

4-1974

## Budget Reform and Impoundment Control

L. Harold Levinson

Jon L. Mills

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Law and Economics Commons](#), and the [President/Executive Department Commons](#)

---

### Recommended Citation

L. Harold Levinson and Jon L. Mills, Budget Reform and Impoundment Control, 27 *Vanderbilt Law Review* 615 (1974)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol27/iss4/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

## Budget Reform and Impoundment Control\*

*L. Harold Levinson\*\**

*Jon L. Mills\* \*\**

### I. Introduction

Impoundment has become a household word within the past two years, as controversy has raged over President Nixon's cutbacks of funds. Numerous significant governmental programs have been curtailed or disrupted. State and local governments face confusion about future funding.

In dozens of cases, the lower federal courts have reviewed the exercise of Presidential discretion during the execution of appropriations, and in most cases the courts have determined that the President acted improperly. The underlying problem evidenced by impoundment remains unsolved, however, since it arises from tensions that build up throughout the budget process of the federal government, from the preparation of the President's budget recommendations, to the enactment of budget legislation, the execution of the

---

[ed.] See Appendix for subsequent Congressional action concerning pending budget reform legislation cited *note 53 infra*.

\* This article is part of the result of a year-long study at the Holland Law Center, University of Florida. We deeply appreciate essential support received from the Josephine H. McIntosh Foundation, Inc. We gratefully acknowledge comments on a draft of this article by Dr. Louis Fisher, Analyst, Congressional Research Service, Library of Congress. The project depended upon the research assistance rendered by a team of law students at the University of Florida, consisting of: Albert Hadeed, Joel Berman, Walter Campbell, Donald Carter, Douglas Crow, Clark Holmes, Atilla Ilkson, Andrew Marcus, Ernon Sidaway, Judith Smith, Malcolm Steinberg, Ronald Swanson and Robert Young. The views expressed here are our own, and should not be attributed to any other person or institution.

Preliminary findings of this project were inserted into the Congressional Record by Senator Lawton Chiles (D-Fla.), 119 Cong. Rec. S 21120 (daily ed. Nov. 27, 1973).

\*\* Professor of Law, Vanderbilt University School of Law; B.B.A. 1957, LL.B. 1962, University of Miami; LL.M. 1964, New York University.

\*\*\* Director, Center for Governmental Responsibility, University of Florida; B.A. 1969, Stetson University; J.D. 1972, University of Florida.

budget and the post-audit of completed transactions. The courts have prudently refrained from examining any stage of the process other than the execution stage, and the courts have consequently been unable to fashion a comprehensive remedy.

Thorough overhaul of the entire system is long overdue. The existing system dates back to 1921, but the size and complexity of the federal budget have increased to a staggering extent since then. Studies and proposals abound concerning not only the budget process but also such related matters as congressional committee structure, openness of governmental activities, and reorganization of the executive branch. The acute need for reform of the entire system was dramatized and publicized by the impoundment controversy of 1972-73.

Bills pending in both Houses of Congress provide for impoundment control and budget reform. The bills in both houses emphasize the spending process (including the formulation, enactment and execution of appropriation) and its coordination with the totals of revenue and debt. The bills do not go into detail regarding reform of the revenue and debt functions, although significant procedural issues arise in these areas also. The emphasis on the spending process reflects the emphasis that the impoundment controversy has focused on spending rather than on other budgetary functions.

This article summarizes various aspects of the impoundment controversy, as an introduction to the authors' recommendations for impoundment control and general reform of the budget process. The emphasis here, as in the congressional bills, is on reform of the spending function, and its coordination with total revenue and debt.

#### A. *Definition and Classifications of Impoundment*

Even though impoundment has been an executive practice since 1803,<sup>1</sup> the term is not defined by statute. The recently enacted Federal Impoundment and Information Act, which requires the President to make periodic reports to Congress regarding impoundments, does not define the term.<sup>2</sup>

Once the government has received goods or services pursuant to proper authorization, of course the President is without discretion

---

1. In 1803 Thomas Jefferson refused to spend funds appropriated for gunboats on the Mississippi River, deeming such gunboats unnecessary to protect the river's east bank since the west bank recently had been purchased from France. See Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 FLA. L. REV. 191 (1973) [hereinafter cited as *Impoundment: Legal Principles*].

2. 31 U.S.C. § 581(c)(1) (Supp. II, 1972).

to default in payment.<sup>3</sup> This well settled proposition is not at issue in the current controversy, and the working definition of "impoundment" should not include any action that would amount to a default in payment for goods or services received.

The term "impoundment" is more properly applied to situations in which the executive declines to enter into obligations or commitments for the full amount appropriated by Congress.<sup>4</sup> Impoundments can be classified on the basis of various distinctions, relating to such factors as: the extent to which Congress directed the expenditure (mandatory or permissive); the stage of the budget process at which the cutoff was achieved (commitment, apportionment, allotment, etc.); the justification given by the executive for the cutoff (delay needed to complete environmental impact study, program would contribute to inflation, etc.); or the subject-matter of the affected program (loans for farmers, housing for low-income purchasers, etc.).

We propose a distinction, with procedural implications, on the basis of whether or not the executive has frustrated the intent of the appropriation act that was affected by an impoundment. We use the term "variance" to denote the type of impoundment that occurs when the President achieves program objectives at less cost or a later date than contemplated by the appropriation act, but without frustrating its intent.<sup>5</sup> Under existing practice, "variance"-type actions are generally carried out as policy-neutral decisions of professional staff personnel,<sup>6</sup> contrasted with other types of impoundment that typically are policy-oriented moves coordinated by higher level directives.<sup>7</sup> Our recommendations<sup>8</sup> propose a further procedural distinction, by subjecting variances to a different type of congressional

---

3. The leading case requiring the government to pay its obligations is *Kendall ex rel. Stokes v. United States*, 37 U.S. (12 Pet.) 524 (1838). Cases decided in connection with the principle, however, have been sometimes cited as precedents indicating solutions to the current controversy.

4. This seems to be the general understanding of the term "impoundment," repeatedly implied in the materials compiled 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. (1973) [hereinafter cited as *1973 Impoundment Hearings*]. Our proposed definition is set forth in Recommendation 9, *infra*.

5. See Recommendation 9 *infra*.

6. These actions are generally authorized by the Anti-Deficiency Act, 31 U.S.C. § 665 (1970). The distinction between policy-neutral and policy-oriented impoundment decisions is discussed in text accompanying notes 9-16 *infra*.

7. See text accompanying notes 9-16 *infra*.

8. Recommendations 10 and 11 *infra*.

control than we propose for other types of impoundment.

### B. *Impoundment Procedures and Rationalia*

Decisions to impound are made by the executive branch alone, through the use of closed meetings and confidential information. Field research<sup>9</sup> indicates that at least four major types of procedure have been followed during the Nixon Administrations, corresponding to the various purposes underlying impoundment decisions.

According to one theory, impoundment has resulted from decisions by the President and certain senior advisors regarding the total amount of impoundment needed to keep governmental spending within limits that the President regards as acceptable, in view of existing levels of taxation and debt. The total desired amount of impoundment is transformed into a series of decisions affecting specific programs, made at lower levels of the administration, subject to continuing review and supervision by higher officials. In order to keep total spending within the desired limits, officials cut those programs that have the lowest priority from the executive's point of view. Thus *executive* priorities rather than *congressional* priorities are reflected in the selection of specific programs to be impounded.<sup>10</sup>

A second theory asserts that the Nixon impoundments result from the President's determination to curtail or eliminate certain programs, for ideological rather than fiscal reasons. To the extent this theory is accepted, it implies that the basic, top level decision is not a spending ceiling in the abstract, but rather a list of specific programs to be cut.<sup>11</sup> Evidently less discretion is exercised by lower level officials filling in the details under this theory than under the first.

A third possibility is that President Nixon has used impoundment as a means of demonstrating the fiscal irresponsibility of Congress, in the hope of pressuring Congress into reform of its own budget process.<sup>12</sup> This theory implies that the President has consid-

---

9. The accompanying text is based upon confidential interviews conducted by the authors during the McIntosh Foundation Executive Impoundment Project, 1973.

10. The President and other administration spokesmen have stressed fiscal policy as a justification for the major impoundments. See notes 27 & 32 *infra*. This justification is drawn into question by the econometric study discussed in text accompanying notes 19-20 *infra*.

11. The President's ideological motives are suggested by Fisher, *Congress, the Executive and the Budget*, 411 ANNALS 102, 108 (1974); Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFFALO L. REV. 141, 169 (1973).

12. In his budget message dated January 29, 1973, President Nixon urged Congress to reform its budget procedures. The President listed a few specific reform suggestions, and added the following warning:

ered, as an element of impoundment decision-making, the extent to which a specific impoundment could effectively embarrass Congress and jolt it toward self-reform.

Finally, many impoundments are initiated at operational levels of the administration, on the basis of cost savings or program-oriented delays,<sup>13</sup> under circumstances corresponding to our proposed definition of "variance."<sup>14</sup>

Related to impoundment is "unimpounding," a process described by some executive officials as "fine tuning," by which portions of impounded funds are released.<sup>15</sup> The decision to unimpound may be made when the complaints arising from an impoundment are more serious than had been anticipated by the Office of Management and Budget (OMB) in the analysis of political costs and benefits prepared when the impoundment was under consideration.<sup>16</sup>

---

The Congress must accept responsibility for the budget *totals* and must develop a systematic procedure for maintaining fiscal discipline. To do otherwise in the light of the budget outlook is to accept the responsibility for increased taxes, higher interest rates, higher inflation, or all three. In practice, this means that should the Congress pass any legislation increasing outlays beyond the recommended total, it must find financing for the additional amount. Otherwise, such legislation will inevitably contribute to undue inflationary pressures and thus will not be in the public interest. And it will be subject to veto.

*Budget Message of the President*, in *THE BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1974*, at 1, 9 (1973) (emphasis in original). At a news conference just 2 days later, Mr. Nixon indicated that he would not only veto, but also impound if Congress enacted appropriations he regarded as inflationary. He said: "The constitutional right for the President of the United States to impound funds and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people, that right is absolutely clear. . . . I will not spend money if Congress overspends. . . ." 9 *WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS* 105, 110 (1973). Similarly, in a statement delivered on October 23, 1972, Mr. Nixon stated:

I am going to use every weapon at my command to hold spending in this fiscal year as close as possible to \$250 billion . . . . During the coming week there will be a number of vetoes. If there are big spending bills which I must sign for policy reasons, I also promise to exercise my full legal powers to hold down these appropriations, or reduce others to make room for the new programs.

8 *WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS* 1553 (1972).

Confidential interviews conducted by the authors during the McIntosh Executive Impoundment Project in 1973 indicate that only a very small minority of persons interviewed considered that Mr. Nixon's impoundments had been undertaken primarily for the purpose of forcing Congress to reform its own budget procedures.

13. These actions are generally authorized by the Anti-Deficiency Act, 31 U.S.C. § 665 (1970).

14. See Recommendation 9 *infra*.

15. See generally *McIntosh Foundation Executive Project: Preliminary Findings*, 119 Cong. Rec. S 21120, S 21122-3 (daily ed. Nov. 27, 1973) (hereinafter cited as *Preliminary Findings*).

### C. *Political Perspectives*

Many other Presidents have impounded funds. President Nixon's impoundments, however, have produced much more controversy than those of his predecessors, a phenomenon which can be traced to a number of factors.

First, Mr. Nixon has impounded unprecedented amounts from social programs, whereas his predecessors generally limited their impoundments to military and public works programs.

Secondly, whether the decision to impound originates because the President dislikes a certain program or because he sets an abstract ceiling for spending, the fact remains that the programs selected for impoundment are those with the lowest priority from the President's point of view. Congressional priorities are significantly different, especially since the congressional majority is politically opposed to the President's party.

Thirdly, Mr. Nixon has shown himself unwilling or unable to maintain the informal liaison with congressional leaders that characterized many previous administrations, and notably that of President Lyndon Johnson. The friction between President and Congress connected with the current proceedings for impeachment make it increasingly unlikely that Mr. Nixon can develop the kind of relationship that enabled many of his predecessors to work out budgetary problems amicably and informally.<sup>17</sup>

Some observers have suggested that an irreversible shift of power is taking place from Congress to the executive branch, due to the inability of the legislature to cope with the complexities and emergencies of our times.<sup>18</sup> President Nixon's impoundments can, under this view, be regarded as symptoms of a broader trend. The courts, however, have imposed significant restraints upon impoundment, and Congress is making strenuous efforts to demonstrate its ability to cope with budgetary matters—notably by giving serious consideration to the budget reform bills that recently passed both Houses.

### D. *Economics*

The President has repeatedly asserted that his impoundments

---

16. See, *Preliminary Findings*, *supra* note 15, at S 21122.

17. *Id.* at S 21123-4.

18. See S. Huntington, *Congressional Responses to the Twentieth Century*, in D. TRUMAN, *THE CONGRESS AND AMERICA'S FUTURE* 6 (2d ed. 1973).

have been necessary in order to prevent inflation. Comparisons of the consumer price index with impoundment against the same index without impoundment, however, do not bear him out in this contention. Using the Chase Econometrics Model,<sup>19</sup> Professor Irving Goffman of the University of Florida<sup>20</sup> computed the price index at three different levels of federal spending. The first level was the actual level of federal government spending as of June 5, 1973, the date of the analysis. A second level was based on a hypothetical increase in spending of 8.5 billion dollars, the amount of impoundments reported by OMB in February 1973. The third level assumed that federal spending had increased not by 8.5 but by 14.5 billion dollars, the impoundment total computed by the Library of Congress staff for the same period.

Neither of these figures accurately portrays the amount of impounding that was carried out for counter-inflationary purposes. The figures are too high, to the extent they include routine, "variance"-type impoundments, undertaken for program-related reasons rather than for fiscal reasons. The figures are too low, to the extent they exclude cutbacks of funds achieved in various manners other than the creation of "reserves," which are the only item included in the OMB reports. Despite their inaccuracy, the figures of 8.5 billion and 14.5 billion dollars were used in order to test the counter-inflationary effects of impoundments of that general order of magnitude.

The model indicates that impoundment, whether at the 8.5 or the 14.5 billion-dollar level, caused very little change in the consumer price index. The index in 1974 would, all other things remaining unchanged, be 137.8 at the actual level of spending, 138.2 if 8.5 billion dollars more were spent, and 138.3 if 14.5 billion dollars more than the actual level were spent.

In addition to the effects on the consumer price index, the model indicates that at least 80,000 persons joined the ranks of the unemployed during 1973 as a result of impoundments.

#### *E. Foreign Relations*

Although the impoundments of 8.5 billion dollars, or even 14.5

---

19. The Chase Econometrics Model, prepared at the Wharton School of Finance, University of Pennsylvania, provides a computerized method of predicting selected economic variables.

20. Professor Goffman is Chairman of the Economics Department, University of Florida.



billion dollars, have not demonstrably reduced inflation in the United States, these actions may have affected the image of the United States government and economy in the eyes of foreign governments and investors.

The President's vigorous and unilateral actions regarding impoundment may persuade foreign interests to have increased confidence in the ability of the United States to pursue equally decisive policies in areas of special international concern, such as balance of payments, tariffs, rates of exchange, and even levels of troops deployed in various parts of the world.

Case law has recognized that the President's inherent power in foreign affairs is broader than in domestic matters.<sup>21</sup> In order to be meaningful, however, the doctrine must be limited to situations directly related to foreign affairs, since virtually every governmental action has some indirect relationship to foreign affairs. Thus the President could plausibly invoke his foreign affairs powers in connection with cutting off funds from a foreign-aid program, but not in connection with impounding purely domestic programs, even though the domestic fiscal condition of the United States is a matter of concern to our overseas image.

#### F. Legal and Constitutional Aspects

1. *Constitutional Issues*—The text of the Constitution does not state how much discretion, if any, may be exercised by the President in carrying out the spending function. Until definitive court decisions clarify the constitutional issues, their resolution must remain in doubt.<sup>22</sup>

A number of provisions in article I of the Constitution imply that the President does not have the power to frustrate the intent of an appropriation act. Article I, section 1 vests the legislative power in Congress, implying that Congress alone shall determine

---

21. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Impoundment: Legal Principles*, *supra* note 1, at 199, 200-01.

22. The United States Supreme Court recently agreed for the first time to hear an impoundment-related case. *Train v. City of New York*, *cert. granted*, 42 U.S.L.W. 3606, 3610 (U.S. Apr. 29, 1974); *Train v. Campaign Clean Water, Inc.*, *cert. granted*, 42 U.S.L.W. 3607, 3610 (U.S. Apr. 29, 1974). The Court ordered consolidation of the 2 cases. The Court declined to exercise its original jurisdiction in *Georgia v. Nixon*, 414 U.S. 810 (1973), a suit brought by the State of Georgia, both as *parens patriae* and on the basis of the proprietary interests of the state itself.

The most comprehensive collection of impoundment cases decided by the lower federal courts is L. FISHER, *COURT CASES ON IMPOUNDMENT OF FUNDS: A PUBLIC POLICY ANALYSIS*, (Congressional Research Service, Library of Congress, multilith, March 15, 1974).

national policy, except in those situations in which another branch of government has been given authority to do so, namely, when a veto is sustained, when a statute is declared unconstitutional, or when the Constitution expressly commits certain policymaking power to another branch. Article I also empowers Congress to override vetoes,<sup>23</sup> levy taxes,<sup>24</sup> appropriate funds,<sup>25</sup> and pass laws deemed "necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>26</sup> The group of article I powers strongly implies that the framers intended to give Congress the full "power of the purse," which logically extends beyond the appropriation process to include the execution of appropriations.

Article II establishes the powers of the President and has been cited in support of both sides of the current impoundment controversy. Section 1 vests the executive power in the President. President Nixon has asserted that the exercise of discretion in spending funds is part of the inherent executive power committed to the President by this section.<sup>27</sup> Among the District Court judges who have rejected this argument, Judge Richey has stated that it was "not within the discretion of the Executive to refuse to execute laws passed by Congress but with which the Executive presently disagrees."<sup>28</sup> In *National Council of Community Mental Health Centers v. Weinberger*, Judge Gesell rejected the Government's claim that there was "inherent constitutional power in the Executive to decline to spend in the face of a clear statutory intent and directive to do so."<sup>29</sup> The administration's action in withholding funds was not "supported by Article II of the Constitution, nor any other authority," said Judge Hart in *American Association of Colleges of Podiatric Medicine v. Ash*.<sup>30</sup> In *Guadamuz v. Ash*, Judge Flannery specifi-

---

23. U.S. CONST., art. I, § 7.

24. *Id.* § 8.

25. *Id.* §§ 8, 9.

26. *Id.* § 8.

27. In his news conference of January 31, 1973, President Nixon asserted that the "constitutional right for the President of the United States to impound funds . . . not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people . . . is absolutely clear." 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 11 (1973). See also *1973 Impoundment Hearings*, *supra* note 4, at 270 (statement by OMB Director Roy Ash); *id.* at 369 (statement by Deputy Attorney General Joseph Sneed).

28. *Pennsylvania v. Lynn*, 362 F. Supp. 1363, 1372 (D.D.C. 1973).

29. 361 F. Supp. 897, 901 (D.D.C. 1973).

30. Civil No. 1139-73 at 3 (D.D.C., October 26, 1973), cited in L. FISHER, *supra* note 22, at 82.

cally rejected the notion of an inherent presidential power to impound, stating: "Money has been appropriated by the Congress to achieve the purposes of both programs and the Executive has no residual constitutional power to refuse to spend these appropriations."<sup>31</sup>

The President has also placed heavy reliance upon article II, section 3, which requires the President to "take care that the laws be faithfully executed." According to the President, this section authorizes him to exercise discretion in carrying out the spending function, so as to "harmonize" the appropriation acts with various general statutes dealing with macro-fiscal matters, such as the debt limit, the Employment Act and the Economic Stabilization Act.<sup>32</sup> If total appropriations exceed these macro-fiscal limitations, the President claims the power to harmonize by scaling down appropriations—and by making the reductions according to his own sense of priorities. An equally strong argument can be made, however, for interpreting the "faithfully execute" clause as requiring the President to make a good faith effort to carry out the intent of Congress. If Congress enacts a series of laws in irreconcilable conflict, the President should, under this view, return to Congress for resolution, rather than make a unilateral decision to harmonize the laws by reducing spending in programs he selects for reduction.

The lower federal courts have consistently rejected the President's assertions that the "faithfully execute" clause authorizes impoundment. In *State Highway Commission v. Volpe*, the Eighth Circuit observed that the Anti-Deficiency Act must be interpreted in order to avoid violating the purposes and objectives of the appropriations at issue.<sup>33</sup> In *Massachusetts v. Weinberger*, the District Court found no language in the Anti-Deficiency Act or the Employment Act to support the President's contention.<sup>34</sup> These decisions

---

31. 368 F. Supp. 1233, 1244 (D.D.C. 1973).

32. Office of Management and Budget, *Budgetary Reserves as of February 4, 1974*, 39 Fed. Reg. 7708 (1974) (hereinafter cited as *OMB Report, Feb. 4, 1974*). This report sets forth a series of reasons in support of the reserves established by OMB. The general introduction to the report states: "From time to time, reserves are established for the purpose of conforming to the requirements of other laws. An example is the Executive's responsibility to stay within the statutory limitation on the outstanding public debt." 39 Fed. Reg. 7708. The major statutes relied upon by the OMB in this connection are the Anti-Deficiency Act, 31 U.S.C. § 665 (1970), the debt ceiling, 31 U.S.C. § 757(b) (Supp. II 1972), the Employment Act, 15 U.S.C. §§ 1021-25 (1970), and the Economic Stabilization Act Amendments of 1971, 12 U.S.C. 1094 (Supp. II, 1972). These statutes, and the Executive's reliance upon them, are discussed in *Impoundment: Legal Principles*, *supra* note 1, at 202-06.

33. 479 F.2d 1099, 1118 (8th Cir. 1973).

34. Civil No. 1308-73 (D.D.C. 1973), *cited in* L. FISHER, *supra* note 22, at 83.

and others<sup>35</sup> necessarily imply that the President has no constitutional power to harmonize in such a manner as to violate congressional intent.

The President's special powers as Commander-in-Chief<sup>36</sup> and as spokesman in foreign affairs<sup>37</sup> may give him broader discretion over spending in these areas than in others. The controversy over impoundment, however, has emphasized non-military, domestic programs, and these special powers are therefore not currently at issue.

The doctrine of separation of powers can be invoked on either side of the impoundment controversy. If the Constitution is regarded as conferring discretion upon the President in the execution of appropriations, the notion of the separation of powers can be invoked to preclude Congress from interfering—hence any congressional attempt to prevent or control impoundment would be unconstitutional. On the other hand, if the Constitution is regarded as empowering Congress not only to appropriate but also to control the manner in which the appropriation is executed, Congress must provide adequate guidelines to the executive officials responsible for executing the appropriation. The failure to provide adequate guidelines may be regarded as an abdication of legislative responsibility. This could be cured in part by the establishment of certain procedures, imposed by Congress or by the President if Congress fails to do so, thus assuring the orderly exercise of discretion.<sup>38</sup> Although the separation of powers question is unlikely to persuade a court to invalidate appropriation acts that fail to provide standards or procedures, the topic raises questions of political accountability.

2. *Congressional intent as expressed in the appropriation act and authorization acts*—Having concluded, in general, that the President must conform to congressional intent, the courts look into this intent as expressed in the appropriation and authorization acts and in their underlying legislative history. The basic question is two-fold: first, how much discretion, if any, did Congress intend to give the President in executing the various stages of the specific appropriation at issue; secondly, has the President abused this discretion. This analysis is more subtle than the traditional distinction

---

35. See cases cited in notes 28-31, *supra*; *Louisiana v. Weinberger*, 369 F. Supp. 856 (E.D. La. 1973); *Government Employees Local 2677 v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

36. U.S. CONST. art. II, § 2.

37. *Id.* §§ 2, 3.

38. On the need to confine and structure the exercise of discretion, either through statutory guidelines or through agency rules, see K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 97 (1969).

between mandatory and permissive appropriations, which implied that the President had either no discretion at all (in the case of the mandatory appropriation) or absolute discretion (in the case of the permissive appropriation). The newer two-fold test was applied in two separate cases arising out of the impoundment of clean-water funds. Two district courts held that the statute conferred some discretion upon the administrator but that this discretion had been abused by his decision to withhold fifty-five percent of the funds.<sup>39</sup>

### G. State Governments in the United States

The budget processes of state governments in the United States suggest some directions for reform of the federal government's budget system.

1. *Publicity of the Process*—State budget processes generally give legislators greater access to information than is available to Congress. In the great majority of the states, the legislature receives not only the Governor's budget document, but also the original requests submitted to the Governor by the agencies, which may be quite different.<sup>40</sup> In many states, agencies are permitted to take their requests directly to the legislature if the Governor does not include the full agency request in his budget package.<sup>41</sup> Legislators and their staffs are often authorized to attend executive budget hearings, although their role is generally limited to observation rather than participation. Legislative prerogatives also often include the right to acquire budgetary information from subordinate officials in the executive branch as well as from the central budget office itself.<sup>42</sup>

Legislative access to information often extends not only to the preparation but also to the execution of the budget. Legislators commonly have access to detailed accounting records of allotments and disbursements and regular reports of expenditures are provided in many states.<sup>43</sup> Additionally, seven states impose specific require-

---

39. *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689, 700 (E.D. Va. 1973); *Minnesota v. Fri*, No. 4-73 Civ. 133 (D. Minn. 1973) mem. op. at 13, cited in L. FISHER, *supra* note 22, at 88.

40. TAX FOUNDATION, *STATE EXPENDITURE CONTROLS: AN EVALUATION* 25-26 (1965) (hereinafter cited as TAX FOUNDATION). The findings of the Tax Foundation, in this respect as in many others, are supported by the responses received from 46 states to a questionnaire distributed in 1973 to the legislative appropriation committee and to the executive budget agency of each state by the McIntosh Executive Impoundment Project, tabulated by Douglas Crow and Malcolm Steinberg (hereinafter cited as McIntosh state questionnaire).

41. See materials cited in note 40 *supra*.

42. This is normally accomplished through the process of legislative committee hearings. McIntosh state questionnaire, note 40 *supra*.

43. Monthly computer reports of expenditures are provided in at least 6 states: Idaho,

ments upon the Governor to report the withholding of funds, either before or after the fact.<sup>44</sup>

2. *Preparation of the Budget*—State legislative modernization has brought some significant changes in committee organization. Fifteen states have adopted joint senate-house appropriation committees,<sup>45</sup> and in four of those states the appropriation and taxation functions are combined.<sup>46</sup> Increasingly, the trend is to provide permanent professional staffing for fiscal committees, often in the form of a central legislative budget office.<sup>47</sup>

Most state legislatures enact an omnibus appropriation, subject to an item veto by the Governor. Typically, the item veto allows the Governor to eliminate individual lines in the appropriation bill, but in eight states the Governor may choose either to eliminate or to reduce, and in some states he may veto provisos or statements of intent included in the appropriation bill.<sup>48</sup>

Despite its widespread availability, the item veto is infrequently used, but when used is rarely overridden. In a small number of states the item veto has been extensively used, especially in those states with the "reduction" item veto.<sup>49</sup>

3. *Execution of the Budget*—States generally have not been faced with "impoundment" problems. State statutes often place restrictions on the executive authority to approve allotments, au-

Maryland, Massachusetts, Montana, South Dakota and Vermont. Regular reports are also required in Kansas, Michigan, North Carolina, Oregon, Washington and Wyoming. McIntosh state questionnaire, note 40 *supra*.

44. Florida, Hawaii, Idaho, Nevada, Oregon, Virginia and Washington. McIntosh state questionnaire, note 40 *supra*.

45. Alabama, Arkansas, Connecticut, Idaho, Louisiana, Maine, Mississippi, Montana, Nebraska, New York, North Carolina, Oregon, South Dakota, Utah and Wisconsin. McIntosh state questionnaire, note 40 *supra*.

46. Alabama, Louisiana, New York, Wisconsin. McIntosh state questionnaire, note 40 *supra*.

47. COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES 1972-73*, at 81-82 (1972).

48. Thirty-seven states were reported as using the omnibus appropriation bill in 1965. TAX FOUNDATION, note 40 *supra*. This result is generally supported by the McIntosh state questionnaire. Of the 37 states responding to the question whether the omnibus appropriation is used, 20 replied affirmatively, another 4 reported the omnibus system was in general use, subject to special separate appropriations for new programs, and 13 reported no omnibus appropriation system.

The item veto is provided in 43 states, including 8 states which permit a reduction veto. *THE BOOK OF THE STATES 1972-73*, *supra* note 47, at 72-73.

49. The McIntosh state questionnaire obtained the following responses: (a) "Is the item veto ever used?" Of 30 states responding, 15 replied "rarely." (b) "Is the item veto ever overridden?" Of 10 states responding, 7 replied "very rarely." Extensive use of the item veto was reported by California, Illinois, Michigan, Missouri, Pennsylvania, Texas and Washington. McIntosh state questionnaire, note 40 *supra*.

thorize fund transfers, or withhold funds to prevent deficits. In some states, impoundments can be made only on an across-the-board basis.<sup>50</sup>

The existence of legislative oversight committees and the availability of attorney general opinions or judicial review appear to have placed significant limits on the discretion exercised by Governors in the execution of their budgets.

Although conflicts resulting in controversial impoundments have arisen in some states,<sup>51</sup> the openness of the process during preparation of the budget, and the availability of the item veto, tend to reduce the risk of conflict between legislature and Governor in the execution of the budget.

4. *Limited Relevance of State Experience as a Model for Federal Reform*—Many of the devices used by state governments have implications as potential methods of reform of the federal budget system. Their significance, however, is limited in view of the limited responsibilities of state governments as compared to the federal government. Only the federal government is responsible for defense, the international balance of payments, nationwide price levels, and other problems of national scope. The federal government may well require unique systems in order to perform its unique functions.

#### H. *Comparative Study of Foreign Governments*

A study of the budget processes of Great Britain, France and West Germany<sup>52</sup> indicates that in all three systems, the executive dominates the process of introducing appropriations proposals into the legislature. In addition, once an appropriation has been enacted, the executive enjoys considerable but not absolute discretion in deciding whether to spend the total amount of funds appropriated. In all three countries, the executive is permitted and indeed expected to reduce the level of spending when considerations of prudent and efficient administration so require, that is, when the legislative program can be carried out at lower cost than originally anticipated, the concept previously referred to as "variance." The executive in

---

50. Georgia, North Carolina, Oregon, South Carolina and Utah. McIntosh state questionnaire, note 40 *supra*.

51. Florida and Illinois reported serious and recurring problems. McIntosh state questionnaire, note 40 *supra*.

52. The comparative study, summarized here by the present authors, was conducted by Hans W. Baade, Professor of Law, University of Texas, in conjunction with the McIntosh Foundation Executive Impoundment Project. The study includes Canada as well as Britain, France and West Germany. The full text of Professor Baade's report has been published in 60 VA. L. REV. 393-450, 611-63 (1974).

all three countries also enjoys limited discretion to reduce spending for specific programs in order to keep total spending within acceptable macroeconomic limits. It seems generally understood, however, that the executive will attempt to fulfill rather than frustrate the intent of the legislature.

Each of the three countries has a parliamentary system of government, in which the executive (the "government") is part of the legislative branch, subject to removal by a simple vote of "no confidence." The legislature thus possesses an ultimate sanction that demands executive deference to policies of the legislative majority. This sanction carries built-in restraints, since the legislator who votes no confidence in his government faces the prospect of parliamentary dissolution, by which his own tenure of office is prematurely ended.

The European countries favor intermediate-term (five-year) plans, as the basis for annual budgets. Special attention is paid to the need to keep inflation within tolerable limits, if possible, and to provide sufficient flexibility in the budget system to respond to whatever inflation is experienced during the budget cycle.

### *I. Proposed Congressional Reforms*

The House in December 1973 and the Senate in March 1974 passed different versions of bills to reform the budget process and control impoundment.<sup>53</sup> At the time of writing, the bills are being considered by a conference committee.

Both bills represent the culmination of reform efforts during the past two years, when dozens of proposals were introduced. The impetus for reform has undoubtedly been the impoundment controversy, and the President deserves some credit for having jolted Congress into a long overdue reform of its budget process.<sup>54</sup>

Both bills combine budget reform and impoundment control in a single package, emphasizing reform of the spending function. Other features shared by both bills include: the creation of a budget committee in each House; the creation of a professional budget staff in Congress; the adoption of tentative totals, at the beginning of each year's budget season, setting targets for appropriations, revenues and debt; the continuation of the existing practice of piecemeal action on appropriations, in as many separate bills as Congress chooses to process; the ability of Congress to amend the target total

---

53. S. 1541, 93d Cong., 2d Sess. (1973); H.R. 7130, 93d Cong., 2d Sess. (1974).

54. See note 12 *supra* and accompanying text.



figures at any time; the change of the fiscal year to October 1; and the imposition of some types of control over impoundment of funds by the President.<sup>55</sup>

The greatest differences between the Senate and House bills are in their respective provisions on impoundment.<sup>56</sup> These bills will be discussed, in more detail, in context of our recommendations for reform of the budget process.

### *J. General Evaluation of Current Situation*

The friction built into our system of separation of powers can be expected to be especially severe when, as at present, the President and the congressional majority are of opposite political parties. The recent confrontations over the impoundment issue, however, have reached serious proportions. When President and Congress assert conflicting policies and priorities regarding governmental spending, citizen confidence in government itself is likely to be undermined, especially when the President resolves the conflict by his own unilateral action, on the basis of procedures that pose an unacceptable risk of abuse within the executive branch.

A Congressman recently described the current system as one in which "Congress gets credit for voting the funds while the President takes Congress off the hook by refusing to spend them."<sup>57</sup> The pending House and Senate bills permit cautious optimism that a more responsible view is gaining ground. The committee reports, moreover, suggest that these bills are intended merely as first stages of more comprehensive reforms, to be undertaken over a period of years.<sup>58</sup>

Many features of the pending bills closely resemble the corresponding provisions in the recommendations that follow, and the similarities will be noted in the commentary following the recom-

---

55. S. 1541; H.R. 7130.

56. S. 1541, § 1001; H.R. 7130, §§ 201-06.

57. Congressman Robinson, quoted in *Preliminary Findings*, *supra* note 15, at S 21123.

58. The report on S. 1541 by the Senate Committee on Rules and Administration states:

The Committee recognizes that as Congress gains experience with its new budget process, it may consider it desirable to supplement the procedures established in S. 1541 with additional enforcement methods. The substitute bill provides that the first budget resolution may require—for the fiscal year to which it applies—additional procedures such as an omnibus appropriation bill, a triggering clause in appropriation bills, or holding appropriation and spending bills at the enrolling desk until Congress has approved the second budget resolution and any required reconciliation measure. Thus, the substitute bill allows for the evolutionary development of the congressional budget process, rather than an all-at-once implementation.

S. Rep. No. 688, 93d Cong., 2d Sess. 17 (1974).

mendations. In general, however, our recommendations propose more comprehensive controls on both Congress and the President than are provided in the pending bills. Until comprehensive reforms are written into law, and until Congress and the President have demonstrated themselves willing and able to comply with the discipline of a reformed system, citizen confidence is unlikely to be restored.

## **II. Recommendations for Budget Reform and Impoundment Control**

The discussion will deal with five major topics: (A) regularized and public procedures throughout the budget process; (B) budget preparation; (C) enactment of appropriations; (D) execution of appropriations; and (E) budget-related litigation. Commentary is submitted for each recommendation in the context of a critical description of existing practice.

### *A. Regularized and Public Procedure Throughout Budget Process*

From beginning to end, the budget process involves a blend of functions of Congress and the executive branch. Each branch should have full and prompt access to information developed by the other, and each branch should function in accordance with a regularized process. The public should have the maximum possible access to records and hearings on the budget, consistent with the requirements of national security and other legitimate reasons for confidentiality.

### **RECOMMENDATION 1. PROCEDURE WITHIN EXECUTIVE BRANCH**

(a) **The President and other officials in the executive branch should prepare and execute the budget in accordance with regularized procedures and timetables.**

(b) **The President and other officials in the executive branch should compile and maintain documentary records of information and opinion concerning major decisions made during the preparation and execution of the budget.**

#### *Commentary*

(a) Executive processes in the *preparation* of the budget are organized and scheduled on a regular basis. The process extends

from well in advance of the affected fiscal year when agency proposals are formulated for submission to the OMB, to the time when the President's budget is submitted to Congress.<sup>59</sup>

Executive processes in the *execution* of the budget are also organized to some extent. A large amount of *ad hoc* decision-making involving impoundment, however, takes place at irregular intervals.<sup>60</sup> While flexibility is valuable in dealing with changing circumstances, the relatively unscheduled tempo of decision-making during the execution of the budget raises questions concerning the quality and the integrity of decisions made under this system. Field research indicates that some important decisions have been made without adequate documentation, deliberation or review. The quality of decisions made under these circumstances is highly questionable. Further, questions of integrity arise, since certain individuals with inside information have found methods of discovering the dates and whereabouts of crucial meetings and the means of reaching the decision-makers.

(b) Documentary records are prepared during the preparation and execution of the budget and are kept highly confidential.<sup>61</sup> Sources indicate that detailed analyses are prepared at various agency levels and compiled by the OMB, dealing with various aspects of selected actual and proposed programs, including political cost-benefit analyses. Although some decisions are supported by these secret documents, other important decisions have been made without any substantial documentation at the time of the decision.<sup>62</sup> Sound administration requires that all relevant documents be compiled in advance of decision making; that they actually be used as a means of arriving at the decision; and that they be preserved as a means of facilitating subsequent review of the decision.

## RECOMMENDATION 2. PUBLICITY OF FUNCTIONS OF EXECUTIVE BRANCH

(a) **The President and other officials in the executive branch should make the records of the preparation and the execution of the budget fully available to Congress and to the public, except that public access may be precluded to the extent**

---

59. Current statutory provisions regarding the President's budget message are found at 31 U.S.C. § 11 (1970).

60. *Preliminary Findings*, *supra* note 15, at S 21122-23.

61. *Id.* at S 21122.

62. The accompanying text is based upon confidential interviews conducted by the authors during the McIntosh Foundation Executive Impoundment Project, 1973.

such records are properly classified in accordance with strict guidelines.

(b) The Office of Management and Budget (OMB) should conduct hearings at certain stages of the preparation of the budget and, if feasible, at certain stages of the execution of the budget. All OMB hearings should be fully open to observation by both Congress and the public except that the public may be excluded for a proper reason in accordance with strict guidelines.

#### *Commentary*

(a) As previously indicated, OMB maintains tight secrecy with respect to the documents it compiles during the preparation and execution of the budget with even Congress denied access to some of these documents. Further, OMB director's review sessions and other budget-related meetings are closed.

Other documents, such as the President's budget message, are released. The final results of the execution of the budget become matters of public information, in aggregate form, when the Treasury Department issues its reports of revenues and expenditures. In addition, pursuant to the Inpoundment and Information Act of 1972,<sup>63</sup> the OMB publishes a quarterly statement of budgetary "reserves."<sup>64</sup> However, the documents containing the facts and opinions that went into the various decisions made during the budget process are kept secret.

Increased publicity of the entire process would facilitate higher level executive evaluation of tentative decisions made at lower levels; would facilitate congressional evaluation of crucial decisions; and would enhance the public accountability of those who make the decisions. Admittedly, certain portions of the record do require confidential treatment because of their sensitive subject-matter; examples include certain aspects of foreign affairs, national security, and law enforcement. While such materials may justifiably be kept from public inspection, they should nevertheless be made fully available to Congress and its agencies.

(b) In the interest of opening up the executive process to greater scrutiny, there should be publicity not only of OMB documents, but also of OMB hearings, such as the OMB director's review sessions. The publicity of these hearings should be limited only

---

63. 31 U.S.C. § 581c-1 (Supp. II, 1972).

64. The most recent is *OMB Report Feb. 4, 1974*, note 32 *supra*.

by the extent to which classified information is likely to be discussed, and even then the hearings should be open to Congress and its agencies. To avoid bogging the process down, the OMB hearings should be open to observation only, not participation.

### **RECOMMENDATION 3. PUBLICITY OF CONGRESSIONAL ACTION ON BUDGET**

**(a) All documentary records compiled or received by Congress, or by any of its committees or agencies, in connection with any aspect of the budget should be made fully available to the public except to the extent that such records are properly classified in accordance with strict guidelines.**

**(b) Congress, or any of its committees and agencies, should not hold executive sessions at any stage of congressional consideration of the budget unless a proper reason, in accordance with strict guidelines, is stated for excluding the public.**

#### *Commentary*

(a) The appropriations committees receive information partly on a government-wide basis from OMB and partly on an agency-by-agency basis during legislative hearings on specific programs. While most of the information compiled by these committees is readily available to Congress and the public, the House Appropriations Committee does maintain secret files for some of the information it compiles.<sup>65</sup> In addition, both appropriations committees conduct some of their proceedings in the secret format of executive sessions.

(b) Except for those types of information that require confidentiality, all congressional files and hearings should be open to the public as a means of maximizing both congressional accountability and citizen confidence.

The Senate bill moves in this direction, by requiring all meetings of the budget committees and their subcommittees to be open to the public, except in designated circumstances.<sup>66</sup>

#### *B. Budget Preparation*

The President's budget message provides volumes of useful information, but it could be made even more informative for subsequent congressional and public evaluation.

---

65. The accompanying text is based upon confidential interviews conducted by the authors during the McIntosh Foundation Executive Impoundment Project, 1973.

66. S. 1541, § 101(d).

#### RECOMMENDATION 4. FORMAT OF PRESIDENT'S BUDGET MESSAGE

(a) The President's budget message should include:

(i) The recommended manner in which appropriation items would be changed, if the total outlays for the ensuing fiscal year were either five percent greater or five percent less than the recommended total;

(ii) Macroeconomic discussion, including alternatives and recommendations;

(iii) Presentation of the anticipated goals and achievements as well as the required resources for major programs.

(b) The President's budget message should conform to those changes in congressional procedures and timetables that are proposed elsewhere in these recommendations.

#### *Commentary*

(a) Some of the President's most difficult decisions in formulating his budget involve those programs he considers to be of marginal importance. The President's budget would be more useful if it identified those programs. This presentation could be made by including in the budget the President's proposal for making changes if the total outlays were slightly greater or slightly less than he recommends. The figure of five percent for the size of the margin is advanced as a reasonable one, but any other factor could be used if it were demonstrably more useful. In addition, outlays rather than new budget authority are suggested as the basis for computing the five percent margin, since the major disputes in the recent battle of the budget have centered around outlays which are the relevant item for macroeconomic planning.<sup>67</sup>

(b) Later proposals require Congress to consider fiscal policy on a macro level by setting total levels of outlay, new budget authority, revenue, debt, and surplus or deficit, before acting on individual programs.<sup>68</sup> In order to carry out this responsibility, Congress needs the benefit of the President's macroeconomic recommendations, documented as fully as possible, and integrated with the budget message. Current practice concentrates the macroeconomic report

---

67. Recommendation 8, *infra*, provides that outlays as well as new budget authority should be included in appropriation acts.

68. See Recommendation 7, *infra*.

in a separate message, given at a different time.<sup>69</sup>

(c) During the in-house preparation of budget requests within the executive branch, program goals are often submitted and used as the basis for recommendations.<sup>70</sup> The President's budget itself, however, abandons much of the program identification that was contained in the underlying requests and continues the practice of classifying by agency and line item. The agency and line item classification should be retained, but with supplemental presentations showing goal and achievement-oriented projections.<sup>71</sup>

The Senate bill imposes a requirement along these lines, beginning with the fiscal year ending on September 30, 1979<sup>72</sup>

(d) A number of our recommendations change the procedures and timetables to be followed by Congress during its action on the budget. The President's budget message should be adapted accordingly.

### C. *Enactment of Appropriations*

Having received a single budget proposal from the President, Congress each year enacts a series of appropriation bills at different times, making it almost impossible to maintain an overview of total spending, or to develop a coherent set of priorities. In addition, huge amounts of expenditures are authorized by "backdoor" procedures by-passing the appropriations committees until after the obligation has been incurred.

The following recommendations outline a set of operational rules and create new congressional committees and staffs, designed to establish effective congressional control over spending, and provide a framework within which the President can exercise a reasonable amount of discretion.

## RECOMMENDATION 5. TIMETABLE

### (a) The fiscal year should be changed to October 1.

---

69. Currently the President submits a separate economic message pursuant to the Employment Act, 15 U.S.C. §§ 1021-25 (1970).

70. This is especially the case under the so-called Management-by-Objective system, currently favored by the OMB. Havemann, *OMB Begins Major Program to Identify and Attain Presidential Goals*, 5 NAT'L. J. 783 (1973); Brady, *MBO Goes to Work in the Public Sector*, 51 HARV. BUS. REV. 65 (Mar.-Apr. 1973).

71. Currently, pursuant to 31 U.S.C. § 11 (1970), the President's budget message does not have to include program or mission-oriented presentations. In recent years, the Appendix to the budget has included some materials of this type.

72. S. 1541, § 601(j).

**(b) Congressional action on appropriations should conform to a timetable, which should be suitably enforced.**

*Commentary*

(a) The recommendations, in general, require Congress to complete a series of rigorous procedures during a "budget season" that begins with the President's submission of his budget message to Congress and that should end with enactment of all appropriation bills before the start of the fiscal year.<sup>73</sup> Under current schedules, the budget season lasts for less than six months, from the submission of the budget in mid-January to the beginning of the fiscal year on July 1. This season is too short to provide Congress with an adequate opportunity to complete even its existing processes, and Congress has been obliged to resort frequently to the continuing resolution as a means of providing the temporary continuation of programs for which appropriations could not be enacted before July 1.<sup>74</sup>

The budget season could be lengthened by requiring the President to submit his budget earlier than January. This, however, would result in submission of the budget either during December (typically, a month when thoughts of adjournment are prevalent) or during November (dominated by elections). The alternative method of lengthening the budget season is by changing the end of the fiscal year from July 1 to a later date. Both bills pending in Congress select this method of lengthening the season, and both select October 1 as the beginning of the fiscal year.<sup>75</sup> This appears to be a reasonable and practical solution.

Both pending congressional bills additionally provide detailed timetables, requiring each stage of congressional action on the budget to be completed by a certain date during the budget season. Our proposed timetable is set forth following the comments to Recommendation 7.

(b) Neither of the pending bills provides a mechanism for enforcing the timetable, except that Congress is prevented from

---

73. See Recommendation 7, *infra*, and the proposed timetable for appropriations following the commentary to Recommendation 7.

74. Report of Senate Rules Committee on S. 1541 states that for fiscal years 1964-1973 only 7 out of 129 appropriation bills were approved prior to July 1. S. Rep. No. 688, 93d Cong., 2d Sess. 62 (1974). See also H.R. Rep. No. 658, 93d Cong., 1st Sess. 36 (1973): "The Committee hopes that this revised time-table [changing the fiscal year to October 1] will put an end to continuing resolutions and the uncertainty which they bring."

75. S. 1541, § 501; H.R. 7130, § 151.



adjourning until after completion of all stages of the budget process. The recommendations in this article include a number of mechanisms designed to enforce the timetable. Recommendation 7(g) creates a two-thirds majority requirement for enactment of any appropriation in the form of a continuing resolution, and 7(h) requires a two-thirds majority for enactment of any appropriation outside the budget season unless the measure includes provision for full coverage by new revenues. These proposals place heavy pressure upon Congress to complete the budget process on schedule, within the budget season.

Other enforcement mechanisms also might be considered. As one approach, the rules of each House could provide that if either House falls behind its timetable, that House could not consider any business other than the budget, with a two-thirds vote necessary for waiver of this rule.

#### **RECOMMENDATION 6. CONGRESSIONAL ORGANIZATION AND STAFF**

**(a) A budget committee should be created as a standing committee in each house of Congress. Each budget committee should report regarding tentative budget totals and should perform functions discussed elsewhere in these recommendations. The two budget committees should jointly supervise the operation of the congressional budget office.**

**(b) A congressional budget office should be created and staffed in a nonpartisan, professional manner. The office should analyze budget data received from the executive branch, develop its own data, keep score of congressional and executive action on all aspects of the budget, and furnish Congress with information and opinions on budgetary matters.**

#### *Commentary*

(a) In each house of Congress, the spending function is handled by an appropriations committee, while the revenue function is handled by a separate committee (Finance in the Senate, Ways and Means in the House). Congress should be required, at the beginning and again at the end of each budget season, to receive an overview report from a committee which can coordinate revenues and expenditures.<sup>76</sup> Only a committee combining both revenue and ex-

---

76. See Recommendation No. 7, *infra*.

penditure jurisdiction could adequately perform this function. Each pending congressional bill provides for the creation of a new committee in each house.<sup>77</sup> The primary function of each proposed budget committee is to coordinate total spending with revenues, debt, and surplus or deficit. The existing committees' handling of revenues and expenditures is left virtually intact.

The existing committees should survive, and a new committee in each house should undertake the proposed new coordinating function. Separation between the budget committees of the two houses is desirable because of the special constitutional responsibility of the House to initiate tax measures,<sup>78</sup> the tradition by which the House initiates appropriation measures,<sup>79</sup> and the risk that a joint Senate-House budget committee could turn out to be unworkable.<sup>80</sup>

The Senate bill creates a fifteen-member budget committee, while the House bill creates a twenty-three-member committee. Each of these proposed committees is small enough to work effectively, as contrasted with past reform attempts which would have created unwieldy budget committees consisting of all members of the appropriations committees plus all members of the Finance or Ways and Means Committees.<sup>81</sup> The bills differ with respect to both eligibility and the method of appointment of budget committee members. Whatever method is used, each budget committee should include significant but not dominant representation from the Appropriations and Finance or Ways and Means Committees.

(b) In order to deal effectively with the proposed new coordinating function, Congress will need not only a budget committee in each house, but also a staff agency of substantial size. The staffs of the existing Appropriations and Finance or Ways and Means Committees can hardly be expected to perform the new task. These staffs will continue to serve the needs of their respective committees, which will continue their existing functions. The General Ac-

---

77. S. 1541, § 101; H.R. 7130, § 111.

78. U.S. CONST., art. I, § 7.

79. R. FENNO, *THE POWER OF THE PURSE* 639-40 (1966); CONGRESSIONAL QUARTERLY, *GUIDE TO THE CONGRESS OF THE UNITED STATES* 185-86 (1971).

80. For a discussion of the success of this mechanism in state governmental budget processes, see *Preliminary Findings*, *supra* note 15, at S 21125, and text accompanying note 45 *supra*.

81. See Leiserson, *Coordination of Federal Budgetary and Appropriations Procedures Under the Legislative Reorganization Act of 1946*, 1 NAT'L TAX J. 118 (1948).

counting Office could feasibly be expanded to fill the new staff role, but the large size of GAO and its general emphasis on post-audit rather than on planning preclude it from being the obvious choice.

Both pending bills provide for the creation of a nonpartisan, professional congressional budget office to serve as a congressional counterpart of the OMB, under the general supervision of the budget committees of the two houses.<sup>82</sup> The bills differ as to method of appointment of the director and the scope of his powers. By whatever method these details are resolved, the director must enjoy a significant amount of independence, have unlimited access to all government documents, and be assisted by a staff of adequate size and qualifications.

#### **RECOMMENDATION 7. PROCEDURE FOR ENACTING APPROPRIATIONS**

(a) The appropriations process should be the exclusive means of authorizing budget authority or outlays.

(b) Congress should adopt tentative budget totals before voting on individual appropriation items.

(c) Congress should revise the tentative budget totals after voting on individual appropriation items, and should submit a draft omnibus appropriation bill, not enrolled, to the President for comment only, not signature.

(d) The President should then have an opportunity to request congressional reconsideration of any item or part of any item in the draft omnibus appropriation bill, and his request for reconsideration should have the effects stated in the following subsection, provided that the President does not request reconsideration of items that, in the aggregate, would reduce total outlays for the ensuing fiscal year by more than five percent.

(e) After receiving reports from the budget committees on the President's request for reconsideration, Congress should reconsider and vote separately on each item or part of an item in the President's request for reconsideration, and the draft omnibus appropriation bill should be modified to eliminate any item or part of an item which fails to receive a two-thirds majority upon reconsideration.

(f) Congress should then enact an omnibus appropriation bill, consistent with the draft appropriation bill, except as modified by Congress upon reconsideration pursuant to the President's request.

---

82. S. 1541, § 201; H.R. 7130, § 171.

(g) A two-thirds majority should be required for the enactment of any appropriation in the form of a continuing resolution, and no continuing resolution should permit the President to take action after the enactment of the continuing resolution reducing its amount, by budget amendment or otherwise.

(h) A two-thirds majority should be required for the enactment of any appropriation which is voted upon separately from the omnibus appropriation bill, unless the measure includes provision for full coverage by new revenues.

#### *Commentary*

(a) Current practice permits "backdoor" authorization of spending through legislation which does not go through the appropriations process until after the financial obligation has been incurred.<sup>83</sup> By this time, of course, appropriation becomes a perfunctory matter, required in order to avoid default on obligations. In order to achieve full and effective congressional control over all aspects of spending, the back door must be closed, and all legislation dealing with budget authority or outlays must be channelled through the appropriations process, subject to coordination by the budget committees.

The proposals pending in both houses provide, in principle, for the elimination of backdoor spending. This is, however, subject to certain exceptions and long phase-out periods.<sup>84</sup> Backdoor spending should be completely eliminated within a phase-out period of no longer than one year.

(b) Although it receives a single budget proposal from the President each year, Congress then fragments the process, enacting thirteen major appropriation bills at different times, this in addition to massive backdoor authorizations.<sup>85</sup> Both bills pending in Congress require, early in the budget season, the adoption of a concurrent resolution setting tentative totals of outlays, new budget authority, revenues, debt, and surplus or deficit.<sup>86</sup> Under each proposal these tentative totals are subject to revision after the completion of

---

83. S. Rep. No. 688, 93d Cong., 2d Sess. 21 (1974). "The Committee is mindful that backdoor spending—spending outside the appropriations process—has emerged in recent years as a principal impediment to comprehensive budget control."

84. S. 1541, § 401; H.R. 7130, § 141.

85. "The very first act of Congress in consideration of the budget is to fracture it into a dozen or more separate appropriation bills, an uncounted number of special measures outside the appropriations process, and a huge and growing portion that is converted into budget authority without any current action by Congress." S. Rep. No. 579, 93d Cong., 1st Sess. 9 (1973).

86. S. 1541, § 301; H.R. 7130, § 121.

action on all appropriation items.

Budget totals should indeed be adopted at the beginning of the budget season. These totals are essential to any system that would allow Congress the opportunity to consider fiscal policy on a macro level before allocating priorities among competing programs at the micro level. The totals adopted at the beginning of the budget season should be tentative and not rigid. Congress needs the opportunity to reconsider its totals after the competing programs have been individually considered so that final priorities can be established; not only as between one spending measure and another, but also as between spending, taxation, and debt in their aggregates.

(c) After adopting the tentative totals at the beginning of the budget season, considering all appropriation measures in detail and reconsidering the budget totals in light of the detailed appropriations, Congress should prepare a draft omnibus appropriation bill, including all proposed appropriations in a single measure that reflects the revised budget total established in the priority reconsideration process.

Neither of the existing reform proposals adopts this approach, although the Senate bill permits the first budget resolution for any year to provide for an omnibus appropriation for that year. On the contrary, both proposals permit appropriations to be passed by Congress and sent to the President piecemeal, with the result that aside from some restrictions imposed by the House bill, some appropriations could become law before the entire appropriations process has been completed.<sup>87</sup> The committee reports recognize that priorities may need to be reconsidered after action on all appropriations has been completed, and they suggest that the earlier-enacted appropriations can, if necessary, be partially rescinded if their priorities are downgraded upon reconsideration.<sup>88</sup>

The omnibus appropriation bill is a much more effective method of resolving priorities. Representative Clarence Cannon, who persuaded Congress to enact an omnibus appropriation bill in 1950,<sup>89</sup> stated that the omnibus system had been an ambition of the House Appropriations Committee since the drafting of the Budget and Accounting Act of 1921.<sup>90</sup> The omnibus system was abandoned

---

87. S. Rep. No. 688, 93d Cong., 2d Sess. 17 (1974); H.R. Rep. No. 658, 93d Cong., 1st Sess. 40 (1973).

88. *Id.*

89. CONG. REC., June 24, 1949, p. 8388, cited in STAFF OF SENATE COMM. ON GOVERNMENT OPERATION, 86th Cong., 2d Sess., FINANCIAL MANAGEMENT IN THE FEDERAL GOVERNMENT 231-32 (COMM. PRINT 1961) [hereinafter cited as FINANCIAL MANAGEMENT].

90. The Budget and Accounting Act of 1921, as amended, 31 U.S.C. § 1 *et seq.*, remains the basic framework of the federal government's budget system.

after 1950, apparently because a number of congressmen considered the system unduly limited opportunities for floor discussion and amendment of specific items.<sup>91</sup> The omnibus appropriation system has been frequently advocated, both before and after 1950.<sup>92</sup> The favorable experience of the majority of states,<sup>93</sup> as well as numerous foreign jurisdictions,<sup>94</sup> suggests that the method is practical.

One of the classical arguments against the omnibus appropriation bill is that it limits the President to an all-or-nothing veto, since he does not have constitutional authority to veto individual items within an appropriation bill.<sup>95</sup> According to this argument, the omnibus appropriation is effective in state governments only because most state constitutions confer the item veto power upon the governor.

The omnibus appropriation should be considered in conjunction with the item veto. We propose the introduction of both mechanisms into the federal process—an omnibus appropriation bill, accompanied by a presidential item veto, exercisable subject to congressional override by a two-thirds majority.

In 1873 President Grant recommended a constitutional amendment which would give the president an item veto over all types of legislation, including appropriation bills.<sup>96</sup> Presidents Hayes, Arthur, F.D. Roosevelt, Truman and Eisenhower subsequently recommended that the President have the item veto power, at least over appropriations.<sup>97</sup> A tally prepared in 1963 showed that 147 proposals had been introduced in Congress recommending a constitutional amendment which would allow the President to exercise an item veto, either over all legislation or over appropriation bills only.<sup>98</sup> Some of the proposals included the power to reduce as well as to

---

91. FINANCIAL MANAGEMENT, *supra* note 89, at 233.

92. See FINANCIAL MANAGEMENT, *supra* note 89, at 229-36; CONGRESSIONAL QUARTERLY, GUIDE TO THE CONGRESS OF THE UNITED STATES 190 (1971); Nelson, *The Omnibus Appropriations Act of 1950*, 15 J. POL. 274 (1953); E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 284 (1940); S. Rep. No. 579, 93d Cong., 1st Sess. 12 (1973); H.R. Rep. No. 658, 93d Cong., 1st Sess. 28 (1973); J. SALOMA, THE RESPONSIBLE USE OF POWER: A CRITICAL ANALYSIS OF THE CONGRESSIONAL BUDGET PROCESS 58-63 (1964).

93. See note 48 *supra* and accompanying text.

94. See generally Baade, *supra* note 52, at 393 *et seq.*

95. H.R. Rep. No. 658, 93d Cong., 1st Sess. 28 (1973); S. Rep. No. 688, 93d Cong., 2d Sess. 12 (1974).

96. FINANCIAL MANAGEMENT, *supra* note 89, at 238-39.

97. *Id.* at 238-40.

98. Up to 1929, 70 measures were introduced. M. Musmanno, Proposed Amendments to the Constitution, H.R. Doc. No. 551, 70th Cong., 2d Sess. 69-70 (1929). Between 1929 and 1963, another 77 were introduced. PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. No. 163, 87th Cong., 2d Sess. 261 (1963). On the item veto, see

eliminate an item. Only one such proposal has gotten as far as being considered on the floor of either house of Congress, and that was defeated in 1883.<sup>99</sup>

In response to the inability to obtain the item veto by constitutional amendment, its advocates have from time to time proposed to achieve a similar result by some other means.<sup>100</sup> In his 1939 budget message, President Franklin D. Roosevelt stated:<sup>101</sup> "A respectable difference of opinion exists as to whether a[n] . . . item veto power could be given to the President by legislation or whether a constitutional amendment would be necessary. I strongly recommend that the present Congress adopt whatever course it may deem to be the correct one." Various types of legislation have been proposed, none successfully.

If the item veto can be provided only by constitutional amendment, such an amendment should be adopted in order to place the nation's budgetary process on a sound basis.

It seems, however, that the equivalent of an item veto over appropriations could be effected without a constitutional amendment, by suitable provisions in the rules of both houses of Congress, and by suitable procedures during the congressional budget process. Cases have generally held that Congress can design its own procedures for the enactment of legislation, and the courts generally do not interfere unless an express provision of the constitution is violated.<sup>102</sup> The recommendations herein enable the President to register his objections to items in the draft appropriation bill, subject to override by a two-thirds congressional vote. Other draftsmen may well be able to improve upon the mechanism.

As a preliminary matter the omnibus appropriation bill should be adopted as a draft, not a final document, and should not be

generally Note, *The Item Veto in the American Constitutional System*, 25 GEO. L.J. 106 (1936); Keating, *The Item Veto—A Needed Reform*, 7 FED. B. NEWS 104 (1960); Statement by Elmer Staats, Comptroller General of the United States, in *1973 Impoundment Hearings*, *supra* note 4, at 101, 110-14; FINANCIAL MANAGEMENT, *supra* note 89, at 236-49.

99. Staats, in *1973 Impoundment Hearings*, *supra* note 4, at 111.

100. *Id.* at 110-14; FINANCIAL MANAGEMENT, *supra* note 89, at 240-49; E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 284, 287-89 (1940).

101. Quoted in FINANCIAL MANAGEMENT, *supra* note 89, at 239.

102. U.S. CONST. art. I, § 5, cl. 2 provides: "Each House may determine the Rules of its Proceedings . . ." On the relative freedom of legislatures to determine their rules, see *Yellin v. United States*, 374 U.S. 109 (1963); *United States v. Smith*, 286 U.S. 6 (1932); *United States v. Ballin*, 144 U.S. 1 (1892); *State v. Gray*, 221 La. 868, 60 So.2d 466 (1952); *State ex rel. Johnson v. Hagemester*, 161 Neb. 475, 73 N.W.2d 625 (1955); *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 625 (1936); 50 Am. Jur. *Statutes* § 65 (rules of the legislature), § 85 (number of votes required) (1964). Certain existing congressional rules require a two-thirds majority: H.R. Rule 27 (suspension of rules requires two-thirds majority); S. RULE 22 (cloture requires two-thirds majority). See generally Barnett, *The Executive Control of the Legislature*, 41 AM. L. REV. 215 (1907).

formally enrolled. It should be sent to the President for comment, not signature. The following discussion outlines the sequels to this initial submission to the President.

(d) The President should be permitted to request Congress to reconsider certain items or parts of items in the draft omnibus appropriation bill. In this context, a presidential request for reconsideration should have the effect of requiring Congress either to abandon the item or to reaffirm it by a two-thirds vote.

The President should be able to request reconsideration of any item or part of an item, thereby achieving a result similar to the "reduction veto" provided in some states.<sup>103</sup> The President's power should, however, be tempered by a percentage limitation, preventing him from requiring reconsideration of massive amounts. Five percent appears to be a feasible limit; the President should be able to request reconsideration of items or parts of items aggregating not more than five percent of the total outlays for the coming fiscal year.

(e) Upon receipt of the President's requests for reconsideration, Congress should receive reports from its budget committees and should then reconsider the items or parts of items in the President's request. A two-thirds vote should override the President's request; the analogy to the two-thirds vote needed to override a veto is evident.

In voting upon the President's requests to reconsider, Congress should be limited to reconsideration of the "items" or "parts of items" in the draft appropriation bill, as the President was similarly limited in the formulation of his requests for reconsideration. This requirement is proposed in order to prevent the possibility of repackaging the itemized structure of the appropriation bill at this stage. Congress should not take any action other than the elimination of items or parts of items which fail to receive the two-thirds vote necessary for their survival after a presidential request to reconsider at this stage of the process. Again, the analogy with the overriding of a veto is evident; Congress cannot change a bill while in the process of overriding a veto.

(f) After responding to the President's request to reconsider, Congress should take final action on the omnibus appropriation bill. No change should be in order at this stage, since the budget season is no longer open. The formal appropriation bill should be identical to the draft, except as modified by congressional failure to override the President's requests to reconsider.

---

103. See text accompanying note 48 *supra*.



The formal omnibus appropriation bill should, and indeed must be, subject to an all-or-nothing veto, as provided in the Constitution, the veto, in turn, being subject to an all-or-nothing override by a two-thirds majority in Congress. The prospect of an all-or-nothing veto is likely to be reduced by the availability of the informal method by which the President can force a two-thirds vote on selected items in the draft omnibus appropriation bill.

(g) Continuing resolutions have been used frequently in recent years as a means of providing stopgap budget authority when the appropriations process has not been completed by the beginning of the new fiscal year.<sup>104</sup> On occasion the entire fiscal year has been funded through continuing resolutions dealing with important programs.<sup>105</sup> The use of these resolutions is a clear admission of the inability of Congress and the President to carry out the appropriations process in a timely fashion.

Special problems have arisen where continuing resolutions have appropriated an indefinite amount, expressed as the total level of expenditures of the prior year or the amount recommended in the President's budget for the coming year, whichever is lower. After enactment of such a resolution, President Nixon reduced his budget request for the year then in progress and claimed that this action effectively reduced the amount made available by the continuing resolution, a retroactive reduction of well over 1 billion dollars.<sup>106</sup>

Despite its undesirable features, the continuing resolution may be an important safety valve, providing for the continuation of government functions in the event of a legislative impasse at the close of the fiscal year. The attractiveness to Congress of the continuing resolution should be reduced by requiring a two-thirds majority for any such enactment. There should also be a prohibition against any continuing resolution which permits the President to reduce the amount of the resolution by budget amendment or otherwise. The bills pending in Congress make no attempt to eliminate or change the use of continuing resolutions.

(h) As far as possible, all appropriations should be enacted during the budget season, culminating in the omnibus appropriation bill. In order to provide the flexibility needed to meet unanticipated circumstances, mechanisms must be available for enacting appropriations at other times of the year. If off-season appropriations reach significant levels, however, they can jeopardize the fiscal

---

104. See note 74 *supra*.

105. See note 74 *supra*; H.R. Rep. No. 658, 93d Cong., 1st Sess. 24 (1973).

106. *Id.* and *Preliminary Findings*, *supra* note 15, at S 21123.

planning and coordination built into the omnibus appropriation bill. The availability of off-season appropriations should therefore be limited. Any such measure, if voted separately from the omnibus appropriation bill, should require a two-thirds majority unless the measure includes provision for full coverage by new revenues.<sup>107</sup> This exception is justified since a fully covered measure will have no net effect on the surplus or deficit planned during the budget season.

A further exception may be required with regard to private bills for claims against the United States. One possible approach would be to include in the omnibus appropriation a "reserve" to cover the estimated amount of claims to be approved during the coming year, and to draw against this reserve as specific claims are approved. If the reserve turns out to be inadequate, a supplemental appropriation would be needed, and although a two-thirds majority hardly seems necessary in such cases, it could no doubt be mustered.

Neither bill pending in Congress makes an attempt to discourage supplemental appropriations. Indeed, both bills permit changes to be made in the tentative budget totals at any time,<sup>108</sup> and the committee reports clearly indicate that supplemental appropriations are anticipated as a recurring feature of the process.<sup>109</sup>

**TIMETABLE:** Assuming all recommendations are implemented, the following timetable for the budgetary process is proposed:

<u>On or before</u>	<u>Action to be completed</u>
April 1	Congress completes action on legislation authorizing enactment of new budget authority.
May 1	Congress completes action on concurrent resolution setting forth tentative budget totals. [Recommendation 7(b)]
July 1	Congress completes action on all appropriation bills, which are not enrolled, pending completion of omnibus appropriation process. [Recommendation 7(c)]

107. Baade, note 52 *supra*.

108. S. 1541, § 304; H.R. 7130, § 122(c).

109. S. Rep. No. 688, 93d Cong., 1st Sess. 13 (1974); H.R. Rep. No. 658, 93d Cong., 1st Sess. 32 (1973).

- August 1 Congress completes action on draft omnibus appropriation bill, which is not enrolled, and which is sent to the President for comment, not signature [Recommendation 7(c)]
- August 15 President submits comments to Congress regarding draft omnibus appropriation bill. [Recommendation 7(d)]
- September 1 Congress completes action on omnibus appropriation bill. [Recommendation 7(e), (f)]
- October 1 Fiscal year begins.

#### RECOMMENDATION 8. FORMAT OF APPROPRIATION BILLS

(a) All appropriation bills should include provisions, having the force of law, creating new budget authority and imposing limits on the amount of outlays during the current or ensuing fiscal year.

(b) In addition, all appropriation bills should include multi-year projections of outlays, which should not have the force of law.

(c) Zero-based budgeting techniques should be applied to certain programs selected by Congress each year.

(d) Pilot testing should be provided, if feasible, for certain new programs selected by Congress each year.

#### *Commentary*

(a) Under current practice, an appropriation bill deals only with the creation of new budget authority. As pointed out in the report of the Committee on Government Operations on the pending Senate bill,<sup>110</sup> Congress has no control over when the funds shall be obligated or expended after the appropriation has been enacted. The lag between appropriations and outlays is illustrated by the 1974 budget. Of the 288 billion dollars in new budget authority, only 174 billion dollars is expected to be used in the current year, with the balance carrying over to future years. Conversely, almost 95 billion dollars in carryovers is likely to be used in 1974. At the end of the year, unused carryover authority will exceed 300 billion dollars, almost all of which will be spent in future years.

Both the Senate and House bills provide that the budget total

---

110. S. Rep. No. 579, 93d Cong., 1st Sess. 10 (1973).

figures, adopted as targets at the beginning of the annual budget season, should include outlays as well as new budget authority.<sup>111</sup> Neither bill, however, requires every appropriation to include outlays as well as new budget authority.

New budget authority should be enacted for as many years as necessary, and outlay authority should also be enacted, but only for one year at a time. This limitation will force review of outlays in each year's appropriations process, with regard to both ongoing budget authority and newly created budget authority. The process will become more complex, but the additional complexity is essential in order to establish effective congressional control of the appropriations process. In an appropriations bill enacted during the budget season, outlays for the ensuing fiscal year should be stated. In an off-season appropriation, it will probably be more useful to state outlays for the current fiscal year.

(b) Both bills pending in Congress require preparation of five-year projections by the congressional budget office on the basis of projections submitted by the President, but neither bill requires Congress to take any action on the out-years.<sup>112</sup>

Congress should adopt five-year target projections of outlays, but these target projections for years beyond the current year should not have legally binding force. As the use of this technique develops, Congress may ultimately be able to enact complete appropriations of new budget authority and outlays for periods of more than one year at a time, subject to supplementation or partial rescission during the annual budget season. Multi-year appropriations for periods of up to five years are a highly desirable legislative goal that does not appear to be attainable until experience has first been acquired with some of the other changes suggested in these recommendations.

(c) The Senate bill calls for further study of methods for establishing maximum and minimum time limitations for program authorization.<sup>113</sup> This provision was adopted as a floor amendment, to replace the recommendations by the Government Operations Committee, which would have placed a three-year maximum length on most major federal programs.<sup>114</sup> The purpose of the maximum

---

111. S. 1541, § 301(a)(1); H.R. 7130, § 121(b)(1).

112. S. 1541, § 602(a), 202(e); H.R. 7130, § 173.

113. S. 1541, § 703(a)(6).

114. The zero-based provision was included in the Government Operations Committee draft of S. 1541, § 801, but was excluded from the Rules Committee draft. The floor amendment, calling for further study, is reported at 120 CONG. REC. S 4017-22 (daily ed. Mar. 20, 1974).

term, generally known as zero-based budgeting, is to compel thorough evaluation of each major program at least once in each such term.

The concept of periodic evaluation of major programs is undoubtedly sound. The congressional budget office should, however, annually recommend programs for thorough evaluation, and Congress itself should make the selection each year, so that current concerns can be reflected in the selection of programs for evaluation.

(d) The Senate bill also calls for the study of pilot testing,<sup>115</sup> a provision adopted as a floor amendment, to replace the Government Operations Committee recommendation which would have required pilot testing of major new programs and expansions of existing programs.<sup>116</sup>

Congress should engage in pilot testing, but only if it can be carried out by use of truly meaningful indicators of the social and other costs and benefits involved, supervised and reported by impartial professionals. Rather than making pilot testing mandatory from the outset, Congress should determine, from year to year, the feasibility of pilot testing of designated new programs. The question of feasibility will, inevitably, include political as well as technical feasibility, and this is desirable since the decision to pilot test rather than to establish the program full-blown will have political implications that should be faced openly when the decision is made.

#### *D. Execution of Appropriations*

If the system for enacting appropriations is redesigned along the lines suggested in the preceding recommendations, the omnibus appropriation act will constitute a coherent statement of budgetary policy, relating the amounts allocated for specific programs at the micro level to the aggregates of revenue, debt, and expenditure at the macro level. Once the omnibus appropriation has been enacted, the President should exercise sound managerial discretion in taking advantage of cost savings and in scheduling expenditures within the general framework of congressional intent, but he should not decide unilaterally that certain programs should be curtailed or eliminated for macroeconomic reasons. If revenues decline or costs increase, leaving a shortfall in available resources, he should make recom-

---

115. S. 1541, § 703(a) (1).

116. The pilot-testing provision was included in the Government Operations Committee draft of S. 1541, § 701, but was excluded from the Rules Committee draft. The floor amendment, calling for further study, is reported at 120 CONG. REC. S 4017-22 (daily ed. Mar. 20, 1974).

mendations to Congress for further legislative action to meet the changed circumstances.

The following recommendations for reform of the system for executing appropriations follow this approach.

#### RECOMMENDATION 9. DEFINITIONS

(a) "*Impoundment*" should be defined as follows: "Any action or inaction of any executive or administrative agency or officer, tending to eliminate, reduce, or delay the obligation, commitment, allotment, apportionment, or expenditure of budget authority, except if such action or inaction is a 'variance' as defined below."

(b) "*Variance*" should be defined as follows: "Any action or inaction of any executive or administrative agency or officer, tending to eliminate, reduce or delay the obligation, commitment, allotment, apportionment or expenditure of budget authority, if the purpose and result are not inconsistent with the intent of Congress expressed or clearly implied in the appropriation act creating the budget authority."

(c) Other terms used in the execution of appropriations such as "allotment," "apportionment," etc. should be defined by statute, so that their meanings can be clarified and preserved.

#### *Commentary*

The Federal Impoundment and Information Act<sup>117</sup> requires the OMB to render quarterly reports of "impoundments," but neither this Act nor any other defines the term. In rendering its quarterly reports, OMB has reported its "reserves" and has indicated that these "reserves" are the "impoundments" which OMB intends to report.<sup>118</sup> The Anti-Deficiency Act<sup>119</sup> authorizes the creation of "reserves" in order to provide for contingencies, or to effect savings whenever they are made possible by changes in requirements, greater operational efficiency, or other developments subsequent to the date when the funds were made available. OMB has interpreted the Anti-Deficiency Act as authorizing reserves "for the purpose of conforming to the requirements of other laws. An example is the Executive's responsibility to stay within the statutory limitation on

---

117. 31 U.S.C. § 581c-1 (Supp. II, 1972).

118. OMB Report Feb. 4, 1974, *supra* note 32, at 7708-09 (1974).

119. 31 U.S.C. § 665 (1970).

the outstanding public debt."<sup>120</sup> By creating a reserve on the basis of the debt ceiling, a general statute that does not mention any particular governmental program, OMB clearly frustrates congressional intent with regard to the program whose funds were "reserved." In determining which programs to cut in order to scale total spending down to debt ceiling limits, OMB cuts those programs which have the lowest executive priority, without regard to congressional priorities.<sup>121</sup>

Recent cases have rejected the OMB's broad interpretation of the Anti-Deficiency Act.<sup>122</sup> The bill pending in the Senate would amend the Anti-Deficiency Act by deleting the clause authorizing creation of reserves in response to "other developments" and adding the following clarifying language: "Reserves shall not be established for fiscal policy purposes or to achieve less than the full objectives and scope of programs enacted and funded by Congress. . . . Except as specifically provided by particular appropriations Acts or other laws, no reserves shall be established other than as authorized by this paragraph."<sup>123</sup> Thus, under the Senate bill, a legitimate reserve is one which fulfills the intent of Congress with regard to the specific program affected, and an illegitimate reserve is one which frustrates that intent.

The weakness of the Senate bill is that it deals solely with the creation of reserves, which is only one method by which the executive can impede the flow of funds to a program. The executive branch could easily comply with the letter of the bill by refraining from creating unauthorized reserves, while at the same time violating its spirit by impeding the flow of funds through other techniques such as delaying allotment or slowing down the processing of applications.<sup>124</sup>

In an attempt to close the loopholes, Senators Ervin and Magnuson engaged in a dialogue during the floor debate, closing with the following exchange:<sup>125</sup>

"Mr. Magnuson. Is it correct to say that under title X, the executive branch may not take any action to delay or withhold appropriations or budget authority, whatever the method or semantic description of the method?"

---

120. *OMB Report Feb. 4, 1974*, *supra* note 32, at 7708.

121. *Preliminary Findings*, *supra* note 15, at S 21120, 21122.

122. *See* notes 33-35 *supra* and accompanying text.

123. S. 1541, § 1001.

124. *Preliminary Findings*, *supra* note 15, at S 21120, 21122-23.

125. CONG. REC. S 4295 (daily ed. Mar. 22, 1974).

“Mr. Ervin. That is correct.”

These two Senators evidently intended to use the term “reserve” in this bill in a different sense than it has been used in the Anti-Deficiency Act<sup>126</sup> and in budgetary practice<sup>127</sup> in the past. Whether their dialogue accomplishes this task is a matter of opinion.

The proposed House bill defines “impoundment” much more broadly as encompassing “any other type of Executive action or inaction which effectively precludes the obligation or expenditure of authorized budget authority or the creation of obligations by contract in advance of appropriations as specifically authorized by law.”<sup>128</sup> However, the House bill fails to differentiate between impoundments that fulfill and those that frustrate congressional intent with regard to the specific program affected.

The recommended definitions make this distinction, as does the Senate bill, and they also include the “any action or inaction” language of the House bill. The term “variance” is suggested for funding cuts or delays which conform to congressional intent with regard to the affected program, while the term “impoundment” is confined to funding cuts or delays which do not qualify as variances. Other terms used in the execution of appropriations should also be statutorily defined, so as to clarify and preserve existing meanings.

#### RECOMMENDATION 10. PROCEDURE FOR IMPOUNDING

(a) The President should not exercise any impoundment unless and to the extent that Congress has given prior approval.

(b) The President may at any time request prior congressional approval of a proposed impoundment, and upon receiving such a request Congress should proceed as follows:

(i) The budget committees, the congressional budget office and other concerned committees should report to Congress;

(ii) Congress may approve all or any part or aspect of the proposed impoundment by concurrent resolution, provided that the impoundment will have no significant effect on the amount of budget authority or outlays appropriated for any fiscal year;

---

126. 31 U.S.C. § 665 (1970).

127. Current practice is reflected, for example, in *OMB Report, Feb. 4, 1974*, note 32 *supra*.

128. H.R. 7130, § 203.



(iii) If the impoundment will have a significant effect on the amount of budget authority or outlays appropriated for the affected program for any fiscal year, Congress should regard the President's request for impoundment as if it were a request for rescission, and Congress may take rescission action.

*Commentary*

(a) If proper procedures have been followed in enacting appropriations under a strengthened system, the President should not have discretion to carry out an impoundment, as defined above. He should be required to seek advance congressional approval for any impoundment, with Congress acting by concurrent resolution to give or deny its approval. If the proposed impoundment will have a significant effect on the amount of funds appropriated for the affected program for any fiscal year, Congress should follow the more formal procedure of rescission.

(b) The existing state of the law regarding impoundment, as defined herein, is a matter of continuing dispute. OMB interprets the Anti-Deficiency Act as authorizing certain types of impoundment,<sup>129</sup> while the executive branch has asserted additional justifications arising from statutes and from the Constitution itself.<sup>130</sup>

The House Bill provides that whenever the President impounds, he shall promptly report to Congress and shall cease the impoundment if either house passes a resolution of disapproval within sixty days after learning of the impoundment from either the President or the Comptroller General.<sup>131</sup> The latter official is authorized to bring suit to enforce these provisions.<sup>132</sup>

The Senate bill would prohibit the creation of the type of "reserve" that would fall within our definition of impoundment.<sup>133</sup> The bill makes no mention of any other types of action or inaction which would fall within this definition, although two Senators created legislative history intended to define "reserve" to include "any action."<sup>134</sup>

---

129. See note 120 *supra* and accompanying text.

130. See note 27 *supra*.

131. *Id.* §§ 201-02.

132. *Id.* § 206.

133. S. 1541, § 1001.

134. See text accompanying notes 125-27 *supra*.

**RECOMMENDATION 11. PROCEDURE FOR EXERCISING VARIANCE**

*[NOTE: Two alternatives are submitted]*

**ALTERNATIVE A.**

(a) The President may exercise a variance without prior congressional approval, subject to the following provisions.

(b) The President should report periodically to Congress, the Comptroller General and the congressional budget office, concerning all variances he has exercised.

(c) When information about the exercise of a variance has been received, from either the President or any other source:

(i) The Comptroller General and the congressional budget office should report to the budget committees if any variance appears improper;

(ii) The budget committees should report to Congress, and should include in their reports any comments received from the Comptroller General or the congressional budget office regarding the impropriety of any variance;

(iii) Congress may, by concurrent resolution, disapprove all or any part or aspect of any variance and may express congressional intent regarding execution of the appropriation; the President should then conform to the concurrent resolution;

(iv) Congress may regard the variance as a presidential request for rescission, and Congress may take rescission action.

**ALTERNATIVE B.**

(a) Except in emergencies (to be defined by general guidelines), the President should not exercise a variance without first requesting the Comptroller General to certify as provided in this section.

(b) The President may at any time request the Comptroller General to certify a proposed variance, but, to the extent feasible, requests for variance should be submitted in consolidated messages on a regular basis in advance of each calendar quarter.

(c) The Comptroller General should promptly certify to the President and Congress his opinion as to whether the proposed actions qualify as variances.

(d) The Comptroller General's certification should have the following effects, and the President should act accordingly:

(i) If the Comptroller General certifies that the proposed action is a variance, it should be deemed to have received congressional approval and may be implemented. Subsequently, Congress may initiate action resulting in a concurrent resolution of disapproval.

(ii) If the Comptroller General certifies that the proposed action is not a variance, the matter should be promptly referred to the budget committees and reported by them to Congress. Congress should then proceed as if the President had requested prior approval for a proposed impoundment, and the proposed variance should not be deemed to have been approved unless Congress approves it in the same manner as an impoundment.

#### *Commentary*

The two authors of this article disagree on some aspects of the variance, and therefore two alternative recommendations are offered.

We both agree on certain points. Congress should have final authority to approve or disapprove variances, and congressional action should be facilitated by requiring the Comptroller General to screen variances and to report to Congress. Furthermore, in strictly defined emergency situations the President should have limited authority to exercise a variance without prior notice to Congress, subject to the earliest possible congressional review. However, we disagree as to whether, in nonemergency situations, the President should also be authorized to exercise a variance without giving Congress prior notice and an opportunity to disapprove.

The pending House bill, defining "impoundment" broadly so as to include both our categories of "impoundment" and "variance,"<sup>135</sup> provides that whenever the President "impounds," he shall promptly report to Congress, and shall cease the impoundment if either house passes a resolution disapproving his action within sixty days after Congress learns of the impoundment from either the President or the Comptroller General.<sup>136</sup>

The pending Senate bill, defining "reserve" so that it bears some resemblance to our definition of "variance," requires the Pres-

---

135. H.R. 7130, § 203.

136. *Id.*, §§ 201-02.

ident to give ten days' notice to the Comptroller General prior to the establishment of a reserve.<sup>137</sup> The Comptroller General is authorized to bring suit to enforce this provision, apparently by seeking an injunction restraining the President from establishing a reserve of which he has given advance notice, if the reserve is not within the authority of this statute. The Senate bill gives Congress no role in approving or disapproving a reserve. However, the bill requires the President to ask Congress to rescind any available budget authority that exceeds the amount required to fulfill the objectives and scope of the program concerned.<sup>138</sup>

Alternative A<sup>139</sup> permits the President, even in non-emergency situations, to exercise a variance without prior notice to Congress. He is required to report all variances to Congress, through the Comptroller General and the congressional budget office. Upon receiving reports from these officials, Congress may disapprove all or any part or aspect of a variance or may regard the variance as a request for rescission.

Alternative B<sup>140</sup> requires the President, except in emergencies, to request the Comptroller General to certify his opinion as to whether each proposed action qualifies as a variance; as a practical matter, these certification requests should normally be made and answered in consolidated messages on a regular basis before each calendar quarter. If the Comptroller General certifies that the proposed action is a variance, Congress will be deemed to have approved it, and can halt the variance by subsequent action, as in Alternative A. If, however, the Comptroller General determines that the proposed action is not actually a variance, the situation should be treated as a request for prior approval of a proposed impoundment. The purpose of Alternative B is to prevent the implementation of cutbacks which could cause irreparable harm to programs before congressional disapproval. The screening by the Comptroller General reduces the risk that an impoundment may be carried out in the guise of a variance.

Both alternatives distinguish between the roles of the Comptroller General and Congress. The Comptroller General is required to pass upon the *propriety* of a variance, either after it has been exercised (Alternative A) or before its exercise (Alternative B). By contrast, Congress can approve or disapprove, for any reason, including considerations of *policy*.

---

137. S. 1541, § 1001.

138. *Id.*

139. Alternative A is favored by Levinson.

140. Alternative B is favored by Mills.

## **RECOMMENDATION 12. INITIATION OF PROPOSED IMPOUNDMENT OR VARIANCE BY BUDGET COMMITTEES**

The budget committee of either house may initiate a proposal for impoundment or variance provided that the committee, before reporting to Congress, submits a draft of the proposal to the President and invites him to comment within a reasonable time and that the committee includes in its report to Congress any comments received from the President.

### *Commentary*

In order to round out congressional control over execution of the budget, the budget committees should be authorized to initiate proposals for impoundment or variance. This initiative might be useful, for example, if Congress agreed with the President that economic conditions necessitated the impoundment of a certain aggregate amount of funds but did not agree with the President's choice of programs to be impounded. Congress could then disapprove the President's request for impoundment, while initiating its own proposal for impoundment of different programs.

The above recommendation contemplates a dialogue between the President and Congress, by requiring that the President be invited to make advisory comments prior to congressional action on proposals initiated by the budget committees for impoundment or variance.

## **RECOMMENDATION 13. REPORTING AND AUDITING**

(a) The President should periodically report to Congress, submitting adequately documented lists of all impoundments and variances that have been exercised and indicating the status of congressional action on each.

(b) The Comptroller General should audit the records of OMB, the Treasury Department, and other federal agencies regarding the execution of appropriations and should render periodic reports to Congress, directing special attention to any previously undisclosed exercise of an impoundment or variance and commenting on any meritorious complaint received from any person alleging any impropriety in the execution of appropriations.

*Commentary*

(a) In addition to rendering reports at the time of an actual or proposed impoundment or variance, the President should submit periodic checklists to Congress, so that the Comptroller General can ascertain that Congress was properly consulted in each instance.

(b) The Comptroller General should, moreover, conduct a post-audit of the execution of appropriations with special emphasis on previously undisclosed impoundments or variances and with special comment on citizen complaints alleging improprieties. Field research has demonstrated the limited scope of the Comptroller General's functions in these areas at present.<sup>141</sup>

An expanded audit could greatly increase the confidence of Congress and the public in the regularity of procedures in the executive branch. Expansion of the Comptroller General's post-audit would also improve the President's ability to supervise the functions of executive agencies. Finally, such expansion of the post-audit would provide Congress with a monitoring device to observe the execution of appropriations.

As the courts continue to invalidate impoundments which have been carried out openly by the creation of OMB reserves, the executive apparently has reacted by using less obvious means of reducing or delaying spending.<sup>142</sup> The need for expanded post-audit is thus underlined.

*E. Budget-related Litigation*

The impoundment-related litigation of the past two years has demonstrated the continuing ability of the courts to cope with novel situations. To a great extent the following recommendations are declaratory of existing practice developed by the courts. Special comment is added regarding the minor changes proposed.

**RECOMMENDATION 14. ACCESS TO COURTS**

**(a) State and local government units adversely affected, persons adversely affected, and a broad range of executive and**

---

141. The accompanying text is based upon confidential interviews conducted by the authors during the McIntosh Foundation Executive Impoundment Project, 1973.

142. Dr. Louis Fisher has demonstrated that many functional equivalents of impoundment have been omitted from the OMB quarterly reports. Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFFALO L. REV. 141, 191-200 (1973). The same author has suggested that the Executive is likely to resort increasingly to the use of "quasi-impoundments," in order to avoid the impact of recent court decisions that tend to prohibit overt impoundments. L. FISHER, *supra* note 22, at 90.

legislative personnel should have standing to bring budget-related suits.

(b) No suit related to appropriations or spending should be justiciable until after enactment of the appropriation at issue.

(c) Courts should expedite decision of budget-related cases.

(d) No budget-related suit should be barred, and no type of relief in any such suit should be denied on the grounds of sovereign immunity.

#### *Commentary*

(a) Without attempting a definitive catalog, we suggest that standing to sue in budget-related cases be conferred upon state and local governments adversely affected (and this seems especially important in view of revenue-sharing distributions), persons adversely affected (such as potential beneficiaries of an impounded program), and a broad range of executive and legislative personnel (including the Comptroller General and the director of the congressional budget office).

Fears will always be expressed about the prospect of embroiling the system in endless litigation. Such fears have generally proved to be unfounded due to the ability of the courts to consolidate similar cases, dispose summarily of frivolous complaints and give expeditious relief when needed. The view of standing that has been followed in the recent impoundment-related litigation demonstrates that the courts are able, in this area as well as in others, to cope with broad grants of standing.<sup>143</sup>

(b) Pre-enactment litigation challenging the propriety of various stages of the process presents a high risk of disrupting the entire budget process and would always place the courts under the most extreme pressure to render a speedy decision.

Although some improprieties in the pre-enactment process might be cured by such litigation, on balance it seems preferable to postpone justiciability until after enactment of the appropriation at issue.

(c) Since other statutes provide that various other types of litigation be expedited,<sup>144</sup> budget-related cases should be similarly provided for, as a protection against being put aside in favor of other

---

143. On standing generally, see K. DAVIS, *Administrative Law Treatise*, ch. 22 (1958).

144. The following types of cases are required to be "expedited," "advanced" or "preferred:" Federal campaign fund, 2 U.S.C. § 438(d) (5); environmental pesticide control, 7 U.S.C. § 136n(b); seeds, cease and desist order, 7 U.S.C. § 1601; Clayton Act, 15 U.S.C.

types of litigation under expediting statutes.

(d) Sovereign immunity has posed some difficulties in recent budget-related litigation and has occasionally been used as a basis for denying relief.<sup>145</sup> Once an appropriation bill has been enacted, we see no sound reason for asserting sovereign immunity as a basis for preventing full judicial consideration and relief.

#### **RECOMMENDATION 15. TYPES OF JUDICIAL RELIEF AVAILABLE**

**Courts should grant any type of relief necessary in budget-related litigation including:**

- (a) **Mandamus to compel performance of ministerial acts;**
- (b) **Injunction to restrain violations of law;**
- (c) **Declaration of invalidity of any action inadequately supported by a required record or resulting from significant violation of law;**
- (d) **Order for release of funds improperly withheld;**
- (e) **Stay of effectiveness of any action pending further proceedings;**
- (f) **Remand for further proceedings;**
- (g) **Any other relief authorized by law or practice.**

#### *Commentary*

Courts should have clear authority to grant whatever relief is called for to render justice in budget-related cases. This recommendation restates well-recognized remedies and adds that the courts can declare the invalidity of any action inadequately supported by a required record. This type of relief is intended to enforce the portions of the recommendations requiring documentary records to be compiled and maintained.<sup>146</sup>

### **III. Conclusion**

A year ago both houses of Congress passed different versions of

---

§ 21(e); Expediting Act for three-judge court cases under Sherman Act and Interstate Commerce Act, 15 U.S.C. § 28, 49 U.S.C. § 44; FTC unfair competition, 15 U.S.C. § 45(e); small business investment companies, 15 U.S.C. § 687a(f); small business administration, 15 U.S.C. § 687c(a); foreign propagandists registration, 22 U.S.C. § 618(f); state individual income tax, federal collection, INT. REV. CODE OF 1954 § 6363(d)(4); presidential election campaign fund, INT. REV. CODE OF 1954 § 9011(h); interlocutory injunction, certain agencies, 28 U.S.C. § 2349(h); inclosure of public lands, 43 U.S.C. § 1062.

145. *Housing Authority v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972); *Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971).

146. See Recommendations 1-2 *supra*.



impoundment control bills. The conference committee was unable to resolve the differences. More recently each house recognized that impoundment control should be dealt with as part of a larger package, reforming the budget process in general. Last year's impoundment control bills were revived, with modifications, and incorporated into the bills recently passed by both Houses. These bills, although described as budget reform bills, do not cover every aspect of that topic. As previously indicated, the bills largely neglect the revenue and debt functions, except to coordinate their totals with the total amount of expenditures. The bills emphasize procedural reform of the spending function, including control of the President's discretion to impound. Neither of the bills extends to the range of reforms covered in our recommendations. Further study and experimentation are called for by the Senate bill.

The pending bills attempt to serve conflicting goals. While recognizing the need for comprehensive reform of the budget process, they nevertheless follow paths of prudence in keeping as close as possible to existing practices and in retaining the influential positions of as many existing personalities as possible.<sup>147</sup> The compromise between these two goals, reflected in the pending bills, may well expedite the enactment of a budget reform act into law, but at the cost of making that act a relatively ineffective instrument. Some of the weaknesses have been pointed out in the preceding discussion—the pending bills make virtually no provisions for publicity of the process, their beginning-of-season target figures are not binding, appropriations continue to be enacted piecemeal, and supplemental appropriations and continuing resolutions remain unchanged.

Enactment of a relatively weak measure now may pave the way for broader reforms later, or may produce an unsatisfactory interim system, as did the reforms of the late 1940's, leading to abandonment of reform efforts rather than to their escalation. While the reformist mood prevails, it would be preferable to see Congress attempt the most comprehensive reforms rather than the most friction-free.

One risk of comprehensive reform is that future Congresses may reject the discipline imposed by their predecessors. This risk can be minimized if the reformed system works effectively through the efforts of professional staff in Congress and the executive branch, and if citizens continue to expect Congress to operate under such a system.

---

147. A similar point is made in Schick, *Budget Reform Legislation: Reorganizing Congressional Centers of Fiscal Power*, 11 HARV. J. LEGIS. 303, 304 (1974).

These recommendations are submitted, therefore, not as an agenda for long-term gradual implementation but as a package proposed for prompt and complete implementation. The recommendations have been drafted in the form of standards that, if approved in principle, would require implementation in somewhat different format and in some instances in greater detail.

Most of the recommendations require implementation in the form of statutes or rules of the houses of Congress. Some, however, may be appropriately accomplished by executive action. For example, the recommendation calling for publicity of executive documents could be implemented by executive order, thereby avoiding the possibility of confrontation that might arise if Congress legislated in a field the President might regard as privileged. Other recommendations, such as those dealing with OMB hearings, could be implemented by OMB regulations.

A number of recommendations call for a blending of executive and legislative functions during the budget process. A promising start would be made if the President and Congress could cooperate in bringing about budget reform by means of a combination of executive and legislative actions.\*

---

\* See Appendix at 664 *infra* for subsequent Congressional action concerning pending budget reform legislation.

## APPENDIX

### CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974

Congress completed action on the Congressional Budget and Impoundment Control Act of 1974 during the month of June 1974. The conference committee bill was approved by a 401 to 6 vote of the House, and by a 75 to 0 vote of the Senate. Essential legislative history is provided by the conference committee report, H.R. REP. No. 93-1101, inserted in 120 CONG. REC. H 4979 (daily ed. June 11, 1974), and by the floor debates in the House, 120 CONG. REC. H 5180 (daily ed. June 18, 1974) and in the Senate, 120 CONG. REC. S 11221 (daily ed. June 21, 1974).

President Nixon had taken no action on the bill as of this writing.

The budget reform provisions of the Act closely follow the organization and substance of the Senate bill. The impoundment control provisions reflect a considerable rewrite by the conference committee, combining some provisions of the Senate bill with some of the House bill and still some others newly added by the conference committee. The effective dates closely follow the Senate bill, making the impoundment control provisions effective immediately, while phasing in the budget reform provisions, most of which do not become effective until 1976.

This appendix briefly notes some of the major achievements and omissions of the Act, under the same headings used in the article.

*A. Regularized and Public Procedure—(see our Recommendations 1-3 and text accompanying notes 59-66 supra.)*

The Act does not deal with the procedure within the executive branch during the preparation and execution of the budget, nor with the publicity of these functions. The President could thus render a distinct service by issuing executive orders and regulations dealing with these matters.

As regards publicity of congressional action, § 101(d) of the Act provides public access to meetings of the Senate budget committee and its subcommittees, subject to some exceptions. No such provision applies to meetings of the House budget committee or its subcommittees. Section 203 provides public access to the files of the Congressional Budget Office, subject to a number of exceptions.

*B. Budget Preparation—(see our Recommendation 4 and text accompanying notes 67-72 supra.)*

Sections 601-604 significantly increase the amount of information required in the President's budget message, including presentation in terms of national needs, agency missions and basic programs.

*C. Enactment of Appropriations*

*1. Timetable—(see our Recommendation 5 and text accompanying notes 73-75 supra.)*

Sections 501-502 change the fiscal year to Oct. 1, following a three month transition period from July 1 to Sept. 30, 1976. As a means of enforcing congressional compliance with the timetable for action on the budget, § 301(f) prohibits Congress from adjourning until action has been completed on the annual budget. More stringent timetable enforcement mechanisms may be needed.

*2. Congressional Organization and Staff—(see our Recommendation 6 and text accompanying notes 76-82 supra.)*

Section 101 creates the 23-member Committee on the Budget of the House, and § 102 creates the 15-member Committee on the Budget of the Senate. Composition of the committees reflects a compromise between seniority and diversity.

Sections 201-202 create the Congressional Budget Office and specify its duties and functions. The director is appointed by the Speaker of the House and the President pro tem of the Senate. His term expires on January 3, 1979 and each fourth year thereafter. His powers are broad, including the power to secure information directly from the executive branch.

3. *Procedure for Enacting Appropriations*—(see our Recommendation 7 and text accompanying notes 83-109 *supra*.)

Section 401 requires, with some exceptions, that legislation creating contract, borrowing and entitlement authority must contain a provision that such authority is to be effective only to the extent provided in appropriation acts. This section closes the back door, but only for the future, since it does not apply to authority in effect prior to the effective date of this section of the Act.

Congressional action on the budget is focused in two concurrent resolutions, setting forth total outlays, budget authority, revenues, surplus or deficit, debt and other appropriate matters. Section 301(b)(1) permits the first concurrent resolution to establish the approximate equivalent of an omnibus appropriation procedure for the year, but no attempt is made to give the President the equivalent of an item veto. Congressional action on the budget is completed by a reconciliation process that brings authorizations, appropriations, revenue and debt into conformity with the second concurrent resolution.

The Act does not deal with continuing resolutions or supplemental appropriations, which apparently retain their existing attributes, subject to conformity with the concurrent resolutions. This requirement presents no serious obstacle, since § 304 permits amendment of the concurrent resolution at any time during the fiscal year.

4. *Format of Appropriation Bills*—(see our Recommendation 8 and text accompanying notes 110-16 *supra*.)

Although the Act requires the concurrent resolutions to include outlays as well as budget authority, this treatment is not carried through to the appropriation acts, which continue to deal only with budget authority.

D. *Execution of Appropriations*—(see our Recommendations 9-13 and text accompanying notes 117-42 *supra*.)

Section 1002 amends the Anti-Deficiency Act by deleting the "other developments" clause, thereby closing a major loophole upon which the President has relied. Section 1003 repeals the Impoundment and Information Act, since other provisions of the present Act impose their own reporting requirements, including the publication of monthly reports in the Federal Register.

Sections 1011-1017 provide the system of impoundment control. If the President determines that part of available budget authority will not be needed, he shall ask Congress for a rescission.

A different procedure applies to "deferrals," defined in the Act as including, "(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." The President shall transmit a special message to Congress on each proposed deferral. Either House may pass an "impoundment resolution" disapproving such deferral at any time, and the President is thereupon required to make the budget authority available for obligation.

A dialogue between Senators Ervin and Humphrey during the floor debate suggested that the President report in greater detail on "policy impoundments" than on "routine impoundments," so that Congress does not have to "plow through hundreds and hundreds of routine impoundments in order to locate a few significant items." 120 CONG. REC. S 11238-9 (daily ed. June 21, 1974). In practice, the plowing is likely to be the primary task of the Comptroller General, who is required to advise Congress regarding the legality and other aspects of each proposed deferral. Further, if the Comptroller General finds that any action or inaction that constitutes a reserve or deferral has not been reported to Congress, he shall himself make the report, which will enable Congress to follow through.

The Act implicitly relies upon the proposition, reflected in recent decisions of lower federal courts, that Congress has constitutional power to require the President to spend appropriated funds. Assuming Congress has this power, a further constitutional question is raised by the delegation of power in the statute which, without spelling out any standards, permits either House to override any deferral, even if the deferral is authorized by the Anti-Deficiency Act. This provision is subject to criticism on other grounds also: it permits either House to override a deferral, even though the other House may take the contrary view; it does not permit Congress to initiate a deferral; and it becomes effective two years before the budget reform provisions, thereby giving either House massive authority over the execution of appropriations before Congress has developed a coordinated approach to the enactment of appropriations. Unless both Houses exercise this override power with restraint, serious difficulties can be anticipated.

*E. Budget-related Litigation—(see our Recommendations 14-15 and text accompanying notes 143-46 supra.)*

Section 1016 authorizes the Comptroller General to bring enforcement suits, through attorneys of his own choosing, but only as a means of compelling the executive to comply with congressional action (or inaction on rescission or impoundment matters).

The availability of congressional rescission and impoundment measures, enforceable by the Comptroller General, arguably pre-empts other types of impoundment-related litigation, on the theory that the new Act gives Congress ample opportunity to express and enforce its intent at any time, and that any deferral surviving these opportunities must therefore be deemed to have received congressional approval. Thus, the Act may shift impoundment control from the courts to Congress, with the courts retaining the limited role of enforcing direct expressions of congressional intent. If the Act, as interpreted, produces this effect, frustrated beneficiaries of impounded programs will be constrained to seek relief in the legislative rather than the judicial forum.