and taxation. That is the essence of the debate: If the current tax laws do not provide sufficient revenues to cover current spending, then the only way to get the remaining money that must be spent is by borrowing it. "Professor Buchanan simply does not explain why the one is constitutional, and the other unconstitutional – or why one, but not the other, *becomes* unconstitutional under sufficiently dire fiscal circumstances." Let us now turn to that issue.

Professor Tribe rejects the argument that Section 4 of the Fourteenth Amendment makes the debt-limit law unconstitutional. He says that I err by misreading Section 4 to apply to all spending commitments as "public debt" that "cannot be questioned," whereas the better reading is that "public debt" means only Treasury securities (i.e., contractual commitments by which the government has borrowed money and promises to repay lenders principal plus interest), not any of the government's other legal commitments to pay money to any other parties.

My mistake, Professor Tribe says, is in engaging in an overly-broad reading of Section 4, which is one of the Constitution's "precise, hard-wired, rule-like provisions". He then offers five reasons why I am wrong to assert that *debt* and *obligation* "mean the same thing." Of course, I never argued that there is no difference between debts and obligations. I argued that all obligations that are due on a particular day -- whether those obligations involve paying principal or interest on U.S. Treasury securities, or paying Social Security benefits, or paying a contractor for services rendered -- are debts in the meaningful sense that the government has to pay them, and that treating some as optional undermines the public debt in precisely

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the way that Section 4 is designed to prevent.

Professor Tribe's fourth and fifth arguments (labeled "*Common sense*" and "*Precedent*," respectively) illustrate the distinction. He points out that the Congress could legally change authorized appropriations, including Social Security. What he does not point out is that Congress may do so *prospectively*. That is, it may certainly decide not to pay doctors the same reimbursement rates under Medicare in 2012 as it did in 2011. It may not, however, decide on the due date that it is not paying the then-current reimbursement rates under the law. As a commenter on one of my previous posts pointed out, recent Supreme Court precedents (*U.S. v. Winstar Corp.*, 518 U.S. 839 (1996) and *Cherokee Nation v. Leavitt*, 534 U.S. 631 (2005)) confirm that the government's statutory spending obligations are legally binding commitments that the government was free not to enter into in the first place, but that it cannot ignore once it has committed to pay the funds.

Again, my point was not that there is never a difference between the meanings of the words *debt* and *obligation*. Instead, the question is what it means under Section 4 to say that the validity of the public debt shall not be questioned. After discussing the logical incoherence in this context of describing an obligation to pay money to a private holder of of a government bond as a "debt" but an obligation to pay money to a private holder of a government contract or other obligation as "not a debt," I turned, naturally, to see whether the courts have spoken.

Even in light of the textual and other points to which Professor Tribe draws our attention, the Supreme Court in *Perry v. United States* stated: ""Nor can we perceive any reason for not considering the expression 'the validity of the public debt' as embracing whatever concerns the integrity of the public obligations." In other words, the *Perry* court is saying that Section 4 is not limited to Treasury securities.

Professor Tribe dismisses this as "a stray *dictum* in a plurality opinion from 1935." I suppose that "stray dicta" lie somewhere on a continuum between "regular dicta" and "rank dicta." In any event, I fail to see how the *Perry* language can be so easily demoted to *dictum* status. Describing the principal that allows us to understand Section 4's overall meaning strikes me as a perfect example of what courts do, whether in 1865, 1935, or 2005. In any case, I am happy to rely on the Court's only express statement to date that -- in this context -- "the validity of the public debt" includes concerns about "the integrity of the public obligations."

Indeed, we can see the illogic of limiting the definition of debt in this context by considering what the word "debt" could be limited to mean. In a narrow sense (consistent with Professor Tribe's treatment of the matter), the debt is the value of the securities issued by the Treasury that are currently outstanding. The debt is what we currently owe. The *interest* on that debt, however, has not yet been paid. The obligation to pay interest is simply a contractual commitment, which the federal government has promised to honor on the relevant future due dates. If we were to read "the validity of the public debt" in the sense in which *debt* is not merely an *obligation*, then a government could affirm the validity of the public debt merely by promising to pay back the principal, but not the interest. The principal, after all, is the debt that we owe today, whereas the interest is to become due at some point in the future.

It is precisely this possibility, however, that motivates our concern about undermining "the full faith and credit" of the government. No bondholder would be satisfied to learn that the

government does not really owe interest, merely because interest is not included in the amount of currently outstanding debt. Yet their claim for payment of interest on any given due date is merely a claim that the government owes them money as of that date, not today.

This is why the *Perry* language about "the integrity of the public obligations" is not merely aspirational. The ratings agencies have recently been warning that any failure to pay a public obligation -- principal on a Treasury security, interest on a security, or any other public obligation -- will be considered an "event" that will undermine the credit rating of the government, thus raising borrowing costs in the future. In other words, "the validity of the public debt" can be brought into question by much more than simply failing to repay narrowly-defined debt.

The Fourteenth Amendment, therefore, is directly applicable to a situation in which the government might not pay its obligations. Failing to pay people who are owed money, when due, under current law casts serious doubt on the government's reliability as a debtor; and we must not enforce laws that would prevent obligations from being paid. This means that there can be no prioritization of payments -- reducing expenditures as necessary to stay under the debt limit -- under the Constitution.

Even assuming that there is no violation under the Fourteenth Amendment, however, Professor Tribe allows that there might be a constitutional issue involved with prioritization, under separation-of-powers concerns. That is, even if the debt-limit statute is constitutionally valid, the combination of the current tax laws, spending laws, and debt limit will soon prevent the President from carrying out his duties to execute the law. Professor Tribe then asks whether there is a way to know what must give. He concludes that it is the spending authorized under the current budget, not the debt limit, that the President is constitutionally authorized to alter.

Professor Tribe offers an analogy to the line-item veto, noting that the Supreme Court's decision in *Clinton v. New York* held that the president may not cancel appropriations that Congress has authorized. I would add that what it being considered here is much more extreme than a line-item veto, because prioritization of spending allows the president to adjust *levels* of spending unilaterally, whereas the line-item veto only allows the president to make all-or-nothing decisions about spending items. If, for example, Congress has authorized $10 million to be spent on housing vouchers, a line-item veto would force the president to accept all $10 million or nothing at all, whereas prioritization would allow the president to reduce spending by any amount at all. As a usurpation of Congressional authority, therefore, prioritization is extreme. If the line-item veto is unconstitutional, then prioritization would be even more of a violation.

Again, however, Professor Tribe frames the problem as a choice between valid laws, and he says that even *Clinton* does not protect duly-enacted spending legislation from being cut due to the debt limit, because it would be even worse to do otherwise.

Professor Tribe's argument, however, describes the President's options not as three choices -- spending, taxing, and borrowing -- but as two: "executive control over spending [or] executive control over revenue-raising." His analysis thus treats taxing and borrowing as the same thing: raising revenue. Clearly, however, both Congress and the President (as well as

everyone else) treat borrowing and taxing quite differently, and the history of this country makes it clear that borrowing and taxing are not the same thing. "No taxation without representation," for example, can hardly be read as a call for the government neither to tax nor to borrow.

I am perfectly happy to concede that Congress's power to tax is highly prized and jealously guarded. Even within Professor Tribe's framing of the argument, however, it is clear that Congress's power to determine spending levels is much more jealously guarded than its ability to set a limit on debt.

It is notable that Professor Tribe points to executive cancellation of congressional appropriations by several presidents, the most recent of whom is Richard Nixon. Nixon's attempt to cancel spending appropriated by Congress led to litigation to re-assert Congress's authority. Before the Supreme Court had an opportunity to rule on Nixon's losses in the lower courts, Congress passed the Impoundment Control Act of 1974. By the terms of that act, Congress allows only the most limited delays in spending duly-authorized funds, and such delays must be approved by Congress. (See a good summary from the Congressional Research Service at pp. 8-9 here.)

While the Impoundment Act is necessarily imperfect, it establishes that Congress has aggressively disapproved of presidential encroachment on its spending authority -- encroachment of precisely the type that prioritization represents. Consider, by contrast, Congress's actions regarding the federal debt limit. Enacted in partial form in 1917 and then in its present form in 1939, Congress has raised the debt limit without fail, treating it (until this year) as a mere formality. That is not to say that Congress puts no weight on the debt-limit statute. After all, Congress has not repealed it. As a matter of priorities, however, Congress's protection of its constitutionally-endowed spending powers has been much more aggressive than its protection of a claimed ability to set a limit on the debts that its own laws otherwise necessitate.

Finally, consider how Congress itself would set its priorities. The prevailing standard for determining how a Congress would act under these circumstances is the "reasonable Congress" approach, not actual Congressional intent. How would a reasonable Congress want a President to proceed?

If the President refuses to spend, people are harmed immediately, perhaps irreversibly. For example, if the President cancels some Medicaid spending, people can be forced to do without life-saving treatments. If, on the other hand, the President borrows more than Congress allows under the debt ceiling, any harm is in the future ("impoverishing future generations" and other such claims) or is diffuse (perhaps slightly higher interest rates -- though that would not happen in today's economy). Moreover, if Congress is truly unhappy with a higher level of debt, it can decide in subsequent years how to reverse that -- what combination of spending cuts and tax increases it wants to enact to bring the debt back down.

A reasonable Congress, then, would choose to have the President violate the debt limit, rather than cut spending or raise taxes. Of course, they would not be happy with that choice, but the exercise here is about choosing the least bad among three bad options.

In short, while I found Professor Tribe's arguments here on Dorf on Law engaging, they still do not add up to an adequate defense of the enforceability of the debt-limit statute. The statute is unconstitutional under Section 4 of the Fourteenth Amendment, because the debt limit threatens the integrity of all government obligations. Even if the debt-limit is otherwise constitutional, however, it must give way to validate Congress's control over spending and taxation.

POSTED BY NEIL H. BUCHANAN AT 6:32 AM 0

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1 COMMENTS:

Hashim said...

You haven't answered the central critique leveled by Tribe (or me in my various comments): even assuming the broad interpretation of 14A "debt" that you propound, why is it the debt-ceiling statute that is unconstitional, as opposed to the cap on marginal income tax rates, or any of the other myriad statutes that limit the source of govt revenues. Article I equally places the power to tax and to borrow in Congress' sole control, and the 14A does not distinguish between tax revenues and borrowed funds in meeting the Nation's "debts." The debt-ceiling is simply a statutory cap on the statutory authorization to borrow, just like the top marginal tax rate is a statutory cap on the statutory authorization to tax. Nothing in your argument explains why the one, rather than the other, is unconstitutional, when the President lacks sufficient funds to satisfy the Nation's "debts."

Again, I think my 1789 hypo is instructive, and you still haven't answered it. Assume that (1) the 14A had been on the books in 1789, (2) the only two laws that Congress had passed were a limited tax and a legally mandated spending program, and (3) the tax revenues were insufficient to satisfy the program obligations. Are you really arguing that the President could have borrowed funds (or increased taxes) in the complete absence of statutory authorization? And if not, then what's the difference between the current setting, where the debt-ceiling is a statutory limit on a statutory authorization?

10:05 AM

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DORF ON LAW

THOUGHTS ON LAW, POLITICS, ECONOMICS AND MORE FROM MICHAEL DORF, NEIL BUCHANAN AND OCCASIONALLY OTHERS

WEDNESDAY, JULY 20, 2011

No Constitutional Options

By Mike Dorf

Let's say you and your friend agree that you will meet at a local movie theater to see the "8 o'clock showing of Harry Potter and the Deathly Hallows, Part 2." You further agree that you will buy the tickets at 7:30 and your friend will arrive at 7:50. You arrive at the theater at 7:30 and notice that the 8 pm showing of HPDH.2 is sold out but that there are still tickets available for the 9 pm show. You also notice that the Tree of Life is playing at 8 pm. You have accidentally left your wallet and cellphone with your friend, and have exactly $22 in cash with you, just enough to buy tickets for the two of you for one or the other film. The clerk in the booth tells you that he only has a few tickets left for each film. You and your friend have similar taste in movies, so you expect that she would prefer to see HPDH.2 to Tree of Life, other things being equal, and you also know that she would rather see either film than just wander around the largely empty mall, but: 1) You don't know whether your friend has seen Tree of Life already; and 2) You don't know whether the 9 pm showing of HPDH.2 would be too late for your friend to make it back home in time to relieve her babysitter.

How should you go about deciding whether to buy tickets for HPDH.2, Tree of Life, or neither? You and your friend hadn't previously discussed the matter, so you have no way of reliably determining what your friend's choice actually is under these changed circumstances. The best you can do is to make a decision that you think your friend *would* make if presented with the current options. That decision in turn will largely reflect what you think is the all-things-considered best thing to do. You know you cannot satisfy your friend's first choice--the 8 pm showing of HPDH.2--and you don't know what the second choice is.

The stakes in this example are pretty low. At worst, you and your friend end up seeing a movie she already saw or you cannot see any movie this particular night. You'll both get over it. But the example more or less mirrors the situation that President Obama will face in a couple of weeks if Congress does not raise the debt ceiling. He will not be able to simultaneously comply with all of the taxing, spending, and borrowing laws, and Congress has not specified a backup. Under these circumstances, what should the President do?

One possibility is that the President is free to choose to comply with whichever statutes he likes. In their recent exchange on this blog, both Professors Tribe and Buchanan think that is off the table. They agree that the President cannot simply raise taxes, for example. I think I agree with this conclusion but it's worth noting what drives it: Some notion that the President lacks the authority to raise taxes (unless delegated that authority by Congress, which hasn't

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Some Further Thoughts About the Debt Limit

Blame the Constitution for the Debt Ceiling Impass...

The Out-Of-Court Brain

Political Timing, the Debt-Limit Debate, and Respon...

occurred here). But I don't think this answer is quite so obvious--at least if one accepts a further assumption, which I need to elaborate.

Professors Tribe and Buchanan disagree about whether failure to pay, e.g., Social Security or Medicare obligations, would violate Section 4 of the 14th Amendment. Tribe says no; Buchanan says yes. Suppose Buchanan is right. Tribe then says the President would *still* be obliged to prioritize spending before engaging in unauthorized borrowing--and, Tribe says, borrowing beyond the debt ceiling would be unauthorized because the debt ceiling, read in combination with laws authorizing borrowing, only authorizes Executive borrowing up to that ceiling. (One of my very astute readers made that point as a comment on several of Buchanan's posts.) Let's assume that's right too.

So now the President's menu of options looks very interesting. There's no way he can comply with all three laws: 1) Taxing to raise revenue X; 2) Borrowing to raise Y; 3) Spending in the amount of Z > X+Y. (I'm assuming that other means of raising revenue, such as selling Alaska back to Russia, or invading Saudi Arabia and selling its oil to China, have been rejected as preposterous.) So:

1) Taxing beyond X would amount to an unconstitutional assumption of the power of Congress to tax;
2) Borrowing in excess of Y would amount to an unconstitutional assumption of the power of Congress to borrow;
and
3) Spending substantially less than Z would violate Section 4 of the Fourteenth Amendment.

Under these circumstances, I read both Professors Tribe and Buchanan to be saying that number 1) is somehow worse than 2) or 3), while I read Professor Tribe to also be saying that number 2) would be worse than number 3), while Professor Buchanan is saying that number 3) is worse than number 2). I'm less interested in the specifics of their agreement and disagreement than in the shared assumption that runs through all of this--namely, that where a President's only choices are all unconstitutional, some of these choices are *more* unconstitutional than others.

That strikes me as probably right, but it's worth noting that there's nothing in the text of the Constitution itself that states this principle. Moreover, I am not aware of any well-developed case law, historical practice, or scholarly literature addressing the question of which constitutional violations are worse than others. Maybe the generation of careful thinking about this question will be a beneficial side-effect of our government driving the economy over the cliff.

POSTED BY MICHAEL C. DORF AT 12:01 AM 0

4 COMMENTS:

Blogger said...

This gordian knot reminds me of the one President Lincoln described in his "all the laws but one" response to Taney (justifying his unconstitutional suspension of

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habeas). There, he reasoned, it was MORE unconstitutional to let the union fail than it was suspend habeas.

12:10 AM

Hashim said...

I think you've framed it exactly right. Here's one proposed rule of prioritization, which I think works in this context and many others, but which I recognize might not work in every context: no govt actor should ever take an unconstitutional action if another govt actor could prevent the constitutional violation while adhering to the limits on its enumerated powers.

That rule makes clear ex ante which govt actor has power to act to prevent the constitutional violation, and thereby ensures political accountability if that actor fails to do so. And by so doing, the rule is most consistent with the Constitution, since it increases pressure on the govt actor that can act w/o violating the Constitution.

In this context, that means the President declines to unconstitutionally tax or borrow, and Congress is properly blamed for the resulting violation of the 14A, because it's not the President's fault that there aren't sufficient funds for him to comply with the 14A. (Unless he vetoes a law that would have solved the problem, in which case he shares in the blame, given the joint nature of the legislative power, and the public can decide whose legislative proposal was more reasonable.)

I think the wisdom of this rule is illustrated by some hypos: if Article III judges failed in an alleged constitutional duty to adjudicate certain constitutional claims and the Senate refused to impeach, it couldn't possibly be proper for the President to "solve" that violation by unilaterally removing judges and appointing new ones; likewise, if the President refused to enforce laws that benefited minorities and ignored judicial injunctions to the contrary, it couldn't possibly be proper for Congress to "solve" that violation by enforcing those laws itself. In both situations, the overreach by one branch seems much worse than the initial failure to act by another branch, and I think the intuition is that one govt actor shouldn't commit a constitutional violation to prevent another govt actor from committing such a violation; require each actor to follow the rules, and then let political accountability punish the one who didn't.

As suggested at the outset, this doesn't answer what to do when no govt actor can constitutionally solve the problem, such that some govt actor is going to violate the constitution no matter what actions it takes. But happily, I can't think right now of a scenario where that would arise under our Constitution properly interpreted, though the possibility might well exist.

12:17 AM

Andrew Oh-Willeke said...

A couple of other considerations:

1. Not all spending is created equal. Some is clearly merely permission for the President to spend, not a requirement that the President spend. Other spending

appears to be mandatory on its face (e.g. Social Security).

2. The appropriations bills and debt ceiling are both acts of Congress. To the extent that an appropriations bill is enacted after the debt ceiling, it is arguably the law that should prevail in the event that the debt ceiling and appropriations bills create an impossible conflict.

2:54 PM

Old_one said...

KISS principal (keep it simple stupid) President should ask the Supreme Court to rule the limit on borrowing is unconstitutional because it impends the 14th Amendment! IF the Supreme court rules that Debt Limit is legal and supersede the constitution, don't pay anyone except defense. Congress caused the problem and would have violated their oath to protect and defend the constitution! Is there room in any of this for treason?

1:34 AM

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July 22, 2011

Obama Should Raise the Debt Ceiling on His Own

By ERIC A. POSNER and ADRIAN VERMEULE

PRESIDENT OBAMA should announce that he will raise the debt ceiling unilaterally if he cannot reach a deal with Congress. Constitutionally, he would be on solid ground. Politically, he can't lose. The public wants a deal. The threat to act unilaterally will only strengthen his bargaining power if Republicans don't want to be frozen out; if they defy him, the public will throw their support to the president. Either way, Republicans look like the obstructionists and will pay a price.

Where would Mr. Obama get his constitutional authority to raise the debt ceiling?

Our argument is not based on some obscure provision of the 14th amendment, but on the necessities of state, and on the president's role as the ultimate guardian of the constitutional order, charged with taking care that the laws be faithfully executed.

When Abraham Lincoln suspended habeas corpus during the Civil War, he said that it was necessary to violate one law, lest all the laws but one fall into ruin. So too here: the president may need to violate the debt ceiling to prevent a catastrophe — whether a default on the debt or an enormous reduction in federal spending, which would throw the country back into recession.

A deadlocked Congress has become incapable of acting consistently; it commits to entitlements it will not reduce, appropriates funds it does not have, borrows money it cannot repay and then imposes a debt ceiling it will not raise. One of those things must give; in reality, that means that the conflicting laws will have to be reconciled by the only actor who combines the power to act with a willingness to shoulder responsibility — the president.

Franklin D. Roosevelt saw this problem clearly, and in his first inaugural address in 1933, addressing his plans to confront the economic crisis, he hinted darkly that "it is to be hoped that the normal balance of executive and legislative authority may be wholly equal, wholly adequate to meet the unprecedented task before us."

"But it may be," he continued, "that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure." In the event, Congress gave him the authorities he sought, and he did not follow through on this threat.

The basic problem today is that the president and the House Republicans are locked in a classic bargaining game. The worst outcome for both is default on the debt, but each side holds out for a favorable deal. They will certainly go to the wire, but economists who have studied bargaining games have shown that there is always a real possibility of breakdown rather than compromise, because only by refusing to deal can each side convey the seriousness of its position. That is why labor strikes occur even though workers and managers do jointly better if they make a deal. Failure to raise the debt ceiling, however, is not akin to any old plant shutdown: it would be catastrophic.

A proposal has been floated by Senator Mitch McConnell of Kentucky, the Republican minority leader, under which Congress would delegate to the president the power to raise the debt ceiling, subject to some minor procedural constraints. Mr. McConnell's ploy is suspect, because it assumes away the problem that it attempts to solve: the internal paralysis of Congress. Congress probably cannot act on its own — for example, by creating a veto-proof budget — because it is internally deadlocked. Not only do Democrats and Republicans disagree, but so do the Republican leaders, who want to avoid a debt default, and the Tea Party-inspired Republican back-benchers, who appear to believe that only a purifying Götterdämmerung can put public finances back in order. The latest proposed deal negotiated by House Speaker John A. Boehner and President Obama is vulnerable to the same problem.

Discussions of an earlier proposal to rely on the 14th Amendment for the President's authority to raise the debt level centered on whether the debt issued after the president's action would be under a cloud. Commentators pointed out that the language in the 14th Amendment, which commands that the validity of legally authorized public debt shall not be questioned, does not explicitly authorize the president to do anything. But debt under a cloud is better than default. It would be better if the parties made a deal, but if they don't, default is the worst outcome.

The 14th Amendment is a red herring, however; even if its debt provision did not exist, the president would derive authority from his paramount duty to ward off serious threats to the constitutional and economic system.

Mr. Obama needs to make clear that he will act unilaterally to raise the debt ceiling if Congress does not cooperate; if he does so, then we predict that Congress will cooperate by enacting the McConnell plan or a similar fig leaf, and so Mr. Obama will not need to follow through on his threat, and the constitutional crisis will pass — just as it did with Roosevelt. Republicans will be publicly outraged, but privately relieved. They do not want an economic catastrophe; they can avoid violating their no-taxes pledge; and they retain the power to fight the budget battle another day. As for the president, he really has no other choice.

Eric A. Posner, a professor of law at the University of Chicago, and Adrian Vermeule, a professor of law at Harvard, are the authors of "The Executive Unbound: After the Madisonian Republic."

TEXT OF BUDGET CONTROL ACT AMENDMENT

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Budget Control Act of 2011".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. SEVERABILITY.

If any provision of this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the application of this Act to any other person or circumstance shall not be affected.

TITLE I—TEN-YEAR DISCRETIONARY CAPS WITH SEQUESTER

SEC. 101. ENFORCING DISCRETIONARY SPENDING LIMITS.

Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 is amended to read as follows:

"SEC. 251. ENFORCING DISCRETIONARY SPENDING LIMITS.

"(a) ENFORCEMENT.—

"(1) SEQUESTRATION.—Within 15 calendar days after Congress adjourns to end a session there shall be a sequestration to eliminate a budget-year breach, if any, within any category.

"(2) ELIMINATING A BREACH.—Each non-exempt account within a category shall be reduced by a dollar amount calculated by multiplying the enacted level of sequestrable budgetary resources in that account at that time by the uniform percentage necessary to eliminate a breach within that category.

"(3) MILITARY PERSONNEL.—If the President uses the authority to exempt any personnel account from sequestration under section 255(f), each account within subfunctional category 051 (other than those military personnel accounts for which the authority provided under section 255(f) has been exercised) shall be further reduced by a dollar amount calculated by multiplying the enacted level of non-exempt budgetary resources in that account at that time by the uniform percentage necessary to offset the total dollar amount by which outlays are not reduced in military personnel accounts by reason of the use of such authority.

"(4) PART-YEAR APPROPRIATIONS.—If, on the date specified in paragraph (1), there is in effect an Act making or continuing appropriations for part of a fiscal year for any budget account, then the dollar sequestration calculated for that account under paragraphs (2) and (3) shall be subtracted from—

"(A) the annualized amount otherwise available by law in that account under that or a subsequent part-year appropriation; and

"(B) when a full-year appropriation for that account is enacted, from the amount other-

wise provided by the full-year appropriation for that account.

"(5) LOOK-BACK.—If, after June 30, an appropriation for the fiscal year in progress is enacted that causes a breach within a category for that year (after taking into account any sequestration of amounts within that category), the discretionary spending limits for that category for the next fiscal year shall be reduced by the amount or amounts of that breach.

"(6) WITHIN-SESSION SEQUESTRATION.—If an appropriation for a fiscal year in progress is enacted (after Congress adjourns to end the session for that budget year and before July 1 of that fiscal year) that causes a breach within a category for that year (after taking into account any prior sequestration of amounts within that category), 15 days later there shall be a sequestration to eliminate that breach within that category following the procedures set forth in paragraphs (2) through (4).

"(7) ESTIMATES.—

"(A) CBO ESTIMATES.—As soon as practicable after Congress completes action on any discretionary appropriation, CBO, after consultation with the Committees on the Budget of

the House of Representatives and the Senate, shall provide OMB with an estimate of the amount of discretionary new budget authority and outlays for the current year, if any, and the budget year provided by that legislation.

"(B) OMB ESTIMATES AND EXPLANATION OF DIFFERENCES.—Not later than 7 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of enactment of any discretionary appropriation, OMB shall transmit a report to the House of Representatives and to the Senate containing the CBO estimate of that legislation, an OMB estimate of the amount of discretionary new budget authority and outlays for the current year, if any, and the budget year provided by that legislation, and an explanation of any difference between the 2 estimates. If during the preparation of the report OMB determines that there is a significant difference between OMB and CBO, OMB shall consult with the Committees on the Budget of the House of Representatives and the Senate regarding that difference and that consultation shall include, to the extent practicable, written communication to those committees that affords

such committees the opportunity to comment before the issuance of the report.

"(C) ASSUMPTIONS AND GUIDELINES.—OMB estimates under this paragraph shall be made using current economic and technical assumptions. OMB shall use the OMB estimates transmitted to the Congress under this paragraph. OMB and CBO shall prepare estimates under this paragraph in conformance with scorekeeping guidelines determined after consultation among the Committees on the Budget of the House of Representatives and the Senate, CBO, and OMB.

"(D) ANNUAL APPROPRIATIONS.—For purposes of this paragraph, amounts provided by annual appropriations shall include any discretionary appropriations for the current year, if any, and the budget year in accounts for which funding is provided in that legislation that result from previously enacted legislation.

"(b) ADJUSTMENTS TO DISCRETIONARY SPENDING LIMITS.—

"(1) CONCEPTS AND DEFINITIONS.—When the President submits the budget under section 1105 of title 31, United States Code, OMB shall calculate

and the budget shall include adjustments to discretionary spending limits (and those limits as cumulatively adjusted) for the budget year and each outyear to reflect changes in concepts and definitions. Such changes shall equal the baseline levels of new budget authority and outlays using up-to-date concepts and definitions, minus those levels using the concepts and definitions in effect before such changes. Such changes may only be made after consultation with the Committees on Appropriations and the Budget of the House of Representatives and the Senate, and that consultation shall include written communication to such committees that affords such committees the opportunity to comment before official action is taken with respect to such changes.

"(2) SEQUESTRATION REPORTS.—When OMB submits a sequestration report under section 254(e), (f), or (g) for a fiscal year, OMB shall calculate, and the sequestration report and subsequent budgets submitted by the President under section 1105(a) of title 31, United States Code, shall include adjustments to discretionary spending limits (and those limits as adjusted) for the fiscal year and each succeeding year, as follows:

"(A) EMERGENCY APPROPRIATIONS; OVERSEAS CONTINGENCY OPERATIONS/GLOBAL WAR ON TERRORISM.—If, for any fiscal year, appropriations for discretionary accounts are enacted that—

"(i) the Congress designates as emergency requirements in statute on an account by account basis and the President subsequently so designates, or

"(ii) the Congress designates for Overseas Contingency Operations/Global War on Terrorism in statute on an account by account basis and the President subsequently so designates,

the adjustment shall be the total of such appropriations in discretionary accounts designated as emergency requirements or for Overseas Contingency Operations/Global War on Terrorism, as applicable.

"(B) CONTINUING DISABILITY REVIEWS AND REDETERMINATIONS.—(i) If a bill or joint resolution making appropriations for a fiscal year is enacted that specifies an amount for continuing disability reviews under titles II and XVI of the Social Security Act and for the cost

associated with conducting redeterminations of eligibility under title XVI of the Social Security Act, then the adjustments for that fiscal year shall be the additional new budget authority provided in that Act for such expenses for that fiscal year, but shall not exceed—

"(I) for fiscal year 2012, $623,000,000 in additional new budget authority;

"(II) for fiscal year 2013, $751,000,000 in additional new budget authority;

"(III) for fiscal year 2014, $924,000,000 in additional new budget authority;

"(IV) for fiscal year 2015, $1,123,000,000 in additional new budget authority;

"(V) for fiscal year 2016, $1,166,000,000 in additional new budget authority;

"(VI) for fiscal year 2017, $1,309,000,000 in additional new budget authority;

"(VII) for fiscal year 2018, $1,309,000,000 in additional new budget authority;

"(VIII) for fiscal year 2019, $1,309,000,000 in additional new budget authority;

"(IX) for fiscal year 2020, $1,309,000,000 in additional new budget authority; and

"(X) for fiscal year 2021, $1,309,000,000 in additional new budget authority.

"(ii) As used in this subparagraph—

"(I) the term 'continuing disability reviews' means continuing disability reviews under sections 221(i) and 1614(a)(4) of the Social Security Act;

"(II) the term 'redetermination' means redetermination of eligibility under sections 1611(c)(1) and 1614(a)(3)(H) of the Social Security Act; and

"(III) the term 'additional new budget authority' means the amount provided for a fiscal year, in excess of $273,000,000, in an appropriation Act and specified to pay

for the costs of continuing disability reviews and redeterminations under the heading 'Limitation on Administrative Expenses' for the Social Security Administration.

"(C) HEALTH CARE FRAUD AND ABUSE CONTROL.—(i) If a bill or joint resolution making appropriations for a fiscal year is enacted that specifies an amount for the health care fraud abuse control program at the Department of Health and Human Services (75–8393–0–7–571), then the adjustments for that fiscal year shall be the amount of additional new budget authority provided in that Act for such program for that fiscal year, but shall not exceed—

"(I) for fiscal year 2012, $270,000,000 in additional new budget authority;

"(II) for fiscal year 2013, $299,000,000 in additional new budget authority;

"(III) for fiscal year 2014, $329,000,000 in additional new budget authority;

"(IV) for fiscal year 2015, $361,000,000 in additional new budget authority;

"(V) for fiscal year 2016, $395,000,000 in additional new budget authority;

"(VI) for fiscal year 2017, $414,000,000 in additional new budget authority;

"(VII) for fiscal year 2018, $434,000,000 in additional new budget authority;

"(VIII) for fiscal year 2019, $454,000,000 in additional new budget authority;

"(IX) for fiscal year 2020, $475,000,000 in additional new budget authority; and

"(X) for fiscal year 2021, $496,000,000 in additional new budget authority.

"(ii) As used in this subparagraph, the term 'additional new budget authority' means the amount provided for a fiscal year, in excess of $311,000,000, in an appropriation Act and

specified to pay for the costs of the health care fraud and abuse control program.

"(D) DISASTER FUNDING.—

"(i) If, for fiscal years 2012 through 2021, appropriations for discretionary accounts are enacted that Congress designates as being for disaster relief in statute, the adjustment for a fiscal year shall be the total of such appropriations for the fiscal year in discretionary accounts designated as being for disaster relief, but not to exceed the total of—

"(I) the average funding provided for disaster relief over the previous 10 years, excluding the highest and lowest years; and

"(II) the amount, for years when the enacted new discretionary budget authority designated as being for disaster relief for the preceding fiscal year was less than the average as calculated in subclause (I) for that fiscal year, that is the difference between the enacted amount and the allowable

adjustment as calculated in such subclause for that fiscal year.

"(ii) OMB shall report to the Committees on Appropriations and Budget in each House the average calculated pursuant to clause (i)(II), not later than 30 days after the date of the enactment of the Budget Control Act of 2011.

"(iii) For the purposes of this subparagraph, the term 'disaster relief' means activities carried out pursuant to a determination under section 102(2) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(2)).

"(iv) Appropriations considered disaster relief under this subparagraph in a fiscal year shall not be eligible for adjustments under subparagraph (A) for the fiscal year.

"(c) DISCRETIONARY SPENDING LIMIT.—As used in this part, the term 'discretionary spending limit' means—

"(1) with respect to fiscal year 2012—

"(A) for the security category, $684,000,000,000 in new budget authority; and

"(B) for the nonsecurity category, $359,000,000,000 in new budget authority;

"(2) with respect to fiscal year 2013—

"(A) for the security category, $686,000,000,000 in new budget authority; and

"(B) for the nonsecurity category, $361,000,000,000 in new budget authority;

"(3) with respect to fiscal year 2014, for the discretionary category, $1,066,000,000,000 in new budget authority;

"(4) with respect to fiscal year 2015, for the discretionary category, $1,086,000,000,000 in new budget authority;

"(5) with respect to fiscal year 2016, for the discretionary category, $1,107,000,000,000 in new budget authority;

"(6) with respect to fiscal year 2017, for the discretionary category, $1,131,000,000,000 in new budget authority;

"(7) with respect to fiscal year 2018, for the discretionary category, $1,156,000,000,000 in new budget authority;

"(8) with respect to fiscal year 2019, for the discretionary category, $1,182,000,000,000 in new budget authority;

"(9) with respect to fiscal year 2020, for the discretionary category, $1,208,000,000,000 in new budget authority; and

"(10) with respect to fiscal year 2021, for the discretionary category, $1,234,000,000,000 in new budget authority;

as adjusted in strict conformance with subsection (b).".

SEC. 102. DEFINITIONS.

Section 250(c) of the Balanced Budget and Emergency Deficit Control Act of 1985 is amended as follows:

(1) Strike paragraph (4) and insert the following new paragraph:

"(4)(A) The term 'nonsecurity category' means all discretionary appropriations not included in the security category defined in subparagraph (B).

"(B) The term 'security category' includes discretionary appropriations associated with agency budgets for the Department of Defense, the Department of Homeland Security, the Department of Veterans Affairs, the National Nuclear Security Administration, the intelligence community management account (95–0401–0–1–054), and all budget accounts in budget function 150 (international affairs).

"(C) The term 'discretionary category' includes all discretionary appropriations.".

(2) In paragraph (8)(C), strike "the food stamp program" and insert "the Supplemental Nutrition Assistance Program".

(3) Strike paragraph (14) and insert the following new paragraph:

"(14) The term 'outyear' means a fiscal year one or more years after the budget year.".

(4) At the end, add the following new paragraphs:

"(20) The term 'emergency' means a situation that—

"(A) requires new budget authority and outlays (or new budget authority and the outlays flowing therefrom) for the prevention or mitigation of, or response to, loss of life or property, or a threat to national security; and

"(B) is unanticipated.

"(21) The term 'unanticipated' means that the underlying situation is—

"(A) sudden, which means quickly coming into being or not building up over time;

"(B) urgent, which means a pressing and compelling need requiring immediate action;

"(C) unforeseen, which means not predicted or anticipated as an emerging need; and

"(D) temporary, which means not of a permanent duration.".

SEC. 103. REPORTS AND ORDERS.

Section 254 of the Balanced Budget and Emergency Deficit Control Act of 1985 is amended as follows:

(1) In subsection (c)(2), strike "2002" and insert "2021".

(2) At the end of subsection (e), insert "This report shall also contain a preview estimate of the adjustment for disaster funding for the upcoming fiscal year.".

(3) In subsection (f)(2)(A), strike "2002" and insert "2021"; before the concluding period insert ", including a final estimate of the adjustment for disaster funding".

SEC. 104. EXPIRATION.

(a) REPEALER.—Section 275 of the Balanced Budget and Emergency Deficit Control Act of 1985 is repealed.

(b) CONFORMING CHANGE.—Sections 252(d)(1), 254(c), 254(f)(3), and 254(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall not apply to the Congressional Budget Office.

SEC. 105. AMENDMENTS TO THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974.

(a) ADJUSTMENTS.—Section 314 of the Congressional Budget Act of 1974 is amended as follows:

(1) Strike subsection (a) and insert the following:

"(a) ADJUSTMENTS.—After the reporting of a bill or joint resolution or the offering of an amendment thereto or the submission of a conference report thereon, the chairman of the Committee on the Budget of the House of Representatives or the Senate may make appropriate budgetary adjustments of new budget authority and the outlays flowing therefrom in the same amount as required by section 251(b) of the Balanced Budget and Emergency Deficit Control Act of 1985.".

(2) Strike subsections (b) and (e) and redesignate subsections (c) and (d) as subsections (b) and (c), respectively.

(3) At the end, add the following new subsections:

"(d) EMERGENCIES IN THE HOUSE OF REPRESENTATIVES.— (1) In the House of Representatives, if a reported bill or joint resolution, or amendment thereto or conference report thereon, contains a provision providing new budget authority and outlays or reducing revenue, and a designation of such provision as an emergency re-

quirement pursuant to 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985, the chair of the Committee on the Budget of the House of Representatives shall not count the budgetary effects of such provision for purposes of title III and title IV of the Congressional Budget Act of 1974 and the Rules of the House of Representatives.

"(2)(A) In the House of Representatives, if a reported bill or joint resolution, or amendment thereto or conference report thereon, contains a provision providing new budget authority and outlays or reducing revenue, and a designation of such provision as an emergency pursuant to paragraph (1), the chair of the Committee on the Budget shall not count the budgetary effects of such provision for purposes of this title and title IV and the Rules of the House of Representatives.

"(B) In the House of Representatives, a proposal to strike a designation under subparagraph (A) shall be excluded from an evaluation of budgetary effects for purposes of this title and title IV and the Rules of the House of Representatives.

"(C) An amendment offered under subparagraph (B) that also proposes to reduce each amount appropriated or otherwise made available by the pending measure that is not required to be appropriated or otherwise made avail-

able shall be in order at any point in the reading of the pending measure.

"(e) ENFORCEMENT OF DISCRETIONARY SPENDING CAPS.—It shall not be in order in the House of Representatives or the Senate to consider any bill, joint resolution, amendment, motion, or conference report that would cause the discretionary spending limits as set forth in section 251 of the Balanced Budget and Emergency Deficit Control Act to be exceeded.".

(b) DEFINITIONS.—Section 3 of the Congressional Budget and Impoundment Control Act of 1974 is amended by adding at the end the following new paragraph:

"(11) The terms 'emergency' and 'unanticipated' have the meanings given to such terms in section 250(c) of the Balanced Budget and Emergency Deficit Control Act of 1985.".

(c) APPEALS FOR DISCRETIONARY CAPS.—Section 904(c)(2) of the Congressional Budget Act of 1974 is amended by striking "and 312(c)" and inserting "312(c), and 314(e)".

SEC. 106. SENATE BUDGET ENFORCEMENT.

(a) IN GENERAL.—

(1) For the purpose of enforcing the Congressional Budget Act of 1974 through April 15, 2012, including section 300 of that Act, and enforcing

budgetary points of order in prior concurrent resolutions on the budget, the allocations, aggregates, and levels set in subsection (b)(1) shall apply in the Senate in the same manner as for a concurrent resolution on the budget for fiscal year 2012 with appropriate budgetary levels for fiscal years 2011 and 2013 through 2021.

(2) For the purpose of enforcing the Congressional Budget Act of 1974 after April 15, 2012, including section 300 of that Act, and enforcing budgetary points of order in prior concurrent resolutions on the budget, the allocations, aggregates, and levels set in subsection (b)(2) shall apply in the Senate in the same manner as for a concurrent resolution on the budget for fiscal year 2013 with appropriate budgetary levels for fiscal years 2012 and 2014 through 2022.

(b) COMMITTEE ALLOCATIONS, AGGREGATES, AND LEVELS.—

(1) As soon as practicable after the date of enactment of this section, the Chairman of the Committee on the Budget shall file—

(A) for the Committee on Appropriations, committee allocations for fiscal years 2011 and 2012 consistent with the discretionary spending

limits set forth in this Act for the purpose of enforcing section 302 of the Congressional Budget Act of 1974;

(B) for all committees other than the Committee on Appropriations, committee allocations for fiscal years 2011, 2012, 2012 through 2016, and 2012 through 2021 consistent with the Congressional Budget Office's March 2011 baseline adjusted to account for the budgetary effects of this Act and legislation enacted prior to this Act but not included in the Congressional Budget Office's March 2011 baseline, for the purpose of enforcing section 302 of the Congressional Budget Act of 1974;

(C) aggregate spending levels for fiscal years 2011 and 2012 and aggregate revenue levels for fiscal years 2011, 2012, 2012 through 2016, 2012 through 2021 consistent with the Congressional Budget Office's March 2011 baseline adjusted to account for the budgetary effects of this Act and legislation enacted prior to this Act but not included in the Congressional Budget Office's March 2011 baseline, and the discretionary spending limits set forth in this Act for the purpose of enforcing section

311 of the Congressional Budget Act of 1974; and

(D) levels of Social Security revenues and outlays for fiscal years 2011, 2012, 2012 through 2016, and 2012 through 2021 consistent with the Congressional Budget Office's March 2011 baseline adjusted to account for the budgetary effects of this Act and legislation enacted prior to this Act but not included in the Congressional Budget Office's March 2011 baseline, for the purpose of enforcing sections 302 and 311 of the Congressional Budget Act of 1974.

(2) Not later than April 15, 2012, the Chairman of the Committee on the Budget shall file—

(A) for the Committee on Appropriations, committee allocations for fiscal years 2012 and 2013 consistent with the discretionary spending limits set forth in this Act for the purpose of enforcing section 302 of the Congressional Budget Act of 1974;

(B) for all committees other than the Committee on Appropriations, committee allocations for fiscal years 2012, 2013, 2013 through 2017, and 2013 through 2022 consistent with

the Congressional Budget Office's March 2012 baseline for the purpose of enforcing section 302 of the Congressional Budget Act of 1974;

(C) aggregate spending levels for fiscal years 2012 and 2013 and aggregate revenue levels for fiscal years 2012, 2013, 2013–2017, and 2013–2022 consistent with the Congressional Budget Office's March 2012 baseline and the discretionary spending limits set forth in this Act for the purpose of enforcing section 311 of the Congressional Budget Act of 1974; and

(D) levels of Social Security revenues and outlays for fiscal years 2012 and 2013, 2013–2017, and 2013–2022 consistent with the Congressional Budget Office's March 2012 baseline budget for the purpose of enforcing sections 302 and 311 of the Congressional Budget Act of 1974.

(c) SENATE PAY-AS-YOU-GO SCORECARD.—

(1) Effective on the date of enactment of this section, for the purpose of enforcing section 201 of S. Con. Res. 21 (110th Congress), the Chairman of the Senate Committee on the Budget shall reduce

any balances of direct spending and revenues for any fiscal year to 0 (zero).

(2) Not later than April 15, 2012, for the purpose of enforcing section 201 of S. Con. Res. 21 (110th Congress), the Chairman of the Senate Committee on the Budget shall reduce any balances of direct spending and revenues for any fiscal year to 0 (zero).

(3) Upon resetting the Senate paygo scorecard pursuant to paragraph (2), the Chairman shall publish a notification of such action in the Congressional Record.

(d) FURTHER ADJUSTMENTS.—

(1) The Chairman of the Committee on the Budget of the Senate may revise any allocations, aggregates, or levels set pursuant to this section to account for any subsequent adjustments to discretionary spending limits made pursuant to this Act.

(2) With respect to any allocations, aggregates, or levels set or adjustments made pursuant to this section, sections 412 through 414 of S. Con. Res. 13 (111th Congress) shall remain in effect.

(e) EXPIRATION.—

(1) Subections (a)(1), (b)(1), and (c)(1) shall expire if a concurrent resolution on the budget for

fiscal year 2012 is agreed to by the Senate and House of Representatives pursuant to section 301 of the Congressional Budget Act of 1974.

(2) Subections (a)(2), (b)(2), and (c)(2) shall expire if a concurrent resolution on the budget for fiscal year 2013 is agreed to by the Senate and House of Representatives pursuant to section 301 of the Congressional Budget Act of 1974.

TITLE II—VOTE ON THE BALANCED BUDGET AMENDMENT

SEC. 201. VOTE ON THE BALANCED BUDGET AMENDMENT.

After September 30, 2011, and not later than December 31, 2011, the House of Representatives and Senate, respectively, shall vote on passage of a joint resolution, the title of which is as follows: "Joint resolution proposing a balanced budget amendment to the Constitution of the United States.".

SEC. 202. CONSIDERATION BY THE OTHER HOUSE.

(a) HOUSE CONSIDERATION.—

(1) REFERRAL.—If the House receives a joint resolution described in section 201 from the Senate, such joint resolution shall be referred to the Committee on the Judiciary. If the committee fails to report the joint resolution within five legislative days, it shall be in order to move that the House discharge

the committee from further consideration of the joint resolution. Such a motion shall not be in order after the House has disposed of a motion to discharge the joint resolution. The previous question shall be considered as ordered on the motion to its adoption without intervening motion except twenty minutes of debate equally divided and controlled by the proponent and an opponent. If such a motion is adopted, the House shall proceed immediately to consider the joint resolution in accordance with paragraph (3). A motion to reconsider the vote by which the motion is disposed of shall not be in order.

(2) PROCEEDING TO CONSIDERATION.—After the joint resolution has been referred to the appropriate calendar or the committee has been discharged (other than by motion) from its consideration, it shall be in order to move to proceed to consider the joint resolution in the House. Such a motion shall not be in order after the House has disposed of a motion to proceed with respect to the joint resolution. The previous question shall be considered as ordered on the motion to its adoption without intervening motion. A motion to reconsider the vote by which the motion is disposed of shall not be in order.

(3) CONSIDERATION.—The joint resolution shall be considered as read. All points of order against the joint resolution and against its consideration are waived. The previous question shall be considered as ordered on the joint resolution to its passage without intervening motion except two hours of debate equally divided and controlled by the proponent and an opponent and one motion to limit debate on the joint resolution. A motion to reconsider the vote on passage of the joint resolution shall not be in order.

(b) SENATE CONSIDERATION.—(1) If the Senate receives a joint resolution described in section 201 from the House of Representatives, such joint resolution shall be referred to the appropriate committee of the Senate. If such committee has not reported the joint resolution at the close of the fifth session day after its receipt by the Senate, such committee shall be automatically discharged from further consideration of the joint resolution and it shall be placed on the appropriate calendar.

(2) Consideration of the joint resolution and on all debatable motions and appeals in connection therewith, shall be limited to not more than 20 hours, which shall be divided equally between the majority and minority leaders or their designees. A motion further to limit debate

is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order. Any debatable motion or appeal is debatable for not to exceed 1 hour, to be divided equally between those favoring and those opposing the motion or appeal. All time used for consideration of the joint resolution, including time used for quorum calls and voting, shall be counted against the total 20 hours of consideration.

(3) If the Senate has voted to proceed to a joint resolution, the vote on passage of the joint resolution shall be taken on or before the close of the seventh session day after such joint resolution has been reported or discharged or immediately following the conclusion of consideration of the joint resolution, and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate.

TITLE III—DEBT CEILING DISAPPROVAL PROCESS

SEC. 301. DEBT CEILING DISAPPROVAL PROCESS.

(a) IN GENERAL.—Subchapter I of chapter 31 of subtitle III of title 31, United States Code, is amended—

(1) in section 3101(b), by striking "or otherwise" and inserting "or as provided by section 3101A or otherwise"; and

(2) by inserting after section 3101 the following:

"§ 3101A. Presidential modification of the debt ceiling

"(a) IN GENERAL.—

"(1) $900 BILLION.—

"(A) CERTIFICATION.—If, not later than December 31, 2011, the President submits a written certification to Congress that the President has determined that the debt subject to limit is within $100,000,000,000 of the limit in section 3101(b) and that further borrowing is required to meet existing commitments, the Secretary of the Treasury may exercise authority to borrow an additional $900,000,000,000, subject to the enactment of a joint resolution of disapproval enacted pursuant to this section. Upon submission of such certification, the limit on debt provided in section 3101(b) (referred to in this section as the 'debt limit') is increased by $400,000,000,000.

"(B) RESOLUTION OF DISAPPROVAL.—Congress may consider a joint resolution of disapproval of the authority under subparagraph (A) as provided in subsections (b) through (f). The joint resolution of disapproval considered under this section shall contain only the language provided in subsection (b)(2). If the time for disapproval has lapsed without enactment of a joint resolution of disapproval under this section, the debt limit is increased by an additional $500,000,000,000.

"(2) ADDITIONAL AMOUNT.—

"(A) CERTIFICATION.—If, after the debt limit is increased by $900,000,000,000 under paragraph (1), the President submits a written certification to Congress that the President has determined that the debt subject to limit is within $100,000,000,000 of the limit in section 3101(b) and that further borrowing is required to meet existing commitments, the Secretary of the Treasury may, subject to the enactment of a joint resolution of disapproval enacted pursuant to this section, exercise authority to borrow an additional amount equal to—

"(i) $1,200,000,000,000, unless clause (ii) or (iii) applies;

"(ii) $1,500,000,000,000 if the Archivist of the United States has submitted to the States for their ratification a proposed amendment to the Constitution of the United States pursuant to a joint resolution entitled 'Joint resolution proposing a balanced budget amendment to the Constitution of the United States'; or

"(iii) if a joint committee bill to achieve an amount greater than $1,200,000,000,000 in deficit reduction as provided in section 401(b)(3)(B)(i)(II) of the Budget Control Act of 2011 is enacted, an amount equal to the amount of that deficit reduction, but not greater than $1,500,000,000,000, unless clause (ii) applies.

"(B) RESOLUTION OF DISAPPROVAL.—Congress may consider a joint resolution of disapproval of the authority under subparagraph (A) as provided in subsections (b) through (f). The joint resolution of disapproval considered under this section shall contain only the lan-

guage provided in subsection (b)(2). If the time for disapproval has lapsed without enactment of a joint resolution of disapproval under this section, the debt limit is increased by the amount authorized under subparagraph (A).

"(b) JOINT RESOLUTION OF DISAPPROVAL.—

"(1) IN GENERAL.—Except for the $400,000,000,000 increase in the debt limit provided by subsection (a)(1)(A), the debt limit may not be raised under this section if, within 50 calendar days after the date on which Congress receives a certification described in subsection (a)(1) or within 15 calendar days after Congress receives the certification described in subsection (a)(2) (regardless of whether Congress is in session), there is enacted into law a joint resolution disapproving the President's exercise of authority with respect to such additional amount.

"(2) CONTENTS OF JOINT RESOLUTION.—For the purpose of this section, the term 'joint resolution' means only a joint resolution—

"(A)(i) for the certification described in subsection (a)(1), that is introduced on September 6, 7, 8, or 9, 2011 (or, if the Senate

was not in session, the next calendar day on which the Senate is in session); and

"(ii) for the certification described in subsection (a)(2), that is introduced between the date the certification is received and 3 calendar days after that date;

"(B) which does not have a preamble;

"(C) the title of which is only as follows: 'Joint resolution relating to the disapproval of the President's exercise of authority to increase the debt limit, as submitted under section 3101A of title 31, United States Code, on _____' (with the blank containing the date of such submission); and

"(D) the matter after the resolving clause of which is only as follows: 'That Congress disapproves of the President's exercise of authority to increase the debt limit, as exercised pursuant to the certification under section 3101A(a) of title 31, United States Code.'.

"(c) EXPEDITED CONSIDERATION IN HOUSE OF REPRESENTATIVES.—

"(1) RECONVENING.—Upon receipt of a certification described in subsection (a)(2), the Speaker, if the House would otherwise be adjourned, shall notify

the Members of the House that, pursuant to this section, the House shall convene not later than the second calendar day after receipt of such certification.

"(2) REPORTING AND DISCHARGE.—Any committee of the House of Representatives to which a joint resolution is referred shall report it to the House without amendment not later than 5 calendar days after the date of introduction of a joint resolution described in subsection (a). If a committee fails to report the joint resolution within that period, the committee shall be discharged from further consideration of the joint resolution and the joint resolution shall be referred to the appropriate calendar.

"(3) PROCEEDING TO CONSIDERATION.—After each committee authorized to consider a joint resolution reports it to the House or has been discharged from its consideration, it shall be in order, not later than the sixth day after introduction of a joint resolution under subsection (a), to move to proceed to consider the joint resolution in the House. All points of order against the motion are waived. Such a motion shall not be in order after the House has disposed of a motion to proceed on a joint resolution addressing a particular submission. The previous

question shall be considered as ordered on the motion to its adoption without intervening motion. The motion shall not be debatable. A motion to reconsider the vote by which the motion is disposed of shall not be in order.

"(4) CONSIDERATION.—The joint resolution shall be considered as read. All points of order against the joint resolution and against its consideration are waived. The previous question shall be considered as ordered on the joint resolution to its passage without intervening motion except two hours of debate equally divided and controlled by the proponent and an opponent. A motion to reconsider the vote on passage of the joint resolution shall not be in order.

"(d) EXPEDITED PROCEDURE IN SENATE.—

"(1) RECONVENING.—Upon receipt of a certification under subsection (a)(2), if the Senate has adjourned or recessed for more than 2 days, the majority leader of the Senate, after consultation with the minority leader of the Senate, shall notify the Members of the Senate that, pursuant to this section, the Senate shall convene not later than the second calendar day after receipt of such message.

"(2) PLACEMENT ON CALENDAR.—Upon introduction in the Senate, the joint resolution shall be immediately placed on the calendar.

"(3) FLOOR CONSIDERATION.—

"(A) IN GENERAL.—Notwithstanding Rule XXII of the Standing Rules of the Senate, it is in order at any time during the period beginning on the day after the date on which Congress receives a certification under subsection (a) and, for the certification described in subsection (a)(1), ending on September 14, 2011, and for the certification described in subsection (a)(2), on the 6th day after the date on which Congress receives a certification under subsection (a) (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion to proceed is not debatable. The motion is not subject to a motion to postpone. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution

is agreed to, the joint resolution shall remain the unfinished business until disposed of.

"(B) CONSIDERATION.—Consideration of the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between the majority and minority leaders or their designees. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

"(C) VOTE ON PASSAGE.—If the Senate has voted to proceed to a joint resolution, the vote on passage of the joint resolution shall occur immediately following the conclusion of consideration of the joint resolution, and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate.

"(D) RULINGS OF THE CHAIR ON PROCEDURE.—Appeals from the decisions of the Chair relating to the application of the rules of the Senate, as the case may be, to the procedure re-

lating to a joint resolution shall be decided without debate.

"(e) AMENDMENT NOT IN ORDER.—A joint resolution of disapproval considered pursuant to this section shall not be subject to amendment in either the House of Representatives or the Senate.

"(f) COORDINATION WITH ACTION BY OTHER HOUSE.—

"(1) IN GENERAL.—If, before passing the joint resolution, one House receives from the other a joint resolution—

"(A) the joint resolution of the other House shall not be referred to a committee; and

"(B) the procedure in the receiving House shall be the same as if no joint resolution had been received from the other House until the vote on passage, when the joint resolution received from the other House shall supplant the joint resolution of the receiving House.

"(2) TREATMENT OF JOINT RESOLUTION OF OTHER HOUSE.—If the Senate fails to introduce or consider a joint resolution under this section, the joint resolution of the House shall be entitled to expedited floor procedures under this section.

"(3) TREATMENT OF COMPANION MEASURES.—If, following passage of the joint resolution in the Senate, the Senate then receives the companion measure from the House of Representatives, the companion measure shall not be debatable.

"(4) CONSIDERATION AFTER PASSAGE.—(A) If Congress passes a joint resolution, the period beginning on the date the President is presented with the joint resolution and ending on the date the President signs, allows to become law without his signature, or vetoes and returns the joint resolution (but excluding days when either House is not in session) shall be disregarded in computing the appropriate calendar day period described in subsection (b)(1).

"(B) Debate on a veto message in the Senate under this section shall be 1 hour equally divided between the majority and minority leaders or their designees.

"(5) VETO OVERRIDE.—If within the appropriate calendar day period described in subsection (b)(1), Congress overrides a veto of the joint resolution with respect to authority exercised pursuant to paragraph (1) or (2) of subsection (a), the limit on debt provided in section 3101(b) shall not be raised,

except for the $400,000,000,000 increase in the limit provided by subsection (a)(1)(A).

"(6) SEQUESTRATION.—(A) If within the 50-calendar day period described in subsection (b)(1), the President signs the joint resolution, the President allows the joint resolution to become law without his signature, or Congress overrides a veto of the joint resolution with respect to authority exercised pursuant to paragraph (1) of subsection (a), there shall be a sequestration to reduce spending by $400,000,000,000. OMB shall implement the sequestration forthwith.

"(B) OMB shall implement each half of such sequestration in accordance with section 255, section 256, and subsections (c), (d), (e), and (f) of section 253 of the Balanced Budget and Emergency Deficit Control Act of 1985, and for the purpose of such implementation the term 'excess deficit' means the amount specified in subparagraph (A).

"(g) RULES OF HOUSE OF REPRESENTATIVES AND SENATE.—This subsection and subsections (b), (c), (d), (e), and (f) (other than paragraph (6)) are enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respec-

tively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution, and it supersedes other rules only to the extent that it is inconsistent with such rules; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 31 of title 31, United States Code, is amended by inserting after the item relating to section 3101 the following new item:

"3101A. Presidential modification of the debt ceiling.".

SEC. 302. ENFORCEMENT OF BUDGET GOAL.

(a) IN GENERAL.—The Balanced Budget and Emergency Deficit Control Act of 1985 is amended by inserting after section 251 the following new section:

"SEC. 251A. ENFORCEMENT OF BUDGET GOAL.

"Unless a joint committee bill achieving an amount greater than $1,200,000,000,000 in deficit reduction as provided in section 401(b)(3)(B)(i)(II) of the Budget Control Act of 2011 is enacted by January 15, 2012, the discretionary spending limits listed in section 251(c) shall be

revised, and discretionary appropriations and direct spending shall be reduced, as follows:

"(1) REVISED SECURITY CATEGORY; REVISED NONSECURITY CATEGORY.— (A) The term 'revised security category' means discretionary appropriations in budget function 050.

"(B) The term 'revised nonsecurity category' means discretionary appropriations other than in budget function 050.

"(2) REVISED DISCRETIONARY SPENDING LIMITS.—The discretionary spending limits for fiscal years 2013 through 2021 under section 251(c) shall be replaced with the following:

"(A) For fiscal year 2013—

"(i) for the security category, $546,000,000,000 in budget authority; and

"(ii) for the nonsecurity category, $501,000,000,000 in budget authority.

"(B) For fiscal year 2014—

"(i) for the security category, $556,000,000,000 in budget authority; and

"(ii) for the nonsecurity category, $510,000,000,000 in budget authority.

"(C) For fiscal year 2015—

"(i) for the security category, $566,000,000,000 in budget authority; and

"(ii) for the nonsecurity category, $520,000,000,000 in budget authority.

"(D) For fiscal year 2016—

"(i) for the security category, $577,000,000,000 in budget authority; and

"(ii) for the nonsecurity category, $530,000,000,000 in budget authority.

"(E) For fiscal year 2017—

"(i) for the security category, $590,000,000,000 in budget authority; and

"(ii) for the nonsecurity category, $541,000,000,000 in budget authority.

"(F) For fiscal year 2018—

"(i) for the security category, $603,000,000,000 in budget authority; and

"(ii) for the nonsecurity category, $553,000,000,000 in budget authority.

"(G) For fiscal year 2019—

"(i) for the security category, $616,000,000,000 in budget authority; and

"(ii) for the nonsecurity category, $566,000,000,000 in budget authority.

"(H) For fiscal year 2020—

"(i) for the security category, $630,000,000,000 in budget authority; and

"(ii) for the nonsecurity category, $578,000,000,000 in budget authority.

"(I) For fiscal year 2021—

"(i) for the security category, $644,000,000,000 in budget authority; and

"(ii) for the nonsecurity category, $590,000,000,000 in budget authority.

"(3) CALCULATION OF TOTAL DEFICIT REDUCTION.—OMB shall calculate the amount of the deficit reduction required by this section for each of fiscal years 2013 through 2021 by—

"(A) starting with $1,200,000,000,000;

"(B) subtracting the amount of deficit reduction achieved by the enactment of a joint committee bill, as provided in section 401(b)(3)(B)(i)(II) of the Budget Control Act of 2011;

"(C) reducing the difference by 18 percent to account for debt service; and

"(D) dividing the result by 9.

"(4) ALLOCATION TO FUNCTIONS.—On January 2, 2013, for fiscal year 2013, and in its sequestration preview report for fiscal years 2014 through

2021 pursuant to section 254(c), OMB shall allocate half of the total reduction calculated pursuant to paragraph (3) for that year to discretionary appropriations and direct spending accounts within function 050 (defense function) and half to accounts in all other functions (nondefense functions).

"(5) DEFENSE FUNCTION REDUCTION.—OMB shall calculate the reductions to discretionary appropriations and direct spending for each of fiscal years 2013 through 2021 for defense function spending as follows:

"(A) DISCRETIONARY.—OMB shall calculate the reduction to discretionary appropriations by—

"(i) taking the total reduction for the defense function allocated for that year under paragraph (4);

"(ii) multiplying by the discretionary spending limit for the revised security category for that year; and

"(iii) dividing by the sum of the discretionary spending limit for the security category and OMB's baseline estimate of nonexempt outlays for direct spending pro-

grams within the defense function for that year.

"(B) DIRECT SPENDING.—OMB shall calculate the reduction to direct spending by taking the total reduction for the defense function required for that year under paragraph (4) and subtracting the discretionary reduction calculated pursuant to subparagraph (A).

"(6) NONDEFENSE FUNCTION REDUCTION.—OMB shall calculate the reduction to discretionary appropriations and to direct spending for each of fiscal years 2013 through 2021 for programs in nondefense functions as follows:

"(A) DISCRETIONARY.—OMB shall calculate the reduction to discretionary appropriations by—

"(i) taking the total reduction for nondefense functions allocated for that year under paragraph (4);

"(ii) multiplying by the discretionary spending limit for the revised nonsecurity category for that year; and

"(iii) dividing by the sum of the discretionary spending limit for the revised nonsecurity category and OMB's baseline

estimate of nonexempt outlays for direct spending programs in nondefense functions for that year.

"(B) DIRECT SPENDING.—OMB shall calculate the reduction to direct spending programs by taking the total reduction for nondefense functions required for that year under paragraph (4) and subtracting the discretionary reduction calculated pursuant to subparagraph (A).

"(7) IMPLEMENTING DISCRETIONARY REDUCTIONS.—

"(A) FISCAL YEAR 2013.—On January 2, 2013, for fiscal year 2013, OMB shall calculate and the President shall order a sequestration, effective upon issuance and under the procedures set forth in section 253(f), to reduce each account within the security category or nonsecurity category by a dollar amount calculated by multiplying the baseline level of budgetary resources in that account at that time by a uniform percentage necessary to achieve—

"(i) for the revised security category, an amount equal to the defense function

discretionary reduction calculated pursuant to paragraph (5); and

"(ii) for the revised nonsecurity category, an amount equal to the nondefense function discretionary reduction calculated pursuant to paragraph (6).

"(B) FISCAL YEARS 2014-2021.—On the date of the submission of its sequestration preview report for fiscal years 2014 through 2021 pursuant to section 254(c) for each of fiscal years 2014 through 2021, OMB shall reduce the discretionary spending limit—

"(i) for the revised security category by the amount of the defense function discretionary reduction calculated pursuant to paragraph (5); and

"(ii) for the revised nonsecurity category by the amount of the nondefense function discretionary reduction calculated pursuant to paragraph (6).

"(8) IMPLEMENTING DIRECT SPENDING REDUCTIONS.—On the date specified in paragraph (4) during each applicable year, OMB shall prepare and the President shall order a sequestration, effective upon issuance, of nonexempt direct spending to achieve

the direct spending reduction calculated pursuant to paragraphs (5) and (6). When implementing the sequestration of direct spending pursuant to this paragraph, OMB shall follow the procedures specified in section 6 of the Statutory Pay-As-You-Go Act of 2010, the exemptions specified in section 255, and the special rules specified in section 256, except that the percentage reduction for the Medicare programs specified in section 256(d) shall not be more than 2 percent for a fiscal year.

"(9) ADJUSTMENT FOR MEDICARE.—If the percentage reduction for the Medicare programs would exceed 2 percent for a fiscal year in the absence of paragraph (8), OMB shall increase the reduction for all other discretionary appropriations and direct spending under paragraph (6) by a uniform percentage to a level sufficient to achieve the reduction required by paragraph (6) in the non-defense function.

"(10) IMPLEMENTATION OF REDUCTIONS.—Any reductions imposed under this section shall be implemented in accordance with section 256(k).

"(11) REPORT.—On the dates specified in paragraph (4), OMB shall submit a report to Congress containing information about the calculations required under this section, the adjusted discre-

tionary spending limits, a listing of the reductions required for each nonexempt direct spending account, and any other data and explanations that enhance public understanding of this title and actions taken under it.".

(b) CONFORMING AMENDMENT.—The table of contents set forth in section 250(a) of the Balanced Budget and Emergency Deficit Control Act of 1985 is amended by inserting after the item relating to section 251 the following:

"Sec. 251A. Enforcement of budget goal.".

TITLE IV—JOINT SELECT COMMITTEE ON DEFICIT REDUCTION

SEC. 401. ESTABLISHMENT OF JOINT SELECT COMMITTEE.

(a) DEFINITIONS.—In this title:

(1) JOINT COMMITTEE.—The term "joint committee" means the Joint Select Committee on Deficit Reduction established under subsection (b)(1).

(2) JOINT COMMITTEE BILL.—The term "joint committee bill" means a bill consisting of the proposed legislative language of the joint committee recommended under subsection (b)(3)(B) and introduced under section 402(a).

(b) ESTABLISHMENT OF JOINT SELECT COMMITTEE.—

(1) ESTABLISHMENT.—There is established a joint select committee of Congress to be known as the "Joint Select Committee on Deficit Reduction".

(2) GOAL.—The goal of the joint committee shall be to reduce the deficit by at least $1,500,000,000,000 over the period of fiscal years 2012 to 2021.

(3) DUTIES.—

(A) IN GENERAL.—

(i) IMPROVING THE SHORT-TERM AND LONG-TERM FISCAL IMBALANCE.—The joint committee shall provide recommendations and legislative language that will significantly improve the short-term and long-term fiscal imbalance of the Federal Government.

(ii) RECOMMENDATIONS OF COMMITTEES.—Not later than October 14, 2011, each committee of the House of Representatives and the Senate may transmit to the joint committee its recommendations for changes in law to reduce the deficit consistent with the goal described in paragraph (2) for the joint committee's consideration.

(B) REPORT, RECOMMENDATIONS, AND LEGISLATIVE LANGUAGE.—

(i) IN GENERAL.—Not later than November 23, 2011, the joint committee shall vote on—

(I) a report that contains a detailed statement of the findings, conclusions, and recommendations of the joint committee and the estimate of the Congressional Budget Office required by paragraph (5)(D)(ii); and

(II) proposed legislative language to carry out such recommendations as described in subclause (I), which shall include a statement of the deficit reduction achieved by the legislation over the period of fiscal years 2012 to 2021.

Any change to the Rules of the House of Representatives or the Standing Rules of the Senate included in the report or legislative language shall be considered to be merely advisory.

(ii) APPROVAL OF REPORT AND LEGISLATIVE LANGUAGE.—The report of the

joint committee and the proposed legislative language described in clause (i) shall require the approval of a majority of the members of the joint committee.

(iii) ADDITIONAL VIEWS.—A member of the joint committee who gives notice of an intention to file supplemental, minority, or additional views at the time of final joint committee vote on the approval of the report and legislative language under clause (ii) shall be entitled to 3 calendar days in which to file such views in writing with the staff director of the joint committee. Such views shall then be included in the joint committee report and printed in the same volume, or part thereof, and their inclusion shall be noted on the cover of the report. In the absence of timely notice, the joint committee report may be printed and transmitted immediately without such views.

(iv) TRANSMISSION OF REPORT AND LEGISLATIVE LANGUAGE.—If the report and legislative language are approved by the joint committee pursuant to clause (ii),

then not later than December 2, 2011, the joint committee shall submit the joint committee report and legislative language described in clause (i) to the President, the Vice President, the Speaker of the House of Representatives, and the majority and minority Leaders of each House of Congress.

(v) REPORT AND LEGISLATIVE LANGUAGE TO BE MADE PUBLIC.—Upon the approval or disapproval of the joint committee report and legislative language pursuant to clause (ii), the joint committee shall promptly make the full report and legislative language, and a record of the vote, available to the public.

(4) MEMBERSHIP.—

(A) IN GENERAL.—The joint committee shall be composed of 12 members appointed pursuant to subparagraph (B).

(B) APPOINTMENT.—Members of the joint committee shall be appointed as follows:

(i) The majority leader of the Senate shall appoint 3 members from among Members of the Senate.

(ii) The minority leader of the Senate shall appoint 3 members from among Members of the Senate.

(iii) The Speaker of the House of Representatives shall appoint 3 members from among Members of the House of Representatives.

(iv) The minority leader of the House of Representatives shall appoint 3 members from among Members of the House of Representatives.

(C) CO-CHAIRS.—

(i) IN GENERAL.—There shall be 2 Co-Chairs of the joint committee. The majority leader of the Senate shall appoint one Co-Chair from among the members of the joint committee. The Speaker of the House of Representatives shall appoint the second Co-Chair from among the members of the joint committee. The Co-Chairs shall be appointed not later than 14 calendar days after the date of enactment of this Act.

(ii) STAFF DIRECTOR.—The Co-Chairs, acting jointly, shall hire the staff director of the joint committee.

(D) DATE.—Members of the joint committee shall be appointed not later than 14 calendar days after the date of enactment of this Act.

(E) PERIOD OF APPOINTMENT.—Members shall be appointed for the life of the joint committee. Any vacancy in the joint committee shall not affect its powers, but shall be filled not later than 14 calendar days after the date on which the vacancy occurs, in the same manner as the original designation was made. If a member of the joint committee ceases to be a Member of the House of Representatives or the Senate, as the case may be, the member is no longer a member of the joint committee and a vacancy shall exist.

(5) ADMINISTRATION.—

(A) IN GENERAL.—To enable the joint committee to exercise its powers, functions, and duties, there are authorized to be disbursed by the Senate the actual and necessary expenses of the joint committee approved by the co-chairs,

subject to the rules and regulations of the Senate.

(B) EXPENSES.—In carrying out its functions, the joint committee is authorized to incur expenses in the same manner and under the same conditions as the Joint Economic Committee is authorized by section 11 of Public Law 79–304 (15 U.S.C. 1024 (d)).

(C) QUORUM.—Seven members of the joint committee shall constitute a quorum for purposes of voting, meeting, and holding hearings.

(D) VOTING.—

(i) PROXY VOTING.—No proxy voting shall be allowed on behalf of the members of the joint committee.

(ii) CONGRESSIONAL BUDGET OFFICE ESTIMATES.—The Congressional Budget Office shall provide estimates of the legislation (as described in paragraph (3)(B)) in accordance with sections 308(a) and 201(f) of the Congressional Budget Act of 1974 (2 U.S.C. 639(a) and 601(f))(including estimates of the effect of interest payment on the debt). In addition, the Congressional Budget Office shall pro-

vide information on the budgetary effect of the legislation beyond the year 2021. The joint committee may not vote on any version of the report, recommendations, or legislative language unless such estimates are available for consideration by all members of the joint committee at least 48 hours prior to the vote as certified by the Co-Chairs.

(E) MEETINGS.—

(i) INITIAL MEETING.—Not later than 45 calendar days after the date of enactment of this Act, the joint committee shall hold its first meeting.

(ii) AGENDA.—The Co-Chairs of the joint committee shall provide an agenda to the joint committee members not less than 48 hours in advance of any meeting.

(F) HEARINGS.—

(i) IN GENERAL.—The joint committee may, for the purpose of carrying out this section, hold such hearings, sit and act at such times and places, require attendance of witnesses and production of books, papers, and documents, take such

testimony, receive such evidence, and administer such oaths as the joint committee considers advisable.

(ii) HEARING PROCEDURES AND RESPONSIBILITIES OF CO-CHAIRS.—

(I) ANNOUNCEMENT.—The Co-Chairs of the joint committee shall make a public announcement of the date, place, time, and subject matter of any hearing to be conducted, not less than 7 days in advance of such hearing, unless the Co-Chairs determine that there is good cause to begin such hearing at an earlier date.

(II) WRITTEN STATEMENT.—A witness appearing before the joint committee shall file a written statement of proposed testimony at least 2 calendar days before the appearance of the witness, unless the requirement is waived by the Co-Chairs, following their determination that there is good cause for failure to comply with such requirement.

(G) TECHNICAL ASSISTANCE.—Upon written request of the Co-Chairs, a Federal agency shall provide technical assistance to the joint committee in order for the joint committee to carry out its duties.

(c) STAFF OF JOINT COMMITTEE.—

(1) IN GENERAL.—The Co-Chairs of the joint committee may jointly appoint and fix the compensation of staff as they deem necessary, within the guidelines for employees of the Senate and following all applicable rules and employment requirements of the Senate.

(2) ETHICAL STANDARDS.—Members on the joint committee who serve in the House of Representatives shall be governed by the ethics rules and requirements of the House. Members of the Senate who serve on the joint committee and staff of the joint committee shall comply with the ethics rules of the Senate.

(d) TERMINATION.—The joint committee shall terminate on January 31, 2012.

SEC. 402. EXPEDITED CONSIDERATION OF JOINT COMMITTEE RECOMMENDATIONS.

(a) INTRODUCTION.—If approved by the majority required by section 401(b)(3)(B)(ii), the proposed legislative

language submitted pursuant to section 401(b)(3)(B)(iv) shall be introduced in the Senate (by request) on the next day on which the Senate is in session by the majority leader of the Senate or by a Member of the Senate designated by the majority leader of the Senate and shall be introduced in the House of Representatives (by request) on the next legislative day by the majority leader of the House or by a Member of the House designated by the majority leader of the House.

(b) CONSIDERATION IN THE HOUSE OF REPRESENTATIVES.—

(1) REFERRAL AND REPORTING.—Any committee of the House of Representatives to which the joint committee bill is referred shall report it to the House without amendment not later than December 9, 2011. If a committee fails to report the joint committee bill within that period, it shall be in order to move that the House discharge the committee from further consideration of the bill. Such a motion shall not be in order after the last committee authorized to consider the bill reports it to the House or after the House has disposed of a motion to discharge the bill. The previous question shall be considered as ordered on the motion to its adoption without intervening motion except 20 minutes of debate equally

divided and controlled by the proponent and an opponent. If such a motion is adopted, the House shall proceed immediately to consider the joint committee bill in accordance with paragraphs (2) and (3). A motion to reconsider the vote by which the motion is disposed of shall not be in order.

(2) PROCEEDING TO CONSIDERATION.—After the last committee authorized to consider a joint committee bill reports it to the House or has been discharged (other than by motion) from its consideration, it shall be in order to move to proceed to consider the joint committee bill in the House. Such a motion shall not be in order after the House has disposed of a motion to proceed with respect to the joint committee bill. The previous question shall be considered as ordered on the motion to its adoption without intervening motion. A motion to reconsider the vote by which the motion is disposed of shall not be in order.

(3) CONSIDERATION.—The joint committee bill shall be considered as read. All points of order against the joint committee bill and against its consideration are waived. The previous question shall be considered as ordered on the joint committee bill to its passage without intervening motion except 2

hours of debate equally divided and controlled by the proponent and an opponent and one motion to limit debate on the joint committee bill. A motion to reconsider the vote on passage of the joint committee bill shall not be in order.

(4) VOTE ON PASSAGE.—The vote on passage of the joint committee bill shall occur not later than December 23, 2011.

(c) EXPEDITED PROCEDURE IN THE SENATE.—

(1) COMMITTEE CONSIDERATION.—A joint committee bill introduced in the Senate under subsection (a) shall be jointly referred to the committee or committees of jurisdiction, which committees shall report the bill without any revision and with a favorable recommendation, an unfavorable recommendation, or without recommendation, not later than December 9, 2011. If any committee fails to report the bill within that period, that committee shall be automatically discharged from consideration of the bill, and the bill shall be placed on the appropriate calendar.

(2) MOTION TO PROCEED.—Notwithstanding Rule XXII of the Standing Rules of the Senate, it is in order, not later than 2 days of session after the date on which a joint committee bill is reported or discharged from all committees to which it was re-

ferred, for the majority leader of the Senate or the majority leader's designee to move to proceed to the consideration of the joint committee bill. It shall also be in order for any Member of the Senate to move to proceed to the consideration of the joint committee bill at any time after the conclusion of such 2-day period. A motion to proceed is in order even though a previous motion to the same effect has been disagreed to. All points of order against the motion to proceed to the joint committee bill are waived. The motion to proceed is not debatable. The motion is not subject to a motion to postpone. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint committee bill is agreed to, the joint committee bill shall remain the unfinished business until disposed of.

(3) CONSIDERATION.—All points of order against the joint committee bill and against consideration of the joint committee bill are waived. Consideration of the joint committee bill and of all debatable motions and appeals in connection therewith shall not exceed a total of 30 hours which shall be divided equally between the Majority and Minority

Leaders or their designees. A motion further to limit debate on the joint committee bill is in order, shall require an affirmative vote of three-fifths of the Members duly chosen and sworn, and is not debatable. Any debatable motion or appeal is debatable for not to exceed 1 hour, to be divided equally between those favoring and those opposing the motion or appeal. All time used for consideration of the joint committee bill, including time used for quorum calls and voting, shall be counted against the total 30 hours of consideration.

(4) NO AMENDMENTS.—An amendment to the joint committee bill, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint committee bill, is not in order.

(5) VOTE ON PASSAGE.—If the Senate has voted to proceed to the joint committee bill, the vote on passage of the joint committee bill shall occur immediately following the conclusion of the debate on a joint committee bill, and a single quorum call at the conclusion of the debate if requested. The vote on passage of the joint committee bill shall occur not later than December 23, 2011.

(6) RULINGS OF THE CHAIR ON PROCEDURE.—Appeals from the decisions of the Chair relating to the application of the rules of the Senate, as the case may be, to the procedure relating to a joint committee bill shall be decided without debate.

(d) AMENDMENT.—The joint committee bill shall not be subject to amendment in either the House of Representatives or the Senate.

(e) CONSIDERATION BY THE OTHER HOUSE.—

(1) IN GENERAL.—If, before passing the joint committee bill, one House receives from the other a joint committee bill—

(A) the joint committee bill of the other House shall not be referred to a committee; and

(B) the procedure in the receiving House shall be the same as if no joint committee bill had been received from the other House until the vote on passage, when the joint committee bill received from the other House shall supplant the joint committee bill of the receiving House.

(2) REVENUE MEASURE.—This subsection shall not apply to the House of Representatives if the joint committee bill received from the Senate is a revenue measure.

(f) RULES TO COORDINATE ACTION WITH OTHER HOUSE.—

(1) TREATMENT OF JOINT COMMITTEE BILL OF OTHER HOUSE.—If the Senate fails to introduce or consider a joint committee bill under this section, the joint committee bill of the House shall be entitled to expedited floor procedures under this section.

(2) TREATMENT OF COMPANION MEASURES IN THE SENATE.—If following passage of the joint committee bill in the Senate, the Senate then receives the joint committee bill from the House of Representatives, the House-passed joint committee bill shall not be debatable. The vote on passage of the joint committee bill in the Senate shall be considered to be the vote on passage of the joint committee bill received from the House of Representatives.

(3) VETOES.—If the President vetoes the joint committee bill, debate on a veto message in the Senate under this section shall be 1 hour equally divided between the majority and minority leaders or their designees.

(g) LOSS OF PRIVILEGE.—The provisions of this section shall cease to apply to the joint committee bill if—

(1) the joint committee fails to vote on the report or proposed legislative language required under

section 401(b)(3)(B)(i) not later than November 23, 2011; or

(2) the joint committee bill does not pass both Houses not later than December 23, 2011.

SEC. 403. FUNDING.

Funding for the joint committee shall be derived in equal portions from—

(1) the applicable accounts of the House of Representatives; and

(2) the contingent fund of the Senate from the appropriations account "Miscellaneous Items", subject to the rules and regulations of the Senate.

SEC. 404. RULEMAKING.

The provisions of this title are enacted by Congress—

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same

manner, and to the same extent as in the case of any other rule of such House.

TITLE V—PELL GRANT AND STUDENT LOAN PROGRAM CHANGES

SEC. 501. FEDERAL PELL GRANTS.

Section 401(b)(7)(A)(iv) of the Higher Education Act of 1965 (20 U.S.C. 1070a(b)(7)(A)(iv)) is amended—

(1) in subclause (II), by striking "$3,183,000,000" and inserting "$13,183,000,000"; and

(2) in subclause (III), by striking "$0" and inserting "$7,000,000,000".

SEC. 502. TERMINATION OF AUTHORITY TO MAKE INTEREST SUBSIDIZED LOANS TO GRADUATE AND PROFESSIONAL STUDENTS.

Section 455(a) of the Higher Education Act of 1965 (20 U.S.C. 1087e(a)) is amended by adding at the end the following new paragraph:

"(3) TERMINATION OF AUTHORITY TO MAKE INTEREST SUBSIDIZED LOANS TO GRADUATE AND PROFESSIONAL STUDENTS.—

"(A) IN GENERAL.—Subject to subparagraph (B) and notwithstanding any provision of

this part or part B, for any period of instruction beginning on or after July 1, 2012—

"(i) a graduate or professional student shall not be eligible to receive a Federal Direct Stafford loan under this part; and

"(ii) the maximum annual amount of Federal Direct Unsubsidized Stafford loans such a student may borrow in any academic year (as defined in section 481(a)(2)) or its equivalent shall be the maximum annual amount for such student determined under section 428H, plus an amount equal to the amount of Federal Direct Stafford loans the student would have received in the absence of this subparagraph.

"(B) EXCEPTION.—Subparagraph (A) shall not apply to an individual enrolled in course work specified in paragraph (3)(B) or (4)(B) of section 484(b).".

SEC. 503. TERMINATION OF DIRECT LOAN REPAYMENT INCENTIVES.

Section 455(b)(8) of the Higher Education Act of 1965 (20 U.S.C. 1087e(b)(8)) is amended—

(1) in subparagraph (A)—

(A) by amending the header to read as follows: "(A) INCENTIVES FOR LOANS DISBURSED BEFORE JULY 1, 2012.—"; and

(B) by inserting "with respect to loans for which the first disbursement of principal is made before July 1, 2012," after "of this part";

(2) in subparagraph (B), by inserting "with respect to loans for which the first disbursement of principal is made before July 1, 2012" after "repayment incentives"; and

(3) by adding at the end the following new subparagraph:

"(C) NO REPAYMENT INCENTIVES FOR NEW LOANS DISBURSED ON OR AFTER JULY 1, 2012.—Notwithstanding any other provision of this part, the Secretary is prohibited from authorizing or providing any repayment incentive not otherwise authorized under this part to encourage on-time repayment of a loan under this part for which the first disbursement of principal is made on or after July 1, 2012, including any reduction in the interest or origination fee rate paid by a borrower of such a loan, ex-

cept that the Secretary may provide for an interest rate reduction for a borrower who agrees to have payments on such a loan automatically electronically debited from a bank account.".

SEC. 504. INAPPLICABILITY OF TITLE IV NEGOTIATED RULEMAKING AND MASTER CALENDAR EXCEPTION.

Sections 482(c) and 492 of the Higher Education Act of 1965 (20 U.S.C. 1089(c), 1098a) shall not apply to the amendments made by this title, or to any regulations promulgated under those amendments.