094562

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D. C. 20548

FOR RELEASE ON DELIVERY
Expected at 12:00 Noon
Tuesday, January 30, 1973

STATEMENT OF
ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES
BEFORE THE
SUBCOMMITTEE ON SEPARATION OF POWERS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

a f R

S. 2515

Mr. Chairman and Members of the Subcommittee:

1 27

At your request I appear before you today to discuss Presidential impoundments of appropriated funds and S. 373, 93d Congress, a bill designed to curb such impoundments. This bill, which has been characterized as the impoundment control bill, seeks: (1) to require the President to notify the Congress whenever he impounds or terminates or authorizes the impoundment or termination of a Federal program, and, (2) to require the President to cease such impounding at the expiration of sixty calendar days unless the Congress approves the President's action by concurrent resolution.

Executive impounding of funds has a number of factual and legal facets and it may occur at various levels within the Executive Branch. It is a problem that has reached significance over the past thirty years and involves problems of statutory and constitutional construction as well as policy considerations.

~~709850~~ 094562

The complex issues that are involved in impoundment include:

--Are appropriations made by the Congress to be considered a mandate to spend or are they a ceiling on amounts to be expended?

--Is a deferral or postponement of expenditure for a project or activity a frustration by the Executive Branch of the action of Congress?

--What are the limits on the Executive Branch in exercising the authority in the "Antideficiency Act"? Under this act the President, acting through the Office of Management and Budget, in making apportionments is authorized to establish reserves to provide for contingencies and for savings when made possible by changes in requirements, greater efficiency of operations, or "other developments" subsequent to the date appropriations are made available.

--Does the constitutional responsibility of the President to see that all laws are faithfully executed carry with it any implied authority to impound funds, if, in the President's opinion, such impoundments are

necessary to comply with other statutory provisions such as expenditure limitations or limitations on the public debt?

These are difficult problems and can only be judged by the considerations, both factual and legal, in the individual case.

The General Accounting Office is not structured to resolve these issues because our enforcement power is that of disallowance of expenditures. We have no power to direct an expenditure except in the limited area of settlement of claims against the Government.

The General Accounting Office was established by the Budget and Accounting Act, 1921, to examine the manner in which Government agencies discharge their responsibilities with regard to public funds appropriated or otherwise made available to them by the Congress, and to make recommendations looking to greater economy and efficiency in public expenditures.

Our present audit authority with respect to the Government as a whole is derived from several statutes beginning with the Budget and Accounting Act, 1921. Section 321 of that act provides in part "***The Comptroller General shall investigate, at the seat of Government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds." Section 206 of the Legislative Reorganization Act of 1946

authorizes the Comptroller General to make expenditure analyses of executive agencies to determine whether public funds have been economically and efficiently administered and expended. Section 111(d) of the Accounting and Auditing Act of 1950 provides, "***The auditing for the Government, conducted by the Comptroller General of the United States, an agent of the Congress, be directed at determining the extent to which accounting and related financial reporting fulfill the purposes specified, financial transactions have been consummated in accordance with laws, regulations, or other legal requirements, and adequate internal financial control over operations is exercised and afford an effective basis for the settlement of accounts of accountable officers."

In carrying out our work with respect to an agency activity, or program, the following matters are examined:

--Whether the agency is carrying out only those activities or programs authorized by the Congress and is conducting them in the manner contemplated, and to an increasing degree, whether they are accomplishing the objectives intended.

--Whether the programs and activities are conducted and expenditures are made in an efficient and economical manner and in compliance with the requirements of applicable laws and regulations.

--Whether the resources of the agency, including funds, property, and personnel, are adequately controlled and utilized in an effective, efficient and economical manner.

--Whether all revenues and receipts arising from the operations are collected and properly accounted for.

--Whether reports by the agency to the Congress and to the central control agencies disclose properly the information required for the purposes of the reports.

In summary, the thrust of our audits and reviews relates to the legality of activities and programs; the efficiency and effectiveness with which they are carried out; and whether the funds utilized have been properly accounted for. We have issued numerous reports to the Congress on these matters, but our audits and reviews have not examined whether agencies should have expended fully the funds that were made available for their use, nor, except under one recent law to be discussed later, have we challenged actions by the Executive Branch with respect to impounding or withholding of appropriations. It may be that in particular cases we have reported that a program or activity was not completely carried out as a result of fund reservation.

Senator Church, in an article in the Stanford Law Review entitled "Impounding of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion," 22 Stan. L. Rev. 1240-1253 (1970), suggested as one possible solution to the problems of executive impounding of appropriated funds that "The duties of the General Accounting Office, an arm of the legislative branch, might be augmented to include supervision of expenditures in order to identify when impounding has occurred." Direct reporting to the Congress by the Office of Management and Budget whenever funds are reserved, also suggested by Senator Church, would seem to be a more effective means for Congress to obtain the information it requires. GAO could, however, examine into any specific situtation at the request of a Committee or Member of Congress.

Currently, the Budget and Accounting Procedures Act of 1950, as amended by section 402 of the Federal Impoundment and Information Act enacted last year, requires that funds partially or completely impounded be reported to the Congress and to the Comptroller General. There has not been any reporting of impoundments under this law. In this regard Pub. L. 93-1 signed by the President on January 19 gives the President until February 10, 1973, to transmit to the Congress his first report on impoundments.

If S. 373 is to be considered favorably it is suggested that section 3 be amended to make it clear that the impoundments cover contracting authority as well as appropriations. Section 2 of the Budget and Accounting Act, 1921, 31 U.S.C. 2 defines appropriations as including, in appropriate context, funds and authorizations to create obligations by contract in advance of appropriations. It is suggested that section 3 be amended by the addition of a sentence along the following lines to carry out this suggestion:

> "The term 'appropriations' as used in this Act includes, in appropriate context, funds and authorizations to create obligations by contract in advance of appropriations."

Since we are not aware of any objections to impoundments falling squarely within the literal language of subsection (c)(2) of the Antideficiency Act or specifically authorized in other law, it is suggested that the Committee might consider amending S. 373 to provide that its provisions shall not apply to funds being withheld in accordance with this and other specific requirements of law. Also, we suggest that you include a statement in the Committee report to the effect that the term "impound" is intended to include any action which effectively prevents the creation of obligations or expenditures of appropriated

funds or of authorizations to create obligations in advance of appropriations, for any period of time irrespective of whether such action is taken by the Office of Management and Budget or the agency head.

Finally, we should like to comment on one aspect of S. 373. Under section 2 of S. 373 the President is required to release impoundments within sixty days after notice of the impoundment has been sent to the Congress unless the Congress grants approval of the impoundment. Under this language, the President could subsequently impound the funds, make his report, and continue the practice. In the case of appropriations with fiscal year limitations this practice could be continued until the appropriation authority expired and in the case of no-year funds this practice could be repeated.

In recent public discussions on the subject of impoundment, I have noted very little reference to the authority of the President to reserve funds under the Antideficiency Act, 31 U.S.C. 665. Subsection (c)(2) of that Act provides that in apportioning any appropriation, reserves may be established (1) to provide for contingencies, or (2) to effect savings whenever savings are made possible by or through: (a) changes in requirements; (b) greater efficiency of operations; or (c) other developments subsequent to the date on which such appropriation was made available.

As we interpret this Act, the President has authority to reserve funds to provide for unforeseen or uncertain events which might otherwise cause a deficiency in the appropriation. There are, for example, seasonal programs such as flood relief, forest fire control, and so forth, which can be anticipated to some degree but difficult to estimate with precision.

The second purpose of this Act is to effect savings where these are made possible by changes in requirements or through management improvements. These are economies which again cannot be fully predicted and do not affect the level of the programs being carried out.

The third type of situation relates to savings resulting from developments which may occur subsequent to the date on which appropriations were made available. For example, a weapons system, upon testing, may be found to require major modification with reduced financial requirements for the fiscal period involved. There are many other types of situations where developments could not be foreseen at the time of the appropriations action where it is only common sense that the funds would be reserved. In a great many of these instances, the money is not legally available for any other purpose.

There is abundant legislative history in connection with the enactment of the Antideficiency Act to support our conclusion that this legislation goes no further than authorizing the President to establish reserves to provide for contingencies, to reflect savings, and to take into account changes in requirements subsequent to the appropriation action, and to reserve funds because of changing circumstances. We are not aware of any specific authority which authorizes the President to withhold funds for general economic, fiscal, or policy reasons.

A more detailed discussion of the legislative history leading up to the enactment of the Antideficiency Act is included as an attachment to this statement.

In spite of the limitations established in the Antideficiency Act, funds have been impounded by Presidents in the past. For example,

--In 1942, President Roosevelt directed the Secretary of War, in cooperation with the Director of the Bureau of the Budget, "to establish reserves in the amount that can be set aside at this time by the deferment of construction projects not essential to the war effort."

--President Truman, in 1949, impounded funds appropriated for a seventy-group Air Force. It is of interest to note in this case that he acted as Commander-in-Chief as well as President because doubts were raised as to his authority to otherwise impound the funds.

--In 1950, the Aircraft Carrier Forrestal was cancelled by the Department of Defense after funds had been appropriated.

--In 1956, the Department of Defense refused to spend an appropriation of the Congress "earmarked for the construction of 20 superfort bombers."

--In 1959, the Administration impounded funds appropriated for the initial procurements of NIKE-ZEUS hardware.

--In 1966, the Administration reduced the obligations available under the Highway Trust Fund and sizeable cutbacks were made in programs for Housing and Urban Development; Health, Education, and Welfare; Agriculture; Interior.

--In 1972, the Administration impounded monies from the Highway Trust Fund. This impoundment has resulted in a lawsuit which is still in litigation.

It can be argued that these actions differ in substantial degree from the recent decision taken by the Administration to withhold large sums in order to keep Fiscal Year 1973 expenditures at the level of approximately $250 billion.

The issue of the President's legal authority is clouded to some degree by the fact, as some have argued, that actions to withhold funds can be justified in carrying out general statutes such as the Economic Stabilization Act of 1970, or to remain within the debt ceiling enacted by the Congress. The counter to this argument is that there is nothing explicit in those laws which authorize the President to go beyond the Antideficiency Act in accomplishing the objectives of these acts.

Even though the Antideficiency Act places rather specific limits on the President's discretion in impounding

funds, the wording of the legislation nevertheless frequently could be read to support the thesis that appropriations represent authority to spend rather than mandates to spend by the executive branch. The wording of authorization and appropriation legislation is generally cast in terms of authorizations to spend rather than directing that certain program or expenditure levels be maintained. There have been exceptions, of course, which have established mandatory levels. In one case which I recall the Congress specified a quarterly level for small business loans; in another case, the minimum strength of the Marine Corps was specified. Clearly, the road is open to the Congress to be more explicit as to its intention with respect to program levels. It could specify the rate or the amount of the expenditure; it could authorize impoundments not to exceed a certain percentage; or it could provide the executive with discretion to shift funds from one activity to a related activity based on changing circumstances and the executive branch's assessment of program priorities. An example of the granting by the Congress of discretion was the authority given to President Truman following the outbreak of the Korean War to impound funds up to a specified level for programs which the President determined to be in competition with the defense effort.

The President has another course of action open to him which is authorized by the Antideficiency Act. That Act

specifies that when funds are reserved under the Act the responsible office "shall recommend the recision of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations." Aside from savings made under the Antideficiency Act, the President obviously could submit recommended legislation for funds which he considers of lower priority or otherwise, in his judgment, excessive for any reason. Past Presidents have submitted such recommendations from time to time.

The Congress has open to it the option of withholding funds for programs desired by the executive branch when impoundments have been made in programs which the Congress judges to be of high priority. For example, Public Law 92-226 of February 7, 1972, specified that appropriations made pursuant to the Foreign Assistance Act of 1971 and the Foreign Military Sales Act for military assistance would not be available for obligation after April 30, 1972, unless the Comptroller General certified to the Congress that all funds previously appropriated and thereafter impounded during fiscal year 1971 for programs and activities administered by or under the direction of the Department of Agriculture, HUD, and HEW, had been released for obligation and expenditure. The provision did specify that the section did not apply to "funds being withheld

in accordance with specific requirements or law." While the purport of this qualification is perhaps debatable, we construed the provision to apply only to funds which were impounded under the limited provisions of the Antideficiency Act.

It has been suggested by some that the granting of an item veto authority to the President, along the lines of the practice in a majority of the States, might allay Executive desire or authority to impound funds. It is true that the grant of such power would succintly define the President's power to change or ignore the appropriation acts of the Congress. The majority view is that a constitutional amendment would be required to grant the President an item veto authority. Thus with a constitutional grant of item veto authority there would be a strong legal and constitutional position that the President's power over the use or non-use of appropriations does not extend beyond items vetoed under such authority. Of course, even with the item veto there would be no guarantee that future impoundments would be avoided. I am including an attachment discussing the item veto at greater length.

Even so, an item veto, if accompanied by provision making it possible for the Congress to override such a veto by

majority vote, would be preferable to the present arrangement where questions continue to be raised as to whether an appropriation should be construed as a mandate to spend at the program levels specified in the appropriation act, or whether it merely represents a ceiling with the Executive Branch being free to make the judgment as to a possibly lower program level.

This concludes my prepared statement.

Attachment to the Statement of the Comptroller General of the United States before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate, January 30, 1973

The Antideficiency Act: Types of executive actions in withholding or reserving appropriated funds which may be taken consistent therewith.

The Antideficiency Act, section 3679 of the Revised Statutes, as amended, 31 U.S.C. 665, provides in subsection (c)(1) for the apportionment of fixed-year appropriations so as to prevent obligation or expenditure in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period; and for the apportionment of no-year appropriations, and certain other obligational authority, so as to achieve the most effective and economical use thereof. Subsection (c)(2) of the act provides:

> "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 by an officer designated in subsection (d) of this section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the purposes of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations."

Essentially, the conditions justifying reservation of funds under the Antideficiency Act, and the extent and limits of such authority, are fully set forth in the first sentence of subsection (c)(2), quoted above. In this connection, Mr. Keller testified at Hearings before the Subcommittee on Separation of Powers of the Senate Judiciary Committee concerning Executive Impoundment of Appropriated Funds, 92d Cong., 1st sess. (hereafter "Hearings"), at 257:

> "* * * Certainly, I would not argue, and I doubt that anybody else would, that all the impounding that is done

is done under the Anti-deficiency Act, because the Anti-deficiency Act quite clearly states the types of conditions under which you can make a reservations of funds. I have generally spelled them out in my statement--reserves for contingencies and savings when made possible by changes in requirements, greater efficiency of operations, or other developments subsequent to the date appropriations are made available. So I think certainly there is a good deal of authority in the Anti-deficiency Act, but I do not think it is blanket authority to cover everything that may be done with regard to impounding of funds."

Without referring specifically to the Antideficiency Act, Senator Church offered, in effect, the same description of this provision in an article entitled Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion, 22 Stanford L. Rev. 1240 (1970), reprinted at Hearings, 364, 369 (footnotes omitted):

"I. Reserving funds to prevent deficiencies or effect savings.

"This method of holding up funds is by far the most common. When used to economize rather than to cripple programs, its usefulness is apparent. For example,

"if an island, for whose inhabitants Congress appropriates X millions of dollars, suddenly were to disappear and all its residents perished, Congress would not expect the President, with a view to escaping its wrath over impounding, to direct that the unexpended portion of the funds thus allocated follow the decedents to their watery grave.

"Or, to use Professor Williams' classic example, when only $500,000 was needed by the Department of Agriculture to control the Mediterranean fruit fly, the remainder of the original $1 million appropriation was rightly placed in a federal reserve.

"In short, no one is opposed to returning moneys to the Treasury whenever a program costs less than originally expected, just as no one should object to apportioning funds to prevent deficiencies. These practices, aimed at fiscal

responsibility and not policymaking, are better referred to as apportioning (in the case of deficiency prevention) and reserving (when funds are placed in the Treasury as a result of program economizing), rather than impounding. The distinction between reserving and impounding is, of course, a matter of degree. When the purpose of holding back funds is not to effect marginal savings but to alter the intention of a program or policy, then 'reserving' has become 'impounding.' The transition is one from fiscal responsibility and economizing--rightly pursued by all components of government--to constitutional irresponsibility, with a concomitant decline of checks and balances and separate institutions."

The legislative history of the Antideficiency Act, while somewhat ambiguous in certain parts, on the whole strongly supports the foregoing construction. The act was amended generally by section 1211 of the so-called "General," or "Omnibus," Appropriation Act, 1951, approved September 6, 1950, ch. 896, 64 Stat. 595, 765-768. The 1950 amendment included, for the first time, language specifically authorizing the reservation of funds. The report on this legislation by the House Appropriations Committee contains only the following brief description with specific reference to the provision eventually enacted as section 1211:

"The so-called Antideficiency Act has been a part of the law for many years but the present statute is antiquated and was written at a time when the fiscal operations of the Government were far more simple. Current laws are so complex and the structure of the Government has become so involved as to render the current law inoperative in many cases. On that account the committee has included as [then] section 1111 in chapter XI a redraft of the Antideficiency Act. The purpose is to require careful apportionment of all types of funds expended by Federal agencies and efficient administration of the Government's business." H. Rept. No. 1797, 81st Cong., 2d sess. at 9.

However, immediately preceding the foregoing there appears a general statement as follows:

"RESPONSIBILITY OF THE EXECUTIVE BRANCH

"Economy neither begins nor ends in the Halls of Congress. Under the Budget and Accounting Act, it is the

responsibility of the executive branch of the Government to submit annually to the Congress the estimates of the amounts which officials in the executive branch feel are required to support the necessary activities of the Government. The Congress reviews these estimates and decides the maximum amounts which must be appropriated for these various activities, and the annual appropriation bill provides the sums so determined by the Congress.

"Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity. The administrative officials responsible for administration of an activity for which appropriation is made bear the final burden for rendering all necessary service with the smallest amount possible within the ceiling figure fixed by the Congress. Every official of the Government who has responsibility for administration of a program must assume a portion of the burden for the deficit in the Federal Treasury. In the first place, he must take into account the condition of the Federal finances when he recommends to the Bureau of the Budget the amount which, in his judgment, is necessary for supporting his activity. In the second place, it is his responsibility to so control and administer the activities under his jurisdiction as to expend as little as possible out of the funds appropriated." Id. (Underscoring added.)

The underscored portion of the above-quoted excerpt has been cited as constituting legislative recognition of a general principle that appropriations are permissive rather than mandatory. See, e.g., 42 Op. Atty. Gen. No. 32 (February 25, 1967), 4-5; Hearings, 94 (testimony of Mr. Caspar W. Weinberger, then Deputy Director of the Office of Management and Budget). This principle is then often employed to support the position that the executive branch has broad authority to impound appropriated funds. However, as noted previously, the actual language enacted reflects a much narrower context. It is also worth noting that the same report, in addressing that portion of the bill dealing with certain Air Force appropriations, contains the following statement:

"On the question of increasing the Air Force program from 48 groups to 58 groups, there was much debate and consideration in the Congress over a period of months prior to the adoption of the 58-group program. In other words, the

bill which was passed by the Congress and approved by the President embraced the 58-group program, but the impounding of funds by the President reduced the program, from a 58-group program to a 48-group program. A major question of policy was determined by the Congress, and funds were provided to implement the policy but the will of Congress was circumvented.

"It is perfectly justifiable and proper for all possible economies to be effected and savings to be made, but there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds. If this principle of thwarting the will of Congress by the impounding of funds should be accepted as correct, then Congress would be totally incapable of carrying out its constitutional mandate of providing for the defense of the Nation." H. Rept. No. 1797, supra, at 311.

An additional consideration with respect to the legislative history of the 1950 amendment is that the language of section 1211 concerning reservation of funds apparently derived originally from almost identical language recommended in a report to the Chairman of the Senate Appropriations Committee submitted jointly by the Director of the Bureau of the Budget and the Comptroller General. See B-66949, June 5, 1947; J. D. Williams, The Impounding of Funds by the Bureau of the Budget, The Inter-University Case Program, ICP Case Series: No. 32 (November 1955), reprinted in Hearings, 378, 392. This report was submitted, in part, to recommend "what can be done to control the use of appropriations so as to prevent the incurring of obligations at a rate which will lead to deficiency or supplemental appropriations or to curtailment of necessary activities if such appropriations are not made * * *." Report at 1. With respect to this problem the report stated:

"* * * Changing conditions inevitably will make necessary certain deficiency or supplemental appropriations. On the other hand, situations frequently will arise where appropriations are in excess of requirements because of circumstances developing subsequent to the formulation of estimates and the enactment of appropriation acts. It is obvious that unless some action is taken to conserve such appropriations, there will be moneys available to the spending agencies for which there is no real need. These moneys frequently will be spent even though the Congress would not have made the

appropriation if it had been requested to do so in the light of the circumstances existing when the appropriation was obligated." Id. at 7.

The report also observed:

> "* * * The Antideficiency Act, while designated to prevent deficiencies, does not fill the need for machinery to conserve appropriations which are in excess of actual requirements. * * *
>
> "The need for a continuous study of appropriations in order to determine whether such appropriations are required for the purposes for which they were provided is just as real in the case of appropriations for the ordinary day-to-day operations of the Government as it is in the case of appropriations for 'the national defense, war agencies, and the prosecution of the war.' While the appropriation acts referred to above provided for a continuous study of appropriations made for those particular purposes with a view towards repealing any parts of such appropriations no longer needed, there is no express statutory provision for a similar study by the Executive branch of other appropriations, except in the law requiring that personnel ceilings be established by the Director of the Bureau of the Budget. * * *" Id. at 13-14.

Finally, the report explained the recommended language with respect to reservation of funds as follows:

> "Paragraph (2) of subsection (c) would authorize the officer making apportionments to establish reserves 'to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in quantitative or personnel requirements, greater efficiency of operations, or other developments' subsequent to the date on which the appropriation, fund, or contract authorization was made available. For the reasons stated in the earlier part of this report, this authority is believed to be essential to sound financial management. It is recognized that this provision presents a policy question for decision by the Congress. It is recognized, also, that the authority which would be granted must be exercised

with considerable care in order to avoid usurping the powers of Congress. However, appropriations are not regarded generally as mandates to spend money to the limit of such appropriations without regard to any considerations of efficiency or economy. In this connection, the authority to set up reserves would not be exercised with respect to appropriations exempted from the apportionment procedure by subsection (f).

"The granting of this authority, accompanied by the restrictions and safeguards contained in the quoted provisions of the proposed bill, would be in line with the action previously taken by the Congress in enacting the provision in the personnel ceiling law for the establishing of reserves where savings in salaries, wages, or other categories of expense are made possible by reason of reduced personnel requirements. Further, the authority to establish reserves to provide for contingencies appears to be essential if there are to be avoided hereafter the deficiency apportionments which heretofore have been made under the authority contained in the present law to waive or modify initial apportionments 'in emergencies or unusual circumstances.' Sound management clearly requires that such reserves be maintained, and the apportioning officer should be empowered to enforce the requirement.", Id. at 20-21.

We believe it is clear from the foregoing that the authority to reserve appropriated funds conferred by the Antideficiency Act applies only to actions which are designed to achieve the most economical and efficient application of particular appropriations to their intended purposes. Without attempting to pass upon the general validity and ramifications of the argument that appropriations are permissive rather than mandatory, it may readily be observed that subsection (c)(2) of the act is based upon an approach that the executive is not required to spend or obligate every penny of every appropriation. However, this approach goes no further than the context of the subsection itself, i.e., achieving efficiency and economy in the implementation of specific appropriations.

The conclusions expressed herein are consistent with those of a number of writers who have considered the effect of the Antideficiency Act. For example, it is stated in Stassen, Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations, 57 Georgetown L. J. 1159, 1178-79 (1969) (footnotes omitted):

"* * * It is clear from the language of section 1211 that no general impounding authority was conferred. Withholding funds for reasons of efficiency and economy are the only instances given any statutory sanction; this limited authority does not extend to impounding when differences of strategic concepts are in issue. Furthermore, a broad interpretation would confer authority upon the executive branch to impound any appropriation at any time for any reason. This has never been Congress' intention.

"A sharp distinction can and must be drawn between an executive refraining from spending money if he finds that a program can be implemented with less funds and an executive refusing to carry out a duly legislated policy of Congress. Therefore, the President's statutory authority to prevent the expenditure of funds provided by Congress is limited to effecting economy and efficiency in executing the purposes for which Congress has provided funds; there is no blanket statutory authority to impound funds provided by Congress.* * *"

See also, Gerald W. Davis, Congressional Power to Require Defense Expenditures, 44 Fordham L. Rev. 39 (1964), Hearings, 569, 580-581; Louis Fisher, The Politics of Impounded Funds, 15 Administrative Science Quarterly 361 (1970), Hearings, 103, 115; Goostree, The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-in-aid to Segregated Activities, 11 American Univ. L. Rev. 32 (1962), Hearings, 584, 586.

There are indications that even the executive branch recognizes the limited effect of the Antideficiency Act. Thus section 12.1 of Budget Circular No. A-34, OMB, Instructions on Budget Execution (July 1971), issued, in part, pursuant to the Antideficiency Act, states in part:

"Apportionments, reapportionments, and reserves are intended to prevent obligation of an account in a manner which would require deficiency or supplemental appropriations; to achieve the most effective and economical use of amounts made available; to provide for contingencies; and to effect savings."

Section 42.7 of the same circular provides in part:

"Reserves may be established by OMB on its own initiative, or at the request of agencies, to identify amounts

> which are not available for obligation. Reserves may be established as a result of changes in requirements, greater efficiency of operations or other developments subsequent to the date on which the budget authority was enacted. Reserves may also be established to provide for contingencies or for subsequent apportionment. * * *"

See also, the definition of "reserves" set forth in section 21.1 (page 8) of this circular. In addition, at least the 1952 edition of the Budget Bureau's Examiner's Handbook stated: "Reserves must not be used to nullify the intent of Congress with respect to specific projects or level of programs." Williams, The Impounding of Funds by the Bureau of the Budget, supra, Hearings, 393; Stassen, Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations, supra, 1179, n. 111. Finally, both Mr. Weinberger, in his testimony before the Senate Subcommittee, and the 1967 Attorney General's Opinion referred to previously specifically describe the Antideficiency Act only in terms of its express provisions. See Hearings, 95, 99-100; 42 Op. Atty. Gen., supra, 5. While both of these sources argue in support of a general authority on the part of the President to impound funds, the broader argument is based primarily upon constitutional provisions and statutory provisions other than the Antideficiency Act. For example, Mr. Weinberger maintains that Article II, section 3 of the Constitution, requiring the President to "take care that the laws are faithfully executed," authorizes or mandates impoundments in order to comply with the debt limitation or past spending ceilings. Hearings, 95-96. Also of interest in this regard is the testimony before the Senate Subcommittee by the Honorable William H. Rehnquist, then Assistant Attorney General for the Office of Legal Counsel. Mr. Rehnquist indicates that because appropriations are generally construed to be permissive rather than mandatory, executive impoundment is generally not inconsistent with congressional design. However, he expressed the view that in a situation where the Congress had clearly mandated a particular expenditure, the President would be required to comply except in matters relating to the President's constitutional prerogatives in the areas of national defense and foreign relations. Id., 233-235.

Attached is a brief summary of the effect of the specific language set forth in subsection (c)(2) of the Antideficiency Act based upon the considerations discussed herein.

Attachment

TYPES OF RESERVATIONS OF FUNDS CONSISTENT WITH THE ANTIDEFICIENCY ACT

Subsection (c)(2) of the Antideficiency Act, 31 U.S.C. 665, authorizes the reservation of appropriated funds, in making apportionments, for two specific objectives.

The first objective is "to provide for contingencies." This language authorizes reservations designed to provide for unforeseen or uncertain events which might otherwise create a need for deficiency or supplemental appropriations. For example, experience may indicate that the costs of certain programs or projects are difficult to estimate with precision.

The second objective is "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." This language authorizes reservations to take advantage of circumstances arising after congressional consideration of appropriations. Such authority is applicable primarily where the purposes which an appropriation was designed to fund cannot be accomplished; or where such purposes may be accomplished at less cost than anticipated. One example of the first situation might be a case in which appropriations are provided to fund research to determine the cure for a certain disease, but a cure is found before any or all of the appropriation is obligated. Situations of the second type might arise on account of government reorganizations, improved technology, or other innovations.

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

Finally, the general purpose of these provisions--to achieve efficient and economical management of appropriated funds--relates to actions upon circumstances concerning the management of particular appropriations. For this reason, the act would not appear to authorize reservations based upon considerations of overall economy in government or other circumstances which do not relate directly to particular appropriations, and which would have the effect of reordering priorities determined by the Congress.

Attachment to Statement of the Comptroller General of the United States before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate, January 30, 1973

THE ITEM VETO

General

The concept of an item veto is almost exclusively a product of the States.[1] Accordingly its precise meaning and application is dependent upon specific provisions of State law and judicial constructions thereof. However, this concept generally refers to a power conferred upon governors to disapprove particular portions--or "items"--of bills presented by the legislature while permitting the remaining portions to become law. The item veto power is generally limited to appropriation legislation; and, since it is a veto, is generally subject to being overriden by the legislature in the same manner as other vetoes.

The item veto first appeared in the provisional constitution of the Confederate States of America, adopted on February 8, 1861, which permitted the president to "veto any appropriation or appropriations, and approve any other appropriation or appropriations, in the same bill." This authority was retained in the permanent constitution of the Confederacy and, following the Civil War, was seized upon by many of the States. The Book of the States for 1972-1973 (Volume XIX), published by the Council of State Governments, indicates, at pages 72-73, that 43 of the 50 States provide for an item veto. Those States which do not are Indiana, Maine, Nevada, New Hampshire, North Carolina (which has no veto in any form), Rhode Island, and Vermont. In addition, the following jurisdictions are listed as having an item veto: Guam, Puerto Rico, the Trust Territories of the Pacific, and the Virgin Islands. In 11 of those States which permit item vetoes, the governor may reduce items in appropriation measures. In the remainder he must apparently accept or reject "items" in their entirety.

1/ It is interesting to note that the Congress has enacted item veto authority for Alaska and Hawaii (prior to statehood) and for certain territories.

Provisions concerning the item veto have been subjected to considerable litigation in the States. See generally 63 Am. Jur. 2d, Public Funds, § 53; annotations, 99 ALR 1277, 35 ALR 600, and 55 LRA 882. The issues arising most frequently in such litigation relate to the meaning and scope of the term "item"--which is generally held to describe separate and distinct portions of an appropriation measure--and whether authority to veto "items" extends to legislative conditions and directions concerning the application of appropriated funds.

Congressional consideration of the item veto

The practice of adding legislative riders to appropriation bills, originated by Congress during the Civil War, and the adoption of the item veto by many States in the post-Civil War period gave rise to efforts for the provision of a presidential item veto. In his fifth annual message to Congress, dated December 1, 1873, President Grant first recommended a constitutional amendment to confer such authority. Actually his proposal was apparently to afford an item veto with respect to any legislation since he specifically requested an amendment

> "to authorize the Executive to approve of so much of any measure passing the two Houses of Congress as his judgment may dictate, without approving the whole, the disapproved portion or portions to be subjected to the same rules as now, to wit, to be referred back to the House in which the measure or measures originated, and, if passed by a two-thirds vote of the two Houses, then to become law without the approval of the President."

The Congress apparently made no response to this request.

In 1876, the first congressional action with respect to the item veto came in the form of a proposal by Representative Faulkner, of West Virginia, to amend the Constitution to confer upon the President authority to veto items in appropriation bills. Since the introduction of this measure, well over 100 legislative proposals have been introduced to this end, differing considerably in scope and detail. Some proposals would have applied the item veto to all appropriation bills, others to "general" appropriation bills, and still others only to certain specific appropriations, such as rivers and harbors bills. Some would have authorized the President to reduce, as well as to veto, items in appropriation bills. Some would have permitted item vetoes to be overriden by majority vote of both Houses, while others would have applied the two-thirds requirement applicable to vetoes generally. Such item veto proposals have never progressed very far

in congressional consideration. In 1883 a motion to suspend the rules to discharge the House Judiciary Committee from further consideration of, and to pass, an item veto proposal fell short of the two-thirds majority vote needed, and was defeated. This was the only occasion prior to 1938 on which the item veto principle was subjected to a vote in either House.

Prior to 1938 all congressional item veto proposals took the form of proposed constitutional amendments. However, in 1937, Chairman Hatton N. Sumners of the House Judiciary Committee, responded to a request for an opinion of the Committee by concluding that the Congress could, without an amendment to the Constitution, authorize the President to veto separate items in appropriation bills. In 1938 an attempt was made to implement Chairman Summers' opinion by introduction from the floor of the House of an amendment to the Independent Offices appropriation bill, 1939, H.R. 8837, 75th Cong. This proposal, known as the Woodrum Amendment, provided in part:

> "* * * The President is authorized to eliminate or reduce by Executive order, in whole or in part, any appropriation or appropriations made by this act, or any act or joint resolution, whenever, after investigation, he shall find and declare that such action will aid in balancing the Budget or in reducing the public debt, and that the public interest will be served thereby: Provided, That whenever the President issues an Executive order under the provisions of this section, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of 60 calendar days after such transmission, unless the Congress shall by law provide for an earlier effective date of such Executive order * * *."

No provision was made for congressional disapproval of such Executive orders, thereby leaving as the only congressional remedy passage of original nullifying legislation. The Woodrum Amendment was adopted in the House. However, it was omitted from the version of the bill reported in the Senate and from the conference version. Proponents of the Woodrum Amendment noted that this provision was similar to the Economy Acts of 1932 and 1933, which authorized the President to eliminate or reduce agency functions and appropriations by Executive order. See 47 Stat. 413, 1518. They also argued that the provision was not an item veto since the President's action would occur after the enactment of appropriation legislation.

Apparently little activity concerning the item veto occurred following rejection of the Woodrum Amendment until 1949, when, as a result of concern over the inability of Congress to fix a total expenditure ceiling and the increased emphasis upon consolidated appropriations bills, Senator Hunt and several cosponsors introduced S. 2161, 81st Cong. This bill authorized the President to strike out all or part of items of appropriations which he deemed "not in the public interest." The bill further provided that the Congress might reappropriate stricken items by simple majority vote, in which event the President could not again strike such items. S. 2161 was referred to the Committee on Government Operations, which eventually voted to indefinitely postpone action on the measure. In 1952 Senator Humphrey and several cosponsors introduced a bill, S. 2602, 82d Cong., which provided in part for the modification of the rules of the two Houses to authorize a Presidential item veto of appropriations subject to being overriden by the two-thirds vote applicable to other vetoes. Identical bills were introduced in subsequent sessions. See S. 1006, 83d Cong., and S. 1902, 84th Cong. Each of these bills was referred to the Government Operations Committee, which took no action. On July 13, 1959, a number of senators introduced S. 2373, 86th Cong., a bill generally similar to the Woodrum Amendment, discussed previously, which would have authorized the President to eliminate or reduce appropriations items by Executive order. Also during the 86th Congress Senator Keating and several cosponsors introduced a resolution, S. J. Res. 44, to establish the item veto by constitutional amendment.

Proposals to confer item veto authority with respect to appropriations have been introduced in every session subsequent to the 86th Congress. The most common version--particularly in the more recent sessions--has been a proposed constitutional amendment. Representative of this approach is H. J.Res. 299, 92d Cong., which would have amended the Constitution to provide, inter alia:

> "* * * The President may approve any appropriation or provision and disapprove any other appropriation or provision in the same appropriation bill. In such case he shall, in signing the bill, designate the appropriations and provisions disapproved; and shall return a copy of such appropriations and provisions, with his objections, to the House in which the bill shall have originated; and the same proceedings shall then be had as in case of other bills disapproved by the President. * * *"

A different approach is illustrated in S. Con. Res. 2 and H. Con. Res. 179, 87th Cong., which proposed to amend the joint rule of the

two Houses contained in section 138 of the Legislative Reorganization Act of 1946, 60 Stat. 832, to require that no bill or joint resolution making appropriations or authorizing the borrowing of money directly from the Treasury be reported to or considered by either House unless it contained item veto authority similar to that provided under H. J. Res. 299, quoted above. A third approach has been to amend the Constitution to authorize the Congress to enact legislation providing for and regulating the item veto. See H. J. Res. 62, 98, and 212, 87th Cong.

Constitutionality of legislation conferring the item veto

Article I, section 7 of the Constitution provides in part:

"Every bill * * * shall * * * be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it. * * *"

It has been pointed out that the quoted language "seems to afford the President only two alternatives--either sign or return the bill", and, accordingly, "it has apparently been generally assumed that such power could be conferred upon the President by constitutional amendment alone." Zinn, The Veto Power of the President (1951) 33, 34. The latter observation is consistent with the previous discussion of legislative proposals prior to 1938 and most recent proposals. In addition, Senator Vandenberg noted in a 1942 speech in support of the view requiring a constitutional amendment that all of the States which recognized the item veto had done so by constitutional provision or amendment. 88 Cong. Rec. 3694.

As noted previously, Chairman Sumners expressed the view that a constitutional amendment was not necessary. The Chairman's opinion referred to the language of Article I, section 7 that the President shall sign or return a bill, but added:

> "Does the word 'bill' necessarily mean all the separate items assembled under one caption, each of which might have been considered the subject matter of a separate bill but which for convenience sake in expediting the public's business are assembled under one caption? It is clear that the sole purpose (of the veto provision in the Constitution) is to make certain that no item of proposed legislation shall be law until it is approved by the President, or, if disapproved by the President, is again passed by both Houses by two-thirds vote, the objections of the President notwithstanding.

* * * * *

"* * * When, therefore, the Houses of Congress, in order to add to their efficiency, guided by their judgment, and acting under their responsibility to the people in the discharge of their constitutional responsibilities so draw an appropriation bill that in their judgment each item may be separately considered by the President and approved or disapproved, and as drawn and approved items may stand as complete and harmonious items of legislation while the items disapproved may be sent back to the Congress for further consideration, they act, it seems clear to me, within their constitutional powers and discretion." 83 Cong. Rec., Appendix, 200, 201.

There is no indication that the framers of the Constitution ever considered the possibility of an item veto. Indeed, this concept did not originate until the Civil War era. However, it has also been pointed out that there is no indication that the framers envisioned the use of omnibus bills and riders, which by their nature and often by design serve to undermine the viability of the veto power as the framers probably conceived of it:

"The Constitution does not define that term ['bill'] nor does it contain any provision prescribing a limitation upon the contents of a bill. In the absence of any informative debates in the Convention, is it assuming too much to hold that the delegates thought of that term as meaning a legislative instrument setting forth one or more propositions of law, all related, however, to a certain subject matter? Several of the States have incorporated provisions in their constitutions requiring the title of a bill to embrace the entire subject matter, with the result that provisions in the bill outside the scope of its title are unconstitutional. In those States the governors may approve the entire bill with the assurance that the courts will invalidate the extraneous provisions.

"Certainly since the subject was not raised in the Convention we may infer that the delegates did not foresee omnibus bills and legislative riders to appropriation bills. Otherwise the preservation of the veto power is left only to the exercise of restraint by the Congress upon the number and variety of subjects it includes in a bill. It becomes merely a matter of degree in the performance of its legitimate function. The President has

> his veto power intact if bills are limited to one subject matter but he does not have it at all if the entire legislative program of a session is incorporated in a single instrument, since he would then be compelled to disapprove the needed legislation with the undesirable." Zinn, supra, 34.

On the other hand, the foregoing observations suggest that the more circumspect legislative course to remedy the dilemma posed by omnibus bills and riders--if indeed a remedy is considered desirable--would be to flatly prohibit such measures rather than to enlarge upon the apparently clear language and effect of Article I, section 7. Cf., Zinn, supra, 35. It must also be noted that this dilemma is not limited to appropriation bills, but applies to any legislation containing matters which a President might consider vital. By contrast, the item veto--as developed by the States--seems generally to be limited to appropriation bills; and, even in that context, the term "item" is generally not considered to include legislative provisions or conditions.

Policy considerations

The essential purpose of the item veto, as stated by its proponents, is to relieve the President of the dilemma forced upon him under the present "all-or-nothing" approach to the veto power in cases where appropriation measures contain funds for objects which he considers vital together with funds which he considers unnecessary or extraneous "legislative" provisions. See, e.g., Keating, The Item Veto--A Needed Reform, 7 Federal Bar News 104 (1960). For example, it is argued that the item veto would enable the President to eliminate from public works appropriations "pork barrel" projects of interest only in particular congressional districts and included only as a quid pro quo for individual congressmen, while preserving those projects which are of national benefit. Thus the item veto is justified by proponents primarily in terms of achieving fiscal responsibility and economy in government. In this context the issue of the item veto gives rise to many of the general arguments arising in the context of affording executive discretion under spending ceilings and impoundment of funds. Thus opponents argue that creation of a presidential item veto power would constitute "buck-passing" and abdication of legislative power over the purse; and would also enable the President to "discipline" recalcitrant congressmen by eliminating funds for their districts. However, it is to be noted that an item veto which included provision for a congressional override could be considered a means of ameliorating the practice of impoundment, which now gives the President the "last word" on spending matters.

On the other hand, statements and discussions concerning creation of a presidential item veto have also placed emphasis upon this device as a means of enabling the President to delete legislative provisions from appropriation measures. Moreover, recent proposed constitutional amendments would appear by their terms to extend the item veto to any "provision" of an appropriation bill. This potential aspect of the item veto appears to raise fundamental issues which may go well beyond the matter of eliminating wasteful and excessive funding provisions. A broad item veto power might be considered applicable to all restrictions upon the use of appropriated funds. For example, the item veto might authorize the President to eliminate a condition in a foreign assistance appropriation freezing all funds under the bill until certain funds for domestic programs are released. If so, it seems that the Congress might sacrifice much in terms of its practical powers. In addition, since many States restrict bills to one subject, it is questionable whether the item veto may traditionally be viewed as a device for avoiding legislative riders.

The foregoing observations suggest that while the item veto might be desirable as a means of reducing waste in appropriation measures and at least formalizing and placing some restrictions upon the practice of impoundment, the potential applications of a broad item veto power might have far more pervasive consequences. For this reason, it appears that the most appropriate vehicle for creating a presidential item veto would be by constitutional amendment authorizing the Congress to legislate on this subject, thereby reserving to the Congress a means of attaching detailed and specific safeguards and restrictions upon the power.