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Counsel's Office, White House (WHCO)

Rothman, Mika and Steven Croley - Subject Files

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
M	10	20	10	2	6838	1485	5973	6714

Folder Title:

[Debt Ceiling/Debt Crisis]

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Withdrawal Marker
Obama Presidential Library

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

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

SERIES:
Rothman, Mika and Steven Croley - Subject Files

FOLDER TITLE:
[Debt Ceiling/Debt Crisis]

FRC ID:
6838
OA Num.:
6714
NARA Num.:
5973

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]
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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
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Court Filing	Youngstown Sheet and Tube Co. v. Sawyer Opinion	59	2011	P5;

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

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Court Filing	City of New Haven, Conn. V. U.S. Opiniion	8	2011	P5;

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Counsel's Office, White House (WHCO)

SERIES:
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FOLDER TITLE:
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Debt Ceiling

As noted above, appropriations constitute budget authority. An appropriation to liquidate contract authority, however, is not new budget authority, since contract authority itself constitutes new budget authority. This treatment is necessary to avoid counting the amounts twice. B-171630, Aug. 14, 1975.

Since the contracts entered into pursuant to contract authority constitute obligations binding on the United States, Congress has little practical choice but to make the necessary liquidating appropriations. B-228732, Feb. 18, 1988; B-226887, Sept. 17, 1987. As the Supreme Court has put it:

> "The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations."

Train v. City of New York, 420 U.S. 35, 39 n.2 (1975). A failure or refusal by Congress to make the necessary appropriation would not defeat the obligation, and the party entitled to payment would most likely be able to recover in a lawsuit. *E.g.*, B-211190, Apr. 5, 1983.

c. Borrowing Authority

"Borrowing authority" is authority that permits agencies to incur obligations and make payments to liquidate the obligations out of borrowed moneys.[5] Borrowing authority may consist of (a) authority to borrow from the Treasury (authority to borrow funds from the Treasury that are realized from the sale of public debt securities), (b) authority to borrow directly from the public (authority to sell agency debt securities), (c) authority to borrow from (sell agency debt securities to) the Federal Financing Bank, or (d) some combination of the above.

Borrowing from the Treasury is the most common form and is also known as "public debt financing." As a general proposition, GAO has traditionally expressed a preference for financing through direct appropriations on the grounds that the appropriations process provides enhanced congressional control. *E.g.*, B-301397, Sept. 4, 2003; B-141869, July 26, 1961. The Congressional Budget Act met this concern to an extent by requiring generally that new borrowing authority, as with new contract authority, be

[5] *Glossary* at 22.

Debt Ceiling

Chapter
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§ 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 $12,394,000,000,000, 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 [1] 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).

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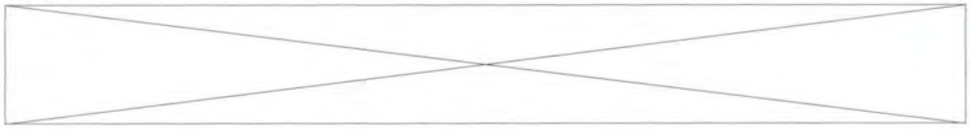
[1] See References in Text note below.



Chapter 31-Public Debt

31 USCA Subt. III, Ch. 31, Refs & Annos

Subchapter I-Borrowing Authority

Subchapter II-Administrative

United States Code Annotated

Title 31. Money and Finance (Refs & Annos)

Subtitle III. Financial Management

Chapter 31. Public Debt (Refs & Annos)

Subchapter I. Borrowing Authority

31 U.S.C.A. § 3101

§ 3101. Public debt limit

Effective: February 12, 2010
Currentness

(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).

Credits

(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.)

Notes of Decisions (4)

Current through P.L. 112-23 approved 6-29-11

102d Congress, 2d Session - - - - House Document 102-352

REVISED DEFERRALS

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A REPORT OF TWO REVISED DEFERRALS OF BUDGET AUTHORITY, PURSUANT TO 2 U.S.C. 684(a)

JUNE 25, 1992.—Message and accompanying papers referred to the Committee on Appropriations and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
59-011 WASHINGTON : 1992

To the Congress of the United States:

In accordance with the Congressional Budget and Impoundment Control Act of 1974, I herewith report two revised deferrals, now totaling $2.2 billion in budgetary resources. Including the revised deferrals, funds withheld in FY 1992 now total $5.7 billion.

The deferrals affect Funds Appropriated to the President and the Department of Agriculture. The details of the deferrals are contained in the attached reports.

GEORGE BUSH.

THE WHITE HOUSE, *June 25, 1992.*

CONTENTS OF SPECIAL MESSAGE
(in thousands of dollars)

Deferral No.	Item	Budget Authority
	Funds Appropriated to the President:	
	International Security Assistance:	
D92-8A	Foreign military financing.....	2,001,098
	Department of Agriculture:	
	Forest Service:	
D92-11A	Timber salvage sales.....	181,549
	Total, deferrals.....	2,182,646

Deferral No. 92-8A

Supplemental Report
Report Pursuant to Section 1014(c) of Public Law 93-344

This report updates Deferral No. 92-8, which was transmitted to the Congress on December 19, 1991.

This revision to a deferral of the Foreign military financing account, International Security Assistance program, of the Funds Appropriated to the President, increases the amount previously reported as deferred from $1,908,000,000 to $2,001,097,900. Funds made available by P.L. 102-266 were deferred. Some of the funds that were available prior to March 31, 1992, were released. The net change is $93,097,900.

Deferral No. 92–8A

DEFERRAL OF BUDGET AUTHORITY
Report Pursuant to Section 1013 of P.L. 93–344

AGENCY: Funds Appropriated to the President	New budget authority..... $ 4,100,000,000 (P.L. 102–266)*
BUREAU: International Security Assistance	Other budgetary resources. $ –81,602,100 *
Appropriation title and symbol: Foreign military financing 1/ 1121082	Total budgetary resources.. $ 4,018,397,900 *
	Amount to be deferred: Part of year..... $ 2,001,097,900 *
	Entire year..... _____
OMB identification code: 11–1082–0–1–152	**Legal authority (in addition to sec. 1013):**
Grant program: [X] Yes [ ] No	[X] Antideficiency Act
	[ ] Other _____
Type of account or fund:	**Type of budget authority:**
[X] Annual	[X] Appropriation
[ ] Multi–year _____ (expiration date)	[ ] Contract authority
[ ] No–Year	[ ] Other _____

JUSTIFICATION: The President is authorized by the Arms Export Control Act to sell or finance by grant, credit, or guarantee articles and defense services to friendly countries to facilitate the common defense. Further, the President is authorized by the International Narcotics Control Act of 1989 to provide military and law enforcement assistance to counter illegal narcotics. Under Section 2 of the Arms Export Act, the Secretary of State, under the direction of the President, is responsible for sales made under the Act, including determining whether there shall be a sale to a country and the amount thereof. Executive Order 11958 further requires the Secretary of State to obtain prior concurrence of the Secretaries of Defense and Treasury, respectively, regarding standards and criteria for credit transactions that are based upon national security and financial policies. These funds have been deferred pending the approval of the Departments of State, Defense, and Treasury for the specific sales to eligible countries. Consultation among these Departments will ensure that each approved program is consistent with the foreign, national security, and financial policies of the United States and will not exceed the limits of available funds. This action is taken pursuant to the Antideficiency Act (31 U.S.C. 1512).

ESTIMATED PROGRAM EFFECT: None.

OUTLAY EFFECT: None.

1/ This account was the subject of a similar deferral in FY 1991 (D91–8).

* Revised from previous report.

Deferral No. 92-11A

Supplemental Report
Report Pursuant to Section 1014(c) of Public Law 93-344

This report updates Deferral No. 92-11, which was transmitted to the Congress on February 19, 1992.

This revision to a deferral of Timber salvage sales of the Forest Service, Department of Agriculture, increases the amount previously reported as deferred from $131,548,574 to $181,548,574. The increase of $50,000,000 reflects the deferral requirements for potential salvage opportunities.

Deferral No. 92–11A

DEFERRAL OF BUDGET AUTHORITY
Report Pursuant to Section 1013 of P.L. 93–344

AGENCY: Department of Agriculture **BUREAU:** Forest Service **Appropriation title and symbol:** Timber salvage sales 1/ 12X5204	New budget authority..... $ 120,385,000 (P.L. 94–588 & 101–512) Other budgetary resources. $ 181,548,574 Total budgetary resources.. $ 301,933,574 Amount to be deferred: Part of year..... $ _____ Entire year..... 181,548,574 * 2/
OMB identification code: 12–9922–0–2–302 **Grant program:** ☐ Yes ☒ No	**Legal authority (in addition to sec. 1013):** ☒ Antideficiency Act ☐ Other _____
Type of account or fund: ☐ Annual ☐ Multi–year _____ (expiration date) ☒ No–Year	**Type of budget authority:** ☒ Appropriation ☐ Contract authority ☐ Other _____

JUSTIFICATION: The Timber Salvage Sales fund was established under the provisions of the National Forest Management Act of 1976 to enable harvesting of dead and dying trees when required by market conditions or catastrophes. Purchasers of dead, damaged, insect–infested, or downed timber are required to make monetary deposits into this fund to cover the preparation costs for future salvage sales.

* The salvage sales program is part of the timber sales program and has specific timber volume targets assigned. Specific timber volume targets are assigned based on current information on salvage opportunities. The Forest Service is pursuing a program to achieve maximum salvage volumes while protecting the full range of environmental values. Approximately 1.8 billion board feet of new and existing salvage sales is planned for FY 1992. This program will require $120 million in FY 1992. The deposits becoming available in the current year are estimated and the related preparation costs are planned for the following year. Efficient program planning is facilitated by operating a stable program well within the funds available in any one year for this purpose. Funds are deferred pursuant to the Antideficiency Act (31 U.S.C. 1512).

ESTIMATED PROGRAM EFFECT: None.

OUTLAY EFFECT: None.

1/ This account was the subject of a similar deferral in FY 1991 (D91–10).

2/ The deferral amount has been reduced to $151,548,574 due to subsequent releases.

* Revised from previous report

apply *Accardi* to criminal proceedings or exercises of prosecutorial-type discretion such as an agency decision not to initiate an enforcement action. *See Carranza v. Immigration & Naturalization Service*, 277 F.3d 65, 68 (1st Cir. 2002); *United States v. Lee*, 274 F.3d 485 (8th Cir. 2001); *United States v. Shakir*, 113 F. Supp. 2d 1182 (M.D. Tenn. 2000); *United States v. Briscoe*, 69 F. Supp. 2d 738, 747 (D. V.I. 1999), *aff'd*, 234 F.3d 1266 (3rd Cir. 2000); *Nichols v. Reno*, 931 F. Supp. 748 (D. Colo. 1996); *Walker v. Reno*, 925 F. Supp. 124 (N.D. N.Y. 1995).

5. Insufficient Funds

Congress occasionally legislates in such a manner as to restrict its own subsequent funding options. An example is contract authority, described in Chapter 2. Another example is entitlement legislation not contingent upon the availability of appropriations. A well-known example here is social security benefits. Where legislation creates, or authorizes the administrative creation of, binding legal obligations without regard to the availability of appropriations, a funding shortfall may delay actual payment but does not authorize the administering agency to alter or reduce the "entitlement."

In the far more typical situation, however, Congress merely enacts a program and authorizes appropriations. For any number of reasons—budgetary constraints, changes in political climate, *etc.*—the actual funding may fall short of original expectations. What is an agency to do when it finds that it does not have enough money to accommodate an entire class of beneficiaries? Obviously, it can ask Congress for more. However, as any program administrator knows, asking and getting are two different things. If the agency cannot get additional funding and the program legislation fails to provide guidance, there is solid authority for the proposition that the agency may, within its discretion, establish reasonable classifications, priorities, and/or eligibility requirements, as long as it does so on a rational and consistent basis.[40]

The concept was explained by the Supreme Court in *Morton v. Ruiz*, 415 U.S. 199, 230–31 (1974), a case involving an assistance program administered by the Bureau of Indian Affairs (BIA):

[40] Even under an entitlement program, an agency could presumably meet a funding shortfall by such measures as making prorated payments, but such actions would be only temporary pending receipt of sufficient funds to honor the underlying obligation. The recipient would remain legally entitled to the balance.

> "[I]t does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose. [Citations omitted.] Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries."

In *Suwannee River Finance, Inc. v. United States*, 7 Cl. Ct. 556 (1985), the plaintiff sued for construction differential subsidy payments under the Merchant Marine Act, administered by the Maritime Administration (MarAd). In response to a sudden and severe budget reduction, MarAd had cut off all subsidies for nonessential changes after a specified date, and had notified the plaintiff to that effect. Noting that "[a]fter this budget cut, MarAd obviously could no longer be as generous in paying subsidies as it had been before," the court held MarAd's approach to be "a logical, effective and time-honored method for allocating the burdens of shrinking resources" and well within its administrative discretion. *Id.* at 561.

Another illustration is *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), concerning the Secretary of the Interior's allocation of funds to Indian tribes where an appropriations shortfall prevented the full allocation contemplated by the authorizing statute. The court held that the Secretary's determination of how to allocate funds in the face of a funding shortfall was subject to judicial review, reversing the district court's opinion that had relied on *Lincoln v. Vigil*, and that the Secretary had exceeded his statutory authority. For additional case law on this point, see *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Secretary, Department of Health & Human Services*, 279 F.3d 660 (9th Cir. 2002); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999).

An illustration from the Comptroller General's decisions is B-202568, Sept. 11, 1981. Due to a severe drought in the summer of 1980, the Small Business Administration (SBA) found that its appropriation was not sufficient to meet demand under the SBA's disaster loan program. Rather than treating applicants on a "first come, first served" basis, SBA amended its regulations to impose several new restrictions, including a ceiling of 60 percent of actual physical loss. GAO reviewed SBA's actions and found them completely within the agency's administrative discretion.

In a 1958 case, Congress had, by statute, directed the Interior Department to transfer $2.5 million from one appropriation to another. Congress had apparently been under the impression that the "donor" account contained a sufficient unobligated balance. The donor account in fact had ample funds if both obligated and unobligated funds were counted, but had an unobligated balance of only $1.3 million. The Interior Department was in an impossible position. It could not liquidate obligations in both accounts. If it transferred the full $2.5 million, some valid obligations under the donor appropriation would have to wait; if it transferred only the unobligated balance, it could not satisfy the entire obligation under the receiving account. First, GAO advised that the transfer would not violate the Antideficiency Act (31 U.S.C. § 1341) since it was not only authorized but directed by statute. As to which obligation should be liquidated first—that is, which could be paid immediately and which would have to await a supplemental appropriation—the best answer GAO could give was that "the question is primarily for determination administratively." In other words, there was no legally mandated priority, and all the agency could do was use its best judgment. GAO added, however, that it might be a good idea to first seek some form of congressional clarification. 38 Comp. Gen. 93 (1958).

An early case, 22 Comp. Dec. 37 (1915), considered the concept of prorating. Congress had appropriated a specific sum for the payment of a designated class of claims against the Interior Department. When all claims were filed and determined, the total amount of the allowed claims exceeded the amount of the appropriation. The question was whether the amount appropriated could be prorated among the claimants.

The Comptroller of the Treasury declined to approve the prorating, concluding that "action should be suspended until Congress shall declare its wishes by directing a pro rata payment ...or by appropriating the additional amount necessary to full payment." *Id.* at 40. If the decision was saying merely that the agency should attempt to secure additional funds—

or at least explore the possibility—before taking administrative action that would reduce payments to individual claimants, then it is consistent with the more recent case law and remains valid to that extent. If, however, it was suggesting that the agency lacked authority to prorate without specific congressional sanction, then it is clearly superseded by *Morton v. Ruiz* and the other cases previously cited. There is no apparent reason why prorating should not be one of the discretionary options available to the agency along with the other options discussed in the various cases. It has one advantage in that each claimant will receive at least something.

A conceptually related situation is a funding shortfall in an appropriation used to fund a number of programs. Again, the agency must allocate its available funds in some reasonable fashion. Mandatory programs take precedence over discretionary ones.[41] Within the group of mandatory programs, more specific requirements should be funded first, such as those with specific time schedules, with remaining funds then applied to the more general requirements. B-159993, Sept. 1, 1977; B-177806, Feb. 24, 1978 (nondecision letter). These principles apply equally, of course, to the allocation of funds between mandatory and nonmandatory expenditures within a single-program appropriation. *E.g.*, 61 Comp. Gen. 661, 664 (1982).

Other cases recognizing an agency's discretion in coping with funding shortfalls are *City of Los Angeles v. Adams*, 556 F.2d 40, 49–50 (D.C. Cir. 1977), and *McCarey v. McNamara*, 390 F.2d 601 (3rd Cir. 1968).

[41] A "mandatory program," as we use the term here, should not be confused with the entitlement programs previously noted. A mandatory program is simply one that Congress directs (rather than merely authorizes) the agency to conduct, but within the limits of available funding. Entitlement programs would take precedence over these mandatory programs.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Transcript	Statement of Gary L. Kepplinger Associate General Counsel of the GAO	13	07/30/1999	P5;

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Counsel's Office, White House (WHCO)

SERIES:
Rothman, Mika and Steven Croley - Subject Files

FOLDER TITLE:
[Debt Ceiling/Debt Crisis]

FRC ID:
6838
OA Num.:
6714
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5973

FOIA ID and Segment:
23-39824-F

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***City of New Haven, Connecticut v. United States of America, et al.*, 809 F.2d 900 (1987)**

In *City of New Haven, Connecticut v. United States of America, et al.*, 809 F.2d 900 (1987), the appellees challenged the extent of the President's statutory authority under section 1013 of the Impoundment Control Act of 1974 (ICA), 2 U.S.C. § 684 (1982), to enact policy deferrals upon the expenditure of funds appropriated by Congress for four HUD housing assistance programs. Writing for the U.S. Court of Appeals for the District of Columbia, Circuit Judge Harry T. Edwards affirmed the decision of the U.S. District Court for the District of Columbia, holding the following: (1) that legislation overturning the President's policy deferrals of four housing assistance programs to be administered by HUD did not render moot the appellees' request for declaratory relief; and (2) that the legislative veto provision in section 1013 of the ICA, held unconstitutional per the precedential Supreme Court case, *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), is inseverable from section 1013's deferral provision, thus rendering the deferral provision invalid.

Following the District Court's ruling in favor of the appellees' position, the President signed into law legislation overturning the challenged deferrals. The question arising from this action is whether the appellees' challenge to the President's exercise of deferral authority under ICA section 1013 was mooted by the legislation signed by the President. The appellees' complaint challenges the four deferrals implemented by the President, as well as the facial validity of the statute under whose authority the President acted. The appellants concede in their reply brief that they foresee the Executive Branch's continued reliance on ICA section 1013 as authority for implementing policy deferrals, as well as the probability of the appellees' being affected by such deferrals. However, the court states that while the claim for injunctive relief is rendered moot by the recently enacted legislation, the appellees' request for declaratory relief hinges upon whether or not ICA section 1013 is facially invalid. As described in the analysis below, the court subsequently finds section 1013 to be facially invalid, and holds that the appellees' request for declaratory relief is not moot.

In the appellees' view, the unconstitutional legislative veto provision was inseverable from the provision in the same section granting the President the statutory authority to make the deferrals. Further, the unconstitutionality of the legislative veto provision would render invalid ICA section 1013 in its entirety, with the result that the President had relied on an invalid statute when making the four policy deferrals. In its analysis, the Court of Appeals undertakes a substantive review of the legislative history and congressional intent of the section in question, determining that "Congress would have preferred no statute at all to a statute that conferred unchecked deferral authority on the President." *City of New Haven*, 809 F.2d at 906. Presuming severability of the provision, *see Alaska Airlines, Inc. v. Donovan,* 766 F.2d 1550 (D.C.Cir. 1985), the court focuses its inquiry on whether, after excision of the invalid provision, "the statute may somehow continue to function in a manner consistent with congressional intent," *Id.* at 905, and concludes that the ICA was passed by Congress with the intent to limit the President's ability to impound funds appropriated by Congress, as well as to permit either the House or Senate to veto any deferral proposed by the President—particularly policy deferrals. *See* 2 U.S.C. § 684 (1982) (allowing impoundments to become effective without prior approval if neither House of Congress passed a resolution disapproving the impoundment); 31 U.S.C. § 1512(c)(1) (1982) (making an amendment to the Anti-Deficiency Act precluding the President from invoking the Act as authority for implementing policy impoundments); H.R. REP. No. 658, 93d Cong., 1st Sess. 43, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS, 3462, 3468 (stating that the basic purpose of the bill is to provide each House an opportunity to veto an impoundment); 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 (emphasizing that the bill was designed to provide Congress with an effective system of impoundment control). With the intent of Congress patently clear, the court holds that the unconstitutional veto provision in ICA section 1013 is inseverable from the remainder of the provision, rendering the entire section invalid.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Citation	Impoundment Control Act	3	N.D.	P5;

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Citation	OMB Circular No. A-11 (2010) Section 112	14	N.D.	P5;

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Antideficiency Act Background

The Antideficiency Act is one of the major laws through which Congress exercises its constitutional control of the public purse. It evolved over a period of time in response to various abuses.

In its current form, the law prohibits:

Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341 (a)(1)(A).

Involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law. 31 U.S.C. § 1341(a)(1)(B).

Accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.

Making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).

The fiscal principles underlying the Antideficiency Act are really quite simple. Government officials may not make payments or commit the United States to make payments at some future time for goods or services unless there is enough money in the "bank" to cover the cost in full. The "bank," of course, is the available appropriation.

Violations of the Antideficiency Act are subject to sanctions of two types, administrative and penal. The Antideficiency Act is the only one of the title 31, United States Code, fiscal statutes to prescribe penalties of both types.

An officer or employee who violates 31 U.S.C. § 1341(a) (obligate/expend in excess or advance of appropriation), section 1342 (voluntary services prohibition), or section 1517(a) (obligate/expend in excess of an apportionment or administrative subdivision as specified in an agency's regulation) "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. §§ 1349(a), 1518.

In addition, an officer or employee who "knowingly and willfully" violates any of the three provisions cited above "shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. §§ 1350, 1519.

Reporting Requirements

§ 1341. Limitations on expending and obligating amounts

(a)

(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Citation	Title X Impoundment Control Act	8	2011	P5;

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ICA

Impoundment of Appropriated Funds

In his Third Annual Message to Congress, President Jefferson established the first faint outline of what years later became a major controversy. Reporting that $50,000 in funds which Congress had appropriated for fifteen gunboats on the Mississippi remained unexpended, the President stated that a "favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of the law unnecessary... ." But he was not refusing to expend the money, only delaying action to obtain improved gunboats; a year later, he told Congress that the money was being spent and gun-boats were being obtained.[628] A few other instances of deferrals or refusals to spend occurred in the Nineteenth and early Twentieth Centuries, but it was only with the Administration of President Franklin Roosevelt that a President refused to spend moneys for the purposes appropriated. Succeeding Presidents expanded upon these precedents, and in the Nixon Administration a well-formulated plan of impoundments was executed in order to reduce public spending and to negate programs established by congressional legislation.[629]

Impoundment[630] was defended by Administration spokesmen as being a power derived from the President's executive powers and particularly from his obligation to see to the faithful execution of the laws, i.e., his discretion in the manner of execution. The President, the argument went, is responsible for deciding when two conflicting goals of Congress can be harmonized and when one must give way, when, for example, congressional desire to spend certain moneys must yield to congressional wishes to see price and wage stability. In some respects, impoundment was said or implied to flow from certain inherent executive powers that repose in any President. Finally, statutory support was sought; certain laws were said to confer discretion to withhold spending, and it was argued that congressional spending programs are discretionary rather than mandatory.[631]

[628] 1 J. Richardson, supra at 348, 360.

[629] History and law is much discussed in Executive Impoundment of Appropriated Funds: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971); Impoundment of Appropriated Funds by the President: Hearings Before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973). The most thorough study of the legal and constitutional issues, informed through historical analysis, is Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L. J. 1549 (1974); Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Response*, 63, id. at 149 (1974). *See generally* L. FISHER, PRESIDENTIAL SPENDING POWER (1975).

[630] There is no satisfactory definition of impoundment. Legislation enacted by Congress uses the phrase "deferral of budget authority" which is defined to include: "(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law." 2 U.S.C. □ 682(1).

[631] Impoundment of Appropriated Funds by the President: Hearings Before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973), 358 (then-Deputy Attorney General Sneed).

On the other hand, it was argued that Congress' powers under Article I, □ 8, were fully adequate to support its decision to authorize certain programs, to determine the amount of funds to be spent on them, and to mandate the Executive to execute the laws. Permitting the President to impound appropriated funds allowed him the power of item veto, which he does not have, and denied Congress the opportunity to override his veto of bills enacted by Congress. In particular, the power of Congress to compel the President to spend appropriated moneys was said to derive from Congress' power "to make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers of Congress and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."[632]

The President's decision to impound large amounts of appropriated funds led to two approaches to curtail the power. First, many persons and organizations, with a reasonable expectation of receipt of the impounded funds upon their release, brought large numbers of suits; with a few exceptions, these suits resulted in decisions denying the President either constitutional or statutory power to decline to spend or obligate funds, and the Supreme Court, presented with only statutory arguments by the Administration, held that no discretion existed under the particular statute to withhold allotments of funds to the States.[633] Second, Congress in the course of revising its own manner of appropriating funds in accordance with budgetary responsibility provided for mandatory reporting of impoundments to Congress, for congressional disapproval of impoundments, and for court actions by the Comptroller General to compel spending or obligation of funds.[634]

[632] Id. at 1-6 (Senator Ervin). Of course, it was long ago established that Congress could direct the expenditure of at least some moneys from the Treasury, even over the opposition of the President. Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).

[633] Train v. City of New York, 420 U.S. 35 (1975); Train v. Campaign Clean Water, 420 U.S. 136 (1975). *See also* State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973); Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974) (the latter case finding statutory discretion not to spend).

Generally speaking, the law recognized two types of impoundments: "routine" or "programmatic" reservations of budget authority to provide for the inevitable contingencies that arise in administering congressionally-funded programs and "policy" decisions that are ordinarily intended to advance the broader fiscal or other policy objectives of the executive branch contrary to congressional wishes in appropriating funds in the first place.

Routine reservations were to come under the terms of a revised Anti-Deficiency Act.[635] Prior to its amendment, this law had permitted the President to "apportion" funds "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." President Nixon had relied on this "other developments" language as authorization to impound, for what in essence were policy reasons.[636] Congress deleted the controverted clause and retained the other language to authorize reservations to maintain funds for contingencies and to effect savings made possible in carrying out the program; it added a clause permitting reserves "as specifically provided by law."[637]

"Policy" impoundments were to be reported to Congress by the President as permanent rescissions and, perhaps, as temporary deferrals.[638] Rescissions are merely recommendations or proposals of the President and must be authorized by a bill or joint resolution, or, after 45 days from the presidential message, the funds must be made available for obligation.[639] Temporary deferrals of budget authority for less than a full fiscal year, as provided in the 1974 law, were to be effective unless either the House of Representatives or the Senate passed a resolution of disapproval.[640] With the decision in *INS v. Chadha*,[641] voiding as unconstitutional the one-House legislative veto, it was evident that the veto provision in the deferral section of the Impoundment Control Act was no longer viable. An Administration effort to utilize the section, minus the veto device, was thwarted by court action, in which, applying established severability analysis, the court held that Congress would not have enacted the deferral provision in the absence of power to police its exercise through the veto.[642] Thus, the entire deferral section was inoperative. Congress, in 1987, enacted a more restricted authority, limited to deferrals only for those purposes set out in the Anti-Deficiency Act.[643]

[634] Congressional Budget and Impoundment Control Act, P.L. 93-344, title X, □□ 1001-1017, 88 Stat. 332 (1974), as amended, 2 U.S.C. □□ 681-88.

[635] Originally passed as the Act of Feb. 27, 1906, ch. 510, □ 3, 34 Stat. 27, 48. The provisions as described in the text were added in the General Appropriations Act of 1951, ch. 896, □ 1211(c)(2), 64 Stat. 595, 765. The amendments made by the Impoundment Control Act, were □ 1002, 88 Stat. 332, 31 U.S.C. □□ 1341, 1512. On the Anti-Deficiency Act generally, *see* Stith, *Congress' Power of the Purse*, 97 YALE L. J. 1343, 1370-1377 (1988).

[636] L. Fisher, supra at 154-57.

[637] 31 U.S.C. □ 1512(c)(1) (present version). Congressional intent was to prohibit the use of apportionment as an instrument of policymaking. 120 CONG. REC. 7658 (1974) (Senator Muskie); id. at 20472-20473 (Senators Ervin and McClellan).

[638] □□ 1011(1), 1012, 1013, 88 Stat. 333-34, 2 U.S.C. □□ 628(1), 683, 684.

[639] 2 U.S.C. □ 683.

[640] □ 1013, 88 Stat. 334. Because the Act was a compromise between the House of Representatives and the Senate, numerous questions were left unresolved; one important one was whether the President could use the deferral avenue as a means of effectuating policy impoundments or whether rescission proposals were the sole means. The subsequent events described in the text mooted that argument.

[641] 462 U.S. 919 (1983).

[642] City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987).

[643] P. L. 100-119, title II, □ 206(a), 101 Stat. 785, 2 U.S.C. □ 684.

With passage of the Act, the constitutional issues faded into the background; Presidents regularly reported rescission proposals, and Congress responded by enacting its own rescissions, usually topping the Presidents'. The entire field was, of course, confounded by the application of the other part of the 1974 law, the Budget Act, which restructured how budgets were received and acted on in Congress, and by the Balanced Budget and Emergency Deficit Control Act of 1985.[644] This latter law was designed as a deficit-reduction forcing mechanism, so that unless President and Congress cooperate each year to reduce the deficit by prescribed amounts, a "sequestration" order would reduce funds down to a mandated figure.[645] Dissatisfaction with the amount of deficit reduction continues to stimulate discussion of other means, such as "expedited" rescission and the line-item veto, many of which may raise some constitutional issues.

[644] P. L. 99-177, 99 Stat. 1037, codified as amended in titles 2, 31, and 42 U.S.C., with the relevant portions to this discussion at 2 U.S.C. □ 901 *et seq.*

[645] *See* Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-RudmanHollings*, 76 CALIF. L. REV. 593 (1988).

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

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The authors wish to express their appreciation to Susan Sauntry, a student at the Georgetown University Law Center, for her assistance in the preparation of this article.

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

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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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

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[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 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-

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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,

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[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

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[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 (b). *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

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[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 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 formulative potential possessed by the President. The initiative or ative element in each of the powers belongs to the President, while the Senate can only approve or disapprove his final decision. The Sen-

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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 ob-

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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).

served: "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]

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).

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-

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

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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 simi'ar 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]

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[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. 92-336, 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 W'KLY 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 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

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(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

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[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

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[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

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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

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[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

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[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 . . . ." [75] 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

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[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

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[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

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[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

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[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

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> 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

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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

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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 W'KLY 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

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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 Ex-

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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.

ecutive 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 institution 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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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

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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 [illegible] of the fiscal year.[141] To prevent requests for deficiency appropria[illegible]s, 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 [illegible] item veto equally shift the balance of power over the budget from [illegible]gress 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

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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]

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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

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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-

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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. Lucias 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-

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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

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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-

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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 (1789).

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

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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]

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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 appropria-

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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.

tion 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 [illegible] 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.

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

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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-

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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

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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.

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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

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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

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[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

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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* Marx, *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 [illegible]powered only to reduce the levels of the President's proposed appro[illegible]tions.

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 [illegible]ort identified as the key sources of excessive expenditures the diffusion [illegible] executive responsibility and the independence and constantly expanding demands of the bureau chiefs.[266] The Select Budget Committee

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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

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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

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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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.).

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 it 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]

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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-

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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

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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-

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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-

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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

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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-

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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-

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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.

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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

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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 Segre-*

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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... Activities, 11 AM. U.L. REV. 32, 43-36 (1962); Ramsey, *supra* note 289, at 291, ...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.

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

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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

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

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> 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.

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-

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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.*)

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390 *See* 343 U.S. at 599-600 (Frankfurter, J., concurring).

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SERIES:
Rothman, Mika and Steven Croley - Subject Files

FOLDER TITLE:
[Debt Ceiling/Debt Crisis]

FRC ID:
6838
OA Num.:
6714
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FOIA ID and Segment:
23-39824-F

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Debt Ceiling

Is the Debt Limit Constitutional? — Part Deux

Jonathan H. Adler • July 3, 2011 1:09 pm

Treasury Secretary Tim Geithner has picked up on suggestions that the debt limit violates Section 4 of the Fourteenth Amendment, though stopped short of saying the Administration would refuse to abide by the ceiling to avoid default. Meanwhile, much bandwidth is being spilled over the various constitutional arguments.

Jack Balkin points to the drafting history of Section 4 that could support the argument against the debt ceiling. In particular, he notes that this portion of the 14th Amendment was intended to prevent subsequent repudiation of Civil War debts. Michael Stern responds noting, among other things, that repudiation and default are not one and the same (a point I also made to Balkin in an e-mail on Thursday). Repudiation cancels a debt, whereas default is a failure to pay a valid debt. In other words, default presumes that the debt is still valid, and does not call into question the validity of the obligation. Further, even if Section 4 precludes repudiation of valid debts, this does not mean default is equally unconstitutional, or that the President is authorized to issue new debt obligations to cover the old without Congressional approval. Balkin responds here, but I am still not convinced. His argument boils down to a claim that since debt repudiation is off the table, so is all political gamesmanship over how and when debts get paid.

Gerard Magliocca adds an interesting wrinkle, noting the Public Debts Clause could be read to preclude Congressional default as well, though Calvin Massey does not believe the clause grants the President unlimited authority to borrow money. Michael Abramowicz — one of the few scholars to have focused on these questions — also notes that broad readings of Section 4 and the Public Debts Clause have implications for other laws and would, among other things, cast a constitutional pall over Medicare. On this basis, he urges a more "modest" approach — an approach Michael Stern does not find so modest. Meanwhile, Mark Tushnet finds the mere suggestion the President has constitutional authority to violate the debt ceiling "off-the-wall" (which is not the same thing as saying it is wrong). Brad DeLong responds to Tushnet here.

Whatever the correct constitutional interpretation of Section 4, there is another question: Whether this question could ever come before the Courts. I don't think so. (Nor does Jonathan Zasloff, who addressed the question a while back.) First, it would be difficult to find someone who would have Article III standing. Second, even if standing could be established, courts would likely avoid the issue on political question or other grounds. Brad DeLong is not convinced. Michael Stern has thoughts on this question too.

UPDATE: Michael Stern responds to Balkin here. As Stern observes, the force of Balkin's rejoinder "lies more in the cleverness of its author than the merits of its argument."

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Debt Ceiling

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).

Balkinization

Balkinization
an unanticipated
consequence of
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The Legislative History of Section Four of the Fourteenth Amendment

JB

The recent debate over the debt ceiling has led various commentators, journalists and politicians to consider the relevance of section Four of the Fourteenth Amendment, which provides:

> 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. 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.

Does Section Four prevent Congress from refusing to raise the debt ceiling? Does it authorize the President to keep paying debts regardless of what Congress does?

This essay does not attempt to answer these questions in detail; I leave that to a future discussion. My goal here is to offer a basic account of the legislative history of Section 4. This discussion, I hope, will be of interest both to originalists and to non-originalists who believe that text, structure and history matter, even if they are not always dispositive of current constitutional questions.

The original purpose of Section Four, which is reflected in its text, was to prevent political disruption and party wrangling over the public debt following the Civil War. However, the language of the Amendment went beyond this particular historical concern. It was stated in broad terms in order to prevent future majorities in Congress from repudiating the federal debt to gain political advantage, to seek political revenge, or to try to disavow previous financial obligations because of changed policy priorities.

Section Four has its origins in section 3 of the proposal brought before the Senate by the Joint House-Senate Committee on Reconstruction, the famous "Committee of Fifteen." As presented to the Senate on May 23, 1866, the original version of section 3 provided that:

> Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.

Congressional Globe, 39th Cong., 1st session 2764 (May 23, 1866).

In a famous speech introducing the Fourteenth Amendment before the Senate, Senator Jacob Howard, the floor manager of the amendment, argued that the Union had no obligation to pay the Confederate debt, which had been contracted to support a "wicked war" to destroy the Union. Equally important, if the issue of whether to pay the Confederate debt was left to ordinary politics, it would become a perpetual "subject of political squabbling and party wrangling. . . . It is necessary to act, to extinguish this debt, to put it beyond the pale of party controversy, to put it out of sight, and to bury it so deep that it can never again be raised to life in such manner as to become a theme of party discussion." Id.

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at 2768.

Howard noted that the Confederate government had issued various obligations which stated that they would be paid in full upon the signing of a peace treaty with the Union; moreover, he argued that foreign creditors would very likely lobby Congress repeatedly for payment of Confederate debts.

Unless Confederate obligations were firmly rejected in the Constitution, Howard explained, former rebels, rebel sympathizers, and foreign investors who speculated by betting on the Confederacy would continually press for these debts to be recognized, disrupting American politics for years to come. "I do not believe in paying traitors, nor do I believe in indemnifying men abroad who, with their eyes open and a malignity in their heart beyond all parallel, gave them aid and comfort. Nor do I see the propriety of keeping this question open before the country, and enabling the foreign holders of cotton bonds to keep the political atmosphere of this country in a turmoil for the future with a view ultimately of getting their pay from somebody. It is time for us to put our hands upon this whole thing and to extinguish all hope."

Id. at 2768.

Senator Benjamin Wade of Ohio was a leader of the Radical Republicans and the President pro tempore of the Senate. He agreed with Howard's reasons for why the Confederate debt should be repudiated, but he argued that if the concern was to avoid future disruption of American politics, the current proposal did not go far enough. It was also necessary to guarantee the Union debt, because former rebels or rebel sympathizers who returned to Congress after the war might, out of selfish or malicious motives, seek to prevent Union soliders and their widows from being compensated. Moreover, there was no guarantee of what a later Congress, motivated by different priorities, might do. Shifting majorities in a future Congress might be willing to sacrifice the public debt or the interests of pensioners in the name of political expediency. Thus, it was as important to guarantee the Union debt as it was to repudiate the Confederate debt.

Wade's proposed language, which eventually became the basis of the current section 4, read as follows:

> The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing the 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. But debts or obligations which have been or may hereafter be incurred in aid of insurrection of of war against the United States, and claims of compensation for loss of involuntary service or labor, shall not be assumed or paid by any State nor by the United States.

Id. at 2768.

Senator Wade's explanation of his proposal is the most extended account of why section 4 protects the federal debt as well as repudating the Confederate debt:

> [The proposed amendment] puts the debt incurred in the civil war on our part under the guardianship of the Constitution of the United States, so that a Congress cannot repudiate it. I believe that to do this wil give great confidence to capitalists and will be of incalculable pecuniary benefit to the United States, for I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate it and placed under the guardianship of the Constitution than he would feel if it were left at loose ends and subject to the varying majorities which may arise in Congress. I consider that a very benficial proposition, which is not in the original proposition.
>
> This section of my amendment goes further, and secures the pensioners of the country. We ought to do something to protect those wounded patriots who have been stricken down in the cause of their country, and to put the securty of their pensions and their means of support beyond the power of wavering majorities in

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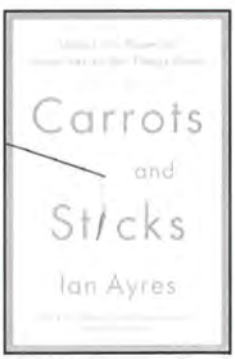

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> Congress, who may, at some time, perhaps, be hostile to the soldier. . . . I am anxious to put the pensions of our soldiers and their widows and children under the guardianship of the Constitution of the United States. They ought to be there, along with your public debt. [That is] especially when we are now prosecuting a doubtful war with your Executive [President Andrew Johnson] as to whether open and hostile rebels shall not have seats in Congress. If they are admitted here to act with their sympathizers at the North, who have constantly opposed every policy that looked to the renumeration of those engaged in the war on our part . . . what will be the result? Under the dictation of such a policy, should it prevail, who can guaranty that the debts of the Goverment will be paid, or that your soldiers and the widows of your soldiers will not lose their pensions?

Id. at 2769.

On June 4th, in response to the Wade proposal, Senator Howard offered a new section 4 to accompany then-section 3, which repudiated the Confederate debt: "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 inviolable." Id. at 2938.

On its face, the language of Howard's proposed section 4 was narrower than Wade's proposal, because it guaranteed only that part of the public debt incurred in defense of the Union.

Senator Hendricks, an opponent of the Fourteenth Amendment, spoke against this provision as well. His speech is relevant because he pointed to the fact that Howard's proposal seemed to protect only part of the federal debt: "Who has asked us to change the Constitution for the benefit of the bond-holders? Are they so much more meritorious than all other classes that they must be specifically provided for in the Constitution? Or, indeed, do we distrust ourselves, and fear that we will all become repudiators? A provision like this, I should think, would excite distrust, and cast a shade on public credit."

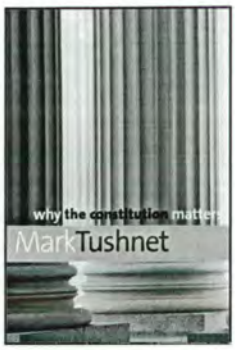
Hendricks then went on to speculate that perhaps the real motive was to prevent taxation on federal bond-holders, although there was nothing in the language that suggested this. Finally, he argued that a specific guarantee was unnecessary. "[H]ow shall we uphold our credit and secure our creditors? By just laws, by equal taxation, by distributing equally over the entire nation the burdens of Government, that they may rest upon the shoulders of all sections and interests." Id. at 2941. Howard's amendment to the existing proposal was accepted, see id., and sections 3 and 4 were eventually renumbered as sections 4 and 5.

The two sections on Confederate and Union debt were then combined on June 8th, the last day of Senate debate. Senator Clark proposed a substitute which is essentially identical to the current language: "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." Id. at 3040. (I believe that this is Senator Daniel Clark of New Hampshire, who was chairman of the Committee on Claims.)

Clark's formulation protected the public debt generally, and singled out those debts incurred for the defense of the Union as a prominent example. Clark's proposal was thus closer to the spirit of Wade's original proposal. Even so, the Senators did not appear to think that the change from Wade's proposal to Howard's to Clark's made much of a difference. Senator Johnson noted "I do not understand that this changes at all the effect of the fourth and fifth sections. The result is the same." Senator Clark repsonded: "The result is the same." The Senate then adopted the substituted version of section 4. (p. 3040).

Senator Davis then sought to add specific protection for "obligations of the United States to pay for private property taken for public use." Davis explained that he wanted to secure payment of bounties that the government had offered "to the loyal owners of slaves" whose slaves had fought in the Union Army. This proposal was voted down, id., at 3041, and the final language of section 4 was adopted. Id. at 3042.

No changes were made to Section 4 in the House of Representatives. Representative Thaddeus Stevens, in introducing the measure to the House,



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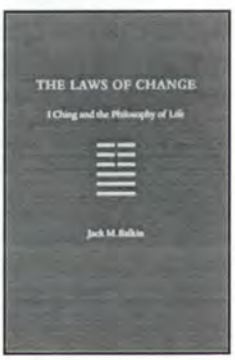

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remarked on it only briefly: "The fourth section, which renders inviolable the public debt and repudiates the rebel debt, will secure the approbation of all but traitors." Id. at 3148. The House passed the final version on June 13. Id. at 3149.

What do we learn from this history? If Wade's speech offers the central rationale for Section Four, the goal was to remove threats of default on federal debts from partisan struggle. Reconstruction Republicans feared that Democrats, once admitted to Congress would use their majorities to default on obligations they did disliked politically. More generally, as Wade explained, "every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate it and placed under the guardianship of the Constitution than he would feel if it were left at loose ends and subject to the varying majorities which may arise in Congress."

Like most inquiries into original understanding, this one does not resolve many of the most interesting questions. What it does suggest is an important structural principle. The threat of defaulting on government obligations is a powerful weapon, especially in a complex, interconnected world economy. Devoted partisans can use it to disrupt government, to roil ordinary politics, to undermine policies they do not like, even to seek political revenge. Section Four was placed in the Constitution to remove this weapon from ordinary politics.

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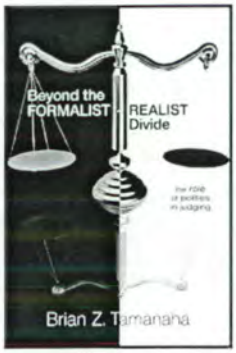

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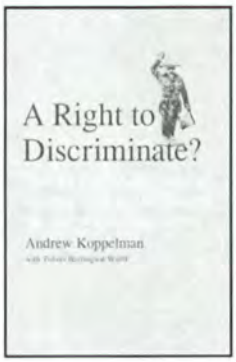

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Our National Debt 'Shall Not Be Questioned,' the Constitution Says

By Garrett Epps

May 4 2011, 7:00 AM ET Comment

In a time that increasingly resembles the Great Depression, Congress shouldn't play politics with raising our debt ceiling

My last post, entitled "The Speech Obama Could Give," was an imaginary presidential address in which Obama announces that if Congress refuses to raise the statutory debt ceiling, he will not observe it, at least to the extent that doing so would require him to default on interest payments on the national debt, suspend payments to Social Security recipients, or withhold paychecks of U.S. troops during Congressionally authorized military action.

The post has drawn some reaction, which I think is a sign of the underlying anxiety people are feeling as Republicans juggle the dynamite of potential default. Emil Henry, a former Bush administration treasury official, calls the ritual of debt-limitation debates a "Kabuki dance." As part of this ritual, my speech was intended to suggest that there are both ramifications and responses to potential default that we may not have foreseen.

> These debts have to be paid, the argument would be, in full, on time, without question. If Congress won't pay them, then the executive must.

As for the consequences, I am a constitutional lawyer, not an economist. But as a matter of common sense, a delay in raising the debt limit may have malign results even if the United States does not technically default on bond-interest payments. I have been reading David Kennedy's *Freedom from Fear: The American People in Depression and War, 1929-1945*, and I am not sleeping well. The current year seems uncomfortably like 1931, when some brave forecasters still nourished hope that recovery was underway. Shocks to confidence in the nation and the world kept coming, however, until by early 1933 severe recession had become unparalleled catastrophe.

Since 2008, we've heard several times that recovery has begun; but events around the world--European debt crises, Middle East revolutions, the earthquake, tsunami and meltdown in Japan, and now political infighting in Washington--keep intervening to strangle it.

So it seems like a bad time for Congressional Republicans to point a gun at the national credit rating and scream, "One step and I'll shoot!" If the debt limit increase is snarled, confidence in our bonds may crater even if Treasury is able to find a temporary way to maintain the interest payments. If the world no longer feels solid about U.S. debt, the consequences could be as bad as 1932-33.

That's where the good old text of the Constitution comes in--the actual text, not the mythical snippets that many Americans misremember from eighth-grade civics, and not the truncated redaction that too many lawyers, alas, learn in their first-year Con Law class.

Section Four of the Fourteenth Amendment states, at its outset, that "[t]he 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." This section was inserted into the Amendment because of a very real concern that Southern political leaders, and their Northern allies, would gain the upper hand in Congress in the 1866 or 1868 elections and vote to repudiate the national debt.

The Lincoln administration had borrowed freely to finance the war machine. As Reconstruction dawned, white Southerners complained bitterly that they would now be taxed to repay the funds that had been borrowed to defeat their cause. "What, ruin us, and then make us help pay the cost of our own whipping?" one asked a Northern journalist in 1865. "I reckon not."

Southerners were used to having their way in Congress--they had dominated the institution from 1787 until secession in 1861--and many believed that when their representatives arrived in House and Senate, they would be able to tear up the nation's IOUs.

Section Four was the response; its language is extraordinary. First, it does not simply say that the national debt must be *paid;* it says that its "validity ... shall not be *questioned."* Only one other section of the Constitution--the Thirteenth Amendment's proclamation that "[n]either slavery nor involuntary servitude ... shall exist within the United States, or any place subject to their jurisdiction"--is as unqualified and sweeping.

Second, it suggests a broad definition of the national debt: "...including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion."

From this language, it's not hard to argue that the Constitution places both payments on the debt and payments owed to groups like Social Security recipients--pensioners, that is--above the vagaries of Congressional politics. These debts have to be paid, the argument would be, in full, on time, without question. If Congress won't pay them, then the executive must.

On the other hand, the language could be seen as simply forbidding outright repudiation, not temporary default. Default on U.S. bonds would, in this analysis, not dispute the "validity" of the debt; it would simply delay repayment. But remember the strict language. Suppose you lend $10,000 to your cousin. When the debt comes due, he says, "Listen, I'm good for the money, but I'm a little short right now. Trust me, I will get it to you sooner or later." That's not repudiation. But on the other hand, you might think the validity was now at least being "questioned."

For the Obama administration to adopt the broad reading of Section Four would be bold (and I hasten to say I don't expect them to do it); but it would hardly be unusual in the recent discourse of presidential power--especially the Republican party's theory of the presidency.

(Coming next: The imaginary speech and the imperial presidency)

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The Mind of Larry David

Jennie Rothenberg Gritz

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Garrett Epps, a former reporter for The Washington Post, is a novelist and legal scholar. He lives in Washington, D.C., and teaches courses in constitutional law and creative writing for law students at the University of Baltimore. His two most recent books are *Peyote vs. the State: Religious Freedom on Trial* and *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America*.

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The Speech Obama Could Give: 'The Constitution Forbids Default'

By Garrett Epps

Apr 28 2011, 3:56 PM ET Comment

Imagining a presidential address confronting Republicans who want to risk the nation's credit for political reasons

My fellow Americans, I am speaking to you tonight to let you know the steps I have taken to ensure that America lives up to its obligations during the current political crisis. As you know, the continuing recession and the pressures of running two wars have made it necessary for the government to borrow money on the world market in order to meet our commitments at home and abroad, see to it that our armed forces receive their pay and equipment, and fulfill our obligations to the retired, the unemployed, and those in need of medical care.

Unfortunately, Congress has not passed an increase in the statutory debt limit as the deadline approaches. Members of the House majority have informed me that they will not agree to an increase in the debt limit without imposing restrictions on the government budget that will threaten our nation's recovery, imperil the national defense, and cause widespread suffering. I have offered to negotiate in good faith, as I did during the budget crisis, but they have shown no interest in real negotiations.

As of midnight tonight, the government's statutory borrowing authority will be exhausted. If no measures are taken, the government must either default on its bonded indebtedness or on its obligations to seniors on Social Security, to unemployed workers dependent on federal insurance payments, and to American service personnel serving in areas of armed conflict.

> That is what the Framers intended: to set the debt obligations of our country beyond the reach of Congressional meddling.

For this reason, I have ordered that Secretary of the Treasury Timothy Geithner immediately begin issuing binding debt instruments on the world market sufficient to cover all the current obligations of the United States government, even in default of Congressional action to meet those obligations.

I take this action to fulfill the oath I took as president of the United States. The Constitution explicitly requires me, under my duty to "take care that the laws be faithfully executed," to meet and pay all debts of the United States.

This requirement is absolute. It is contained in Section Four of the Fourteenth Amendment, which directs, in no uncertain terms, that **"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."**

This provision makes clear that both the monies our nation owes to bondholders, and the sums promised in legislation to those receiving pensions set by law from the federal government, must be paid regardless of the political whims of the current congressional majority. All obligations that the nation has undertaken by drawing on its credit must at all times be rendered current.

As a former professor of constitutional law, I want to explain to you the origin of Section Four. After the Civil War, political leaders in the defeated South announced their intention of resuming their seats in Congress and of using their power--augmented by increased Congressional representation for the freed slaves--to compel the federal government either to pay off all debts of the Confederacy or to default on the national debt which had been borrowed to finance the Union war effort. They also intended to present to the nation a huge bill for what they claimed was the value of the slaves that had been freed by the Emancipation Proclamation and the Thirteenth Amendment.

For this reason, the Framers of the Fourteenth Amendment wrote into our fundamental law an absolute prohibition against defaulting on the national debt. Its language establishes a complete firewall against the misuse of governmental power by one political faction to get its way by wrecking the public credit. Only one other provision of the Constitution--the Thirteenth Amendment's categorical prohibition on slavery--is as rigid as the language of Section Four. That language is not binding only on Congress, but on all parts of the government, including the executive branch.

For nearly a century and a half, the absolute language of the Fourteenth Amendment was not even questioned. I regret to say, however, that today our nation faces exactly the threat Section Four was designed to guard against. A vocal and determined political minority--what our great Founder James Madison would have called a "faction"--is determined to use its dominance in one House of Congress as a weapon to circumvent the democratic process. It wants to find a back-door way to undo programs and policies that have been democratically enacted over a 75-year period. It wants to impose a narrow vision of government and America that has been rejected by our people repeatedly over the same period.

This determined minority is now prepared to defy the Constitution to get its way. Some of its voices have begun to say that national default would be welcome, even if it wrecks our international credit and leads the U.S. to default not only on its bonded obligations but on the debts due to its armed forces in the field--debts that are even more sacred than "pensions and bounties for services" already performed by veterans in previous wars. Indeed, I am convinced that the only reason why the framers of Section Four did not explicitly include "payments to military personnel in the field during congressionally authorized military action" is that it was *literally unthinkable* even to the most hardened partisans among them that *any* faction within the United States Congress would countenance cutting off payments to those who carry our flag in foreign nations under hostile fire.

Some may ask why I do not simply use my executive authority to juggle accounts and cook the federal books in order to pay the most pressing obligations while I implore this determined minority to honor their oaths to uphold the Constitution. I do not have the luxury of partial or halfhearted compliance with the *absolute command* of our nation's fundamental law. Section Four does not say that the national debt "shall be paid sooner or later," or "shall be stretched out as long as possible," or "shall be paid in some areas but not in others." It also does not say "shall not be questioned unless Congress really wants to."

> As long as I remain president, the national debt of the United States shall not be questioned.

It says it "shall not be questioned." The national debt must be paid in full, on time, regardless of any political division within our Congress. That is what the Framers intended: to set the debt obligations

of our country beyond the reach of Congressional meddling. Those obligations will not be questioned as long as I am president of the United States.

This action requires me to authorize borrowing that is not in conformity with the debt-limit statute. But *no congressional statute can command or permit our government to violate the Constitution.* I find the debt limit, to the extent that it could be construed to require national default on any obligation of our nation, to be in the words of the great chief justice John Marshall, repugnant to the Constitution and thus void.

I regret that the intransigence of a small minority of members of Congress have forced our nation into this situation. I know that some of these same political leaders will now charge me with violating the Constitution -- the same Constitution that they apparently have no desire either to read or to follow. If they truly believe this to be true, I challenge them to bring Articles of Impeachment against me. The charge should be that I did what was necessary to support our troops in the field, to bolster our public credit, and to prevent destitution and despair among American families. I welcome that debate.

But as long as I remain president, the national debt of the United States shall not be questioned. That is my pledge to you, to the world, and to the memory of the brave men and women who gave the last full measure of devotion to rescue the United States from forces who long ago sought its destruction.

Good night. And God bless America.

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Wednesday, July 06, 2011

Under What Circumstances Can The President Ignore the Debt Ceiling?

JB

The Fourteenth Amendment imposes a constitutional duty on both the President and Congress not to act in such a way as to bring the validity of the public debt into question. As I have explained in previous posts, the purpose of section 4 was to prevent the political branches from holding the validity of the public debt hostage as part of a political threat or in order to exact political revenge.

I believe that section 4 was designed to prevent what the Republican leaders of Congress are currently doing. Members of Congress should stop trying to use the risk of default to hold the country hostage in order to win concessions on ordinary matters of politics. The should simply increase the debt ceiling to match appropriations that Congress has already made. Then they should have negotiations about taxes and federal spending.

In the press and in the public commentary, however, the issue has been repeatedly posed as whether or not the debt ceiling is constitutional under section 4 of the Fourteenth Amendment.

This is the wrong question.

We have had a debt ceiling in this country for a long time. Imposing a ceiling on the amount of debt the United States can take on does not by itself violate the Constitution. Quite the contrary, doing so is an exercise of Congress's powers under Article I, section 8.

Rather, the correct question is whether either the President or Congress, or both, are acting in a way to call the validity of the public debt into question. If they are, then they have a constitutional duty to stop, and take appropriate measures. In this case, I believe that Congress is behaving inappropriately, and they should stop. In order to avoid calling the validity of the public debt into question, they should raise the debt ceiling immediately. Indeed, as a matter of good public policy, they should tie decisions about the debt ceiling to decisions about appropriations, as was the practice until recently. President Obama has complained about Congress using the debt ceiling like a gun to extract political concessions, and he is right to do so.

The duty imposed by section 4 of the Constitution exists whether or not a court could order either Congress or the President to act. There are many constitutional duties that no court can order either the President or members of Congress to perform. This may well be one of them. Congress is doing pretty much what the framers of the Fourteenth Amendment did not want them to do. But it is not clear that anyone has standing to force Congress to live up to its constitutional duty.

There is a second question making the rounds, which is equally misleading: People want to know whether the President may threaten to issue new debt if Congress does not raise the debt ceiling.

Again, this the wrong question to ask. For one thing, the President must be careful not to take any steps that might call the validity of the public debt into question. Making such threats at present might be highly counterproductive; it might actually undermine the economy because it might signal that the President believes that United States is about to default and hasten the questioning of the validity of the public debt. Moreover, the whole point of section 4 is not to engage in political gamesmanship over the public debt. (Considered in its best light, this may explain President Obama's reticence to discuss the constitutional issue.).

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If Congress refuses to raise the debt ceiling, the President is bound under Article II to take care that the laws are faithfully executed. This duty includes *all* of the laws, including section 4 of the Fourteenth Amendment, the laws passed by Congress that appropriated funds and ordered the President to spend them, and the debt ceiling.

The President (and the Treasury Secretary) must therefore act in such a way as to honor all of these commitments to the greatest extent possible.

The President must use every available legal option to preserve the validity of the public debt, through accounting measures, and through selectively deciding which bills to pay and which to delay paying.

What I have just said assumes that not every service that the government provides is part of the public debt within the meaning of section 4. Thus, I assume that a government shut-down, in and of itself, need not violate section 4 of the Fourteenth Amendment, if the government does not default or threaten to default on "the public debt," however that is defined.

It is possible that the President and Congress may disagree about what falls within that definition. If so, the President must make the call as best he can, because he has an independent constitutional duty not to violate Section 4 of the Fourteenth Amendment. He does not have to accept Congress's view. He may view the factors that lead to questioning the public debt more broadly than Congress, because he may worry that markets will see the government's operations (and thus its creditworthiness) as interconnected.

But suppose that the Secretary of the Treasury has exhausted all possible accounting tricks and methods for preventing default on the public debt, that the validity of the debt is likely to be put in question as a result, and that Congress still has not raised the debt ceiling. (Note that when I say, "all possible," I mean that the Treasury Secretary has a legal duty to try everything, including things that would be very unpopular.)

The President and the Treasury Secretary have come to the end of what they can do, and Congress still has not raised the debt ceiling. Then one of two things will happen.

The first is that the markets will start to melt down, and Congress, finally realizing that they have brought on economic Armageddon, will raise the debt ceiling. The President will have complied with his constitutional duty, and the members of Congress will have complied with theirs. (At least until the next showdown).

I think that this is what will happen. As soon as the markets begin to slide, Congress will make a deal. The Republicans in Congress may be stubborn, and even wrong headed at times, but I continue to believe that they are not crazy.

But suppose that this does not happen. Suppose that the Republicans in Congress turn out to be like Pharaoh in the Old Testament: No matter how many plagues are visited upon Egypt, his heart is still hard.

Imagine, then, that the hearts of the Republicans in Congress are as hard as Pharaoh's heart.

Then we have the second possibility: The markets are cratering. The world economy is dissolving before our eyes.

In these extreme circumstances, the President's Article II powers come into play in a different way.

The President has inherent emergency powers, at least as a default rule. Think about the President's power as Commander-in-Chief. The President has the authority to repel attacks on the country or on American citizens, and to safeguard vital American interests in times of emergency, when Congress cannot act.

Some scholars believe that this power is not only inherent in the executive, but that it cannot be taken away by Congress. I do not agree. I believe that the President has the power to act *as a default rule* in emergencies, subject to Congress's creating rules that limit and guide his actions. In this case, Congress

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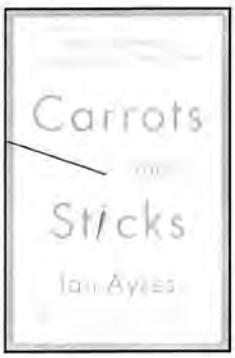

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has authorized presidential action in emergencies in a series of laws beginning with the early Militia Acts.

But sometimes the President acts where it is not clear that he has power (even as a default), or where it is likely that he does not have power. When the President acts in an emergency without congressional authorization in these situations, he must ask Congress for retroactive authorization of what he has done. He is "borrowing" power temporarily, so to speak, and this debt must promptly be paid.

The most famous example of "borrowing power" is Lincoln's suspension of habeas corpus at the beginning of the Civil War, which was retroactively authorized by Congress. Congress, and not the President, has the power to suspend the writ. In my view it is illegal for the President to suspend the writ on his own. But Lincoln acted, arguing that nobody else could act because Congress was not in session, and a decision had to be made. Equally important, he acted publicly, and gave his reasons for acting in public. (It would be a different matter if Lincoln had acted in secret and told no one, in order to avoid responsibility to Congress and the public). But here he acted transparently. And having acted, he recognized that he was at Congress's mercy. They could approve what he did retroactively, or they could impeach him.

This is the right way to think about what would happen if the country was really about to default, and the Treasury had exhausted all possible options under the current debt ceiling. Under these circumstances, the President would authorize the issuance of new debt if he believed that it would stabilize the situation and prevent default and economic catastrophe.

Without Congressional authorization, this action would be of very dubious legality. Indeed, without subsequent authorization, it would be illegal. As I read the Constitution, only Congress has the power to authorize new debt. But in extreme circumstances the President would do so anyway, arguing, like Lincoln, that Congress can approve what he does after he does it. But it would be essential that he did so publicly and did not try to hide what he was doing under a cloak of Presidential authority or national security. (This is the problem of the George W. Bush Administration. This Administration also justified its actions in the name of emergency, but it asserted a right to act in secret without any authorization at all, and the debate over retroactive authorization began only after it was found out.).

In this extreme case, the President acts because no one else will act, but in so acting he puts himself at the pleasure and mercy of Congress.

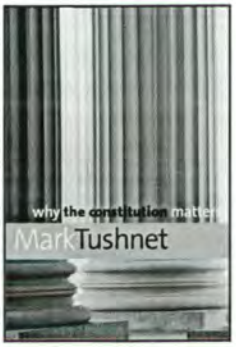
He says, in effect: "This is what I have done to save the country. If you approve of it, then it is legal. If you do not approve, you may impeach and convict me. But now you must choose what to do. The responsibility is yours."

This is a very dangerous game to play. Even when they are open about what they are doing, Presidents should not act like this unless there is absolutely no alternative. That is because this gambit, once begun, may be come habitual. Presidents may start to violate the law in private, hoping that no one will notice what they have done (Again, see the Bush Administration). Congress can become lazy or cowardly and simply wait for the President to do all the work and take all the risks. We should not be so eager to expand the President's power to act unilaterally, no matter how noble the cause, for the next President may not be one we like as well and the cause pursued far less praiseworthy.

That is why it is misleading to ask whether the President has or does not have the power to issue new debt beyond the debt limit without Congressional authorization. He will indeed issue new debt if worse comes to worse, but that is because he has no other choice. And he will need Congress to authorize what he does eventually.

Even so, the present situation is not quite the same as Lincoln's suspension of habeas corpus, where Lincoln could plausibly argue that Congress could not act and and therefore had not disapproved of his actions. (Of course, Congress could not act because Lincoln had conveniently not called them into session).

In this case, but not in Lincoln's case, Congress has specifically said: "we don't want to raise the debt ceiling." So the President is not acting in a vacuum; he is acting in defiance of Congress, and his powers are therefore at their nadir, and should be.



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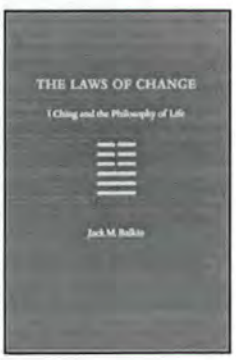

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In this respect, the situation is closer to Truman's seizure of the steel mills in 1952. Truman acted and then (it is often forgotten) asked for Congress's authorization. They did not give it. Yet that case, too, was different than the present case, because the courts could hear the Steel Seizure Case and resolve it so that Congress did not have to act. They could avoid responsibility. It is very unlikely that the courts could hear a case arising out of the current facts. So in this case, Congress would be forced to put up or shut up.

Moreover, the situation is also different from past examples because the damage to the country and to the world economy may be even greater than the damage that would have resulted if Lincoln had not been able to suspend the writ in 1861; it certainly seems to be a greater emergency than the danger of a labor strike in 1952. So even if the President's powers are at their nadir, he still might have the power to risk his power.

Such an act, in my view, is not legal when done, but it may become legal later on, if Congress approves. But it is a dangerous maneuver. If Congress does not approve it after the fact, then the President has acted illegally, and he may be impeached and removed from office.

Such an act may be necessary. It may stave off disaster. But it is no way to run a country.

Suppose, however, that it came to that. If the bond markets are going crazy, America's economic reputation is being destroyed, and the world economy is facing disaster, I do not doubt that Congress will approve the President's efforts to save the country after the fact. Congress will raise the debt ceiling (what they should have done in the first place) and declare that the new bond issues are valid.

Congress may be very angry at the President for acting, and they may denounce him, but they will recognize he acted in an emergency that they themselves created. The members of Congress will also recognize that if they impeach him for saving the economy, they will damage the credit of the United States even more.

It will likely never come to this. Congress will raise the debt ceiling long before the markets begin to crumble. Or, at the first sign of crumbling, Congress will almost certainly raise the debt ceiling. But if this does not happen, then I have described the very limited circumstances under which the President might act.

Note, however, that this is very different from asking whether the debt ceiling is constitutional or unconstitutional.

Posted 7:55 PM by JB [link]

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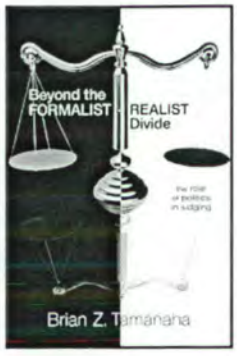

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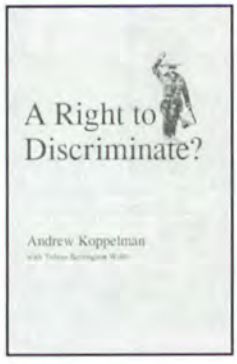

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appropriations, whenever an agency like USMS, whose statutory mission involves the protection of life and property, runs out of money, it has open-ended authority to continue to incur obligations under the Antideficiency Act's emergencies exception.[108] This is exactly the "coercive deficiency" that the Congress legislated against in enacting the Antideficiency Act.[109] *See* B-285725, Sept. 29, 2000. The Antideficiency Act was intended to keep agency operations at a level within the amounts that Congress appropriates for that purpose. If an agency concludes that it needs more funds than Congress has appropriated for a fiscal year, the agency should ask Congress to enact a supplemental appropriation; it should not continue operations without regard to the Antideficiency Act.

e. Voluntary Creditors

A related line of decisions are the so-called "voluntary creditor" cases. A voluntary creditor is an individual, government or private, who pays what he or she perceives to be a government obligation from personal funds. The rule is that the voluntary creditor cannot be reimbursed, although there are significant exceptions. For the most part, the decisions have not related the voluntary creditor prohibition to the Antideficiency Act, with the exception of one very early case (17 Comp. Dec. 353 (1910)) and two more recent ones (53 Comp. Gen. 71 (1973) and 42 Comp. Gen. 149 (1962)). The voluntary creditor cases are discussed in detail in Chapter 12, section C.4.c in volume III of the second edition of *Principles of Federal Appropriations Law*, dealing with claims against the United States.

4. Apportionment of Appropriations

Because of the apportionment and related provisions of the Antideficiency Act, 31 U.S.C. §§ 1511–1519, an agency generally does not have the full amount of its appropriations available to it at the beginning of the fiscal year. Apportionment is an administrative process by which, as its name suggests, appropriated funds are distributed to agencies in portions over the period of their availability. The Office of Management and Budget (OMB) apportions funds for executive branch agencies. 31 U.S.C. § 1513(b); Exec. Order No. 6166, § 16 (June 10, 1933), *at* 5 U.S.C. § 901 note. Appropriations for legislative branch agencies, the judicial branch,

[108] The opinions did acknowledge, of course, that USMS could not actually spend funds if its appropriations were exhausted. They also noted that a determination whether particular obligations would satisfy the emergencies exception could not be made in the abstract and would require case-by-case evaluation.

[109] See section C.2.b of this chapter for a discussion of the "coercive deficiency" concept.

the District of Columbia, and the International Trade Commission are apportioned by officials having administrative control of those funds. 31 U.S.C. § 1513(a). In addition to apportionment, appropriations are subject to further administrative subdivision by the heads of the agencies to which the appropriations are made. 31 U.S.C. § 1514.

Section 1517(a) of title 31 prohibits officers and employees of the federal and District of Columbia governments from making or authorizing an expenditure or obligation that exceeds an apportionment or the amount permitted under certain other subdivisions of appropriated funds. Agencies must report violations of section 1517(a) to the Congress and the President. Those who violate section 1517(a) are subject to administrative discipline as well as criminal penalties in the case of willful violations. *See* 31 U.S.C. §§ 1517(b), 1518, and 1519.

a. Statutory Requirement for Apportionment

Subsection (a) of section 1512 establishes the basic requirement for the apportionment of appropriations:

> "(a) Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section."

Although apportionment was first required legislatively in 1905,[110] the current form of the statute derives from a revision enacted in 1950 in section 1211 of the General Appropriation Act, 1951.[111] The 1950 revision was part of an overall effort by Congress to amplify and enforce the basic restrictions against incurring deficiencies in violation of the Antideficiency Act, 31 U.S.C. § 1341.

[110] Pub. L. No. 217, ch. 1484, 33 Stat. 1214, 1257 (Mar. 3, 1905).

[111] Pub. L. No. 759, ch. 896, 64 Stat. 595, 765 (Sept. 6, 1950).

Section 1512(a) requires that all appropriations be administratively apportioned so as to ensure their obligation and expenditure at a controlled rate which will prevent deficiencies from arising before the end of a fiscal year. Although section 1512 does not tell you who is to make the apportionment, section 1513 names the President as the apportioning official for most executive branch agencies. The President delegated the function to the Director of the Bureau of the Budget in 1933,[112] and it now reposes in the successor to that office, the Director of the Office of Management and Budget (OMB).[113] Legislative and judicial branch appropriations are apportioned by officials in those branches. 31 U.S.C. § 1513(a).

The term "apportionment" may be defined as follows:

> "The action by which [the apportioning official] distributes amounts available for obligation, including budgetary reserves established pursuant to law, in an appropriation or fund account. An apportionment divides amounts available for obligation by specific time periods (usually quarters), activities, projects, objects, or a combination thereof. The amounts so apportioned limit the amount of obligations that may be incurred. An apportionment may be further subdivided by an agency into allotments, suballotments, and allocations. In apportioning any account, some funds may be reserved to provide for contingencies or to effect savings made possible pursuant to the Antideficiency Act. Funds apportioned to establish a reserve must be proposed for deferral or rescission pursuant to the Impoundment Control Act of 1974 (2 U.S.C. §§ 681–688).
>
> "The apportionment process is intended to (1) prevent the obligation of amounts available within an appropriation or fund account in a manner that would require deficiency or supplemental appropriations and (2) achieve the most

[112] Exec. Order No. 6166, § 16 (June 10, 1933), *at* 5 U.S.C. § 901 note.

[113] Reorganization Plan No. 2 of 1970, 35 Fed. Reg. 7959, 84 Stat. 2085 (effective July 1, 1970), designated the Bureau of the Budget as OMB and transferred to the President all functions vested in the former Bureau of the Budget. Executive Order No. 11541, 35 Fed. Reg. 10737 (July 1, 1970), 31 U.S.C. § 501 note, transferred those functions to the Director of OMB.

> effective and economical use of amounts made available for obligation."[114]

Apportionment is required not only to prevent the need for deficiency or supplemental appropriations, but also to ensure that there is no drastic curtailment of the activity for which the appropriation is made. 36 Comp. Gen. 699 (1957). *See also* 38 Comp. Gen. 501 (1959). In other words, the apportionment requirement is designed to prevent an agency from spending its entire appropriation before the end of the fiscal year and then putting Congress in a position in which it must either enact an additional appropriation or allow the entire activity to come to a halt. 64 Comp. Gen. 728, 735 (1985). *See also* Memorandum Opinion for the General Counsel, United States Marshals Service, *USMS Obligation To Take Steps To Avoid Anticipated Appropriations Deficiency*, OLC Opinion, May 11, 1999 (opining that 31 U.S.C. § 1512(a) imposes "an affirmative obligation" on federal agencies to take steps to use their available funds in a way that will avoid the need for a deficiency or supplemental appropriations, citing 64 Comp. Gen. 728 and 36 Comp. Gen. 699).

In 36 Comp. Gen. 699, Post Office funds had been reapportioned in such a way that the fourth quarter funds were substantially less than those for the third quarter. The Comptroller General stated:

> "A drastic curtailment toward the close of a fiscal year of operations carried on under a fiscal year appropriation is a *prima facie* indication of a failure to so apportion an appropriation 'as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period.' In our view, this is the very situation the amendment of the law in 1950 was intended to remedy."

36 Comp. Gen. at 703. *See also* 64 Comp. Gen. 728, 735–36 (1985). However, the mere fact that an agency faces a severe lack of funds and needs to curtail services late in a fiscal year does not necessarily mean that the apportioning authority has violated 31 U.S.C. § 1512(a). Programmatic

[114] GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), at 12–13. *See also* OMB Circular No. A-11, pt. 4, *Instructions on Budget Execution*, §§ 120.1–120.5 (June 21, 2005). For a discussion of the Impoundment Control Act, see section D.3.b of Chapter 1.

factors that could not reasonably be foreseen at the time of an apportionment or reapportionment may affect the pattern or pace of spending over the course of the year. Also, as discussed hereafter in section C.4.e, the statute itself permits apportionments indicating the need for a deficiency or supplemental appropriation in certain limited circumstances.

A 1979 decision involved the Department of Agriculture's Food Stamp Program. The program was subject to certain spending ceilings which it seemed certain, given the rate at which the Department was incurring expenditures, that the Department was going to exceed. The Department feared that, if it was bound by a formula in a different section of its authorizing act to pay the mandated amount to each eligible recipient, it would have to stop the whole program when the funds were exhausted. Based on both the Antideficiency Act and the program legislation, GAO concluded that there had to be an immediate *pro rata* reduction for all participants. Discontinuance of the program when the funds ran out would violate the purpose of the apportionment requirement. A-51604, Mar. 28, 1979.

This is not to say that every subactivity or project must be carried out for the full fiscal year, on a reduced basis, if necessary. Section 1512(a) applies to amounts made available in an appropriation or fund. Where, for example, the then Veterans Administration (VA) nursing home program was funded from moneys made available in a general, lump-sum VA medical care appropriation, the agency was free to discontinue the nursing home program and reprogram the balance of its funds to other programs also funded under that heading. B-167656, June 18, 1971. (The result would be different if the nursing home program had received a line-item appropriation.)

The general rule against apportionments that indicate the need for a deficiency or supplemental appropriation does not preclude an agency from requesting an apportionment of all or most of its existing appropriations at the same time that it is seeking a supplemental so long as the agency has in place a plan that would enable it to function through the end of the fiscal year should Congress not enact the supplemental. 64 Comp. Gen. 728, 735 (1985). *See also* B-255529, Jan. 10, 1994. In 64 Comp. Gen. 728, the former Interstate Commerce Commission (ICC) had requested an apportionment of the full annual amount available to it under a continuing resolution at the outset of fiscal year 1985. At the same time, the ICC voted to seek a supplemental appropriation in order to avoid

severe staffing cuts that would have been required without it. The Comptroller General held that the apportionment was not improper:

> "As we have indicated, at the recommendation of its Managing Director the ICC adopted an operating plan for fiscal year 1985 which included a request for a supplemental appropriation. However, part of that operating plan was an emergency plan which would enable the ICC to operate for the entire fiscal year even without a supplemental. Under the plan, if the Congress did not enact a supplemental appropriation by the end of March, the Commission was to furlough all its employees for 1 day per week for the remainder of the year. This would allow the Commission to operate through the end of the fiscal year within the $48 million already appropriated. In fact a supplemental was not passed by the end of March and the furlough was implemented. . . .
>
> "[T]he actions taken by the ICC . . . demonstrate that from the time at which the Congress and the President approved legislation reducing ICC's funding below the requested level, every decision related to expenditures was made to avoid violation of the Antideficiency Act."

64 Comp. Gen. at 735.

The requirement to apportion applies not only to 1-year appropriations and other appropriations limited to a fixed period of time, but also to "no-year" money and even to contract authority (authority to contract in advance of appropriations). 31 U.S.C. §§ 1511(a), 1512(a). In the case of indefinite appropriations and contract authority, the requirement states only that the apportionment is to be made in such a way as "to achieve the most effective and economical use" of the budget authority. *Id.* § 1512(a).

Prior to the 1982 recodification of title 31 of the United States Code, the apportionment requirement applied explicitly to government corporations which are instrumentalities of the United States.[115] While the applicability of the requirement has not changed, the recodification dropped the explicit

[115] 31 U.S.C. § 665(d)(2) (1976 ed.).

language, viewing it as covered by the broad definition of "executive agency" in 31 U.S.C. § 102.[116] The authority of some government corporations to determine the necessity of their expenditures and the manner in which they shall be incurred is not sufficient to exempt a corporation from the apportionment requirement. 43 Comp. Gen. 759 (1964).

The apportionment process provides a set of administrative controls over the use of appropriations in addition to those Congress has imposed through the appropriations act itself. The apportionment process cannot alter or otherwise affect the operation of statutory requirements concerning the availability or use of appropriated funds. In this regard, OMB's guidance on apportionments states:

> ". . . The apportionment of funds should not be used as a means of resolving any question dealing with the legality of using funds for the purposes for which they are appropriated. Any questions as to the legality of using funds for a particular purpose must be resolved through legal channels."

OMB Circ. No. A-11, pt. 4, § 120.17.[117]

Furthermore, an apportioning official cannot apportion funds in advance of their availability for obligation or expenditure. In B-290600, July 10, 2002, OMB had apportioned certain budget authority for loan guarantees to the Air Transportation Stabilization Board pursuant to the Board's request. The statute enacting this budget authority had conditioned its availability such that the budget authority "shall be available only to the extent that a request . . . that includes designation of such amount as an emergency requirement . . . is transmitted by the President to Congress." The President had not transmitted this designation at the time of the apportionment. Therefore, GAO concluded that OMB and the Board had violated the Antideficiency Act. OMB and the Board recognized the violation and had already taken steps to avoid a recurrence.

b. Establishing Reserves

Section 1512(c) of 31 U.S.C. provides as follows:

[116] See the codification note following 31 U.S.C. § 1511.

[117] Before 2002, OMB's guidance on apportionments was located in Circular No. A-34.

> "(c)(1) In apportioning or reapportioning an appropriation, a reserve may be established only—
>
> "(A) to provide for contingencies;
>
> "(B) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or
>
> "(C) as specifically provided by law.
>
> "(2) A reserve established under this subsection may be changed as necessary to carry out the scope and objectives of the appropriation concerned. When an official designated in section 1513 of this title to make apportionments decides that an amount reserved will not be required to carry out the objectives and scope of the appropriation concerned, the official shall recommend the rescission of the amount in the way provided in chapter 11 of this title for appropriation requests. Reserves established under this section shall be reported to Congress as provided in the Impoundment Control Act of 1974 (2 U.S.C. 681 *et seq.*)."

Section 1512(c) seeks to limit the circumstances in which the full appropriation is not apportioned or utilized and a reserve fund is established. Under this provision, the apportioning official is authorized to establish reserves only to provide for contingencies or to effect savings, unless the reserve is specifically authorized by statute.

At one time, this section was a battleground between the executive and legislative branches. The executive branch had relied on this portion of the Antideficiency Act to impound funds for general fiscal or economic policy reasons such as containment of federal spending and executive judgment of the relative merits, effectiveness, and desirability of competing federal programs (often referred to as "policy impoundments"). *See* 54 Comp. Gen. 453, 458 (1974); B-135564, July 26, 1973.

Prior to 1974, the predecessor of 31 U.S.C. § 1512(c) contained rather expansive language to the effect that a reserve fund could be established pursuant to "other developments subsequent to the date on which [the] appropriation was made available." 31 U.S.C. § 665(c)(2) (1970 ed.).

Despite this expansive language, the Comptroller General's position had been that the authority to establish reserves under the Antideficiency Act was limited to providing for contingencies or effecting savings which are in furtherance of, or at least consistent with, the purposes of an appropriation. B-130515, July 10, 1973. The Comptroller General did not interpret the law as authorizing a reserve of funds (*i.e.*, an impoundment) based upon general economic, fiscal, or policy considerations that were extraneous to the individual appropriation or were in derogation of the appropriation's purpose. B-125187, Sept. 11, 1973; B-130515, July 10, 1973. *See also State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1118 (8th Cir. 1973), which held that the right to reserve funds in order to "effect savings" or due to "subsequent events," *etc.*, must be considered in the context of the applicable appropriation statute.

The Impoundment Control Act of 1974[118] amended section 1512(c) by eliminating the "other developments" clause and by prohibiting the establishment of appropriation reserves except as provided under the Antideficiency Act for contingencies or savings, or as provided in other specific statutory authority. The intent was to preclude reliance on section 1512(c) as authority for "policy impoundments." *City of New Haven v. United States*, 809 F.2d 900, 906 (D.C. Cir. 1987); 54 Comp. Gen. 453 (1974); B-148898-O.M., Aug. 28, 1974.

The executive branch, however, continued to defer for policy reasons, arguing that section 1013 of the Impoundment Control Act provided authority, independent of the Antideficiency Act, to withhold funds from obligation temporarily for fiscal policy reasons. GAO agreed that this interpretation was consistent with the language of the Impoundment Control Act and with the statutory scheme, pointing out that Congress had reserved the power under the Impoundment Control Act to disapprove any deferral, particularly deferrals for fiscal policy reasons, as a counterweight to the President's power to defer. 54 Comp. Gen. at 455. At that time, the Impoundment Control Act provided for disapproval using a one-house veto. This counterweight vanished when the Supreme Court held one-house legislative veto provisions unconstitutional. *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Accordingly, in a decision issued on January 20, 1987, the U.S. Court of Appeals for the District of Columbia invalidated section 1013, which was the sole general

[118] Pub. L. No. 93-344, title X, § 1002, 88 Stat. 297, 332 (July 12, 1974).

legislative authority for policy deferrals.[119] *City of New Haven*, 809 F.2d at 902, 905–09. In September of 1987, Congress reenacted section 1013(b) of the Impoundment Control Act, 2 U.S.C. § 684(b), without the unconstitutional legislative veto provision and reiterated that the same limits on appropriation reserves that appear in 31 U.S.C. § 1512(c) are the sole justifications for deferrals. *See* Pub. L. No. 100-119, § 206, 101 Stat. 754, 785 (Sept. 29, 1987). See Chapter 1, section D.3.b for a general discussion of impoundments and the Impoundment Control Act.

The Comptroller General discussed examples of permissible (*i.e.*, nonpolicy) reserves in 51 Comp. Gen. 598 (1972) and 51 Comp. Gen. 251 (1971). The first decision concerned the provisions of a long-term charter of several tankers for the Navy. The contract contained options to renew the charter for periods of 15 years. In the event that the Navy declined to renew the charter short of a full 15-year period, the vessels were to be sold by a Board of Trustees, acting for the owners and bondholders. Any shortfall in the proceeds over the termination value was to be unconditionally guaranteed by the Navy. GAO held that it would not violate the Antideficiency Act to cover this contingent liability by setting up a reserve. 51 Comp. Gen. 598 (1972). In 51 Comp. Gen. 251 (1971), GAO said that it was permissible to provide in regulations for a clause to be inserted in future contracts for payment of interest on delayed payments of a contractor's claim. Reserving sufficient funds from the appropriation used to support the contract to cover these potential interest costs would protect against potential Antideficiency Act violations.

In 1981, the Community Services Administration established a reserve as a cushion against Antideficiency Act violations while the agency was terminating its operations. Grantees argued that the reserve improperly reduced amounts available for discretionary grants. In *Rogers v. United States*, 14 Cl. Ct. 39, 46–47 (1987), *aff'd*, 801 F.2d 729 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989), the court held that a reasonable reserve for contingencies was properly within the agency's discretion.

c. Method of Apportionment

The remaining portions of 31 U.S.C. § 1512 are subsections (b) and (d), set forth below:

[119] The Court concluded that the one-house legislative veto was not severable from the Act's deferral provision, and invalidated that provision as well. *Id.*

> "(b)(1) An appropriation subject to apportionment is apportioned by—
>
> > "(A) months, calendar quarters, operating seasons, or other time periods;
> >
> > "(B) activities, functions, projects, or objects; or
> >
> > "(C) a combination of the ways referred to in clauses (A) and (B) of this paragraph.
> >
> > * * * * *
>
> "(d) An apportionment or reapportionment shall be reviewed at least 4 times a year by the official designated in section 1513 of this title to make apportionments."

Subsection (b) and (d) are largely technical, implementing the basic apportionment requirement of 31 U.S.C. § 1512(a). Section 1512(b) makes it clear that apportionments need not be made strictly on a monthly, quarterly, or other fixed time basis, nor must they be for equal amounts in each time period. The apportioning officer is free to take into account the "activities, functions, projects, or objects" of the program being funded and the usual pattern of spending for such programs in deciding how to apportion the funds. Absent some statutory provision to the contrary, OMB's determination is controlling. Thus, in *Maryland Department of Human Resources v. United States Department of Health & Human Services*, 854 F.2d 40 (4th Cir. 1988), the court upheld OMB's quarterly apportionment of social services block grant funds, rejecting the state's contention that it should receive its entire annual allotment at the beginning of the fiscal year. Section 1512(d) requires a minimum of four reviews each year to enable the apportioning officer to make reapportionments or other adjustments as necessary.

Conversely, OMB may decide to apportion all or most of an available appropriation at the outset of a fiscal year. In B-255529, Jan. 10, 1994, GAO held that OMB's apportionments at the beginning of the fiscal year of the full amounts available for two State Department appropriation ("Contributions to International Organizations" and "Contributions for International Peacekeeping Activities") constituted an appropriate exercise of OMB's discretion. Quoting from an earlier opinion, B-152554, Feb. 17,

1972, the decision then observed that the amounts to be apportioned depended on the needs of the programs as determined by OMB:

> "It must be recognized that, with respect to a number of programs, particularly where grant or other assistance funds are involved, a large portion of the funds normally are obligated during the early part of the fiscal year. The pattern of obligations is much different than where, for example, an appropriation is primarily available for salaries and administrative expenses. In such case the expenditures would be comparatively constant throughout the year. The pattern of obligations, however, is primarily an administrative matter . . . [for resolution through] the apportionment process."

The decision pointed out that, according to the State Department, payments under the Contributions to International Organizations account traditionally were made in the first quarter of the fiscal year. Payments under the Peacekeeping account usually occurred as bills were received and funds were available, but the Department advised GAO that there was a large backlog of bills at the time funds became available, thereby justifying immediate apportionment of the entire annual appropriation.[120]

d. Control of Apportionments

Section 1513 of title 31, United States Code, specifies the authorities and timetables for making the apportionments or reapportionments of appropriations required by section 1512. Section 1513(a) applies to appropriations of the legislative and judicial branches of the federal government, as well as appropriations of the International Trade Commission and the District of Columbia government.[121] It assigns authority to apportion to the "official having administrative control" of the

[120] The two decisions cited concerned apportionments that OMB made under continuing resolutions. As a general matter, the discussion of OMB's apportionment discretion would apply to any appropriation. For a discussion of continuing resolutions, see Chapter 8.

[121] A permanent provision of law included in the 1988 District of Columbia appropriation act states that appropriations for the D.C. government "shall not be subject to apportionment except to the extent specifically provided by statute." Pub. L. No. 100-202, § 135, 101 Stat. 1329, 1329-102 (1987). This provision appears to implicitly repeal 31 U.S.C. § 1513(a) as applied to the D.C. government.

appropriation.[122] Apportionment must be made 30 days before the start of the fiscal year for which the appropriation is made, or within 30 days after the enactment of the appropriation, whichever is later. The apportionment must be in writing.

Section 1513(b) deals with apportionments for the executive branch. The President is designated as the apportioning authority. As we have seen, the function has been delegated to the Director, Office of Management and Budget (OMB).[123] The Director of OMB has up to 20 days before the start of the fiscal year or 30 days after enactment of the appropriation act, whichever is later, to make the actual apportionment and notify the agency of the action taken. 31 U.S.C. § 1513(b)(2). Again, the apportionments must be in writing. Although primary responsibility for a violation of section 1512 lies with the Director of OMB, the head of the agency concerned also may be found responsible if he or she fails to send the Director accurate information on which to base an apportionment.

In B-163628, Jan. 4, 1974, GAO responded to a question from the chairman of a congressional committee about the power of OMB to apportion the funds of independent regulatory agencies, such as the Securities and Exchange Commission (SEC). The Comptroller General agreed with the chairman that independent agencies should generally be free from executive control or interference. The response then stated:

> "[T]he apportionment power may not lawfully be used as a form of executive control or influence over agency functions. Rather, it may only be exercised by OMB in the manner and for the purposes prescribed in 31 U.S.C. § [1512]—*i.e.*, to prevent obligation or expenditure in a manner which would give rise to a need for deficiency or supplemental appropriations, to achieve the most effective and economical use of appropriations and to establish reserves either to provide for contingencies or to effect savings which are in furtherance of or at least consistent with, the purposes of an appropriation.

[122] Neither section 1513 nor case law defines the phrase "official having administrative control." Consequently, the apportioning official for legislative and judicial appropriations is named by the head of the agency to whom the appropriation is made.

[123] See footnote 113, *supra*, and accompanying text.

> "As thus limited, the apportionment process serves a necessary purpose—the promotion of economy and efficiency in the use of appropriations. . . .
>
> * * * * *
>
> "[S]ince a useful purpose is served by OMB's proper exercise of the apportionment power, we do not believe that the potential for abuse of the power is sufficient to justify removing it from OMB."

Thus, the appropriations of independent regulatory agencies like the Securities and Exchange Commission (SEC) are subject to apportionment by OMB, but OMB may not lawfully use its apportionment power to compromise the independence of those agencies.

The Impoundment Control Act may permit OMB, in effect, to delay the apportionment deadlines prescribed in 31 U.S.C. § 1513(b). For example, when the President sends a rescission message to Congress, the budget authority proposed to be rescinded may be withheld for up to 45 days pending congressional action on a rescission bill. 2 U.S.C. §§ 682(3), 683(b). In B-115398.33, Aug. 12, 1976, GAO responded to a congressional request to review a situation in which an apportionment had been withheld for more than 30 days after enactment of the appropriation act. The President had planned to submit a rescission message for some of the funds but was late in drafting and transmitting his message. If the full amount contained in the rescission message could be withheld for the entire 45-day period, and Congress ultimately declined to enact the full rescission, release of the funds for obligation would occur only a few days before the budget authority expired. The Comptroller General suggested that, where Congress has completed action on a rescission bill rescinding only a part of the amount proposed, OMB should immediately apportion the amounts not included in the rescission bill without awaiting the expiration of the 45-day period. *See also* B-115398.33, Mar. 5, 1976.

e. Apportionments Requiring Deficiency Estimate

In our discussion of the basic requirement for apportionment, we quoted 31 U.S.C. § 1512(a) to the effect that appropriations must be apportioned "to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation." The requirement that appropriations be apportioned so as to avoid the need for

deficiency or supplemental appropriations is fleshed out in 31 U.S.C. § 1515 (formerly subsection (e) of the Antideficiency Act):

> "(a) An appropriation required to be apportioned under section 1512 of this title may be apportioned on a basis that indicates the need for a deficiency or supplemental appropriation to the extent necessary to permit payment of such pay increases as may be granted pursuant to law to civilian officers and employees (including prevailing rate employees whose pay is fixed and adjusted under subchapter IV of chapter 53 of title 5) and to retired and active military personnel.
>
> "(b)(1) Except as provided in subsection (a) of this section, an official may make, and the head of an executive agency may request, an apportionment under section 1512 of this title that would indicate a necessity for a deficiency or supplemental appropriation only when the official or agency head decides that the action is required because of—
>
> > "(A) a law enacted after submission to Congress of the estimates for an appropriation that requires an expenditure beyond administrative control; or
> >
> > "(B) an emergency involving the safety of human life, the protection of property, or the immediate welfare of individuals when an appropriation that would allow the United States Government to pay, or contribute to, amounts equired to be paid to individuals in specific amounts fixed by law or under formulas prescribed by law, is insufficient.
>
> "(2) If an official making an apportionment decides that an apportionment would indicate a necessity for a deficiency or supplemental appropriation, the official shall submit immediately a detailed report of the facts to Congress. The report shall be referred to in submitting a proposed deficiency or supplemental appropriation."

Section 1515 thus provides certain exceptions to the requirement of section 1512(a) that apportionments be made in such manner as to assure that the funds will last throughout the fiscal year and there will be no necessity for a deficiency appropriation. Under subsection 1515(a), deficiency apportionments are permissible if necessary to pay salary increases granted pursuant to law to federal civilian and military personnel. Under subsection 1515(b), apportionments can be made in an unbalanced manner (*e.g.*, an entire appropriation could be obligated by the end of the second quarter) if the apportioning officer determines that (1) a law enacted subsequent to the transmission of budget estimates for the appropriation requires expenditures beyond administrative control, or (2) there is an emergency involving safety of human life, protection of property, or immediate welfare of individuals in cases where an appropriation for mandatory payments to those individuals is insufficient.

Prior to 1957, what is now subsection 1515(b) prohibited only the *making* of an apportionment indicating the need for a deficiency or supplemental appropriation, so the only person who could violate this subsection was the Director of OMB. An amendment in 1957 made it equally a violation for an agency to *request* such an apportionment. *See* 38 Comp. Gen. 501 (1959). The exception in subsection 1515(b)(1)(A) for expenditures "beyond administrative control" required by a statute enacted after submission of the budget estimate may be illustrated by statutory increases in compensation, although many of the cases would now be covered by subsection (a). We noted several of the cases in our consideration of when an obligation or expenditure is "authorized by law" for purposes of 31 U.S.C. § 1341.[124] Those cases established the rule that a mandatory increase is regarded as "authorized by law" so as to permit overobligation, whereas a discretionary increase is not. The same rule applies in determining when an expenditure is "beyond administrative control" for purposes of 31 U.S.C. § 1515(b). Thus, statutory pay increases for Wage Board employees granted pursuant to a wage survey meet the test. 39 Comp. Gen. 422 (1959); 38 Comp. Gen. 538, 542 (1959). *See also* 45 Comp. Gen. 584, 587 (1966) (severance pay in fiscal year 1966).[125] Discretionary increases, just as they are not "authorized by law" for purposes of 31 U.S.C. § 1341, are not "beyond administrative control" for

[124] See section C.2.g of this chapter.

[125] The law mandating payment of severance pay was enacted after the start of fiscal year 1966, which is why the expenditures in that case would qualify under 31 U.S.C. § 1515(b).

purposes of section 1515(b). 44 Comp. Gen. 89 (1964) (salary increases to Central Intelligence Agency employees); 31 Comp. Gen. 238 (1951) (pension increases to retired District of Columbia police and firefighters).

The Wage Board exception was separately codified in 1957 and now appears at 31 U.S.C. § 1515(a), quoted above. Subsection 1515(a) reached its present form in 1987 when Congress expanded it to include pay increases granted pursuant to law to non-Wage Board civilian officers and employees and to retired and active military personnel.[126]

The "emergency" exceptions in subsection 1515(b)(1)(B) have not been discussed in GAO decisions, although a 1989 internal memorandum suggested that the exception would apply to Forest Service appropriations for fighting forest fires. B-230117-O.M., Feb. 8, 1989. The exceptions for safety of human life and protection of property appear to be patterned after identical exceptions in 31 U.S.C. § 1342 (acceptance of voluntary services), so the case law under that section would likely be relevant for construing the scope of the exceptions under section 1515(b). *See* 43 Op. Att'y Gen. 293, 5 Op. Off. Legal Counsel 1, 9–10 (1981) ("as provisions containing the same language, enacted at the same time, and aimed at related purposes, the emergency provisions of" sections 1342 and 1515(b)(1)(B) "should be deemed *in pari materia* and given a like construction"); Memorandum for the General Counsel, United States Marshals Service, *Continuation of Federal Prisoner Detention Efforts in the Face of a USMS Appropriation Deficiency*, OLC Opinion, Apr. 5, 2000 ("we think it clear that, if an agency's functions fall within § 1342's exception for emergency situations, the standard for the 'emergency' exception under § [1515(b)(1)(B)] also will be met"). *See also* Memorandum for the Director, Office of Management and Budget, *Government Operations in the Event of a Lapse in Appropriations*, OLC Opinion, Aug. 16, 1995, at 7, fn. 6.

It is less obvious that the converse would necessarily be true—that is, that an "emergency" for purposes of subsection 1515(b)(1)(B) automatically qualifies as an "emergency" for purposes of section 1342. As we pointed out in discussing section 1342, this section was amended in 1990 to add the following language:

[126] Pub. L. No. 100-202, § 105, 101 Stat. 1329, 1329-433 (Dec. 22, 1987) (1988 continuing resolution).

> "As used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."

Such language was not added to subsection 1515(b)(1)(B). Thus, on its face, subsection 1515(b)(1)(B) may embody at least a slightly more flexible standard of "emergency" than section 1342, although we have found no cases addressing this point.

Importantly, the exceptions in 31 U.S.C. § 1515(b) are exceptions only to the prohibition against making or requesting apportionments requiring deficiency estimates; they are not exceptions to the basic prohibitions in 31 U.S.C. § 1341 against obligating or spending in excess or advance of appropriations. The point was discussed at some length in B-167034, Sept. 1, 1976. Legislation had been proposed in the Senate to repeal 41 U.S.C. § 11 (the Adequacy of Appropriations Act),[127] which prohibits the making of a contract, not otherwise authorized by law, unless there is an appropriation "adequate to its fulfillment," except in the case of contracts made by a military department for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies." The question was whether, if 41 U.S.C. § 11 were repealed, the military departments would have essentially the same authority under section 1515(b).

The Defense Department expressed the view that section 1515(b) would not be an adequate substitute for the 41 U.S.C. § 11 exception which allows the incurring of obligations for limited purposes even though the applicable appropriation is insufficient to cover the expenses at the time the commitment is made. Defense commented as follows:

> "The authority to apportion funds on a deficiency basis in [31 U.S.C. § 1515(b)] does not, as alleged, provide authority to incur a deficiency. It merely authorizes obligating funds at a deficiency rate under certain circumstances, *e.g.*, a $2,000,000 appropriation can be obligated in its entirety at the end of the third quarter, but it does not provide authority to obligate one dollar more than $2,000,000."

[127] See section C.2.a of this chapter for a further discussion of 41 U.S.C. § 11.

Letter from the Deputy Secretary of Defense to the Chairman, House Armed Services Committee, Apr. 2, 1976 (quoted in B-167034, Sept. 1, 1976).

The Comptroller General agreed with the Deputy Secretary, stating:

> "[Section 1515(b)] in no way authorizes an agency of the Government actually to incur obligations in excess of the total amount of money appropriated for a period. It only provides an exception to the general apportionment rule set out in [31 U.S.C. § 1512(a)] that an appropriation be allocated so as to insure that it is not exhausted prematurely. [Section 1515(b)] says nothing about increasing the total amount of the appropriation itself or authorizing the incurring of obligations in excess of the total amount appropriated. On the contrary, as noted above, apportionment only involves the subdivision of appropriations already enacted by Congress. It necessarily follows that the sum of the parts, as apportioned, could not exceed the total amount of the appropriations being apportioned.
>
> "Any deficiency that an agency incurs where obligations exceed total amounts appropriated, including a deficiency that arises in a situation where it was determined that one of the exceptions set forth in [section 1515(b)] was applicable, would constitute a violation of 31 U.S.C. § [1341(a)] . . . ."

B-167034, Sept. 1, 1976.

f. Exemptions from Apportionment Requirement

A number of exemptions from the apportionment requirement, formerly found in subsection (f) of the Antideficiency Act, are now gathered in 31 U.S.C. § 1516:

> "An official designated in section 1513 of this title to make apportionments may exempt from apportionment—
>
> > "(1) a trust fund or working fund if an expenditure from the fund has no significant effect on the financial operations of the United States Government;

"(2) a working capital fund or a revolving fund established for intragovernmental operations;

"(3) receipts from industrial and power operations available under law; and

"(4) appropriations made specifically for—

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

"(B) payment of claims, judgments, refunds, and drawbacks;

"(C) items the President decides are of a confidential nature;

"(D) payment under a law requiring payment of the total amount of the appropriation to a designated payee; and

"(E) grants to the States under the Social Security Act (42 U.S.C. 301 *et seq.*)."

Section 1516 is largely self-explanatory and the various enumerated exceptions appear to be readily understood. Note that the statute does not make the exemptions mandatory. It merely authorizes them, within the discretion of the apportioning authority (OMB). OMB's implementing instructions, OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, part 4, § 120 (June 21, 2005), have not adopted all of the exemptions permitted under the statute. For example, the Circular's list of funds exempted from apportionment pursuant to 31 U.S.C. § 1516 does not include trust funds or intragovernmental revolving funds. *See* OMB Cir. No. A-11, at § 120.7.

In addition, 10 U.S.C. § 2201(a) authorizes the President to exempt appropriations for military functions of the Defense Department from apportionment upon determining "such action to be necessary in the interest of national defense."

Another exemption, this one mandatory, is contained in 31 U.S.C. § 1511(b)(3): appropriations for "the Senate, the House of Representatives, a committee of Congress, a member, officer, employee, or office of either House of Congress, or the Office of the Architect of the Capitol or an officer or employee of that Office" are exempt from the apportionment requirement. The remainder of the legislative branch along with the judicial branch are subject to apportionment. *See* 31 U.S.C. § 1513(a).

g. Administrative Division of Apportionments

Thus far, we have reviewed the provisions of the Antideficiency Act directed at the appropriation level and the apportionment level. The law also addresses agency subdivisions.

The first provision to note is 31 U.S.C. § 1513(d):

> "An appropriation apportioned under this subchapter may be divided and subdivided administratively within the limits of the apportionment."

Thus, administrative subdivisions are expressly authorized. The precise pattern of subdivisions will vary based on the nature and scope of activities funded under the apportionment and, to some extent, agency preference. The levels of subdivision below the apportionment level are, in descending order, allotment, suballotment, and allocation. See OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, § 20.3 (June 21, 2005), which notes under its definition of apportionment: "An apportionment may be further subdivided by an agency into allotments, suballotments, and allocations." As we will see later in our discussion of 31 U.S.C. § 1517(a), there are definite Antideficiency Act implications flowing from how an agency structures its fund control system.

The next relevant statute is 31 U.S.C. § 1514:[128]

> "(a) The official having administrative control of an appropriation available to the legislative branch, the judicial branch, the United States International Trade Commission, or the District of Columbia government, and, subject to the approval of the President, the head of each executive

[128] Prior to the 1982 recodification of title 31, sections 1513(d) and 1514 had been combined as subsection (g) of the Antideficiency Act.

agency (except the Commission) shall prescribe by regulation a system of administrative control not inconsistent with accounting procedures prescribed under law. The system shall be designed to—

> "(1) restrict obligations or expenditures from each appropriation to the amount of apportionments or reapportionments of the appropriation; and
>
> "(2) enable the official or the head of the executive agency to fix responsibility for an obligation or expenditure exceeding an apportionment or reapportionment.

"(b) To have a simplified system for administratively dividing appropriations, the head of each executive agency (except the Commission) shall work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative division for each appropriation affecting the unit."

Section 1514 is designed to ensure that the agencies in each branch of the government keep their obligations and expenditures within the bounds of each apportionment or reapportionment. The official in each agency who has administrative control of the apportioned funds is required to set up, by regulation, a system of administrative controls to implement this objective. The system must be consistent with any accounting procedures prescribed by or pursuant to law, and must be designed to (1) prevent obligations and expenditures in excess of apportionments or reapportionments, and (2) fix responsibility for any obligation or expenditure in excess of an apportionment or reapportionment.[129] Agency fund control regulations in the executive branch must be approved by OMB. *See* OMB Cir. No. A-11, pt. 4, § 150.7.

[129] See, in this regard, GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: Nov. 9, 1999); GAO, *Policy and Procedures Manual for the Guidance of Federal Agencies*, title 7 (Washington, D.C.: May 18, 1993).

Subsection (b) of 31 U.S.C. § 1514 was added in 1956[130] and was intended to simplify agency allotment systems. Prior to 1956, it was not uncommon for agencies to divide and subdivide their apportionments into numerous "pockets" of obligational authority called "allowances." Obligating or spending more than the amount of each allowance was a violation of the Antideficiency Act as it then existed. The Second Hoover Commission (Commission on Organization of the Executive Branch of the Government) had recommended simplification in 1955. The Senate and House Committees on Government Operations agreed. Both committees reported as follows:

> "The making of numerous allotments which are further divided and suballotted to lower levels leads to much confusion and inflexibility in the financial control of appropriations or funds as well as numerous minor violations of [the Antideficiency Act]."

S. Rep. No. 84-2265, at 9 (1956); H.R. Rep. No. 84-2734, at 7 (1956). The result was what is now 31 U.S.C. § 1514(b).[131]

As noted, one of the objectives of 31 U.S.C. § 1514 is to enable the agency head to fix responsibility for obligations or expenditures in excess of apportionments. The statute encourages agencies to fix responsibility at the highest practical level, but does not otherwise prescribe precisely how this is to be done. Apart from subsection (b), the substance of section 1514 derives from a 1950 amendment to the Antideficiency Act.[132] In testimony on that legislation, the Director of the then Bureau of the Budget stated:

> "At the present time, theoretically, I presume the agency head is about the only one that you could really hold responsible for exceeding [an] apportionment. The revised section provides for going down the line to the person who creates the obligation against the fund and fixes the

[130] Pub. L. No. 863, ch. 814, § 3, 70 Stat. 782, 783 (Aug. 1, 1956).

[131] The historical summary in this paragraph is taken largely from 37 Comp. Gen. 220 (1957).

[132] Pub. L. No. 759, ch. 896, § 1211, 64 Stat. 595, 765 (Sept. 6, 1950).

> responsibility on the bureau head or the division head, if he is the one who creates the obligation."[133]

Thus, depending on the agency regulations and the level at which administrative responsibility is fixed, the violating individual could be the person in charge of a major agency bureau or operating unit, or it could be a contracting officer or finance officer.

Identifying the person responsible for a violation will be easy in probably the majority of cases. However, where there are many individuals involved in a complex transaction, and particularly where the actions producing the violation occurred over a long period of time, pinpointing responsibility can be much more difficult. Hopkins and Nutt, in their study of the Antideficiency Act, present the following as a sensible approach:

> "Generally, [the individual to be held responsible] will be the highest ranking official in the decision-making process who had knowledge, either actual or constructive, of (1) precisely what actions were taken and (2) the impropriety or at least questionableness of such actions. There will be officials who had knowledge of either factor. But the person in the best and perhaps only position to prevent the ultimate error—and thus the one who must be held accountable—is the highest one who is aware of both.[134]

Thus, Hopkins and Nutt conclude, where multiple individuals are involved in a violation, the individual to be held responsible "must not be too remote from the cause of the violation and must be in a position to have prevented the violation from occurring."[135]

h. Expenditures in Excess of Apportionment

The former subsection (h) of the Antideficiency Act, now 31 U.S.C. § 1517(a), provides:

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[133] *Hearings Before Senate Comm. on Appropriations on H.R. 7786*, 81st Cong., 2d Sess. 10 (1950), quoted in Hopkins & Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 128 (1978).

[134] Memorandum for the Assistant Secretary of the Army (Financial Management), 1976, quoted in Hopkins & Nutt, *supra*, at 130.

[135] *Id.*

> "(a) An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding—
>
> > "(1) an apportionment; or
> >
> > "(2) the amount permitted by regulations prescribed under section 1514(a) of this title."

Section 1517(a) must be read in conjunction with sections 1341, 1512, and 1514, previously discussed.

Subsection 1517(a)(1) prohibits obligations or expenditures in excess of an apportionment. Thus, an agency must observe the limits of its apportionments just as it must observe the limits of its appropriations. It follows that an agency cannot obligate or expend appropriations before they have been apportioned. Thus, GAO stated in B-290600, July 10, 2002:

> "The Antideficiency Act prohibits . . . the making or the authorizing of obligations or expenditures in advance of, or in excess of, available appropriations. 31 U.S.C. § 1341. An agency may obligate an appropriation only after OMB has apportioned it to the agency."

Since the Antideficiency Act requires an apportionment before an agency can obligate the appropriation, 31 U.S.C. § 1512(a), an obligation in advance of an apportionment violates the Act. *See* B-255529, Jan. 10, 1994. In other words, if zero has been apportioned, zero is available for obligation or expenditure.[136] When an agency anticipates a need to obligate appropriations upon their enactment, it may request (but not receive) an apportionment before a regular appropriation or continuing resolution has been enacted. Typically, for regular appropriation acts, agencies submit their apportionment requests to OMB by August 21 or within 10 calendar days after enactment of the appropriation, whichever is later. *See* OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, § 120.30 (June 21, 2005). OMB permits agencies to submit requests on the day Congress completes action on the appropriation bill. *Id.* § 120.34. OMB encourages agencies to begin their preparation of apportionment requests as soon as the House and Senate have reached agreement on funding levels (*id.* § 120.30) and to discuss the proposed request with OMB representatives (*id.* § 120.34). OMB will entertain expedited requests and, for emergency funding needs, may approve the apportionment request by telephone or fax. *Id.* For continuing resolutions, OMB typically expedites the process by making "automatic" apportionments under continuing resolutions. *See* B-255529, Jan. 10, 1994; OMB Cir. No. A-11, § 123.5.

[136] *But see Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed. Cir. 1997), *cert. denied*, 525 U.S. 818 (1998). In that case, the Navy had exercised an option to extend a contract on October 1. The appropriation that Navy charged the obligation to was signed into law on October 1; however, OMB had not yet apportioned the appropriation. Cessna, trying to get out of the contract, argued that the obligation for the contract extension was not valid since it was made in advance of the apportionment. The court held that the provisions of the Antideficiency Act were only internal government operating requirements and, as such, they did not confer legal rights on outside parties. *Id.* at 1451–52. *See generally Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 n.9 (Ct. Cl. 1980); *Rough Diamond Co. v. United States*, 351 F.2d 636, 640, 642 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 957 (1966).

In *dicta*, the court said that apportionment is not a prerequisite to the obligation of appropriated funds. The court noted that 31 U.S.C. § 1341 explicitly prohibits obligations both in excess of and (unless otherwise authorized) in advance of appropriations. By contrast, the court pointed out, the apportionment sections of title 31 explicitly prohibit only obligations exceeding an apportionment; they do not literally forbid obligations in advance of an apportionment. *Cessna*, 126 F.3d at 1450–51. The court also rejected Cessna's reliance on provisions of the Defense Department accounting manual that generally prohibited obligations in advance of an apportionment. The *Cessna dicta* has not been followed in any subsequent case.

Under some circumstances, an agency may have a legal duty to seek an additional apportionment from OMB. *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 n.9 (Ct. Cl. 1980); *Berends v. Butz*, 357 F. Supp. 143, 155–56 (D. Minn. 1973). In *Berends v. Butz*, the Secretary of Agriculture had terminated an emergency farm loan program, allegedly due to a shortage of funds. The court found the termination improper and directed reinstatement of the program. Since the shortage of funds related to the amount apportioned and not the amount available under the appropriation, the court found that the Secretary had a duty to request an additional apportionment in order to continue implementing the program. The case does not address the nature and extent of any duty OMB might have in response to such a request.

Subsection 1517(a)(2) makes it a violation to obligate or expend in excess of an administrative subdivision of an apportionment to the extent provided in the agency's fund control regulations prescribed under section 1514. The importance of 31 U.S.C. § 1514 becomes much clearer when it is read in conjunction with 31 U.S.C. § 1517(a)(2). Section 1514 does not prescribe the level of fiscal responsibility for violations below the apportionment level. It merely recommends that the agency set the level at the highest practical point and suggests no more than one subdivision below the apportionment level. The agency thus, under the statute, has a measure of discretion. If it chooses to elevate overobligations or overexpenditures of lower-tier subdivisions to the level of Antideficiency Act violations, it is free to do so in its fund control regulations.

At this point, it is important to return to OMB Circular No. A-11. Since agency fund control regulations must be approved by OMB (*id.* § 150.7), OMB has a role in determining what levels of administrative subdivision should constitute Antideficiency Act violations. Under OMB Circular No. A-11, § 145.2, overobligation or overexpenditure of an allotment or suballotment are always violations. Overobligation or overexpenditure of other administrative subdivisions are violations only if and to the extent specified in the agency's fund control regulations. *See* 31 U.S.C. §§ 1514(a), 1517(a)(2).

In 37 Comp. Gen. 220 (1957), GAO considered proposed fund control regulations of the Public Housing Administration. The regulations provided for allotments as the first subdivision below the apportionment level. They then authorized the further subdivision of allotments into "allowances," but retained responsibility at the allotment level. The "allowances" were intended as a means of meeting operational needs

rather than an apportionment control device. GAO advised that this proposed structure conformed to the purposes of 31 U.S.C. § 1514, particularly in light of the 1956 addition of section 1514(b), and that expenditures in excess of an "allowance" would not constitute Antideficiency Act violations.

For further illustration, see 35 Comp. Gen. 356 (1955) (overobligation of allotment stemming from misinterpretation of regulations); B-95136, Aug. 8, 1979 (overobligation of regional allotments would constitute reportable violation unless sufficient unobligated balance existed at central account level to adjust the allotments); B-179849, Dec. 31, 1974 (overobligation of allotment held a violation of section 1517(a) where agency regulations specified that allotment process was the "principal means whereby responsibility is fixed for the conduct of program activities within the funds available"); B-114841.2-O.M., Jan. 23, 1986 (no violation in exceeding allotment subdivisions termed "work plans"); B-242974.6, Nov. 26, 1991 (nondecision memorandum) (under Defense Department regulations, overobligations of administrative subdivisions of funds that are exempt from apportionment do not constitute Antideficiency Act violations.).

5. Penalties and Reporting Requirements

a. Administrative and Penal Sanctions

Violations of the Antideficiency Act are subject to sanctions of two types, administrative and penal. The Antideficiency Act is the only one of the title 31, United States Code, fiscal statutes to prescribe penalties of both types, a fact which says something about congressional perception of the Act's importance.

An officer or employee who violates 31 U.S.C. § 1341(a) (obligate/expend in excess or advance of appropriation), section 1342 (voluntary services prohibition), or section 1517(a) (obligate/expend in excess of an apportionment or administrative subdivision as specified by regulation) "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. §§ 1349(a), 1518. For a case in which an official was reduced in grade and reassigned to other duties, see *Duggar v. Thomas*, 550 F. Supp. 498 (D.D.C. 1982) (upholding the agency's action against a charge of discrimination).

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Q and A	Debt Ceiling Questions and Answers	5	N.D.	P5;

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Counsel's Office, White House (WHCO)

SERIES:
Rothman, Mika and Steven Croley - Subject Files

FOLDER TITLE:
[Debt Ceiling/Debt Crisis]

FRC ID:
6838
OA Num.:
6714
NARA Num.:
5973

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).

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

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

SERIES:
Rothman, Mika and Steven Croley - Subject Files

FOLDER TITLE:
[Debt Ceiling/Debt Crisis]

FRC ID:
6838
OA Num.:
6714
NARA Num.:
5973

FOIA ID and Segment:
23-39824-F

RESTRICTION CODES

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

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Handwritten Note	Debt Ceilling Call Notes	2	07/15/2011	P5;

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Debt Ceiling

PRESIDENTIAL AUTHORITY TO DECLINE TO EXECUTE UNCONSTITUTIONAL STATUTES

This memorandum discusses the President's constitutional authority to decline to execute unconstitutional statutes.

November 2, 1994

MEMORANDUM FOR THE HONORABLE ABNER J. MIKVA
COUNSEL TO THE PRESIDENT

I have reflected further on the difficult questions surrounding a President's decision to decline to execute statutory provisions that the President believes are unconstitutional, and I have a few thoughts to share with you. Let me start with a general proposition that I believe to be uncontroversial: there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.

First, there is significant judicial approval of this proposition. Most notable is the Court's decision in Myers v. United States, 272 U.S. 52 (1926). There the Court sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute. More recently, in Freytag v. Commissioner, 501 U.S. 868 (1991), all four of the Justices who addressed the issue agreed that the President has "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional." Id. at 906 (Scalia, J., concurring); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (recognizing existence of President's authority to act contrary to a statutory command).

Second, consistent and substantial executive practice also confirms this general proposition. Opinions dating to at least 1860 assert the President's authority to decline to effectuate enactments that the President views as unconstitutional. See, e.g., Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469-70 (1860) (asserting that the President need not enforce a statute purporting to appoint an officer); see also annotations of attached Attorney General and Office of Legal Counsel opinions. Moreover, as we discuss more fully below, numerous Presidents have provided advance notice of their intention not to enforce specific statutory requirements that they have viewed as unconstitutional, and the Supreme Court has implicitly endorsed this practice. See INS v. Chadha, 462 U.S. 919, 942 n.13 (1983) (noting that Presidents often sign legislation containing constitutionally objectionable provisions and indicate that they will not comply with those provisions).

While the general proposition that in some situations the President may decline to enforce unconstitutional statutes is unassailable, it does not offer sufficient guidance as to the appropriate course in specific circumstances. To continue our conversation about these complex issues, I offer the following propositions for your consideration.

1. The President's office and authority are created and bounded by the Constitution; he is required to act within its terms. Put somewhat differently, in serving as the executive created by the Constitution, the President is required to act in accordance with the laws -- including the Constitution, which takes precedence over other forms of law. This obligation is reflected in the Take Care Clause and in the President's oath of office.

2. When bills are under consideration by Congress, the executive branch should promptly identify unconstitutional provisions and communicate its concerns to Congress so that the provisions can be corrected. Although this may seem elementary, in practice there have been occasions in which the President has been presented with enrolled bills containing constitutional flaws that should have been corrected in the legislative process.

3. The President should presume that enactments are constitutional. There will be some occasions, however, when a statute appears to conflict with the Constitution. In such cases, the President can and should exercise his independent judgment to determine whether the statute is constitutional. In reaching a conclusion, the President should give great deference to the fact that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation. Where possible, the President should construe provisions to avoid constitutional problems.

4. The Supreme Court plays a special role in resolving disputes about the constitutionality of enactments. As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.

5. Where the President's independent constitutional judgment and his determination of the Court's probable decision converge on a conclusion of unconstitutionality, the President must make a decision about whether or not to comply with the provision. That decision is necessarily specific to context, and it should be reached after careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch's constitutional authority. Also relevant is the likelihood that compliance or non-compliance will permit judicial resolution of the issue. That is, the President may base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.

6. The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment. If the President does not challenge such provisions (i.e., by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality; a policy of consistent Presidential enforcement of statutes limiting his power thus would deny the Supreme Court the opportunity to review the limitations and thereby would allow for unconstitutional restrictions on the President's authority.

Some legislative encroachments on executive authority, however, will not be justiciable or are for other reasons unlikely to be resolved in court. If resolution in the courts is unlikely and the President cannot look to a judicial determination, he must shoulder the responsibility of protecting the constitutional role of the presidency. This is usually true, for example, of provisions limiting the President's authority as Commander in Chief. Where it is not possible to construe such provisions constitutionally, the President has the authority to act on his understanding of the Constitution.

One example of a Presidential challenge to a statute encroaching upon his powers that did result in litigation was Myers v. United States, 272 U.S. 52 (1926). In that case, President Wilson had defied a statute that prevented him from removing postmasters without Senate approval; the Supreme Court ultimately struck down the statute as an unconstitutional limitation on the President's removal power. Myers is particularly instructive because, at the time President Wilson acted, there was no Supreme Court precedent on point and the statute was not manifestly unconstitutional. In fact, the constitutionality of restrictions on the President's authority to remove executive branch officials had been debated since the passage of the Tenure of Office Act in 1867 over President Johnson's veto. The closeness of the question was underscored by the fact that three Justices, including Justices Holmes and Brandeis, dissented in Myers. Yet, despite the unsettled constitutionality of President Wilson's action, no member of the Court in Myers suggested that Wilson overstepped his constitutional authority -- or even acted improperly -- by refusing to comply with a statute he believed was unconstitutional. The Court in Myers can be seen to have implicitly vindicated the view that the President may refuse to comply with a statute that limits his constitutional powers if he believes it is unconstitutional. As Attorney General Civiletti stated in a 1980 opinion,

> Myers is very nearly decisive of the issue [of Presidential denial of the validity of statutes]. Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts. He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980).

7. The fact that a sitting President signed the statute in question does not change this analysis. The text of the Constitution offers no basis for distinguishing bills based on who signed them; there is no constitutional analogue to the principles of waiver and estoppel. Moreover, every President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions. See annotations of attached signing statements. As we noted in our memorandum on Presidential signing statements, the President "may properly announce to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority." Memorandum for Bernard N. Nussbaum, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel at 4 (Nov. 3, 1993). (Of course, the President is not obligated to announce his reservations in a signing statement; he can convey his views in the time, manner, and form of his choosing.) Finally, the Supreme Court recognized this practice in INS v. Chadha, 462 U.S. 919 (1983): the Court stated that "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds" and then cited the example of President Franklin Roosevelt's memorandum to Attorney General Jackson, in which he indicated his intention not to implement an unconstitutional provision in a statute that he had just signed. Id. at 942 n.13. These sources suggest that the President's signing of a bill does not affect his authority

to decline to enforce constitutionally objectionable provisions thereof.

In accordance with these propositions, we do not believe that a President is limited to choosing between vetoing, for example, the Defense Appropriations Act and executing an unconstitutional provision in it. In our view, the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision.

We recognize that these issues are difficult ones. When the President's obligation to act in accord with the Constitution appears to be in tension with his duty to execute laws enacted by Congress, questions are raised that go to the heart of our constitutional structure. In these circumstances, a President should proceed with caution and with respect for the obligation that each of the branches shares for the maintenance of constitutional government.

Walter Dellinger
Assistant Attorney General

Brief Description of Attached Materials

Attorney General Opinions

1) Memorial of Captain Meigs, 9 Op. Att'y Gen. 462 (1860): In this opinion the Attorney General concluded that the President is permitted to disregard an unconstitutional statute. Specifically, Attorney General Black concluded that a statute purporting to appoint an officer should not be enforced: "Every law is to be carried out so far forth as is consistent with the Constitution, and no further. The sound part of it must be executed, and the vicious portion of it suffered to drop." Id. at 469.

2) Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21 (1980): In this opinion Attorney General Civiletti instructed Secretary of Education Hufstedler that she was authorized to implement regulations that had been disapproved by concurrent congressional resolutions, pursuant to a statutory legislative veto. The Attorney General noted that "the Attorney General must scrutinize with caution any claim that he or any other executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt." Id. at 29. He concluded, however, that "[t]o regard these concurrent resolutions as legally binding would impair the Executive's constitutional role and might well foreclose effective judicial challenge to their constitutionality. More important, I believe that your recognition of these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions against constitutional encroachment." Id.

3) The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980): Attorney General Civiletti, in answer to a congressional inquiry, observed that "Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts." Id. at 59. He added as a cautionary note that "[t]he President has no `dispensing power,'"

meaning that the President and his subordinates "may not lawfully defy an Act of Congress if the Act is constitutional. . . . In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot." Id. at 59-60.

4) Letter from William French Smith, Attorney General, to Peter W. Rodino, Jr., Chairman, House Judiciary Committee (Feb. 22, 1985): This letter discussed the legal precedent and authority for the President's refusal to execute a provision of the Competition in Contracting Act. The Attorney General noted that the decision "not to implement the disputed provisions has the beneficial byproduct of increasing the likelihood of a prompt judicial resolution. Thus, far from unilaterally nullifying an Act of Congress, the Department's actions are fully consistent with the allocation of judicial power by the Constitution to the courts." Id. at 8. The letter also stated that "the President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does presidential approval of an enactment cure constitutional defects." Id. at 3.

Office of Legal Counsel Opinions

1) Memorandum to the Honorable Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Sept. 27, 1977): This opinion concluded that the President may lawfully disregard a statute that he interprets to be unconstitutional. We asserted that "cases may arise in which the unconstitutionality of the relevant statute will be certain, and in such a case the Executive could decline to enforce the statute for that reason alone." Id. at 13. We continued, stating that "[u]nless the unconstitutionality of a statute is clear, the President should attempt to resolve his doubts in a way that favors the statute, and he should not decline to enforce it unless he concludes that he is compelled to do so under the circumstances." Id. We declined to catalogue all the considerations that would weigh in favor of non-enforcement, but we identified two: first the extent of the harm to individuals or the government resulting from enforcement; and, second, the creation of an opportunity for a court challenge through non-enforcement (e.g., Myers).

2) Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731 (1980): In this opinion we rejected the constitutionality of a proposed legislative veto, prior to the Court's decision in Chadha. We opined that "[t]o regard this provision as legally binding would impair the Executive's constitutional role and would constitute an abdication of the responsibility of the Executive Branch." Id. at 734. It should be noted that the legislation in question was pending in Congress, and the possibility that President Carter would sign the legislation did not affect our analysis of the constitutional issue. We simply stated that, "if enacted, the [legislative veto provision] will not have any legal effect." Id.

3) Issues Raised by Section 102(c)(2) of H.R. 3792, 14 Op. O.L.C. 38 (1990) (preliminary print): This opinion also addressed then-pending legislation, in this case the foreign relations authorization bill for fiscal years 1990 and 1991. The opinion found that a provision of the bill was unconstitutional and severable. Regarding non-execution, the opinion stated that "at least in the context of legislation that infringes the separation of powers, the President has the constitutional authority to refuse to enforce unconstitutional laws." Id. at 53. The opinion concluded that "if the President chooses to sign H.R. 3792, he would be constitutionally authorized to decline to enforce" the constitutionally objectionable section. Id. at 38.

4) Issues Raised by Section 129 of Pub. L. No. 102-138 and Section 503 of Pub. L. No. 102-140, 16 Op. O.L.C. 18 (1992) (preliminary print): This opinion concluded that two statutory provisions that limited the issuance of official and diplomatic passports were unconstitutional and were severable from the remainder of the two statutes. On the question of non-execution, the opinion rejected "the argument that the President may not treat a statute as invalid prior to a judicial determination." Id. at 40. The opinion concluded that the Constitution authorizes the President to refuse to enforce a law that he believes is unconstitutional.

5) Memorandum for Bernard N. Nussbaum, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (Nov. 3, 1993): This opinion discusses different categories of signing statements, including those construing bills to avoid constitutional problems and those in which the President declares "that a provision of the bill before him is flatly unconstitutional, and that he will refuse to enforce it." Id. at 3. The opinion concludes that such "uses of Presidential signing statements generally serve legitimate and defensible purposes." Id. at 7.

Presidential Signing Statements

1) Statement by the State Department (Announcing President Wilson's Refusal to Carry Out the Section of the Jones Merchant Marine Act of June 5, 1920, directing him to terminate treaty provisions restricting the Government's right to impose discriminatory tonnage dues and tariff duties), 17 A Compilation of the Messages and Papers of the Presidents 8871 (Sept. 24, 1920) (Pres. Wilson): The State Department announced that it "has been informed by the President that he does not deem the direction contained in Section 34 of the so-called Merchant Marine Act an exercise of any constitutional power possessed by the Congress." Id. The statement also defended President Wilson's decision to sign the bill and noted that "the fact that one section of the law involves elements of illegality rendering the section inoperative need not affect the validity and operation of the Act as a whole." 5 Green Haywood Hackworth, Digest of International Law 324 (1943).

2) Special Message to the Congress Upon Signing the Department of Defense Appropriation Act, Pub. Papers of Dwight D. Eisenhower 688 (July 13, 1955): President Eisenhower, in signing a bill (H.R. 6042) that contained a legislative veto, stated that the legislative veto "will be regarded as invalid by the executive branch of the Government in the administration of H.R. 6042, unless otherwise determined by a court of competent jurisdiction." Id. at 689.

3) Memorandum on Informing Congressional Committees of Changes Involving Foreign Economic Assistance Funds, Pub. Papers of John F. Kennedy 6 (Jan. 9, 1963): President Kennedy stated that a provision in the bill he was signing contained an unconstitutional legislative veto. He announced that "[i]t is therefore my intention . . . to treat this provision as a request for information." Id.

4) Statement by the President Upon Approving the Public Works Appropriations Act, Pub. Papers of Lyndon B. Johnson 104 (Dec. 31, 1963): President Johnson also found that a legislative veto provision was unconstitutional and stated that he would treat it as a request for information.

5) Statement About Signing the Public Buildings Amendments of 1972, Pub. Papers of Richard Nixon 686 (June 17, 1972): President Nixon stated that a clause conditioning the

use of authority by the executive branch on the approval of a congressional committee was unconstitutional. He ordered the agency involved to comply with "the acceptable procedures" in the bill "without regard to the unconstitutional provisions I have previously referred to." Id. at 687.

6) Statement on Signing the Department of Defense Appropriation Act of 1976, Pub. Papers of Gerald R. Ford 241 (Feb. 10, 1976): President Ford stated that a committee approval mechanism was unconstitutional and announced that he would "treat the unconstitutional provision . . . to the extent it requires further Congressional committee approval, as a complete nullity." Id. at 242.

7) Statement on Signing Coastal Zone Management Improvement Act of 1980, Pub. Papers of Jimmy Carter 2335 (Oct. 18, 1980): President Carter stated that a legislative veto provision was unconstitutional and that any attempt at a legislative veto would "not [be] regarded as legally binding." Id.

8) Statement on Signing the Union Station Redevelopment Act of 1981, Pub. Papers of Ronald Reagan 1207 (Dec. 29, 1981): President Reagan stated that a legislative veto was unconstitutional and announced that "[t]he Secretary of Transportation will not . . . regard himself as legally bound by any such resolution." Id.

9) Statement On Signing the National and Community Service Act of 1990, Pub. Papers of George Bush 1613 (Nov. 16, 1990): President Bush rejected the constitutionality of provisions that required a Presidentially appointed board exercising executive authority to include, among its 21 members, "seven members nominated by the Speaker of the House of Representatives . . . [and] seven members nominated by the Majority Leader of the Senate." Id. at 1614. He announced that the restrictions on his choice of nominees to the board "are without legal force or effect." Id.

10) 7 A Compilation of the Messages and Papers of the Presidents 377 (Aug. 14, 1876) (Pres. Grant): This is one of the earliest of many instances of a President "construing" a provision (to avoid constitutional problems) in a way that seems to amount to a refusal to enforce a provision of it. An 1876 statute directed that notices be sent to certain diplomatic and consular officers "to close their offices." President Grant, in signing the bill, stated that, "[i]n the literal sense of this direction it would be an invasion of the constitutional prerogatives and duty of the Executive." Id. In order to avoid this problem, President Grant "construe[ed]" this provision "only to exercise the constitutional prerogative of Congress over the expenditures of the Government," not to "imply[] a right in the legislative branch to direct the closing or discontinuing of any of the diplomatic or consular offices of the Government." Id. at 378.

Other Presidential Documents

1) A Presidential Legal Opinion, 66 Harv. L. Rev. 1353 (1953): This was a legal opinion from President Franklin Roosevelt to Attorney General Jackson. President Roosevelt stated that he was signing the Lend-Lease Act despite a provision providing for a legislative veto, "a provision which, in my opinion, is clearly unconstitutional." Id. at 1357. The President stated that, "[i]n order that I may be on record as indicating my opinion that the foregoing provision of the so-called Lend-Lease Act is unconstitutional, and in order that my approval of the bill, due to the existing exigencies of the world situation, may not be construed as a tacit acquiescence in any contrary view, I am requesting you to place this memorandum in

the official files of the Department of Justice. I am desirous of having this done for the further reason that I should not wish my action in approving the bill which includes this invalid clause, to be used as a precedent for any future legislation comprising provisions of a similar nature." Id. at 1358.

2) Message to the Congress on Legislative Vetoes, Pub. Papers of Jimmy Carter 1146 (Jun. 21, 1978): In this memorandum President Carter expressed his strong opposition to legislative vetoes and stated that "[t]he inclusion of [a legislative veto] in a bill will be an important factor in my decision to sign or to veto it." Id. at 1148. He further stated that, "[a] s for legislative vetoes over the execution of programs already prescribed in legislation and in bills I must sign for other reasons, the Executive Branch will generally treat them as 'report-and-wait' provisions. In such a case, if Congress subsequently adopts a resolution to veto an Executive action, we will give it serious consideration, but we will not, under our reading of the Constitution, consider it legally binding." Id. at 1149.

Historical Materials

1) Statement of James Wilson on December 1, 1787 on the Adoption of the Federal Constitution, reprinted in 2 Jonathan Elliot, Debates on the Federal Constitution 418 (1836): Wilson argued that the Constitution imposed significant -- and sufficient -- restraints on the power of the legislature, and that the President would not be dependent upon the legislature. In this context, he stated that "the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges,-- when they consider its principles, and find it to be incompatible with the superior power of the Constitution,-- it is their duty to pronounce it void . . . . In the same manner, the President of the United States could shield himself, and refuse to carry into effect an act that violates the Constitution." Id. at 445-46.

2) Letter from Chief Justice Chase to Gerrit Smith (Apr. 19, 1868), quoted in J. Schuckers, The Life and Public Services of Salmon Portland Chase 577 (1874): Chase stated that President Johnson took the proper action in removing Secretary of War Stanton without Senate approval, in light of Johnson's belief that the statutory restriction on his removal authority was unconstitutional. In this regard, Chase commented that "the President had a perfect right, and indeed was under the highest obligation, to remove Mr. Stanton, if he made the removal not in wanton disregard of a constitutional law, but with a sincere belief that the Tenure-of-Office Act was unconstitutional and for the purpose of bringing the question before the Supreme Court." Id. at 578.

Congressional Materials

1) The President's Suspension of the Competition in Contracting Act is Unconstitutional, H.R. Rep. No. 138, 99th Cong., 1st Sess. (1985): The House Committee on Government Operations concluded that the President lacked the authority to refuse to implement any provision of the Competition in Contracting Act. The Committee stated that, "[t]o adopt the view that one's oath to support and defend the Constitution is a license to exercise any available power in furtherance of one's own constitutional interpretation would quickly destroy the entire constitutional scheme. Such a view, whereby the President pledges allegiance to the Constitution but then determines what the Constitution means, inexorably leads to the usurpation by the Executive of the others' roles." Id. at 11. The Committee also

stated that "[t]he Executive's suspension of the law circumvents the constitutionally specified means for expressing Executive objections to law and is a constitutionally impermissible absolute veto power." Id. at 13.

2) Memorandum from the Congressional Research Service to the Committee on Government Operations concerning "The Executive's Duty to Enforce the Laws" (Feb. 6, 1985), reprinted in Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 544 (1985): This memorandum stated that the President lacks the authority to decline to enforce statutes. The CRS argued that "[t]he refusal of the President to execute the law is indistinguishable from the power to suspend the laws. That power, as is true of the power to amend or to revive an expired law, is a legislative power." Id. at 554.

Cases (not included in the submitted materials)

1) Myers v. United States, 272 U.S. 52 (1926): The President refused to comply with -- that is, enforce -- a limitation on his power of removal that he regarded as unconstitutional, even though the question had not been addressed by the Supreme Court. A member of Congress, Senator Pepper, urged the Supreme Court to uphold the validity of the provision. The Supreme Court vindicated the President's interpretation without any member of the Court indicating that the President had acted unlawfully or inappropriately in refusing to enforce the removal restriction based on his belief that it was unconstitutional.

2) United States v. Lovett, 328 U.S. 303 (1946): The President enforced a statute that directed him to withhold compensation from three named employees, even though the President believed the law to be unconstitutional. The Justice Department argued against the constitutionality of the statute in the ensuing litigation. (The Court permitted an attorney to appear on behalf of Congress, amicus curiae, to defend the statute.)

3) INS v. Chadha, 462 U.S. 919 (1983): This case involved the withholding of citizenship from an applicant pursuant to a legislative veto of an Attorney General decision to grant citizenship. Despite a Carter Administration policy against complying with legislative vetoes (see Carter Presidential memorandum, supra), the executive branch enforced the legislative veto, and, in so doing, allowed for judicial review of the statute. As with Lovett, the Justice Department argued against the constitutionality of the statute.

4) Morrison v. Olson, 487 U.S. 654 (1988): The President viewed the independent counsel statute as unconstitutional. The Attorney General enforced it, making findings and forwarding them to the Special Division. In litigation, however, the Justice Department attacked the constitutionality of the statute and left its defense to the Senate Counsel, as amicus curiae, and the independent counsel herself.

5) Freytag v. Commissioner, 501 U.S. 868 (1991): A unanimous Court ruled that the appointment of special trial judges by the Chief Judge of the United States Tax Court did not violate the Appointments Clause. Five Justices concluded that the Tax Court was a "Court of Law" for Appointments Clause purposes, despite the fact that it was an Article I court, so that the Tax Court could constitutionally appoint inferior officers. Four Justices, in a concurrence by Justice Scalia, contended that the Tax Court was a "Department" under the Appointments Clause. The concurrence stated that "Court of Law" did not include Article I courts and that the Framers intended to prevent Congress from having the power both to create offices and to appoint officers. In this regard, the concurrence stated that "it was not

enough simply to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including a separate political constituency, to which he alone was responsible, and the power to veto encroaching laws, see Art. I, § 7, or even to disregard them when they are unconstitutional." Id. at 906 (Scalia, J., concurring).

6) Lear Siegler, Inc., Energy Products Division v. Lehman, 842 F.2d 1102 (9th Cir. 1988), withdrawn in part 893 F.2d 205 (9th Cir. 1990) (en banc): The President refused to comply with provisions of the Competition in Contracting Act that he viewed as unconstitutional and thereby allowed for judicial resolution of the issue. The Ninth Circuit rejected the President's arguments about the constitutionality of the provisions. The court further determined that Lear Siegler was a prevailing party and was entitled to attorneys' fees, because the executive branch acted in bad faith in refusing to execute the contested provisions. In this regard, the court stated that the President's action was "utterly at odds with the texture and plain language of the Constitution," because a statute is part of the law of the land that the President is obligated to execute. Id. at 1121, 1124. On rehearing en banc, the court ruled that Lear Siegler was not a prevailing party and withdrew the sections of the opinion quoted above.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Memorandum	Memorandum to the Attorney General - To: The Attorney General - From: Acting Assistant Attorney General Ralph W. Tarr	15	10/21/1985	P5;

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

SERIES:
Rothman, Mika and Steven Croley - Subject Files

FOLDER TITLE:
[Debt Ceiling/Debt Crisis]

FRC ID:
6838
OA Num.:
6714
NARA Num.:
5973

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]
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Memorandum	Note to File re ICA - To: File	6	N.D.	P5;

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SERIES:
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FOLDER TITLE:
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Debt Ceiling

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

April 4, 2011

The Honorable Harry Reid
Democratic Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

I am writing to update you on the Treasury Department's projections regarding when the statutory debt limit will be reached and to inform you about the limits of the available measures at our disposal to delay that date temporarily.

In our previous communications to Congress, we provided regular estimates of the likely time period in which the debt limit could be reached. We can now make that projection with more precision. The Treasury Department now projects that the debt limit will be reached no later than May 16, 2011. This is a projection based on the expected level of tax receipts, the timing of our commitments and obligations over the next several weeks, and our judgment concerning the level of cash balances we need to operate. Although these projections could change, we do not believe they are likely to change in a way that would give Congress more time in which to act. Treasury will provide an update of this projection in early May.

If the debt limit is not increased by May 16, the Treasury Department has authority to take certain extraordinary measures, described in detail in the appendix, to temporarily postpone the date that the United States would otherwise default on its obligations. These actions, which have been employed during previous debt limit impasses, would be exhausted after approximately eight weeks, meaning no headroom to borrow within the limit would be available after about July 8, 2011. At that point the Treasury would have no remaining borrowing authority, and the available cash balances would be inadequate for us to operate with a sufficient margin to meet our commitments securely.

As Secretary of the Treasury, I would prefer to avoid resorting to these extraordinary measures. The longer Congress fails to act, the more we risk that investors here and around the world will lose confidence in our ability to meet our commitments and our obligations.

If Congress does not act by May 16, I will take all measures available to me to give Congress additional time to act and to protect the creditworthiness of the country. These measures, however, only provide a limited degree of flexibility—much less flexibility than when our deficits were smaller.

As the leaders of both parties in both houses of Congress have recognized, increasing the limit is necessary to allow the United States to meet obligations that have been previously authorized and appropriated by Congress. Increasing the limit does not increase the obligations we have as a Nation; it simply permits the Treasury to fund those obligations that Congress has already established.

If Congress failed to increase the debt limit, a broad range of government payments would have to be stopped, limited or delayed, including military salaries and retirement benefits, Social Security and Medicare payments, interest on the debt, unemployment benefits and tax refunds. This would cause severe hardship to American families and raise questions about our ability to defend our national security interests. In addition, defaulting on legal obligations of the United States would lead to sharply higher interest rates and borrowing costs, declining home values and reduced retirement savings for Americans. Default would cause a financial crisis potentially more severe than the crisis from which we are only now starting to recover.

For these reasons, default by the United States is unthinkable. This is not a new or partisan judgment; it is a conclusion that has been shared by every Secretary of the Treasury, regardless of political party, in the modern era.

Treasury has been asked whether it would be possible for the Treasury to sell financial assets as a way to avoid or delay congressional action to raise the debt limit. This is not a viable option. To attempt a "fire sale" of financial assets in an effort to buy time for Congress to act would be damaging to financial markets and the economy and would undermine confidence in the United States.

Selling the Nation's gold, for example, would undercut confidence in the United States both here and abroad. A rush to sell other financial assets, such as the remaining financial investments from the Emergency Economic Stabilization Act programs, would impose losses on American taxpayers and risk damaging the value of similar assets held by private investors without generating sufficient revenue to make an appreciable difference in when the debt limit must be raised. Likewise, for both legal and practical reasons, it is not feasible to sell the government's portfolio of student loans.

Nor is it possible to avoid raising the debt limit by cutting spending or raising taxes. Because of the magnitude of past commitments by Congress, immediate cuts in spending or tax increases cannot make the necessary cash available. And, reductions in future spending commitments cannot supply the short-term cash needed. In order to avoid an increase in the debt limit, Congress would need to eliminate annual deficits immediately.

As the Congressional Research Service stated in its February 11, 2011 report:

> "If the debt limit is reached and Treasury is no longer able to issue federal debt, federal spending would have to be decreased or federal revenues would have to be increased by a corresponding amount to cover the gap in what cannot be borrowed. To put this

into context, the federal government would have to eliminate all spending on discretionary programs, cut nearly 70% of outlays for mandatory programs, increase revenue collection by nearly two-thirds, or take some combination of those actions in the second half of FY2011 (April through September 30, 2011) in order to avoid increasing the debt limit. Additional spending cuts and/or revenue increases would be required, under current policy, in FY2012 and beyond to avoid increasing the debt limit."[1]

None of those budget policy choices is feasible or responsible. As a consequence, given that Congress has imposed on itself the requirement for periodic increases, there is no alternative to enactment of an increase in the debt limit.

I am encouraged that the leaders of both parties in both houses of Congress have clearly stated in public over the last few weeks and months that we cannot default on our obligations as a nation and therefore have to increase the debt limit. Because the date by which we need to increase the limit is growing nearer, I hope that the leadership in both houses will help us impress upon all Members the gravity of this issue and the imperative of timely action.

President Obama is strongly committed to working with both parties to restore fiscal responsibility, and he looks forward to working with Congress to achieve that critically important objective. In the meantime, it is critical that Congress act to increase the debt limit so that the full faith and credit of the United States is protected.

I hope this information is helpful as you plan the legislative schedule for the coming weeks.

Sincerely,

Timothy F. Geithner

Identical letter sent to:

The Honorable John A. Boehner, Speaker of the House
The Honorable Nancy Pelosi, House Democratic Leader
The Honorable Mitch McConnell, Senate Republican Leader

cc: The Honorable Dave Camp, Chairman, House Committee on Ways and Means
The Honorable Sander M. Levin, Ranking Member, House Committee on Ways and Means
The Honorable Max Baucus, Chairman, Senate Committee on Finance
The Honorable Orrin Hatch, Ranking Member, Senate Committee on Finance
All other Members of the 112th Congress

Enclosure

[1] CRS Report R41633, February 11, 2011

APPENDIX

Descriptions of the Extraordinary Measures

Previous Secretaries of the Treasury, in both Republican and Democratic administrations, have taken extraordinary measures in order to prevent the United States from defaulting on its obligations as Congress deliberated on increasing the statutory debt limit.[2] Four of these extraordinary measures are available this year. Other measures taken by previous Treasury Secretaries, however, are either unavailable or of limited use.

The extraordinary measures currently available are: (1) suspending sales of State and Local Government Series (SLGS) Treasury securities; (2) determining that a "debt issuance suspension period" exists, which would permit the redemption of existing, and the suspension of new, investments of the Civil Service Retirement and Disability Fund (CSRDF); (3) suspending reinvestment of the Government Securities Investment Fund (G Fund); and (4) suspending reinvestment of the Exchange Stabilization Fund (ESF). These measures are described in more detail below.

These measures, all of which have been employed during previous debt limit impasses, have the effect of creating or conserving headroom beneath the debt limit. Importantly, these extraordinary measures—even taken together—are of limited use. On average, the public debt of the United States increases by approximately $125 billion per month (although there are significant variations from month to month). In total, the extraordinary measures free up approximately $165 billion in headroom under the limit before June 30, 2011, as described below. In addition, if the United States does not exhaust the $165 billion before June 30, 2011, the law governing the CSRDF permits Treasury to take one more action on June 30, which would create an additional $67 billion in headroom on that date.

Under Treasury's current projections, these extraordinary measures would be exhausted after approximately eight weeks, meaning no headroom to borrow within the limit would be available after about July 8, 2011. This estimate is dependent on a number of factors, such as the total amount of tax receipts, which cannot be known with certainty until they actually come in during the second half of April, and the fact that large payments like Social Security and interest payments on Treasury securities are made at certain times of the month.

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[2] The Treasury Department has already taken an action, relating to the Supplementary Financing Program, that has delayed the date that the debt limit will be reached. In January, Treasury announced that it would allow the outstanding $200 billion in Treasury bills issued under the Supplementary Financing Program (which count against the debt limit) to mature in an orderly fashion without being refunded by new bills. By taking this action, Treasury has reduced the debt by $200 billion, so as to postpone the date the debt limit is reached. This action has already been completed and the resulting reduction in debt has already been factored into Treasury's projections; it cannot further postpone the date the debt limit is reached.

It should also be noted that these extraordinary measures are less useful than in previous debt limit impasses. In the 1995-1996 debt limit impasse, for example, the monthly increase in debt was not as large, and the extraordinary measures were therefore able to postpone the date by which the debt limit needed to be increased for several months. The same was true during the 1985 and 2003 debt limit impasses. And, as noted below, some extraordinary measures that were used in the past are no longer available or of limited use today.

1. State and Local Government Securities (SLGS)

The Treasury Department has authority to suspend its issuance of State and Local Government Series Treasury securities (SLGS). This, however, is a limited measure that does not free up borrowing authority.

SLGS are special purpose Treasury securities issued to state and local government entities. In ordinary times, the Treasury Department issues SLGS to state and local governments to assist these governments in complying with Federal tax laws when they have cash proceeds to invest from their issuance of tax exempt bonds. When Treasury issues these securities, they count against the debt limit.[3] There is no statutory or other requirement for the Treasury Department to issue SLGS; they are issued in order to assist state and local governments, and Treasury may suspend SLGS sales during or in anticipation of a debt limit impasse.

This action does not free up headroom under the debt limit. Rather, it conserves headroom (*i.e.*, it eliminates increases in debt that would count against the debt limit if issued).[4] Utilizing this measure reduces uncertainty in projecting the growth of the debt.[5]

2. Civil Service Retirement and Disability Fund

Once the debt limit has been reached, Treasury has authority to take actions regarding investments under the Civil Service Retirement and Disability Fund (CSRDF). This includes declaring a "debt issuance suspension period" with respect to the CSRDF investments.[6]

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[3] The total amount of SLGS outstanding at the end of February 2011 was $182.4 billion.

[4] In other words: when Treasury issues these securities, these securities count against the debt limit; suspending issuance therefore conserves headroom.

[5] Approximately $3 - $12 billion in SLGS is issued per month although this amount is subject to substantial variation from month to month.

[6] The final three measures—relating to Civil Service Retirement and Disability Fund, the Government Securities Investment Fund of the Thrift Savings Plan, and the Exchange Stabilization Fund—all involve the management of the portion of the debt held by U.S. Government accounts, not the debt that is held by the public. The debt of the United States consists of two components: (1) debt held by the public (*e.g.*, the Treasury securities that are periodically auctioned by Treasury); and (2) debt held by U.S. Government accounts. This second category includes, for example, the investments by the Social Security trust fund and other trust funds, and consists of special Treasury securities that are issued directly to those trust fund accounts. The debt held by U.S. Government accounts is approximately $4.6 trillion—in other words, it constitutes roughly a third of the debt.

a. Declaring a "Debt Issuance Suspension Period"

The CSRDF provides defined benefits to retired and disabled Federal employees covered by the Civil Service Retirement System. The fund is invested in special-issue Treasury securities, which count against the debt limit. Congress has given Treasury statutory authority to take certain actions in the event of a debt limit impasse. Specifically, the statute authorizes the Secretary of the Treasury to determine that a "debt issuance suspension period" exists and, once he has done so, Treasury can (1) redeem certain existing investments in the CSRDF, and (2) suspend new investment.

The Secretary of the Treasury does not have unlimited discretion to declare a debt issuance suspension period. Under the statute that governs the CSRDF, the term "debt issuance suspension period" means the period of time that the Treasury Secretary determines that Treasury securities cannot be issued without exceeding the debt limit. The determination of the length of the period must be based on the facts as they exist at the time.

Declaring a debt issuance suspension period is a limited measure that relates only to the CSRDF; it has no impact on any other investments or any other portion of the debt. Moreover, it only provides limited additional time. Assuming a two-month debt issuance suspension period, this measure would free up approximately $12 billion in headroom.[7]

Even if the Secretary were to declare a much longer debt issuance suspension period, this would provide only limited additional headroom. Declaring a 12-month debt issuance suspension period, for example, would only free up approximately $72 billion in additional headroom.[8] In other words, because the debt increases on average by approximately $125 billion per month, a 12-month debt issuance suspension period (which frees up roughly $72 billion in headroom) would postpone the date by which the debt limit must be increased by only a matter of weeks.

During a debt issuance suspension period, civil service benefit payments would continue to be made as long as the United States has not yet exhausted the extraordinary measures. Once the extraordinary measures have been exhausted, however, the U.S. Government will be limited in

[7] The statute governing the CSRDF gives Treasury authority to redeem existing Treasury securities held by the CSRDF in an amount up to the amount of civil service benefit payments authorized to be made from the CSRDF during the debt issuance suspension period. 5 U.S.C. § 8348(k). Treasury makes approximately $6 billion in civil service benefit payments from the CSRDF each month. Therefore, declaring a two-month debt issuance suspension period would allow Treasury to redeem approximately $12 billion of the Treasury securities held by the CSRDF, freeing up approximately $12 billion in headroom. The statute also authorizes Treasury to suspend new investments by the CSRDF during a debt issuance suspension period. The CSRDF receives approximately $2 billion in new employer and employee contributions each month. Therefore, during each month of a debt issuance suspension period, approximately $2 billion in headroom that would otherwise be used is conserved.

[8] As explained above, Treasury makes approximately $6 billion in civil service benefit payments each month. A 12-month debt issuance suspension period would allow Treasury to redeem approximately $6 billion 12 times, or approximately $72 billion, of the Treasury securities held by the CSRDF, freeing up approximately $72 billion in headroom. Additionally, each month it would also conserve approximately $2 billion in headroom.

its ability to make payments across the government. After the debt limit impasse has ended, the statute provides that the CSRDF is made whole.[9]

b. One-time measure available on June 30 if the United States has not exhausted the measures before that date

If the United States has not exhausted the measures before June 30, the statute governing the CSRDF provides an additional one-time measure on that date that frees up headroom.

The same statute that authorizes Treasury to redeem existing investments during a debt issuance suspension period also authorizes Treasury to suspend new investments by the CSRDF during such a period. On June 30, approximately $67 billion in CSRDF investments mature. Ordinarily the proceeds of the maturing investments would be reinvested. But with the investment-suspension authority available, Treasury may suspend the reinvestment of the maturing investments. Suspending the reinvestment would free up approximately $67 billion in headroom.

It should be understood that this suspension of reinvestment that frees up headroom is a one-time measure: it is only available on June 30.[10] The benefit of this additional headroom, moreover, is offset in part by the fact that on that same day Treasury is required to make $12 billion in interest payments on certain of its securities held by the public.

3. G Fund

Once the debt limit has been reached, Treasury may also suspend the daily reinvestment of the Treasury securities held by the Government Securities Investment Fund (G Fund) of the Federal Employees' Retirement System Thrift Savings Plan.

The G Fund is a money market defined-contribution retirement fund for Federal employees. The Fund is invested in special-issue Treasury securities, which count against the debt limit. The entire balance matures daily and is ordinarily reinvested. Congress has granted Treasury the statutory authority to suspend reinvestment of all or part of the balance of the G Fund when the Secretary determines that the Fund cannot be fully invested without exceeding the debt limit.[11]

Using this measure immediately frees up headroom under the debt limit. Because the G Fund balance is approximately $130 billion, using this measure can immediately create up to approximately $130 billion in headroom.

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[9] After the debt limit impasse has ended, Treasury is required to put the CSRDF investment portfolio into the position it would have been in if the impasse had not occurred, and to restore lost interest on the next regularly scheduled interest payment date on the Treasury securities held by the CSRDF.

[10] In addition, this measure conserves headroom. On June 30, there is an interest payment of approximately $18 billion scheduled to be made to the fund. If this interest were invested, it would use up headroom. Because the statute governing the CSRDF authorizes Treasury to suspend new investments, Treasury may suspend the investment of this interest payment, which would conserve approximately $18 billion of headroom.

[11] 5 U.S.C. § 8438(g).

During the period of the investment suspension, payments from the G Fund continue to be made as long as the United States has not yet exhausted the extraordinary measures. Once the United States has exhausted the extraordinary measures, however, the U.S. Government will be limited in its ability to make payments across the government. After the debt limit impasse has ended, the G Fund is made whole.[12]

4. Exchange Stabilization Fund

Treasury may also suspend the daily reinvestment of Treasury securities held by the Exchange Stabilization Fund (ESF).

The ESF has a number of uses, including purchasing or selling foreign currencies. A portion of the ESF is held in U.S. dollars, and the dollar-balance of the ESF is invested in special-issue Treasury securities. The entire dollar-balance matures daily. There is no requirement that the Treasury Department invest the ESF, so Treasury may discontinue investing the dollar-balance of the ESF during a debt limit impasse.

Suspending the daily reinvestment of the dollar-balance of the ESF immediately frees up headroom under the debt limit. Because the dollar-balance of the ESF is approximately $23 billion, this would create up to approximately $23 billion in headroom.

After a debt limit impasse, the interest lost by the ESF is not restored: there is no existing authority to reimburse the ESF for lost interest during the period that the dollar-balance is not invested.

* * *

As described above, the four extraordinary measures can free up approximately $230 billion in headroom. This would postpone the date by which the debt limit needs to be increased by approximately 8 weeks, or until about July 8, 2011.

Other Measures Used by Previous Treasury Secretaries Are No Longer Available or of Limited Use

The other measures that previous Treasury Secretaries have used in past debt limit impasses in order to postpone the date by which the debt limit needed to be increased are either not available or of limited use.

First, although previous Treasury Secretaries have suspended the issuance of U.S. savings bonds to the public, doing so now would be of little benefit. Suspending the issuance of U.S. savings bonds would not free up any headroom under the debt limit. As is the case with suspending sales of SLGS, suspending the sales of savings bonds would only eliminate increases in debt that would count against the debt limit if the securities were issued. Moreover, suspending such sales conserves very little headroom.[13] Second, measures relating to the Federal

[12] Treasury is required to restore lost interest on the next business day.

[13] Sales of savings bonds increase the amount of debt by less than $220 million per month on average.

Financing Bank (FFB) are of limited use.[14] Third, a measure previously used, involving the calling in of cash that Treasury kept on deposit at banks, is no longer available: Treasury no longer keeps these balances.[15] Finally, Congress has in the past provided one-time tools in the midst of a debt limit impasse;[16] those authorities expired 15 years ago.

Other Assets

Although the U.S. Government owns other assets, such as gold, there are prudential or legal limitations on its ability to sell these assets. Selling the Nation's gold to meet payment obligations would undercut confidence in the United States both here and abroad, and would be extremely destabilizing to the world financial system.

With respect to the portfolio of mortgage-backed securities owned by Treasury, Treasury recently announced that it would begin gradually selling these assets, at the rate of up to $10 billion per month subject to market conditions.[17] Treasury's assessment is that selling this amount maximizes value to taxpayers without adversely affecting the market or mortgage rates. A "fire sale" of these assets would be adverse to the interests of taxpayers and could jeopardize the still-fragile housing market. Similarly, although the United States retains investments received in connection with the Troubled Asset Relief Program, Treasury is in the process of exiting these investments in an orderly manner. A "fire sale" of these investments would not maximize value for the taxpayer and could be detrimental to the economy in general. Finally, as mentioned above, for both legal and practical reasons, sale of the government's portfolio of student loans is not feasible. Secretaries of the Treasury of both parties have concluded that asset sales are not a prudent or viable alternative to increasing the debt limit.

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[14] In the past, Treasury was able to free up headroom under the debt limit by entering into multi-step exchange transactions with FFB and the CSRDF, swapping obligations that do not count against the debt limit for an equal amount of Treasury securities held by the CSRDF that do count against the debt limit. In each case, FFB used the Treasury securities that it received from the CSRDF to pay down its borrowings from Treasury. When Treasury received from FFB the Treasury securities, they were extinguished, creating the headroom. The potential to use such an exchange transaction is of limited use at this time because FFB has a limited amount of obligations available to exchange.

[15] In the past, Treasury had an ability to increase its cash balance without increasing debt by calling in the non-interest-bearing balances that Treasury formerly kept on deposit at banks to compensate them for fiscal services they provided to Treasury. That option is no longer available because Treasury discontinued keeping those "compensating balances" after Congress appropriated funding to Treasury in 2004 to pay directly for fiscal services.

[16] Specifically, in 1996, in order to enable Treasury to pay the March 1996 Social Security benefits, Congress passed legislation that permitted Treasury to issue a limited amount of Treasury securities that were temporarily excluded from being counted against the debt limit. In addition, Congress passed legislation that temporarily excluded from being counted against the debt limit the new Treasury securities that Treasury issued to federal trust funds in March 1996 to invest new trust fund receipts and to reinvest the proceeds of maturing trust fund investments. Those exclusions from the debt limit expired on March 30, 1996.

[17] The proceeds from these sales are already built into the Treasury projections.

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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 district's 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. 18923–18929. 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 of 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(e)(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 $486,716,000 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 3757 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.

Is the Debt Cap Unconstitutional? A "Thought Experiment" from 1998

IAN AYRES
06/30/2011 | 2:02 pm

- SHARE

Recent discussions of whether the Fourteenth Amendment's Public Debt Clause would allow the president to ignore the debt limit reminded me of a paper on the topic that a former student of mine, **Michael Abramowicz**, wrote under my supervision almost fifteen years ago. Michael has since become a prolific scholar on other topics, and this year he had the rare distinction of publishing articles in both the *Harvard Law Review* (here) and the *Yale Law Journal* (here). Meanwhile, he and I have recently coauthored twice, on randomizing law (also with my colleague **Yair Listokin**) and on using bonds as commitment devices. I tried to find Michael's old article with Google and couldn't, so I wrote to him asking about it. With his permission, I include here his reply:

The article is not publicly available online, though it is available on Westlaw or on Hein Online for those with access. Your question has inspired me to get the penultimate version of the article up on SSRN, and it is now available. The article mostly speaks for itself, but I'll add a few points to put it into the context of the current debate:

(1) The Public Debt Clause was poorly drafted, and because Section 4 was the least important part of the Fourteenth Amendment, there is not a lot of legislative history to guide us. Particularly frustrating was the Framers' use of the passive voice: "The validity of the public debt … shall not be questioned." What counts as a questioning of the debt? There is room for debate. To my ear, the word "questioned" is broad, referring not just to direct repudiation of the debt, but at least also to default on the debt. My article defended a broad interpretation that would count as a questioning of any statute that ultimately would lead to a default, if Congress hypothetically never passed any other statutes.

(2) If that broad interpretation is correct, however, it makes constitutionally suspect not just the debt limit statute itself, but the entire statutory fiscal scheme. As I understand it, Medicare alone, if untouched, would eventually become such a burden that a default would follow. Of course, that won't happen; trends that can't continue won't. But my paper emphasizes that the argument for finding the debt limit unconstitutional is the same as the argument for finding an unsustainable fiscal policy unconstitutional. Each puts the nation on a path to default that can be averted only by congressional action.

(3) Until this month, no one joined the argument or cared much about my article, but now **Garrett Epps** has taken a position similar to mine, and **Michael Stern** has written some thoughtful posts on the other side (here, here, here, and here). One argument that Michael makes that is particularly intriguing is that, if I am correct that a default would violate the Public Debt Clause, who is to say that the appropriate remedy is for the President to ignore the debt limit? After all, it is the combination of the debt limit and our taxation and spending policies that would lead to default. Could the President not unilaterally cut spending or raise taxes instead?

(4) These considerations make me think that a modest approach for the President to take would be not to conclude that the debt limit is facially unconstitutional, but rather that it would be unconstitutional as applied, to the extent that it would prevent payment of interest on the debt. If the President took that position, the Administration would in effect continue to raise the debt limit as necessary to make payments on the debt. But when other bills came due, if there were insufficient funds to pay them, that would not justify the issuance of additional debt. The consequences of such nonpayment are sufficiently severe that the President and Congress could continue to play their game of chicken, but the worst case scenario would be a government shutdown, rather than a default. Perhaps the President can accomplish this even without invoking the Public Debt Clause, simply by prioritizing payments on the debt over other payments that come due, but his ability to do that depends in part on the timing of revenues and expenditures, and an announcement that the President will make payments on the debt despite the debt limit statute no matter what would calm the markets. Perhaps the Office of Legal Counsel will issue an opinion helping the President to do this, but if not, President Obama has shown a willingness to seek out other legal opinions to allow him to reach the ends he seeks.

(5) The President may not be willing to do this, though, because of the political cost. Many readers found my argument that the debt limit may make the debt limit unconstitutional counterintuitive simply because the statute had been around so long, and the President also might believe that a crisis would ultimately help him politically. In that case, it will be interesting to see whether a bondholder files a preemptive lawsuit, and whether the courts would find such a suit justiciable, an issue I consider preliminarily in the article.

(http://www.advancingafreesociety.org/author/michael-mcconnell/)

The Debt Ceiling Is Certainly Not "Unconstitutional"

Michael McConnell (http://www.advancingafreesociety.org/author/michael-mcconnell/) | July 04, 2011 | 8:36 am

As we approach the debt ceiling sometime in August, with no agreement seemingly in reach, there is wild talk in Washington to the effect that the debt ceiling violates Section Four of the Fourteenth Amendment. The theory is bunk.

Section Four reads: "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." According to some wishful thinkers, because it would be unconstitutional to default on the public debt, the Treasury must have authority to borrow any additional funds necessary to pay principal and interest on the existing debt as they become due. This means President Obama can ignore the debt ceiling and issue more debt, for the purpose of paying off past loans, without getting approval from Congress. If true, this would take the pressure off the President to agree to spending reductions in exchange for an increase in the limit.

Legislative control over incurring new debt is a fundamental aspect of separation of powers, going back to Parliament's curtailment of the royal prerogative of borrowing in the wake of the Glorious Revolution of 1688. Article I, Section 8, Clause 2 empowers Congress, and only Congress, "to borrow money on the credit of the United States." Without congressional authorization, the President may no more borrow money than he could make new criminal laws, declare war, or enact a new spending program. The "debt ceiling" is simply the limit Congress has imposed on how much money the country may borrow. The executive branch cannot constitutionally borrow a dime in excess of this amount.

Section Four of the Fourteenth Amendment does not create a back-door method for the Administration to borrow more money without congressional authorization. For Congress to limit the amount of the debt does not "question" the "validity" of the debt that has been "authorized by law." At most, it means that paying the public debts and pension obligations of the United States, as they become due, has priority over all other spending. Each month, the Treasury takes in about $175 billion in new revenues. These are more than sufficient to pay principal and interest when due, as well as pension obligations. (Social Security, by the way, is not a "pension" obligation within the meaning of this provision. The Supreme Court held in *Fleming v. Nestor* that Social Security claims are nothing more than promises to pay, not legal obligations to pay.)

If we reach the debt limit, the Treasury will be compelled to reduce spending (other than payments on the public debt and pensions) to bring current expenditures in line with current receipts, just as a family has to do when it has maxed out on its credit cards. Presumably, the executive branch will have to make the tough decisions about priorities. No law exists to guide the process. In theory, essential services and payments will keep flowing, and less essential services and payments will be postponed. In practice, if history is any guide, politicians in the executive branch will find it more in their interest to shutter the most conspicuous and painful services

first – this is called "closing the Washington Monument" – to maximize public pressure to increase the limit. It would be a crying shame if the executive stopped funding truly inessential services and programs, and no one (other than the immediate beneficiaries) noticed.

A wise and prudent President could use the occasion of hitting the debt ceiling to trim waste and excessive spending from the budget. This would not solve our long-term fiscal problem (that will require structural reform in entitlement programs coupled with measures to increase economic growth), but it would signal to the bond markets that we are serious about grappling with the spending mess. Waste and abuse are like the weather. Everybody talks about it, but nobody does anything about it. Indeed, in ordinary times the Impoundment Control Act (an unfortunate piece of legislation passed in response to Nixonian abuses) requires the executive to expend all appropriated funds, and thus prohibits the executive from postponing or cancelling non-essential spending, however wasteful. But the debt limit takes precedence over the Impoundment Control Act, especially in light of the Fourteenth Amendment's prohibition of "questioning" the validity of the debt, which means the President can trim spending to the extent that appropriations exceed revenues. A President serious about controlling spending would find this an opportunity for leadership.

Thus, the real effect of Section Four of the Fourteenth Amendment is almost the opposite of what hopeful voices in Washington are saying. Section Four puts the onus on the President to reduce spending in order to avoid default on the debt. It does not permit him to borrow more.

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