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Impounding Pollution Control Funds

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IMPOUNDING POLLUTION CONTROL FUNDS*

I. INTRODUCTION

Early in 1974 the United States District Court for the Northern District of Florida directed the United States Environmental Protection Agency to make available all funds authorized for appropriation by the Federal Water Pollution Control Act Amendments of 1972.1 Florida v. Train2 was another in a series of cases that have prompted similar directives.3 The Nixon Administration's refusal to make those funds available, which gave rise to the litigation, provides one example of a presidential practice generally characterized as "impoundment" of appropriated funds. Stated briefly, impoundment occurs when a President, for any of a variety of reasons, declines to release the entirety of an appropriation authorized by Congress.4

* This note was set in print prior to the resignation of former President Nixon. The issues discussed herein, however, remain unaffected by recent political events. President Ford has not intimated any inclination to reverse the Nixon policy regarding the withholding of water pollution control funds and such a reversal is not likely to occur. Because of the new President's intention to reduce federal expenditure, see, e.g., A Sick Economy—What's To Be Done?, U.S. News & World Rep., September 9, 1974, at 13, alteration of a policy designed to curtail government spending realistically cannot be expected—unless the Supreme Court dictates otherwise. Moreover, it appears that, even as a congressman, President Ford hoped that water pollution control spending could be held below the congressionally authorized level. See note 174 infra. Therefore, it does not seem likely that the President will act to moot the water pollution control funding controversy, which the Supreme Court has agreed to resolve during its 1974 term. See note 11 infra.

4. There is no precise and generally accepted definition of the term "impoundment." See Levinson & Mills, Impoundment: A Search for Legal Principles, 26 U. Fla. L. Rev. 191-93 (1973); Note, Impoundment of Funds, 86 Harv. L. Rev. 1505 n.1 (1973); Note, Protecting the Fisc: Executive Impoundment and Congressional Power, 82 Yale L.J. 1636 n.2 (1973). As used throughout this note, however, "impoundment" will refer to any unilateral presidential decision to withhold any portion of funds made available for expenditure by Congress.

It is important to recognize that impoundment can be accomplished in a variety of ways; a simple presidential directive to halt the release of particular federal revenues has not always been at issue. The same result can be attained, for example, by refusing
Sometimes compelling justifications may exist for the President's unilateral action.\(^5\) At other times, however, it may appear that the President intends to frustrate the realization of a congressionally enacted program that he considers unnecessary or uncomplementary to his own policies and priorities.

The latter situation has occurred with unprecedented frequency during the incumbency of President Nixon,\(^6\) and is exemplified by his impoundment of over half the sums authorized for appropriation by the pollution control act amendments. In October 1972 Congress approved the appropriation of 11 billion dollars for the construction of water treatment plants during fiscal years 1973 and 1974.\(^7\) The President vetoed that bill because of its "staggering, budget-wrecking" price tag,\(^8\) but Congress subsequently overrode his veto by a wide margin.\(^9\) Despite the override, the President directed the Administrator of the Environmental Protection Agency (EPA) to make available for expenditure only 5 billion of the 11 billion dollars authorized for appropriation.\(^10\)

Litigation that has resulted from the President's directive provides an instructive overview of the approach the judiciary has adopted in resolving impoundment disputes. Moreover, the Administration's withholding of pollution control funds will prompt the first United States...
Supreme Court pronouncement on the impoundment issue.\(^1\) The resolution of the pollution control act controversy will be particularly significant for the state of Florida: only seven states stand to lose more federal aid during fiscal 1975 if the President's policy is sustained by the Supreme Court.\(^2\) This note will focus specifically on the considerations that should prove determinative of the Court's decision and will offer a commentary on the issue of impoundment generally.

II. THE NIXON EXPERIENCE: IMPOUNDMENT TO EFFECTUATE POLICY

As the Nixon Administration contends, the practice of impoundment enjoys considerable historical heritage.\(^3\) Almost without exception, however, previous administrations have impounded appropriated funds only where military spending was affected or wartime emergency measures were involved,\(^4\) or where Congress had expressed its approval of the President's action.\(^5\) Thus, past impoundments arguably could be justified as an exercise of the President's responsibilities as "Commander-in-Chief" under article II, section 2,\(^6\) or as the effectuation of a policy sanctioned by both the executive and legislative branches of government.

An important alteration in this historical pattern has evolved during the tenure of President Nixon. The Nixon Administration has not impounded funds to reshape the military budget, nor has it sought congressional approval when the withholding of appropriated funds is contemplated. Rather, the Administration has impounded funds in a manner designed to impose its own economic and political

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12. Florida was to be allotted $72.5 million for fiscal year 1973, $108.8 million for fiscal year 1974 and $164.5 million for fiscal year 1975. See Brief for Appellant at 3a-4a, Florida v. Train, appeal docketed, No. 74-1790, 5th Cir., April 3, 1974.


16. But see note 42 infra.
philosophy on congressionally established policies and programs, and to substitute its priorities for those of Congress. While a variety of justifications have been offered for the withholding of funds, one fact remains clear: legislative programs disdained by the President have suffered, while programs held in presidential esteem have received adequate financial support.

Even a cursory review of recent executive budgetary decisions confirms this conclusion. During the early days of its tenure, for example, the Nixon Administration withheld funding intended for research health grants, Model Cities and urban renewal as part of its plan to control inflation through a reduction in government expenditures. But, at the same time, the Administration supported such costly projects as the supersonic transport, a landing on Mars and a new manned bomber. The Administration maintains that comparative effectiveness, the choice between "good" and "better," controls its determination to support certain programs while withholding appropriated funds from others. Aside from the question of whether the President, rather than Congress, should make that determination, the very fact that the SST received the President's blessing suggests that politics weighs more heavily in the balance than does program effectiveness.

A similar conclusion can be derived from a statistical analysis of Administration spending priorities. A large proportion of the President's yearly budget is "uncontrollable"; that is, certain funds are previously obligated to such programs as social security, Medicare and veterans' benefits. Approximately 75 percent of the 1974 fiscal year

18. More specifically, the Nixon Administration sacrificed a variety of congressionally enacted domestic programs in pursuit of its policy of curtailing inflation through budget reductions. Statutory programs in the areas of housing, agriculture, education, health, water pollution control and the former Office of Economic Opportunity have suffered most heavily. For a summary of litigation concerning funds impounded in each of these areas, see Fisher, Court Cases On Impoundment of Funds: A Summary and Analysis, Aug. 22, 1973 (Congressional Research Service).
19. See notes 42-51 and accompanying text infra.
21. Id.
23. Many authorities scorned the wastefulness of efforts to develop the SST, which was characterized as an "aerial Edsel." See Aerospace: The Troubled Blue Yonder, Time, April 5, 1971, at 76.
budget, for example, was "uncontrollable." This means that only 25 percent of the projected budget was amenable to alteration by the President or Congress. Military-related expenditures constitute the greatest portion of "controllables," yet a study of the 1971 budget revealed that, while the Department of Defense received 76 percent of total controllable funds, only 10.5 percent of all presidential impoundments affected military appropriations.

The Administration's intent to use impoundment as a means of establishing its own spending priorities also can be inferred from the President's active campaign against the passage of legislation empowering him to control expenditures through across-the-board cuts in appropriations. After the Senate adopted the "Jordan Amendment," authorizing the President to withhold funding on an equal basis from all programs, domestic and military, the Administration fought the proposal in the House and ultimately secured its defeat. The lobbying efforts undertaken by the Administration suggest that the President prefers to control spending only if he can select the particular programs to be affected.

Critics of Administration policy tend to focus their attention on the Office of Management and Budget (OMB), where decisions to impound certain appropriations are finalized. Although OMB (formerly the Bureau of the Budget) originally was established to assist Congress, the operation of that department has evolved into an effective means of implementing presidential policy. Through the use of selective impoundments the Nixon Administration has enabled OMB to perform a major role in the establishment of national priorities. Although Budget Director Ash contends that the President's budget is intended only as a proposal, offered for congressional consideration, there is evidence to suggest that much of the proposal is considered final. Data collected by one commentator indicate that when Congress appropriates more than the presidential budget has allocated to a particular program, the congressional "add-on" simply may be withheld by

26. Id. See also 1973 Hearings 535 (remarks of Senator Muskie).
27. See 1973 Hearings 257, 276 (remarks of Senator Ervin).
28. Secretary of Agriculture Butz, however, argues that across-the-board cuts are the "cowardly way" to reduce federal spending. See 1973 Hearings 535.
32. The following table is taken from Glass, Impoundment Policy Fuels Political Struggle With Congress, 3 NAT'L J. 1027 (1971):
OMB. Moreover, the Administration apparently believes that when the President's budget message proposes the termination of a congressionally enacted program, the administrator responsible for that program should act accordingly and, even before Congress approves or disapproves, begin to "phase out" program activities through the withholding of appropriated funds. Since the budget message constitutes a declaration of presidential priorities, the withholding of appropriated funds to bring congressional spending preferences in line with that message can accurately be characterized as the use of impoundment to effect presidential policy that Congress specifically has rejected.

Defenders of the Administration argue that the President has no choice but to impound appropriated funds, in view of the congression-

**IMPOUNDMENTS IN URBAN SECTOR**

This table lists impoundments of major housing and transit programs for fiscal 1971. Program backlog is the total demand for funds for approved programs and does not include pending applications. Unmet demand is the difference between program backlog and the Nixon Administration's spending plans. In most cases, the Nixon budget and the funds withheld add up to the appropriation. In the case of model cities, however, the Administration now plans to spend more than the $375 million it budgeted; thus, the budget figure and the amount withheld fall short of the appropriation. All figures are in millions of dollars.

<table>
<thead>
<tr>
<th></th>
<th>Appropriated</th>
<th>Nixon Budget</th>
<th>Withheld</th>
<th>Program Backlog</th>
<th>Unmet Demand</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urban renewal</td>
<td>$1,200</td>
<td>$1,000</td>
<td>$200</td>
<td>$2,756</td>
<td>$1,756</td>
</tr>
<tr>
<td>Model cities</td>
<td>1,107</td>
<td>375</td>
<td>583</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>Water and sewer</td>
<td>350</td>
<td>150</td>
<td>200</td>
<td>2,500#</td>
<td>2,350</td>
</tr>
<tr>
<td>Public housing</td>
<td>320</td>
<td>128</td>
<td>192</td>
<td>560</td>
<td>432</td>
</tr>
<tr>
<td>Mass transit</td>
<td>600</td>
<td>269†</td>
<td>200</td>
<td>1,000†</td>
<td>731†</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$3,577</strong></td>
<td><strong>$1,222</strong></td>
<td><strong>$1,375</strong></td>
<td><strong>$6,816†</strong></td>
<td><strong>$5,269†</strong></td>
</tr>
</tbody>
</table>

*—Approximately 50 per cent of initial applications and 30 per cent of initial program budgets were approved for model cities program. Few, if any, additional cities are to be designated under pending fiscal 1972 budget.

#—$465 million of the total backlog is listed as active backlog for fiscal 1971.

†—Excluding model cities.

†—Capital grants only. The total Administration budget for mass transit is $400 million.

SOURCE: Senate Committee on Banking, Housing and Urban Affairs

33. This conclusion is reinforced by the Administration's treatment of Congress' fiscal year 1971 appropriation for the Rural Electrification Administration. Although the budget request for that program amounted to $322 million, Congress appropriated $337 million. The President thereupon impounded the additional $15 million. See Arnold & Porter, Memorandum to National Rural Electric Cooperative Association, in 1973 Hearings 594, 628.

al proclivity to enact swollen appropriations bills.\textsuperscript{35} Several congressmen themselves have suggested that only the President can retard the fiscal irresponsibility of Congress.\textsuperscript{36} The wisdom of certain impoundments hardly can be faulted;\textsuperscript{37} for example, the President's withholding of funds earmarked for the construction of a National Aquarium in Washington, D.C., precluded what seemed to be a nonessential infusion of 10 million dollars into an inflationary economy.\textsuperscript{38} Had Congress been left to its own devices, the money apparently would have been spent.

Regardless of whether the President has in some instances "properly" impounded appropriated funds, however, the fact remains that Congress' right to legislate has been seriously eroded. When the President vetoes an appropriations bill passed by Congress and that veto ultimately is overridden, the matter, theoretically, is ended. But the Nixon Administration has added an additional step to the process—the subsequent impoundment of funds appropriated over the President's veto. The President's use of impoundment to ensure that Congress will not contravene his spending policies creates serious implications for the separation of powers concept inherent in American government. It is the function of individual congressmen to respond to the needs of their respective constituencies through the initiation of appropriate legislation. Such efforts will become irrelevant if the President can, at will, refuse to release funds appropriated to implement that legislation.\textsuperscript{39} The withholding of appropriated funds by the Nixon Administration to effectuate its policies has added a new dimension to the historical impoundment controversy: the struggle now is reduced to the question of which governmental branch—Congress or the President—enjoys ultimate authority to establish national priorities.\textsuperscript{40}

\textsuperscript{35} See, e.g., 1973 Hearings 369 (statement of J.T. Sneed, Deputy Attorney General).
\textsuperscript{36} The late Senator Long, of Louisiana, once remarked: "If we can't restrain ourselves from spending $30 billion more than we are taking in . . . then we shouldn't complain about a fellow who refuses to bankrupt the country." 1973 Hearings 367 (statement of J.T. Sneed, Deputy Attorney General), quoting from The Washington Post, January 26, 1973, at A2.
\textsuperscript{37} See notes 81-82 and accompanying text infra.
\textsuperscript{38} This particular episode is discussed in more detail in 1971 Hearings 139-41.
\textsuperscript{39} But see 1973 Hearings 837 (statement of J.T. Sneed, Deputy Attorney General): "Protests of 'usurpation' are being voiced by some in the current debate. Surely such protests are hyperbole. The modest power not to spend money is not the power of a man on horseback."
\textsuperscript{40} This is not to suggest, of course, that the President is not accorded a constitutional role in the establishment of national spending priorities. He clearly does share a role in that process, through the recommending of legislation and the exercise of his veto authority. See U.S. Const. art. I, § 7. But the inclusion in the Constitution of authority to override a presidential veto, \textit{id.}, suggests that Congress enjoys the last word.
President Nixon has argued that his constitutional right to impound appropriated funds is "absolutely clear." More precisely, Administration spokesmen have defended on three particular bases the President's refusal to release the entirety of certain appropriations. First, those spokesmen contend that certain article II executive powers provide the President with considerable latitude to control the rate at which appropriated funds are obligated. Few courts have con-

41. See N.Y. Times, Feb. 1, 1973, at 20, col. 1. The President was discussing his right to impound "when the spending of money would mean either increasing prices or increasing taxes for all the people . . . ," id; it is not clear whether the President was asserting a constitutional right generally, or only in those more limited circumstances.

42. More specifically, Administration spokesmen cite the presidential obligation to "take care that the laws be faithfully executed," mandated by art. II, § 3. Although critics have assailed the "anomalous proposition" that the duty to execute the laws includes the right to withhold appropriated funds, see Rehnquist, Presidential Authority To Impound Funds Appropriated for Assistance to Federally Impacted Schools, in 1973 Hearings 390, 393; 1973 Hearings 373, 382 (remarks of Senator Ervin), the Administration contends that its position is dictated by two closely related propositions. First, it is argued that the President must operate within the framework of frequently conflicting federal statutes. For example, the Antideficiency Act and the federal debt ceiling, see notes 44 & 47 infra, may require the reservation of funds authorized for expenditure by a particular appropriations act. See 1973 Hearings 278 (statement of R.L. Ash, Director designate, OMB). When such conflicts arise, the President must decide either to partially contravene the appropriations act or to ignore those statutes designed to limit federal expenditures: "[The President] has a duty to execute all the laws . . . and sometimes he has to harmonize them in ways that will not permit the accomplishment fully of each." Id. at 382 (testimony of J.T. Sneed, Deputy Attorney General). Secondly, the Administration finds in article II a delegation to the President of general managerial authority to ensure that the laws are implemented economically. Deputy Attorney General Sneed has reasoned that the President's obligation to faithfully execute the laws "plainly includes an obligation to prevent waste." Id. at 360. If Sneed's contention is correct, the Administration apparently enjoys considerable latitude to exercise value judgments with respect to specific programs, since a determination of "wasteful" expenditure obviously will approximate one's personal evaluation of substantive merit.

Although the specific issue has not arisen within the context of recent impoundment decisions, but cf. National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 901 (D.D.C. 1973), Administration spokesmen have argued that the President enjoys "substantial" constitutional authority to control spending in the areas of national defense and foreign relations. See 1973 Hearings 388 (statement of J.T. Sneed, Deputy Attorney General); 1971 Hearings 95 (statement of C.W. Weinberger, Director, OMB). This authority allegedly arises from the President's article II role as Commander-in-Chief, and from the recognition of presidential hegemony over foreign affairs implicit in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). There is historical precedent to support the Administration's position; the Commander-in-Chief clause has been invoked previously to justify both the wartime impoundment of public works funds and the peacetime impoundment of weapons systems appropriations. See, e.g., Fisher, Impoundment of Funds: Uses and Abuses, 23 BUFFALO L. REV. 141, 158-64 (1973). But the constitutional delegation of article II Commander-in-Chief authority must be balanced against the delegation to Congress of authority to declare war, to raise and support armies, to provide and maintain a navy, and to establish rules for the regulation of both land and naval forces. See U.S. CONST. art. I, § 8. In short, the
fronted this argument; it has not been persuasive, however, to those that have considered it. Secondly, the Administration argues that in

plain language of the Constitution suggests that, aside from strategic and tactical decision-making, Congress shares "wartime authority" with the President.

Moreover, United States v. Curtiss-Wright Corp., supra, is of questionable relevance to the issue of impounded funds, even when those funds are destined for international obligation. The Court in Curtiss-Wright did repeat with approval a characterization of the President as "the sole organ of the nation in its external relations." 299 U.S. at 319. But the presidential proclamation challenged and sustained in that case had been expressly authorized by Congress. Id. at 312. Similar legislative-executive agreement is absent when Congress authorizes the expenditure of certain funds, and those funds subsequently are withheld by the President.

Finally, the legal scope of Commander-in-Chief or "sole organ" impoundment authority probably will remain an academic issue in the foreseeable future. The Nixon Administration has not attempted to justify its withholding of funds from domestic programs on the basis of a "wartime emergency." And in view of current executive support of the development of a "modern defense capability," a significant withholding of funds from the Department of Defense is not likely to eventuate. Cf. notes 24-26 and accompanying text supra.

43. In Pennsylvania v. Lynn, 362 F. Supp. 1363 (D.D.C. 1973), rev'd on other grounds, No. 73-1835 (D.C. Cir. July 19, 1974), the court was effectively confronted with the Administration's postulation of an article II executive responsibility to prevent wasteful expenditures. See note 42 supra. Pursuant to the President's determination that certain Housing and Urban Development Act programs had "failed," Secretary Lynn, relying upon the "powers granted to the Executive by article II of the Constitution," suspended program funding. 362 F. Supp. at 1372. The court, however, summarily dismissed the Secretary's constitutional analysis:

    It is certainly true that [article II] powers have long been interpreted as broad grants of authority necessary to the fulfillment of the many and varied duties imposed upon the President and the Executive Branch. It is not true that the Executive has the authority to terminate . . . a statutory program such as that involved here. . . . It is not within the discretion of the Executive to refuse to execute laws passed by Congress but with which the Executive presently disagrees.

Id. Similarly, in Massachusetts v. Weinberger, Civil Action No. 1308-73 (D.D.C. July 26, 1973), reprinted at 119 Cong. Rec. S 15,044 (daily ed. July 30, 1973), the Secretary of Health, Education and Welfare defended his refusal to release funds appropriated under the National Defense Education Act partially on the basis of alleged article II executive power "to control overall federal spending." Id. at S 15,045. The court was unimpressed by that rationale and, while conceding that the control of spending was "an entirely laudable objective," nevertheless concluded that no such article II power exists: "Certainly the President's duty to see that the laws are faithfully executed cannot include the power defendants are claiming." Id.

In Government Employees Local 2677 v. Phillips, 358 F. Supp. 60 (D.D.C. 1973), former Director Phillips maintained that his termination of certain OEO activities was justifiable in view of the President's decision to request no additional program funds for the following fiscal year. The court responded that Phillips really argued "that the Constitution confers the discretionary power upon the President to refuse to execute laws passed by Congress with which he disagrees." Id. at 77. The court then turned to Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), for the proposition that, were the article II "faithfully execute" clause interpreted to sanction the withholding of funds mandated for expenditure by Congress, it "would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice." 358 F. Supp. at 77, quoting from 37 U.S. (12 Pet.) at 613. Were the position of the defendant sustained, the court reasoned, "no barrier would remain to the executive
many instances a variety of federal statutes require the President to withhold substantial portions of a particular appropriation. Prominent among these are the Antideficiency Act of 1950 (ADA), the Employment Act of 1946, the Economic Stabilization Act of 1970 and the ignoring any and all Congressional authorizations if he deemed them . . . contrary to the needs of the nation.” 358 F. Supp. at 77.

44. 31 U.S.C. § 665 (1970). The ADA authorized the Bureau of the Budget, now the Office of Management and Budget (OMB), to “provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which [an] appropriation was made available.” 31 U.S.C. § 665(c)(2). C.W. Weinberger, Secretary of Health, Education and Welfare, has characterized the ADA as perhaps “the most explicit authority” for presidential impoundment of appropriated funds. See 1971 Hearings 95. Obviously, the statutory language quoted is amenable to broad interpretation, and the Administration has found considerable latitude in the reference to “other developments.” For example, Budget Director Ash has argued that the failure of a congressionally enacted program to achieve its original objectives, in the Administration’s opinion, is a “dramatic other development” necessitating that funds be withheld from that program. See 1973 Hearings 287.

As critics of impoundment urge, however, see, e.g., 1973 Hearings 283-84 (remarks of Senator Ervin), the ADA was intended to preclude executive expenditure beyond the levels authorized by Congress, and to prevent the development of year-end deficiencies historically caused by over-expenditure at the beginning of a particular year. See Fisher, Presidential Spending Power, excerpted in 1973 Hearings 396-99, discussing history and purposes of the ADA. Moreover, the Budget Bureau Examiner’s Handbook for 1952 admonishes that funds must not be reserved pursuant to the ADA “to nullify the intent of Congress with respect to specific projects or levels of programs.” Id. at 399. And finally, the Act provides that if the Director of OMB determines that certain reservations “will not be required to carry out the purposes of the appropriation concerned,” he can recommend the rescission of that portion of the appropriation. See 31 U.S.C. § 665(c)(2) (1970). It is therefore apparent that the framers of the Act did not contemplate unilateral action by the President, but rather intended that Congress have the final word.


public debt ceiling. Of these statutes only the ADA has received significant judicial attention, but no court has found it a determinative consideration.

Finally, the Administration looks to appropriations acts themselves for support; but here its position has been ambivalent. Initially it was argued that the Constitution prohibits Congress from mandating the expenditure of appropriated funds. Federal spending, the President’s defenders contended, is a constitutional responsibility shared by both the executive and legislative branches of government. More recently the Administration apparently has conceded that Congress can require the release of appropriations. Thus the Administration’s defense of impoundment has focused on the allegedly discretionary nature of funding obligations imposed by particular acts or statutes.

47. 31 U.S.C.A. § 757(b) (Supp. 1973). The Administration contends that when Congress appropriates funds which, if obligated, would necessitate government borrowing beyond the limit established by law, the President has no choice but to impound those funds. See 1973 Hearings 366 (statement of J.T. Sneed, Deputy Attorney General). There is reason to believe, however, that the President would encounter no difficulty in securing at least a temporary increase in the debt ceiling should the expenditure of appropriated funds so require. Budget Director Ash concedes that the Administration has indeed requested such an increase on several occasions. See 1973 Hearings 291. Since Congress generally has responded to a demonstrated need to raise the debt ceiling, see Note, Impoundment of Funds, 86 Harv. L. Rev. 1505, 1522 (1973), it seems fair to conclude that the debt ceiling itself does not “require” the withholding of appropriated funds.

48. In State Highway Comm’n v. Volpe, 479 F.2d 1099 (8th Cir. 1973) (impoundment of Federal-Aid Highway Act funds), the court reasoned that a total or substantial cut in the funding of a particular program constitutes more than an effectuation of “savings,” as prescribed by the ADA. The court observed that reserves may only be established when the funds “will not be required to carry out the purposes of the appropriation concerned. . . .” [The] power to withhold funds cannot be used if it would jeopardize the policy of the statute. Id. at 1118. The court added that the question of whether a particular “other development” may justify the withholding of funds, see note 44 supra, must be viewed “in the context of not violating the purposes and objectives of the particular appropriation statute.” Id; accord, Sioux Valley Empire Elec. Ass’n v. Butz, 367 F. Supp. 686, 697 (D.S.D. 1973). The Eighth Circuit’s reasoning suggests that the Administration’s refusal to allot 55% of funds authorized for appropriation by the Federal Water Pollution Control Act Amendments of 1972, see notes 7-10 and accompanying text supra, could not be supported by the ADA. But see Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 501 (4th Cir. 1973), cert. granted, 94 S. Ct. 1991 (1974).

49. See notes 55-56 and accompanying text infra.

50. See notes 70-73 and accompanying text infra.

51. A judicial conclusion that a particular act or statute does not mandate expenditure, however, is not dispositive of the impoundment issue. The court then must determine whether the executive may consider factors other than those enumerated in the statute, such as the rate of inflation, in controlling the rate of spending. This latter inquiry is significant; obviously, if the President’s spending discretion is circumscribed by factors enumerated in the statute he is less able to use impoundment arbitrarily or as a means of substituting his own policies and priorities for those of Congress. Most courts have agreed that the President’s spending discretion is limited by the specifics of
Numerous commentators already have analyzed and dissected the Administration's defense of impoundment and this note will not undertake a similar general inquiry. Moreover, speculation concerning the President's constitutional ability to impound appropriated funds is largely a fruitless endeavor: no court has been, nor likely will be, called upon to decide whether "impoundment" per se is legal. Instead, impoundment litigation has turned on the language and history of the appropriations legislation involved. Therefore, this note will address only the third of the asserted justifications for impoundment—relating to the nature of appropriations acts—and will devote particular attention to impoundment cases concerning the Federal Water Pollution Control Act Amendments of 1972. Several procedural obstacles to judicial review of impoundment disputes then will be considered and, finally, a recent legislative response to the issue will be briefly examined.

III. THE NATURE OF AN APPROPRIATION: A MANDATE TO SPEND?

The Administration's argument that it is not required to commit all funds authorized for expenditure by Congress proceeds on the premise that appropriations acts in general permit, but do not require, the release of those funds. Whether this premise is derived from the language of the Constitution or merely from historical precedent remains unclear. Article I, section 9, of the Constitution states in part: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law . . . ." In the opinion of OMB Director Ash, this language conclusively establishes Congress' inability to compel the expenditure of funds: "No money is drawn from the treasury that is not duly appropriated, but that does not [mean] all money actually appropriated must be drawn from the Treasury."

the disputed legislation. See, e.g., State Highway Comm'n v. Volpe, 479 F.2d 1099, 1114 (8th Cir. 1973) ("We find nothing within these provisions of the Act which explicitly or impliedly allows the Secretary to withhold approval of construction projects for reasons remote and unrelated to the Act"); Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 697 (D.S.D. 1973) (legislation in question did not delegate to the President "the power to reassess and reorder Congressional priorities in an attempt to effect Executive economic policies"); Minnesota v. EPA, No. 4-73 Civ. 133 (D. Minn. July 12, 1973), appeal docketed, No. 73-1446, 8th Cir., July 12, 1973 ("[N]owhere in the statute does Congress provide that the Administrator may consider matters such as the shape of the national economy in carrying out this program.").

52. See, e.g., sources cited in notes 4, 13-15 supra.

53. The constitutional issue will almost certainly be avoided since an adequate alternative basis for decision—statutory construction—is available. See note 179 infra.


Secretary of Health, Education and Welfare Casper Weinberger also has endorsed this view, reasoning that the "essentially negative character" of article I, section 9, logically reinforces the Administration's contention that a law appropriating funds is merely permissive in nature. In support of its argument the Administration cites remarks of two former Presidents, a former Attorney General and a House Appropriations Committee. Each of these authorities has concluded that an appropriations act does not require the full expenditure of authorized funds, a conclusion that Secretary Weinberger finds similarly recognized by Congress in the Antideficiency Act. Moreover, several federal court decisions have been invoked to demonstrate that the Administration's position has been sanctioned by the judiciary.

Sources apart from the Administration also have embraced the view that Congress cannot coerce the President to release all appropriated funds. Several congressmen have suggested that the appropriations power is circumscribed by presidential authority. Professor Corwin

56. 1971 Hearings 94 (statement of C.W. Weinberger, Deputy Director, OMB).
57. President Truman, then Senator, once observed: "When the Congress appropriates funds it gives the Executive Branch an authority to incur obligations. Certainly none of us hold that we give a mandate to expend the funds appropriated." 1971 Hearings 94, quoting from 89 CONG. REC. 10,362 (1943) (statement of C.W. Weinberger, Deputy Director, OMB).

President Roosevelt is reported to have said: "[T]he mere fact that Congress, by the appropriation process, has made available specified sums for the various programs and functions of the Government is not a mandate that such funds must be fully expended." 1971 Hearings 94.
58. 1971 Hearings 94 (statement of C.W. Weinberger, Deputy Director, OMB).
59. " Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity." Id., quoting from H.R. REP. No. 1797, 81st Cong., 2d Sess. (1950).
61. See McKay v. Central Elec. Power Coop., 223 F.2d 623, 625 (D.C. Cir. 1955); Lovett v. United States, 104 Ct. Cl. 557, 583 (1945), aff'd on other grounds, 328 U.S. 303 (1946); Campagna v. United States, 26 Ct. Cl. 316, 317 (1891); Hukill v. United States, 16 Ct. Cl. 562, 565 (1880). While these decisions might appear relevant to the impoundment controversy, each is factually distinguishable on closer examination. See Ramsey, Impoundment by the Executive Department of Funds Which Congress Has Authorized It To Spend or Obligate, in 1971 Hearings 291; Pine, supra note 24, at 104-05. None of the courts that recently have entertained impoundment suits has found these decisions persuasive.
62. Then-Congressman Laird once remarked: "The Congress cannot compel the President of the United States to spend money that he does not want to spend." 114 CONG. REC. 90,588-89 (daily ed. Oct. 10, 1968). Without adding specifics, Congressman Flood has referred to the "many instances" in which the President's constitutional power to withhold appropriations has been made clear. Id. at 30,588. See also 114 CONG. REC. 29,159 (daily ed. Oct. 2, 1968) (remarks of Senator Dominick). However, William Rehnquist, as Assistant Attorney General, has concluded that the "nature or precise
has characterized federal expenditure as "primarily an executive function," and has concluded that Congress' role in the appropriations process is "simply [one] of setting bounds to executive discretion." Corwin's opinion, however, seems to include an inherent contradiction. If Congress can "set bounds" to executive discretion it should follow that a minimum, as well as maximum, spending level can be designated—which, of course, is the functional equivalent of mandating a particular level of expenditure. In other words, if Congress is constitutionally required to allow for presidential spending discretion, it could simply designate its desired spending level as the minimum amount that might be spent, while providing presidential discretion to spend more, up to a given ceiling.

The alternative interpretation of Corwin's position—that Congress can set only an upper limit, or ceiling, on presidential spending discretion—has been proposed frequently by presidential spokesmen. The logic of this interpretation, however, is difficult to defend; it suggests that while Congress may limit the amount a President may spend, he is nonetheless free to spend as little as he might please. Such a proposition surely is inconsistent with constitutional intent: it would accord the President authority to "veto" any legislative program Congress might enact, simply by withholding sufficient funding to obstruct its implementation. It is inconceivable that the framers of the Constitution intended article I, section 9, to provide presidential discretion to abrogate the will of Congress—particularly when a carefully circumscribed veto power was conferred on the President in article I, section 7.

Finding logical infirmity in the view that Congress cannot compel

source of authority" for these congressional observations is open to question. See Rehnquist, Presidential Authority To Impound Funds Appropriated for Assistance to Federally Impacted Schools, in 1973 Hearings 390, 393.

63. E. Corwin, The President: Office and Powers 1787-1957 at 127-28 (4th rev. ed. 1957). Corwin does concede that Congress may "stipulate any terms it chooses as the condition of making an appropriation and thereby limit the effective scope of the inherently executive prerogative of planning and directing expenditure." Id. at 129. Corwin apparently viewed Congress' predominant role in the appropriations process as one of providing restraint to excessive federal expenditure.

64. Secretary Weinberger, for example, has relied upon a House Appropriations Committee Report for the proposition that "[a]ppropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity." 1971 Hearings 94, quoting from H.R. Rep. No. 1797, 81st Cong., 1st Sess. (1951).

65. Several commentators have recognized the similarity between impoundment and the exercise of an extra-constitutional "item" veto. See 1973 Hearings 400 (remarks of Mr. Kurland, Chief Consultant, Subcomm. on Separation of Powers); 1971 Hearings 3 (statement of Senator Ervin); Miller, supra note 13, at 512; Comment, Presidential Impounding of Funds: The Judicial Response, 40 U. Chi. L. Rev. 528, 380-31 (1973).
the expenditure of appropriated funds, several authorities have questioned the Administration's position. Justice William Rehnquist has concluded that executive authority to withhold appropriated funds "is supported by neither reason nor precedent." Rehnquist also has expressed doubt that a constitutional theory might be formulated to justify a presidential refusal to comply with a congressional directive to spend. Moreover, a memorandum prepared for the 1971 congressional hearings with regard to the impoundment controversy concluded that Congress enjoys at least three methods of mandating the expenditure of appropriated funds. And although the Supreme Court has never expressly considered whether appropriations acts are discretionary or mandatory in nature, it has seemed to favor the latter view in certain circumstances.

Despite the expressed views of presidential defenders such as Ash and Weinberger, it would be incorrect to conclude that the Administration's best case for discretionary appropriations acts rests upon the language of article I, section 9. Indeed, the Administration has relied upon statutory construction, not constitutional analysis, when arguing its case before the courts. At oral argument in State Highway Commision v. Volpe counsel for the Government even observed: "I suppose our brief comes as close as it can to conceding that were Congress to make [spending] mandatory, that would be the end of the case." Similarly, Deputy Attorney General Sneed has suggested that Congress may mandate full expenditure of appropriated funds, if it does so "in unmistakably clear terms." And, under questioning, Secretary Wein-

67. Id. at 394.
68. Ramsey, supra note 61, reprinted in 1971 Hearings 304. Ramsey argues that Congress may mandate the expenditure of appropriated funds (1) by enacting a general law that particular appropriations are to be expended "promptly," (2) by stipulating that a certain amount appropriated for a specific purpose is to be available for that purpose or (3) by enacting a program into law and requiring that it be implemented to the extent of available appropriations.
71. 479 F.2d 1099, 1106 (8th Cir. 1973).
72. 1973 Hearings 367. Similarly, President Nixon himself has alluded to congressional authority to mandate the expenditure of appropriations. In the course of vetoing a Labor-HEW-OEO appropriations bill the President remarked that "nearly nine-tenths of these [appropriations are] for mandatory programs which leave the Executive Branch no discretion whatever either as to the level or the purpose of the
berger tempered his previously quoted view with the qualification that Congress does have authority to deprive a President of discretion to withhold appropriations. 73

It would also be incorrect, however, to conclude on the basis of these remarks that the Administration has abandoned entirely one important line of its impoundment defense. Although the President's spokesmen apparently now concede that Congress can write mandatory appropriations acts, they have not conceded that Congress can in fact force the President to spend. This seemingly anomalous position has been aptly expressed by Mr. Sneed:

[W]hen we get down to . . . situations in which all of the statutory justifications for impounding [are] stripped away and we have simply a question of whether there is any constitutional power on the part of the President to impound and Congress has said you must spend, it is our contention that he may refuse to spend and that the collision in that case . . . is a political question that is not justifiable [justiciable?]. 74

In short, although Congress can tell the President he must spend, the courts cannot require him to do so. 75

The continuing debate over the scope of presidential authority to withhold appropriations serves only to obfuscate the more critical issue raised by the impoundment practices of the Nixon Administration. Even if one accepts the thesis that Congress cannot mandate the full expenditure of appropriated funds, it does not thereby follow that the President may exercise his spending discretion to cripple the legislative initiatives of Congress. Indeed, even those sources invoked by the President as authority for the right to impound have recognized the limited nature of discretion to withhold appropriations. To his added expenditures." See Congressional Remedies for Impoundment of Funds, in 1973 Hearings 860, 862.

74. 1973 Hearings 383. For a general discussion of the justiciability issue see pp. 602-05 infra.

75. This is a curious argument. If Congress imposes a mandatory duty upon an executive agency to release funds for a specific purpose, and if, as the Administration seems to concede, Congress is constitutionally empowered to impose that duty, it would seem that mandamus should lie to compel the performance of what amounts to a ministerial act. Accord, Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 666, 690 (D.S.D. 1973) (mandamus lies to compel consideration of applications for low interest loans where Congress had not conferred discretionary authority on Secretary of Agriculture to refuse such consideration). Sneed's argument reflects the Administration's hope to shield impoundment from judicial review on the "political question" rationale—a hope that the courts so far have frustrated. See discussion at pp. 600-06 infra.
assertion that appropriations acts are nonmandatory, then Senator Truman added the qualification that funds must be spent "where needed . . . to carry out some phase of the law." President Roosevelt emphasized that the reservation of funds "should not be used to set aside or nullify the expressed will of Congress." Similarly, the House Appropriations Committee, referred to previously, indicated that the President's right to withhold appropriations extends only to those funds unnecessary to achieve a legislative objective.

Valid policy considerations do support the view that Congress may not mandate the full expenditure of appropriated funds. It is impossible to identify precisely the level of spending that will be required to effectuate particular legislation prior to its implementation. Moreover, when a congressional goal can be achieved more efficiently than originally projected, with concomitant financial savings, unnecessary expenditures certainly should be reserved. The reservation of such unnecessary funding is unquestionably a legitimate function of the executive branch—a fact statutorily recognized by Congress and established by years of precedent. But the dilemma raised by the view that Congress cannot require the expenditure of appropriated funds is its implicit sanction of presidential ability not merely to minimize expenditures through efficient administration, but rather to substitute presidential priorities for established congressional preferences. If article I, section 9, were interpreted to preclude congressional authority to mandate expenditures, Congress would be deprived of any institutionalized means of ensuring that its policies will

76. See note 57 supra.
79. See note 59 supra.
80. "The Administration officials responsible for administration of an activity . . . bear the final burden for rendering all necessary service with the smallest amount possible within the ceiling figure fixed by Congress . . . ." 1971 Hearings 94 (testimony of C.W. Weinberger, Deputy Director, OMB), quoting from H.R. Rep. No. 1797, 81st Cong., 1st Sess. (1951) (emphasis added).
82. See authorities cited at note 13 supra.
83. Cf. 1973 Hearings 410-11 (remarks of Senator Muskie). Senator Muskie argued that the Administration had used a grant of spending flexibility, intended to encourage efficiency, to justify the impoundment of pollution control funds pursuant to Administration economic policy. The House Appropriations Committee Report relied upon by Secretary Weinberger, see note 80 supra, seemed also to recognize the danger that discretionary appropriations acts could be used by the executive branch to frustrate congressional intention:
be effected. Rather, the realization of statutorily enacted congressional policy could well become dependent upon pragmatic political considerations.\textsuperscript{84}

IV. A Case Study: Impoundment of Water Pollution Control Funds

The President's impoundment of water pollution control funds, after Congress had overridden his veto of the Federal Water Pollution Control Act Amendments of 1972,\textsuperscript{85} has prompted more litigation than any other executive withholding of authorized funding. The extensive judicial review of the President's action is representative of the approach to the impoundment controversy adopted by the courts. Additionally, the judicial response to the impounding of pollution control act funds provides some tentative answers to the question of whether Congress can require the expenditure of appropriations.

A rudimentary knowledge of the statutory scheme prescribed by the 1972 Amendments is necessary to understand the judicial disposition of suits brought to compel the release of pollution control funds. Federal funds are provided through a two-phased process, sometimes referred to as "contract authority."\textsuperscript{86} During the first phase, "allotment," sums authorized for appropriation are divided proportionally among the states.\textsuperscript{87} A state then must submit an application to the Administrator of the EPA detailing how it will use its share of available funds.\textsuperscript{88} The second phase occurs if and when those plans are approved. The state then may contractually obligate its share of the authorization, and federal funds ultimately are appropriated to liquidate those obligations as they become payable.\textsuperscript{89} While allotment is not tanta-

\textsuperscript{84} Furthermore, recognized authority to impound funds at will would enable a President, should he be so inclined, to render efficient programming subservient to political partisanship. The potential for political blackmail is obvious. Congressmen critical of the President might find funds for federally assisted home district construction projects impounded, until their criticism moderated; the flow of federal funding might become as much a function of election year maneuvering as of careful, objective planning. For concrete examples of such possible abuses, and for an enlightening discussion of the political use of impoundment, see Pine, \textit{supra} note 24, at 125-27.

\textsuperscript{85} See notes 7-10 and accompanying text \textit{supra}.


\textsuperscript{89} The statute includes specific criteria upon which the Administrator is to base
mount to expenditure, it is clear that if authorized funds are not allotted, the obligation or expenditure phase cannot occur. Thus, by allotting only 5 billion of the 11 billion dollars authorized by Congress, the President effectively impounded over half the available pollution control funding. 80

A. The Litigants’ Positions: An Overview

Courts that have entertained suits challenging the withholding of pollution control funds have focused their attention on the statutory language and history of the 1972 Amendments. When the Supreme Court considers the issue during its 1974 term, its inquiry is likely to be similarly limited. 91 On the basis of that language and history, both plaintiffs 92 and defendant (Administrator of the EPA) 93 have constructed convincing yet diametrically opposed arguments. Central to the positions of the respective parties is the specific language of sections 205 and 207 of the Amendments:

Section 205(a). [All] sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall

his decision to approve or disapprove a proposal. See Pub. L. No. 92-500, §§ 203-04, 86 Stat. 816 (1972). See also note 150 infra.

90. The Administration maintains that since allotment precedes appropriation, its refusal to allot does not constitute an “impoundment.” Therefore, unallotted water pollution control funds have not been reported pursuant to the Federal Impoundment and Information Act, Pub. L. No. 92-599, tit. IV, 86 Stat. 1324 (1972) (repealed 1974), which requires a periodic listing of funds withheld by the executive. See also Note, Impoundment of Funds, 86 Harv. L. Rev. 1505-06 n.2 (1973). Despite this fine semantic distinction, a refusal to allot is the equivalent of an impoundment, since, if allotment does not occur, states are precluded from incurring obligations which funds will be appropriated to liquidate. See Pub. L. No. 92-500, § 203, 86 Stat. 816 (1972).

91. See note 179 infra.


93. Named defendants in the impoundment suits discussed herein generally have been the successive administrators of the United States Environmental Protection Agency: William Ruckelshaus, Robert Fri and Russell Train. The Nixon Administration, of course, has been the effective defendant in each case.
be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized ....

Section 207. There is authorized to be appropriated . . . for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.94

In conference the bracketed word "all" was removed from section 205, while the phrases "not to exceed" were inserted in section 207.95 Upon these syntactical alterations the Administration premises its contention that the Administrator of the EPA is not required to allot among the states the full amounts authorized for each fiscal year.96 The Administration finds additional support for its position in congressional debate that occurred prior to passage of the Amendments. Of critical significance is Representative William Harsha’s statement that the statutory modifications were "intended to emphasize the President’s flexibility to control the rate of spending."97 Conversely, plaintiffs challenging the impoundment of pollution funds argue that since the phrase "sums authorized . . . shall be allotted" employs mandatory language, the Administrator lacks discretion to allot less than the full authorization for each year.98

95. See 1971 Hearings 404 (statement of W.D. Ruckelshaus, EPA Administrator). The conference report did not suggest why these changes were made. Id.
96. See, e.g., City of New York v. Ruckelshaus, 358 F. Supp. 669, 677 (D.D.C. 1973), aff’d sub nom. City of New York v. Train, 494 F.2d 1033 (D.C. Cir.), cert. granted, 94 S. Ct. 1991 (1974). It again should be emphasized that the issue of whether all authorized sums should be allotted is quite different from the question of whether all allotted sums subsequently must be released or obligated. See notes 86-90 and accompanying text supra. The latter question has not been before the courts.
97. 118 Cong. Rec. H 9122 (daily ed. October 4, 1972). Congressman Harsha was a member of the conference committee that finalized the language of the 1972 Amendments and was House sponsor of the bill.
98. See also 1973 Hearings 404-05 (statement of W.D. Ruckelshaus, EPA Administrator).
apparently concede that the Administrator may exercise discretion to control the rate of spending at the second, or obligation, phase of the appropriations process. Like the Administration, those seeking the release of funds invoke legislative debates concerning the Amendments, and particularly the remarks of Representative Harsha, to demonstrate that the EPA lacks authority to withhold any portion of the sums available for allotment. Finally, plaintiffs contend that when sections 205 and 207 are read in context with other portions of the Amendments, the statutory scheme makes no sense if the allotment of all authorized funding is not considered mandatory.

Despite litigants' assertions to the contrary, the congressional in-

99. See Brief of Center for Governmental Responsibility as Amicus Curiae at 9, Florida v. Train, No. Civ.-T.D.-73-156 (N.D. Fla. 1974). It remains unclear whether, at the obligation phase, the Administrator may control the rate of expenditure only pursuant to the criteria enumerated in the Amendments, see Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 204, 86 Stat. 816, or whether extraneous matters, such as the state of the economy, may be considered in determining the rate at which funds are released for obligation. Still another unresolved question is whether the Administrator is empowered to control only the rate at which funds are spent, or whether he may control the ultimate level of obligated funding. Neither issue has been before the courts. One district court has implied that the Administrator is authorized to control the ultimate level of funding, see Brown v. Ruckelshaus, 364 F. Supp. 258, 267 n.13 (1973), although the District of Columbia Circuit apparently disagrees: "We find that it was Congress' intention that the full $18 billion be spent to control water pollution." City of New York v. Train, 494 F.2d 1033, 1042 (D.C. Cir.), cert. granted, 94 S. Ct. 1991 (1974).

100. The thrust of plaintiffs' argument has been that the statement of Mr. Harsha quoted by the defendant Administrator, see note 97 and accompanying text supra, was intended to emphasize presidential authority to control funding at the expenditure, or obligation, phase of the appropriation process, rather than at the initial allotment phase. See, e.g., Brief of Center for Governmental Responsibility as Amicus Curiae, supra note 99, at 9; Brief of Appellee at 24-29, Florida v. Train, appeal docketed, No. 74-1790 5th Cir., April 3, 1974. Also of particular significance to plaintiffs is Congressman Harsha's characterization of the criteria enumerated in § 204 of the Amendments (approval of plan specifications, cost estimates, etc.) as "the pacing item in the expenditure of funds." Brief of Appellee at 29, Florida v. Train, supra, quoting from 118 Cong. Rec. H 10,268 (daily ed. Oct. 18, 1972) (emphasis omitted). Those criteria become considerations only after funds already are allotted, and requests for obligation of those funds have been submitted by the states. A statement by Senator Muskie, Senate sponsor of the Amendments, provides support for plaintiffs' position. Explaining the intent of the bill, Muskie observed that "sums authorized to be obligated need not be committed though they must be allocated." Brief of Center for Governmental Responsibility as Amicus Curiae, supra at 10. But see Brief of Appellant at 15-16, Florida v. Train, supra (criticizing Muskie's analysis).

101. See, e.g., Brief of Center for Governmental Responsibility as Amicus Curiae, supra note 99, at 18-19.

102. The patent ambiguity of the statutory scheme is reflected in the fact that both parties to the controversy can assert, not disingenuously, that the "plain meaning" of the legislation supports their respective positions. Compare Brief of Center for Governmental Responsibility as Amicus Curiae, supra note 99, at 7 ("when considered alone the statute is plain in declaring that the Administrator shall allot the sums specified"), with
tent reflected in the debates regarding sections 205 and 207 is ambiguous at best. It is true that, taken literally, the remarks of Congressman Harsha and others suggest that the Administrator is authorized to control funding only at the expenditure, or obligation, level of the appropriations process— not at the allotment phase. On the other hand, it is entirely conceivable that references to control of "expenditure" were intended in a more generic sense; in the course of debate the legislators might not have been consciously distinguishing between allotment and expenditure. It might have been tacitly assumed that control of allotments was simply one means of controlling the ultimate rate of obligation; thus, if discretion to control the latter clearly were established, reference to authority to control the former was, perhaps, presumed unnecessary. The conscious removal of the word "all" from the phrase "All sums . . . shall be allotted" seems to sustain the plausibility of this interpretation of congressional intention. The syntactical alteration thus would suggest an intent to affect the nature of the allotment section of the Amendments.

Looking beyond the narrow semantic inquiry, however, the purpose and policy of the appropriation scheme prescribed by the Amendments indicate that allotment of all authorized funds is indeed mandatory. The "contract authority" process was intended to eliminate the inefficiency caused by the Federal Water Pollution Control Act Amendments of 1956. These earlier amendments made allotment contingent upon the amount of federal money actually appropriated each year, and therefore precluded long-range planning on the part of the states. Future availability of federal pollution control funds could not be predicted with certainty. The allotment provisions of the 1972 Amendments, however, designate the level of federal aid that will be available for each of three succeeding years. The burden

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103. See note 100 supra and sources cited therein.
105. See note 86 and accompanying text supra.
106. The funding mechanism prescribed by the 1956 Amendments was virtually the reverse of that prescribed by the 1972 Amendments. States were allotted their respective shares of federal funds only after those funds actually were appropriated. See Act of July 9, 1956, ch. 518, §§ 5(a)-(c), 70 Stat. 498. Although a specified sum was authorized for appropriation each year Congress was of course not required to appropriate the entirety of the allowable amount in any given year. Thus, the amount allotted was contingent upon the amount actually appropriated each year and long-term state planning was impossible.
107. See note 106 supra.
108. See Brief of the Center for Governmental Responsibility as Amicus Curiae, supra note 99, at 17.
of actually qualifying for that aid remains upon the states, but, since the degree of federal assistance ultimately available is established, long-term planning is facilitated.

Thus, if the 1972 Amendments are read to confer administrative discretion to withhold authorized funds from allotment, an important objective of the statutory scheme—long-term planning—is frustrated. The level of funding that Congress has determined will be available for three succeeding years may not, in fact, be available. The states would then be in no better position to plan for the future than they were under the 1956 legislation. Logically, therefore, Congress seems to have intended that the full amounts authorized be allotted for fiscal years 1973, 1974 and 1975. Executive spending control could then be exercised only as states attempt to obligate their previously allotted portions of available federal funding.

B. The Judicial Response

As the following discussion will demonstrate, courts that have been called upon to resolve impoundment disputes have carefully avoided the question of whether Congress is constitutionally authorized

109. Before a state may obligate its share of allotted funds, its plan must be approved by the Administrator and certain conditions precedent must be satisfied. See Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, §§ 203-04, 86 Stat. 816. See also note 150 infra.

110. It should be noted that the amount of federal funding available for use by each state is predetermined by means of a specific formula. See Brief for Appellant, appendix, Florida v. Train, appeal docketed, No. 74-1790, 5th Cir., April 3, 1974. Therefore, the amount of funding available, or impounded, on a national basis has a direct relation to the amount available to each state.

111. It might be argued that the planning purposes of the Amendments are not frustrated even if the President does refuse to allot some portion of authorized funding, as long as he does make clear the reduced level of funding that will be available. There are two considerations, however, that militate against this line of reasoning. First, Congress in 1972 designated the level of funding that it intended to be available for fiscal 1973, 1974 and 1975. Shortly thereafter, of course, the President announced that only a portion of that funding would be available for 1973 and 1974; it was not until 1974, however, that the President announced that the authorized funding for 1975 also would be reduced. See note 10 supra. Thus, a state that undertook a long-term construction project in 1973, relying upon the availability of federal funds for 1975, might find that the projected federal share will not be forthcoming. Secondly, Administration spokesmen now suggest that the level of allotment initially designated by the President may not in fact be final. Rather, the Administration's position now seems to be that it can increase allotments when it deems the need to exist. See 1973 Hearings 840-41. Unfortunately, however, this in no way would facilitate state planning, since Administration spokesmen also argue that factors other than existing need, such as the rate of inflation, must figure in any decision to allot. See 1973 Hearings 416-17 (testimony of W.D. Ruckelshaus, EPA Administrator). Thus, federal funds might not be allotted even when local need is demonstrated.

112. See notes 88-89 and accompanying text supra.
to mandate spending; rather, those courts have based their decisions on statutory interpretation. Nonetheless, the judicial response to impoundment in general, and to the withholding of water pollution control funds in particular, provides a framework for several tentative conclusions regarding Congress' constitutional authority to require the release of an entire appropriation or, more importantly, to dictate the only bases on which appropriations may be withheld. Additional-

ly, the disposition of the pollution control act cases has reflected a considerable difference of judicial opinion; this conflict among the lower courts has prompted the Supreme Court to agree for the first time to confront the impoundment controversy. The litigation giving rise to that conflict therefore will be examined in some detail.

(I) The District Courts

The district courts that have considered the Administration's refusal to allot all authorized pollution control funding have confined their attention to the language and history of the 1972 Amendments. No court has considered the appropriations issue in constitutional terms. In City of New York v. Ruckelshaus, Martin-Trigona v. Ruckelshaus and Minnesota v. EPA the respective courts concluded that statutory language and history reflected Congress' intent to require the allotment of all authorized funds. Similarly, the more recent

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113. The latter inquiry is the more significant since, for obvious policy reasons, see p. 574 supra, Congress only rarely has mandated the full expenditure of a particular appropriation. See 1973 Hearings 367 (statement of J.T. Sneed, Deputy Attorney General). The central issue in the current impoundment controversy is whether the President may withhold funding on the basis of policy considerations of his own, not enumerated as conditions of or limitations on funding by the legislation in question. Thus the critical question is whether Congress may dictate the only terms on which appropriated funds may be withheld.

114. Several early Supreme Court cases, Miguel v. McCarl, 291 U.S. 442 (1934); United States v. Price, 116 U.S. 43 (1885); Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), occasionally have been cited as precedential authority on the impoundment issue. See, e.g., 1973 Hearings 368 (statement of J.T. Sneed, Deputy Attorney General). None of those cases was decided within a political context as exists at present, involving policy conflicts between the President and Congress.


118. In reaching their decisions, the courts relied primarily upon the amendments to the language of §§ 205 and 207 of the Act, see notes 94-95 and accompanying text supra, and the congressional commentary relating to those amendments. See, e.g., 358 F. Supp. at 676-79. Since Congressman Harsha had indicated that the thrust of the
decisions in *Texas v. Fri*\(^{119}\) and *Florida v. Train*\(^{120}\) adopted the view that allotment is a nondiscretionary duty imposed upon the Administrator.\(^{121}\) None of these courts reached the issue of whether all allotted funds ultimately must be obligated.\(^{122}\)

Two other district courts viewed the 1972 Amendments differently and, while reaching different conclusions, agreed that the Adminis-

amendments was to provide the Administrator with discretion to "control the rate of spending," see note 97 and accompanying text *supra*, the respective courts concluded that administrative discretion exists only at the obligation, or "spending," phase of the appropriations process. Consequently, the allotment of authorized funding was deemed mandatory. *But see* notes 103-04 and accompanying text *supra*.


121. In a more conclusionary fashion, *see*, e.g., No. Civ.-T.D.-73-156, at 5-6, the courts in *Texas v. Fri* and *Florida v. Train* interpreted the amendments to §§ 205 and 207 as did the district courts that already had considered the issue. *See note* 118 *supra*. The court in *Texas v. Fri*, however, was additionally influenced by the unique "contract authority" appropriations process established by the Water Pollution Control Act:

Congress chose the allotment procedure and contract authority so that state and local governments would be able to effectively make long range plans in their fight against water pollution. The feeling was that without unequivocal federal financial commitment state and local governments would have difficulty entering into long term contracts and financing long term bonds. It is illogical to think that Congress would inject the same uncertainty back into the system it had sought to avoid with the allotment procedure by giving the Administrator discretion to choose the amount to be made available to the state and local governments.

Civil Action No. A-73-CA-38, at 5. The structure of the Act, incorporating separate allotment and obligation procedures, is probably the most persuasive evidence that Congress intended the allotment of all authorized funding to be mandatory. *See* notes 105-12 and accompanying text *supra*. As the court in *Texas v. Fri* recognized, if allotment is not mandatory, its inclusion in the Act as a separate phase of the appropriations process seems meaningless: planning will be futile if allotment is not mandatory. While other courts have discussed the purpose of allotment, the point has been raised to substantiate the conclusion that a particular suit was not hypothetical or premature. *See, e.g.*, 358 F. Supp. at 674. No other court has given the "contract authority" statutory scheme the attention it seems to deserve in passing on the mandatory/discretionary allotment issue.

122. Several courts have indicated, however, that the Administrator is authorized to use his discretion in actually obligating previously allotted funds. *See*, e.g., No. 4-73 Civ. 133, at 11; Civil Action No. A-73-CA-38, at 5. If those indications are correct, another thorny question arises: Is the Administrator's discretion circumscribed by the factors specifically enumerated in the 1972 Amendments, *see* note 150 *infra*, or is he authorized to consider extraneous matters, notably the rate of inflation, in deciding what amount of allotted funds to obligate? There is no unanimity of conjecture on this issue. *Compare Civil Action No. A-73-CA-38, at 5 ("The logical interpretation seems to be that Congress intended to make a definite financial commitment to the state and local governments while . . . giving the Administrator some discretion in the rate of spending to ease inflationary pressures.")*, with No. 4-73 Civ. 133, at 11 ("[N]owhere in the statute does Congress provide that the Administrator may consider matters such as the shape of the national economy in carrying out this program.").
trator is not required to allot all authorized funding. In Campaign Clean Water, Inc. v. Ruckelshaus, Judge Merhige did find that pollution control funds had been improperly withheld by the Administrator. The rationale for his decision, however, bore little resemblance to the reasoning of the courts that have found in the legislative history of the 1972 Amendments an intent that the full congressional authorization be allotted. Judge Merhige observed that the City of New York court had erred in ignoring the "syntactical history" of the Amendments. Accordingly, he determined that Congress did intend to delegate to the executive discretion to control the allotment of authorized funds. Nevertheless, Judge Merhige was particularly impressed by the substantial vote to override the President's veto, and was convinced that, in so voting, Congress had "reaffirm[ed] the massive national commitment to environmental protection and [a] willingness to incur vast expenses in achieving that commitment." He then concluded that, regardless of the apparent grant of executive authority to withhold some pollution funds from allotment, the impoundment of 55 percent of those funds constituted a "violation of the spirit, intent and letter of the Act and a flagrant abuse of executive discretion.”

Although the suit was dismissed for lack of standing, Judge Hauk nonetheless reviewed the language and history of the 1972 Amendments in Brown v. Ruckelshaus. Judge Hauk concluded that the decisions of the other courts that had entertained pollution control act suits were simply "not correct." He accepted as uncontroversed
the proposition that an appropriations act places only a ceiling on permissible expenditure of appropriated funds. From this premise, he reasoned that an authorization to allot funds for future appropriation similarly must be subject to discretionary executive action. Like Judge Merhige in Campaign Clean Water, Judge Hauk was convinced that the Amendments did delegate discretion to the Administrator to withhold authorized funds from allotment. He apparently was not persuaded, however, that the withholding of 55 percent of those funds constituted an abuse of discretion, since he did not even allude to that issue.

Although Judges Merhige and Hauk both premised their decisions upon an interpretation of statutory language, their respective opinions reflect the dilemma inherent in the view that Congress cannot coerce the President to spend appropriated funds. Brown implicitly condones the proposition that, where the President is not required to release an appropriation in its entirety, he enjoys discretion to withhold as much as he sees fit. Judge Hauk did not discuss possible congressional action that could prevent the President from utilizing that discretion to nullify duly approved legislation without a formal veto. Although Judge Hauk maintained that his decision was based upon clear statutory intent, it is difficult to imagine how any statutory program might be implemented as intended if 55 percent of its authorized funding is withheld. One therefore hesitates to accept his conclusion that the President’s action was consistent with congressional intention. Rather, the Brown opinion seems to ignore the distinction be-

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131. Id. But see notes 76-84 and accompanying text supra.
132. 364 F. Supp. at 269. Judge Hauk cited the Antideficiency Act of 1950 (ADA), 31 U.S.C. § 665, as congressional recognition of the proposition that “an appropriation places an upper limit on spending, but not a floor.” The express language of the ADA, however, seems to grant the executive branch only a qualified right to withhold appropriations in particular circumstances. See note 44 supra. Other courts that have passed on the impoundment issue have been unwilling to accept Judge Hauk’s broad reading of the ADA. See State Highway Comm’n v. Volpe, 479 F.2d 1099, 1118 (8th Cir. 1973); Sioux Valley Empire Elec. Ass’n v. Butz, 367 F. Supp. 686, 696 (D.S.D. 1973).
133. Judge Hauk cited “one of Mr. Nixon’s philosophical opposites,” President Franklin Roosevelt, for the proposition that appropriations acts are permissive in nature. Judge Hauk failed to recognize, however, that his quoted authority raised the very issue he ignored. Roosevelt had added that the reservation of appropriated funds “should not be used to set aside or nullify the expressed will of Congress . . . .” 364 F. Supp. at 270, quoting from Hearings on H.R. 3598 Before a Subcomm. of the Senate Comm. on Appropriations, 78th Cong., 1st Sess. 739 (1943). Judge Hauk did not attempt to reconcile Roosevelt’s qualifying language with President Nixon’s impoundment of more than half of a congressional authorization.
135. Judge Hauk’s reasoning also is vitiated by the structure of the 1972 Amendments. In answer to defendant’s claim that plaintiffs’ action was premature, Judge Hauk noted at the outset of his opinion that the “financial scheme” (i.e., contract
tween the legitimate exercise of executive discretion to effect valid economies and the political exercise of that discretion to render congressional policy subservient to presidential priorities. Although Brown turned on statutory construction, it illustrates the result to which the view that Congress cannot mandate expenditure might lead: a recognition of presidential authority to frustrate legislative initiatives.

At first glance, Campaign Clean Water might suggest that the courts could prevent abuse of a recognized presidential authority to withhold appropriations, but there is little in Judge Merhige's opinion to sustain such a presumption. Even assuming, as Judge Merhige did, that the withholding of appropriated funds at some point becomes a deliberate obstruction of congressional intent, the difficulty of identifying that point remains. Many observers might agree that the President consciously frustrated the will of Congress by impounding 55 percent of authorized pollution control funding. But what standards might have guided Judge Merhige's decision had the impoundment not been so substantial? Had the President withheld only 20 percent of authorized funding the decision reached in Campaign Clean Water would be more difficult to defend. The treatment of Campaign Clean Water on appeal demonstrates the difficulty of applying the abuse-of-discretion standard.

(2) The Circuit Courts of Appeals

In Campaign Clean Water, Inc. v. Train the Fourth Circuit approved the district court's conclusion that the Administrator of the EPA does enjoy discretion to refuse to allot all sums authorized for appropriation by the 1972 Amendments. After considering the issue

authority) was adopted by Congress "to facilitate long-range planning" on the part of local governing units. 364 F. Supp. at 262. Long-range planning hardly can be facilitated if, as Judge Hauk concluded, the Administrator is authorized to refuse to allot. Allotment is essential to inform local governments of the level of federal aid that ultimately will be available to assist implementation of their construction plans.


137. Of course, Judge Hauk's conclusion that an appropriations act affixes only a ceiling to executive spending discretion leaves the same question unresolved. If Congress appropriated $90 billion for defense spending could the President legitimately spend nothing? Could he spend as little as $25 billion?


139. In fact, unlike other plaintiffs seeking the release of pollution control funds, the plaintiff in Campaign Clean Water conceded that allotment pursuant to the Amendments is a discretionary function. See 489 F.2d at 495. Instead, plaintiff urged the Fourth Circuit to accept the district court's conclusion, see notes 126-28 and accompanying text supra, that the Administrator had abused his discretion by impounding (i.e., withholding from allotment) 55% of authorized pollution control funding. 489 F.2d at 496. Defendant Administrator, on the other hand, reiterated his argument
of whether that discretion had been abused, the court remanded the case to the lower court with directions to establish a sufficient evidentiary basis for its decision. Like the district court, the Fourth

that he enjoyed "absolute discretion in making such allotments, and that his exercise of discretion \[was\] immune from judicial review." Id.

Although on appeal plaintiff acquiesced in the district court's holding that the Amendments provide administrative discretion to withhold allotments, the Fourth Circuit was not required to accept, nor should it have accepted, that determination. The question of whether the Administrator is required to allot all authorized funds clearly is not a question of fact, which the courts are not competent to review. See K. Davis, Administrative Law Text § 30.03, at 548 (3d ed. 1972). Rather, it is a question of law: it concerns the scope of legal responsibility imposed on the Administrator by an act of Congress. Moreover, the district court treated the allotment issue as a question of law, and reviewed statutory intent in reaching its decision. See 361 F. Supp. 697-99. Since the Fourth Circuit did not criticize the district court's methodology, it tacitly approved the lower court's conclusion that a question of law was at issue.

Nonetheless, instead of addressing the issue, the Fourth Circuit turned to another accepted method of judicially approving an administrative agency decision: the court suggested the existence of a "rational basis" to support the Administrator's judgment. See note 143 and accompanying text infra. See also Davis, supra § 30.04, at 549-51. In so doing the court failed to review the district court's interpretation of the legal duty created by a federal law; certainly the litigants' agreement with the district court should not have foreclosed such review, as the Fourth Circuit seemed to imply. See 489 F.2d at 497. Furthermore, in looking to the rational basis test to evaluate the propriety of the Administrator's action, the court presumed an answer to the question it should have first considered. Put another way, by directing its attention to a variety of bases on which the Administrator's actions might be sustained, see 489 F.2d at 499-501, the court ignored the threshold legal question of whether the Administrator had been delegated authority to refuse to allot all available funding in the first place. The Fourth Circuit's opinion seems clearly at odds with the Supreme Court's most recent pronouncement concerning the proper scope of judicial review when administrative agency decisions are at issue:

The court is first required to decide whether the Secretary acted within the scope of his authority. This determination naturally begins with a delineation of the scope of the Secretary's authority and discretion. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971) (citations omitted). Only after the reviewing court has made this initial determination should it proceed to the question on which the Fourth Circuit focused: whether an administrative decision was arbitrary and capricious, or otherwise not in accordance with law. Id. at 416. Of course an appellate court normally does not review sua sponte an issue not raised on appeal. But where a case involves the proper interpretation of a federal statute having a broad impact on the ability of local governments to allocate their scarce construction revenues, the public interest would seem to compel a definitive resolution of a question of law.

140. Before reaching the abuse-of-discretion issue, the court concluded that the Administrator's exercise of that discretion was, in fact, amenable to judicial review. 489 F.2d at 497-99. The court noted that the Administrative Procedure Act, 5 U.S.C. § 701 (1970), supported its refusal to adopt the "'view that the [legislative] act of committing a matter to an agency's discretion forecloses court consideration of an alleged abuse of that discretion.'" 489 F.2d at 498, quoting from Overseas Media Corp. v. McNamara, 385 F.2d 308, 316 n.14 (D.C. Cir. 1967). Finally, the court reasoned that a question of whether an agency is exercising its asserted discretionary power "in a manner consistent with the legislative purpose and . . . the constitutional principle of separation of powers," is reviewable and is not itself committed to agency discretion. Id.

141. 489 F.2d at 501.
Circuit recognized that when the executive exercises discretionary appropriation authority "in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals," judicial intervention is appropriate. But this observation only raises the same question that the district court in *Campaign Clean Water, Inc. v. Ruckelshaus* did not adequately answer: When the executive concededly is not required to release all appropriated funds, at what point does the impoundment of those funds controvert congressional intention? Put another way, how can the executive be prevented from exercising such discretionary spending authority to substitute its policy priorities for those of Congress? Perhaps the Fourth Circuit should be credited for its willingness to at least approach this troublesome issue. Unfortunatel-

According to the Fourth Circuit, the fatal defect in the district court opinion was that it had failed to consider the President's order to allot only 55 percent of authorized pollution control funds "in conjunction with the explanation given by the Administrator [of the EPA] both in his presentation to this Court and in his Congressional appearances." The explanation to which the court referred related to the existing need and capability of the states to spend, or obligate, pollution control funds. In premising its opinion on the district court's failure to consider this sort of evidence, the Fourth Circuit

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142. *Id.* at 498.
143. *Id.* at 499.
144. Specifically, the court was impressed by the Administrator's claim that there had been "no denial of any qualified project in either fiscal year 1973 or fiscal year 1974." *489 F.2d* at 500. The fact that plaintiff had not contradicted the Administrator's declaration that "no qualified project for the Commonwealth of Virginia" had been denied contract authorization also was persuasive to the court. *Id.* But as the text of this note suggests, the existence of "qualified projects" should not be germane to the question of whether all authorized pollution control funds should be allotted among the states. Therefore the Administrator's assertions, as well as the plaintiff's failure to contradict those assertions, should have been irrelevant. Similarly, the court should have recognized that, with regard to allotment, additional considerations raised by the Administrator were irrelevant: whether authorizations could be spent "in a wise or expeditious manner"; whether sufficient "technical capacity" then existed to carry on a more extensive program; and the rate of inflation within the construction industry as compared to the cost of living. *Id.* at 499-500. While these factors might be considered by the Administrator in determining whether to obligate previously allotted funds, *but see* note 122 *supra*, they should not be determinative of the appropriate amount of allotment. *See* discussion pp. 588-89 *infra.*
failed to make the critical distinction between the allotment and obligation phases of the appropriations process. While the existing capability of the states actually to utilize federal funds might be a relevant consideration when the obligation of funds is at issue, both the purpose and structure of the 1972 Amendments indicate that such considerations are extraneous to the question of whether authorized funds have been allotted as Congress intended.

To reiterate, the expressed purpose of a "contract authority" appropriations process, with separate and distinct allotment and obligation procedures, is to facilitate long-term planning on the part of the states. Even accepting the proposition that allotment pursuant to the 1972 Amendments is not mandatory, the planning objective of the pre-obligation allotment procedure would be totally frustrated if, before allotment occurs, states were required to demonstrate existing capacity to utilize federal funds immediately. The Fourth Circuit's reasoning seems to reverse the statutory procedure: rather than require the allotment of all available funds, based upon which the states could then plan their sewer construction programs, the court apparently would require that the states plan and initiate construction projects before the EPA even must allot—let alone obligate—federal funds authorized for appropriation. Moreover, since the court willingly accepts the proposition that allotment is discretionary, should a state actually proceed with construction in hope of demonstrating a need for allotment, the Administrator presumably still could refuse to allot on some alternative ground. If the court's interpretation is correct, it is questionable whether such a statutory scheme would create much incentive for states to implement sewage treatment plans.

145. Even when he determines whether to oblige previously allotted funds, however, it is not clear that the Administrator may take into account extrinsic factors, such as the rate of inflation, not specifically mentioned in the Amendments. See note 122 supra.
146. See note 86 and accompanying text supra.
147. See notes 105-12 and accompanying text supra.
148. In addition to the paramount objective of facilitating long-term planning, the legislative history of the 1972 Amendments reflects a congressional concern that federal credibility be established with respect to the Government's commitment to pollution control: "'At a bare minimum the credibility of the existing federal commitment must be re-established by backing words of authorization with monies of appropriation. . . . A change in federal grant policy to establish a reliable commitment is vital . . . ." City of New York v. Train, 494 F.2d 1033, 1040 (D.C. Cir.), cert. granted, 94 S. Ct. 1991 (1974), quoting from Hearings on Water Pollution Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Pub. Works, 92d Cong., 1st Sess., ser. 49, pt. 1 (1971). Federal credibility is not likely to be enhanced if, before federal funds even are allotted, the states must demonstrate existing need.
149. The court alluded to a variety of considerations, in addition to lack of existing need, that might justify the Administrator's refusal to allot all authorized funds. See note 144 supra.
Aside from the Fourth Circuit's disinclination to consider the purpose of the 1972 Amendments, the court can be faulted for its failure to review the structure of the legislation in reaching its decision. One obvious question not answered by the opinion is why, if the Administrator enjoys discretion to withhold allotments, the Amendments include separate sections enumerating factors that the Administrator should consider in determining whether to obligate previously allotted funds. The court suggests that the Administrator need only demonstrate a sort of "rational basis" for his action in order to properly refuse to allot. If the court is correct an enumeration of criteria to guide the Administrator in controlling obligation seems superfluous. Spending could more easily be controlled in the first instance, simply by refusing to allot.

Additionally, section 205 of the Amendments directs that sums authorized for appropriation "shall be allotted. . . not later than the January 1st immediately preceding the beginning of the fiscal year.

150. See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, §§ 203-04, 86 Stat. 816. Section 205 of the Amendments directs that in determining whether to obligate previously allotted funds the Administrator should consider the plans, specifications and estimated costs of a state's proposed projects. The Amendments do not specifically delineate what constitutes a plan worthy of approval, which gives rise to the unresolved issue of whether the Administrator may consider extraneous matters, such as the rate of inflation, in approving state plans. See note 122 supra. The approval of a plan under § 203(a) is the equivalent of obligation of the necessary federal funds. Section 204 provides additional factors, in the form of "limitations and conditions," which the Administrator is to consider before approving the obligation of funding for any plan; for example, § 204(a)(5) requires that the size and capacity of a project relate directly to need to be served by the project, including sufficient reserve capacity.

151. 489 F.2d at 501: "After all, there is a presumption of legality that attaches ordinarily to an administrator's action and the burden of establishing impropriety rests on him who challenges."

152. In defense of the Fourth Circuit one might argue that the statutory scheme prescribed by the Amendments dictates that the Administrator consider the factors enumerated in §§ 204-05, see note 150 supra, only after he determines, in his discretion, what amount of available funding to allot. Thus it would not be superfluous to prescribe a discretionary allotment process in addition to a discretionary obligation procedure: the latter might be viewed only as an additional "check" to ensure that funds are not unwisely or unnecessarily obligated. But such an interpretation would be difficult to sustain in the face of the emphatic view of Congressman Harsha, the floor manager of the 1972 Amendments in the House, and a member of the conference committee that finalized the language of that legislation. Harsha declared: "I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. This is the pacing item in the expenditure of funds." 118 Cong. Rec. H 10,268 (daily ed. October 18, 1972). Section 205(a) of the Amendments provides that the approval of plans, specifications and estimates occurs after funds have already been allotted and states have submitted applications for federal aid based upon those allotments. Since Congressman Harsha stipulated that approval of those applications would be "the pacing item," it is unlikely that Congress intended the allotment process to be utilized to pace expenditures as well.
for which authorized . . ."

This language, on its face, appears to reflect congressional intention that authorized sums shall be allotted once yearly, before the respective fiscal years begin, and not, as the Nixon Administration argues, as the need for allotments develops throughout the year. Nonetheless, the Fourth Circuit was "strongly persuaded" that section 205 provides only an initial date at which sums then needed might be allotted, with additional allotments to occur during the course of the fiscal year as the Administrator should determine the need to exist. Again, this construction seems inconsistent with the structure of the Amendments. No provision is made for the disposition of sums not allotted by the first of January preceding each successive fiscal year. Surely Congress would have devised some procedure in the Amendments to handle authorized funds left unallotted if it had intended that portions of funds available for allotment could be withheld. The existence of such a procedure relating to funds allotted but unobligated reinforces this conclusion.

The Campaign Clean Water opinion is open to criticism in still other respects. What the court implies were conclusions of the Administrator, justifying his withholding of allotments, actually were the expressions of third parties not involved in the litigation. More-


154. In defense of its position, the Administration offers the following: [W]hile a literal reading of [section 205] might suggest that no funds may be allotted after the statutory time limits [i.e., after the January 1st preceding each fiscal year], [we] do not believe that such a reading would be truly reflective of Congressional intention. [We] interpret the . . . statutory language to mean that the President's best judgment under circumstances prevailing at the time as to the amounts that may be prudently allotted should be exercised by the statutory time limits.

1973 Hearings 841.

155. The court offered no rationale for its inclination to interpret the statutory directive that sums shall be allotted "not later than" January 1st to mean such sums can indeed be allotted later than January 1st.

156. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 205(b)(1), 86 Stat. 816, provides: "Any amounts . . . allotted which are not obligated by the end of [each] one-year period shall be immediately reallocated by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section."

157. The court misrepresented the testimony of the Administrator given before the Senate ad hoc Subcommittee on Impoundment of Funds on February 6, 1973. The court first noted that the Administrator's refusal to fully allot authorized funds was based on his judgment that greater authorizations "could not be spent 'in a wise or expeditious manner.' " 489 F.2d at 499 (footnote omitted). The court then continued: This judgment was based, in turn, he [the Administrator] testified, on a conclusion that "there was not sufficient technical capacity, technical capability, I think it was, or contractual capacity" to carry out a greater or more extensive program. In reaching that conclusion, he had taken note, according to his testimony, that
over, the court’s assertion that the Antideficiency Act would authorize the Administrator’s action seems unsupportable on closer examination. Finally, if the reasoning of the Fourth Circuit is approved by the Supreme Court during its 1974 term, and if any of the tenuous justifications suggested by the court are held to be sufficient to sustain the Administrator’s action, the EPA would seem to enjoy

there were already available other contract authorizations for the same purposes . . . which . . . meant that “there was $7.25 billion released on the 27th of November [1973] to be spent over the next 18 months” in meeting the goals of the program.

Id. (footnotes omitted). The quoted passage above, referring to “technical capacity,” was not the statement of the Administrator before the Subcommittee, but the statement of Senator Chiles, paraphrasing what former White House counselor John Ehrlichman “was reported” to have said. 1973 Hearings 416. Ehrlichman’s attitude toward the Amendments, and hence the value his interpretation should be accorded, is reflected in the additional comment, not quoted by the court, that “you just can’t correct pollution by pasting dollars on trees.” Id. Moreover, Ehrlichman apparently was only repeating the view of the President. See id. In short, what the court implied was the statement of the Administrator was in reality the statement of Senator Chiles, who was paraphrasing John Ehrlichman, who was paraphrasing the President. The court did attempt to maintain literal accuracy by referring to “a conclusion” rather than “his conclusion.” The following sentence, however, includes an obvious representation that the statement had been made by the Administrator (“In reaching that conclusion, he had taken note . . .”). In fact, the Administrator admitted to the Subcommittee that he had not even seen the statement to which Senator Chiles referred, 1973 Hearings 416, and which the court attributed to him.

The Administrator’s “judgment” that all authorized funds could not be spent “in a wise or expeditious manner” was not, as the court stated, “based on” the passage quoted above. The quotations placed in conjunction by the court were lifted from separate and distinct portions of the Administrator’s testimony. See 1973 Hearings 413, 416. Nor did the Administrator “affirm,” as the court stated, that his decision to withhold allotments was “arrived at” on the basis of his determination that funds could not be spent wisely or expeditiously. See 489 F.2d at 499. The court quoted the Administrator’s “wise or expeditious” language entirely out of context. The Administrator was not attempting to justify his impoundment of pollution control funds; rather, he was offering a general proposition: “As a proposition I think there may be some responsibilities that we have been given by Congress in various areas for which funds are made available, for which it appears that the funds simply can’t be spent in a wise or expeditious manner and in which Congress may agree with us.” 1973 Hearings 413 (emphasis added). Few would disagree with the Administrator’s assertion when it is read in context. It is interesting, however, that an appellate court should upbraid the court below for its failure to consider what in reality are misattributed quotations and statements taken out of context.


159. 489 F.2d at 501. The court concluded that the ADA would empower the Administrator to withhold funds from allotment “‘for reasons of efficiency and economy.’” But the court ignored that provision of the ADA which directs OMB to recommend the rescission of appropriations that it deems unnecessary. See 31 U.S.C. § 665(c)(2) (1970). See also note 44 supra.

160. In remanding the case to the district court, the Fourth Circuit was careful to add that it was not necessarily concluding that its many suggested rationalizations for the Administrator’s action were in fact valid; rather, the district court was to determine whether those rationalizations were relevant “under a proper construction of the discretionary power found to exist in the executive.” 489 F.2d at 501 (footnote
almost blanket authority to determine the level of pollution control
funding that will be allotted among the states.

In *City of New York v. Train* the District of Columbia Circuit
reviewed the district court's decision in *City of New York v. Ruckels-
haus*. It was unnecessary for the appellate court to reach the issue of
whether the Administrator had abused his discretion pursuant to the
1972 Amendments; rather, the court agreed with the district court
that, at the allotment stage, the Administrator possesses no discretion
to abuse. The City conceded, and the court agreed, that the Amend-
ments authorize discretionary action at the obligation phase of the
appropriations process—that the Administrator may control the rate
at which previously allotted funds are obligated. But the court con-
cluded that the Administrator is required to allot among the states
all sums authorized for appropriation by Congress; thus, the District
of Columbia Circuit refused to recognize discretionary authority that
the Fourth Circuit had affirmed. It is this conflict that the Supreme
Court has agreed to resolve.

The District of Columbia Circuit undertook an exhaustive review
of the language and history of the 1972 Amendments in reaching its
decision. An extensive analysis of congressional intent was necessitated
by the interpretive methodology employed by the court. Unlike various
district courts, the circuit court did not premise its opinion specifical-
ly on the language and congressional discussion of sections 205 and
207 (the allotment and authorization provisions). Instead, the court
looked to the stated purposes of the 1972 Amendments in their en-
tirety and found that "it was Congress' intention that the full 18

omitted). Nonetheless, it is apparent from its opinion that the Fourth Circuit would
accept several, if not all, of the conceivable arguments in defense of the Administrator's
position. The existing need of the states for federal funds is, according to the court, "a
matter that might well be considered" in determining whether the Administrator had
exceeded his discretion. 489 F.2d at 500; see notes 143-49 and accompanying text supra.
Additionally, the court was "strongly persuaded" that the Administrator is not required
to allot all authorized funds by January 1st of each fiscal year. 489 F.2d at 501. In short,
the Fourth Circuit in *Campaign Clean Water* does significantly more than "suggest" what
factors the district court might consider on remand.

162. Id. at 1043, 1044.
163. Id. at 1050.
164. This is not to suggest that the Supreme Court actually will reach the specific
issue on which the Fourth Circuit and District of Columbia Circuit divided. It is con-
ceivable, though not likely, that the Court will resolve the issue on procedural grounds.
See pp. 598-607 infra.
165. Most district courts have directed their primary attention to the more narrow
issue of the language of §§ 205 and 207, and to congressional debate specifically relating
to that language. See notes 115-33 and accompanying text supra.
166. Sections 205 and 207 of the Amendments are quoted at pp. 576-77 supra.
billion dollars be spent to control water pollution. ” Having made that initial determination, the court proceeded to consider the allotment issue on the premise that “if discretion in allotment would make the achievement of this goal [i.e., the expenditure of $18 billion] more difficult, it must be assumed that Congress intended no such authorization.” Viewed within this framework, the court's rejection of the Administrator's claim of discretion to withhold allotments seemed a foregone conclusion. Indeed, the court's further analysis of statutory language only confirmed what approached an initial assumption that the spending objectives of the Amendments necessitate the allotment of all authorized funds.

From an analytical viewpoint, the City of New York opinion provides a coherent and sensible reading of the Water Pollution Control Act Amendments. The court does not entirely avoid the need to consider, if not divine, the intent reflected in the unexplained alterations in statutory language; the opinion does, however, minimize the influence of arguably contradictory assertions of legislators by looking to the philosophy and objectives of the Amendments for primary guidance. Given the ambiguity and complexity of the statutory language, this was the court's only realistic alternative.

But the court's reading of legislative objectives, on which it based the conclusion that allotment is mandatory, is not beyond question. While there is support for the court's finding that Congress intended to spend a full 18 billion dollars to combat pollution, several con-

167. 494 F.2d at 1042 (emphasis added).
168. Id.
169. See id. at 1042-46.
170. The court noted that there was "no precise explanation" for the removal of the word "all" before the phrase "sums authorized . . . shall be allotted" in § 205(a). 494 F.2d at 1043. Congressman Harsha stated that this semantic change was intended to "emphasize" the President's control over the rate of spending. 118 Cong. Rec. H 10,268 (daily ed. October 18, 1972). It has been suggested that Harsha's use of the word "emphasize" reflects his intent not to make a substantive change in the legislation, i.e., not to confer discretion (over allotments) where none originally had been conferred. See Brief of Appellee at 29, Florida v. Train, appeal docketed, No. 74-790, 5th Cir., April 3, 1974. On the other hand, at least two courts have concluded that the elimination of the word "all" was intended to substantively alter § 205, and to provide the Administrator with discretionary authority over allotments. See Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689, 698-99 (E.D. Va.), remanded with directions sub nom. Campaign Clean Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973), cert. granted, 94 S. Ct. 1991 (1974); Brown v. Ruckelshaus, 364 F. Supp. 258, 269 (C.D. Cal. 1973).
171. 494 F.2d at 1039: "Initially, it is to be noted that a 'plain meaning' analysis will not suffice here." See also note 102 and accompanying text supra.
172. E.g., "The [House-Senate conference committee] agreed in the end that a total of $18 billion had to be committed by the Federal Government . . . during fiscal years 1973-75." 494 F.2d at 1040, quoting from 118 Cong. Rec. S 16,870-71 (daily ed. October 4, 1972) (emphasis added by court). See also sources quoted in 494 F.2d at 1040-
gressmen appeared unwilling to accept that conclusion. Almost immediately after stating that Congressman Harsha "clearly intended to obligate the entire $18 billion," the court quotes several remarks which seem to indicate that Harsha, the House sponsor of the bill, entertained no such intention. At another point the court seems to contradict, or at least limit, its own finding that Congress intended to spend the authorized funds in their entirety: "We express no opinion as to whether or to what extent the Administrator could legally withhold funds at the obligation stage . . . ." In short, while the court was on firm theoretical ground in depending upon congressional spending objectives to guide its construction of the Amendments, it is not clear that the court's interpretation of those objectives was correct.

Rather than premise its analysis on the questionable presumption that Congress intended full expenditure of all authorized funding, the circuit court might have relied primarily upon the unique structure of the 1972 Amendments in reaching its decision. Ironically, the court at the very outset of its opinion sets forth the most plausible basis for its conclusion that allotment is intended to be a mandatory function:

The Act revised the procedures for funding federal aid to local governments for the purpose of the construction of sewage treatment plants. Prior to the Act's passage, these expenditures were first authorized and then specifically funded by the normal Congressional appropriation process. Due to the nature of this process, local

42. Several of the passages from congressional debate relied upon by the court, however, are somewhat suspect because of their rhetorical nature. E.g., "The question is not, 'Can we afford to spend $18 billion over the next three years for waste treatment plants?' but 'can we afford not to?' " Id. at 1042, quoting from 118 CONG. REC. H 10,268-69 (daily ed. October 18, 1972) (emphasis added by court).
173. 494 F.2d at 1044.
   " . . .
   "As I understand the comments of [Mr. Harsha] the inclusion of the words in section 207 in three instances of 'not to exceed' indicates that it is a limitation. More importantly that it is not a mandatory requirement that in 1 year . . . there would be $5 billion and the next year . . . $6 billion and a third year . . . $7 billion [i.e., $18 billion] obligation or expenditure?"
   "Mr. Harsha.
   "I do not see how reasonable minds could come to any other conclusion [than] that the language means we can obligate or expend up to that sum—anything up to that sum but not to exceed that amount."
494 F.2d at 1044, quoting from 118 CONG. REC. H 9123 (daily ed. October 18, 1972) (emphasis added by court).
175. 494 F.2d at 1049 n.36. The court perhaps intended some distinction between its use of the term "obligation" here, as opposed to its earlier finding that the full $18 billion "be spent." See pp. 592-93 supra. But there is no meaningful difference between the terms: once funds are obligated they effectively are "spent."
governmental recipients could not ascertain the exact amount they would receive until after the formal appropriation. As a result, local governments were hesitant to enter construction contracts with only a hope that federal monies would be ultimately passed to them. The Act was passed to insure that ultimate grantees could rely in advance on the amounts available.\textsuperscript{176}

If Congress deviated from the "normal appropriation process" in order to implement a procedure that would encourage and permit local planning, it is only logical to interpret that procedure in a manner that will in fact facilitate planning. And since discretionary allotment of authorized funds would inhibit, if not frustrate, local planning, allotment properly should be considered mandatory—a ministerial duty imposed upon the Administrator.\textsuperscript{177} Curiously, after raising this issue, the City of New York court does not again allude to it. In a sense, then, the court looked to the wrong congressional objective for support. The court should have looked to Congress' intent in structuring the Amendments as it did, rather than intent with respect to the ultimate level of spending authorized by the legislation. Of course, the court would have reached the identical conclusion, but its rationale would have seemed more defensible.

\textbf{C. Summary}

The foregoing discussion has emphasized the point that the "contract authority" framework of the Federal Water Pollution Control Act Amendments makes no sense if the Administrator of the EPA is authorized at the allotment stage to impound funds designated for appropriation by Congress. Most district courts, as well as the District of Columbia Circuit, have concluded that full allotment is mandatory. But those courts have devoted their attention to the language and history of the 1972 Amendments to the Act. Because of the ambiguities in and complexity of that language and history, it would be more appropriate for the Supreme Court to focus on the planning objectives behind the contract authority scheme when it considers the issue this term. If the legislative intent evinced by that scheme is accorded the significance it deserves, the duty to allot all authorized funds should be deemed mandatory.

This review of court decisions concerning impoundment of pollution control funds was preceded by a general discussion of whether Congress is constitutionally empowered to mandate expenditure of

\textsuperscript{176} 494 F.2d at 1036-37.
\textsuperscript{177} See notes 105-12 and accompanying text \textit{supra}.
appropriations. This issue has not been addressed by any court that has considered the impoundment of pollution control funds, or by any court that has reviewed impoundments in other areas.\textsuperscript{178} Nor is it likely that any court will confront the issue, in view of the judiciary's disinclination to consider a constitutional question when alternative decisional grounds—such as statutory interpretation—are available.\textsuperscript{179} But even if Congress cannot mandate expenditure, the courts' efforts to divine legislative intent when impoundment is at issue suggest that Congress can limit executive spending discretion so strictly that the President often will have little choice but to spend.\textsuperscript{180} Judicial intervention will be available to require the observation of those limits. Perhaps the courts have recognized the "informal veto" potential\textsuperscript{181} of an unreviewable executive power to withhold authorized funding. More importantly, however, by resolving impoundment disputes through statutory rather than constitutional interpretation, the courts have avoided "political question" obstacles to review of an issue infused with separation of powers overtones. Thus, the most critical element of the Administration's effort to establish uncontested impoundment authority also has been rejected.

V. PROCEDURAL ISSUES

In defending its impoundment practices before the courts, the Administration has steadfastly maintained that a presidential decision to impound appropriated funds raises a nonjusticiable "political ques-

\textsuperscript{178} But see State Highway Comm'n v. Volpe, 479 F.2d 1099, 1122 (8th Cir. 1973) (Stephenson, J., dissenting).

\textsuperscript{179} See Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

\textsuperscript{180} At least one court in a pollution control act decision concluded that the President may withhold funds only pursuant to the criteria established by Congress. See Minnesota v. EPA, No. 4-73 Civ. 133, at 11 (D. Minn. June 25, 1973), appeal docketed, No. 73-1446, 8th Cir., July 12, 1973 ("[N]owhere in the statute does Congress provide that the Administrator may consider matters such as the shape of the national economy in carrying out this program."). Other courts have reached similar conclusions. See, e.g., State Highway Comm'n v. Volpe, 479 F.2d 1099, 1109 (8th Cir. 1973), stating:

[Although a general appropriation act may be viewed as not providing a specific mandate to expend all of the funds appropriated, this does not a fortiori endow the Secretary with the authority to use unfettered discretion as to when and how the monies may be used. The Act circumscribes that discretion and only an analysis of the statute itself can dictate the latitude of the questioned discretion. (Citations omitted.) See also Fisher, Court Cases on Impoundment of Funds: A Summary and Analysis 49-54, August 22, 1973 (Congressional Research Service).

\textsuperscript{181} See note 65 supra.
tion" and that a suit instituted to secure the release of those funds is barred by the doctrine of sovereign immunity. The respective defendant-EPA Administrators also have challenged the standing of various plaintiffs seeking the allotment of pollution control act funds; only once has that challenge been sustained, however, and the court’s reasoning in that instance was not entirely convincing.


183. 361 F. Supp. at 694; 358 F. Supp. at 673.

184. See, e.g., 361 F. Supp. at 692-93.

185. In Brown v. Ruckelshaus, 364 F. Supp. 258 (C.D. Cal. 1973), Judge Hauk concluded that neither Congressman George E. Brown, Jr. (on behalf of himself and all other California citizens and residents), nor the City of Los Angeles, had shown “that any act of the President or the EPA [had] hurt, is injuring, or will impair” the activities of either of them. Id. at 264. He correctly noted that in all the previous suits brought to compel the allotment of funds pursuant to the 1972 Amendments, plaintiffs had submitted affidavits documenting the imminent injury they would sustain if relief were not granted. See, e.g., Minnesota v. EPA, No. 4-73 Civ. 133 (D. Minn. June 25, 1973), appeal docketed, No. 73-1446, 8th Cir., July 12, 1973. Judge Hauk reasoned that without such affidavits neither plaintiff had “alleged such a personal stake in the outcome of the controversy as to assure that ‘concrete adverseness which ripens the presentation of issues upon which the court so largely depends . . . . ’” 364 F. Supp. at 264, quoting from Baker v. Carr, 369 U.S. 186, 204 (1962).

In reaching his decision to dismiss, however, Judge Hauk failed to consider both the nature of the relief sought by plaintiffs, and the intent of the Federal Water Pollution Control Act Amendments of 1972. As did the Fourth Circuit in Campaign Clean Water, Inc. v. Train, see notes 144-45 and accompanying text supra, Judge Hauk ignored the specific reason for Congress’ enactment of a “contract authority” appropriation process, with separate allotment and obligation phases. See notes 105-12 and accompanying text supra. Plaintiffs seeking only the allotment of authorized funds, as were the plaintiffs in Brown, should not be required to allege that “proposals have been rejected because of frozen funds,” as Judge Hauk concluded. See 364 F. Supp. at 264. Rather, the only requirement for standing should be an allegation that the Administrator’s failure to allot is disrupting the local government’s ability to formulate long-term plans for the construction of sewage treatment facilities. Such an allegation should satisfy the test for standing announced by the United States Supreme Court in Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970). The plaintiff has been caused “injury in fact, economic or otherwise,” id. at 152, since the plaintiff has been denied the present opportunity to allocate efficiently its scarce revenues in preparation for construction projects. Moreover, “the interest sought to be protected” in suits challenging the impoundment of pollution control act allotments “is arguably within the zone of interests to be protected . . . by the statute . . . in question.” Id. at 153. The “contract authority” procedure is expressly designed to sustain the local interest in long-term planning; that specific interest is thwarted when allotments are withheld at the Administrator’s pleasure. In sum, the Brown court should have approached the standing issue in a more liberal and farsighted fashion. While the court might have required an affidavit from the City of Los Angeles claiming that its ability to plan sewage construction projects had been impaired, the court should not have required a showing that actual proposals had been rejected because of frozen funds. The latter
The Administration's persistence in raising these jurisdictional objections implies that it is perhaps less confident of its legal position than President Nixon's broad declaration of an "absolutely clear" constitutional right to impound would suggest. Rather, it appears that a critical element in the Administration's efforts to establish a recognized right to impound is the necessity to insulate the assertion of that right from judicial consideration. This analysis of the Administration's position is apparently confirmed by the remarks of Deputy Attorney General Sneed to the effect that, even if alleged statutory justifications for impoundment were repealed by Congress, leaving only the Constitution for authority, presidential impoundment still would transcend judicial review as a nonjusticiable political "collision" between the executive and legislative branches of government.

A definite advantage would accrue to the Administration should the courts accept Sneed's contention: the impoundment controversy then would be resolved on the political battlefield. And, with the President on the side of "budget trimming," American voters would be likely to view his position as the more palatable one. The courts, however, have been largely unimpressed by the Administration's claim that jurisdictional obstacles bar the judiciary from entertaining suits challenging the impoundment of funds.

A. Sovereign Immunity

The Administration cites two United States Supreme Court decisions, Land v. Dollar and Larson v. Domestic & Foreign Corp., in support of its argument that the doctrine of sovereign immunity bars plaintiffs from initiating suits challenging impoundment in the federal courts. Land established the principle that "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration . . . the suit is one against the
sovereign," and therefore must be dismissed. In *Larson* the Court dismissed a suit brought by a private corporation against the War Assets Administration, concluding that a suit challenges the sovereign if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." *Larson*, however, could just as easily be invoked to sanction the filing of an impoundment suit, as the Court also reasoned that, should a plaintiff allege that a government official has acted either unconstitutionally or beyond the scope of his statutory authority, the suit need not be dismissed. Impoundment suits commonly have included allegations that a particular executive official or administrator has acted beyond his statutory discretion in withholding appropriated funds.

Moreover, the judgment sought by a plaintiff challenging the impoundment of appropriated funds would not "expend itself on" public revenues—the monies sought already have been authorized for appropriation by Congress. The judgment sought by plaintiffs seeking the full allotment of authorized pollution control funding certainly is not vulnerable to the sovereign immunity argument: since allotment is not the equivalent of expenditure, the treasury is in no way affected by the former procedure. Finally, plaintiffs in impoundment suits do not seek to compel the government to act; the government already has acted in authorizing expenditures under the various statutes that have been at issue. The courts therefore have encountered little difficulty in recognizing the frailty of the Administration's sovereign immunity defense.

192. 330 U.S. at 738.
193. 337 U.S. at 704.
194. Id. at 689-90.
In defense of its impoundment practices, the Administration has invoked two elements of the "political question" doctrine as articulated by Justice Brennan in *Baker v. Carr.* First, the Administration has urged that the grant of "executive power" in article II, section 1, of the Constitution comes "very close" to a "textually demonstrable commitment" of spending authority to the President. Secondly, it is argued that no "judicially discoverable and manageable standards" are available for determining whether particular expenditures of federal funds are appropriate. The former assertion clearly is open to question. If the President is empowered to control federal spending by virtue of article II, section 1, it is only through an extremely generous reading of that clause, hardly amounting to a "textually demonstrable commitment." Arguably, the control of federal spending is more "demonstrably committed" to Congress by virtue of article I, section 7, and where the executive branch has infringed upon legislative prerogatives, *Youngstown Sheet & Tube Co. v. Sawyer* suggests that judicial intervention is available. Moreover, even when a specific duty or responsibility has been demonstrably committed to a

199. 369 U.S. 186 (1962). In delineating the possible bases of a political question, Justice Brennan remarked:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

200. U.S. CONST. art. II, § 1: "The executive Power shall be vested in a President of the United States of America."


202. *Id.*


204. 343 U.S. 579 (1952).

205. The court in *Youngstown Sheet & Tube* carefully circumscribed the article II powers of the President. The controversy that prompted the litigation arose when President Truman seized the nation's steel mills to prevent a strike which he believed would jeopardize the national defense. The President maintained that the "aggregate" of his powers under article II justified his actions, 343 U.S. at 587, but Justice Black, speaking for the Court, found this reasoning unpersuasive. Justice Black first observed that the President's constitutional function in the lawmaking process is limited "to the recommending of laws he thinks wise and the vetoing of laws he thinks bad," *id.,* and
particular governmental branch, *Powell v. McCormack*\(^{206}\) indicates that the judiciary may determine whether an action of that branch exceeds the responsibility committed to it.\(^{207}\)

While the separation of powers principle certainly is infused with political overtones, it does not follow that the courts therefore should shrink from their responsibility to preserve the vitality of that doctrine. When political resolution of an intragovernmental dispute is not realistic, it is essential that the courts fulfill their duty to maintain the independence of the executive and legislative branches of government. Several courts that have entertained suits challenging the impoundment of pollution control funds have acknowledged this unique judicial burden.\(^{208}\) Those courts have placed principal reliance on the District of Columbia Circuit's recent observation: "In our overall pattern of government the judicial branch has the function of requiring

then concluded that the President's seizure order amounted to an attempt to make law, in contravention of the Constitution. *Id.* at 588.

The Court's willingness to adjudicate the respective bounds of executive and legislative power in *Youngstown Sheet & Tube* seems to constitute ample precedent for judicial intervention in the impoundment controversy; the underlying issue—the power to "make law"—is strikingly similar. The Nixon Administration has dismissed the relevance of the *Youngstown Sheet & Tube* precedent, however, on the basis of the remedy available to the Court in that situation. While the Court in *Youngstown Sheet & Tube* simply could strike down the presidential seizure order, "[i]t [is] quite another thing for [a court] to undertake to direct the President with respect to how and in what manner . . . he would spend appropriations." *1973 Hearings* 401 (testimony of J.T. Sneed, Deputy Attorney General). But courts that have heard impoundment cases have avoided this alleged obstacle to judicial review by turning to specific statutory language for guidance. *See* note 215 and accompanying text *infra*. No court has attempted to "supervise" the President.


\(^{207}\) In *Powell* the Supreme Court determined that the House of Representatives' expulsion of the late Congressman Adam Clayton Powell was not insulated from judicial review by the "political question" doctrine. Quoting from *Baker v. Carr*, Chief Justice Warren remarked:

"[D]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." 395 U.S. at 521, quoting from 369 U.S. at 211. One commentator suggests that *Powell* reflects the Court's intent to interpret "carefully and narrowly" any purported "textual commitment." *See* Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1531 (1973).

the executive (or administrative) branch to stay within the limits prescribed by the legislative branch." 209

Serious implications arise from the Administration's claim of unreviewable article II impoundment authority. Presidential responsibility to control federal spending, were it effectively sanctioned through judicial abstention from impoundment disputes, could preclude Congress from establishing national priorities through the appropriations process, and from exercising the authority expressly conferred by article I, section 7.210 Moreover, the unique nature of the impoundment issue seems to dictate the courts' refusal to embrace the Administration's "demonstrable commitment" argument. A court rightfully abstains from judicial review on political question grounds when the matter in controversy can be resolved more appropriately and effectively through the competitive political process. Reference to the most notorious recent issue designated "political" by the courts—the legality of the Vietnam War211—illustrates this point. Aside from other factors militating against judicial intervention in that dispute,212 Congress was adequately equipped, had it so desired, to challenge the President's war policies through its control of the budget. When the issue

210. U.S. CONST. art. I, § 8, which provides, in part:
The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . .
. . .
To establish Post Offices and post Roads;
. . .
To raise and support Armies . . .
To provide and maintain a Navy . . .
211. See, e.g., Massachusetts v. Laird, 451 F.2d 26, 33 (1st Cir. 1971), stating: "As to the power to conduct undeclared hostilities . . . we are inclined to believe that the Constitution . . . committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation." The court did indicate, however, that "[s]hould either branch be opposed to the continuance of hostilities," it might be inclined to a different view. Id. at 34. Were the latter situation to eventuate, the issue would be similar to that raised by executive impoundment: whether one branch had encroached upon the other's constitutional responsibilities. See notes 208-09 and accompanying text supra.
212. Litigation concerning the Vietnam War seemed to constitute a classic example of a "political question," since, in addition to the two elements of the political question doctrine discussed above, the issue arguably involved "an initial policy determination of a kind clearly for nonjudicial discretion"; judicial review might have expressed a "lack of the respect due coordinate branches of government"; there was a potential for "embarrassment from multifarious pronouncements by various departments on one question"; there was, in the view of many, "an unusual need for unquestioning adherence to a political decision already made." Cf. Baker v. Carr, 369 U.S. 186, 217 (1962). On the other hand, none of these additional "political" factors seem to have a significant bearing on the impoundment dispute. See Comment, Presidential Impounding of Funds: The Judicial Response, 40 U. Citi. L. Rev. 328, 344 n.83 (1973).
is executive withholding of appropriated funds, however, the President has seized control of the very weapon—the "power of the purse"—that provides Congress with its competitive coequality. This distinguishing characteristic of the impoundment issue should influence the judiciary to intervene in the conflict.

The second "political factor" that the Administration finds inherent in impoundment disputes—an absence of "judicially discoverable and manageable standards" sufficient to direct the expenditure of appropriated funds—has been rejected by the courts with virtual unanimity. Statutory language, legislative history and declarations of congressional policy generally have enabled the courts to ascertain sufficient "standards" to resolve the narrow question raised by impoundment cases: whether a particular statute or act grants the executive discretion to withhold funding thereunder. The courts, therefore, have not been called upon to assess the manner in which the executive branch has conducted itself; rather, they have been compelled to decide only whether a statute provides administrative discretion or imposes a ministerial duty. Plainly, there is no absence

218. One commentator has summarized the alternatives available to Congress in battling the President over impoundment, and has found those alternatives unacceptable:

> An attempt by Congress to impeach the president might create a constitutional crisis more grave than the present one. If Congress cut off funds for the operation of the executive branch, government services would be impaired and the national interest injured. Congress could refuse to enact programs devised by the president until the impounded funds were spent, but such action might result in the delay of urgently needed programs. Finally, Congress could attempt to pass a bill specifically commanding the expenditure of already appropriated funds. But such a bill would, of course, be subject to veto, and, therefore, a two-thirds vote of each house would be necessary to compel executive compliance with an appropriation previously enacted into law.

Comment, supra note 212, at 345 (footnotes omitted).


215. See, e.g., 479 F.2d at 1111 ("The fundamental issue is whether the Secretary possesses . . . authority to exercise contract controls for the reasons advanced here. Such authority, if it exists at all, must be gleaned from the language of the Act itself."); 358 F. Supp. at 68 ("[P]laintiffs claim that the defendant . . . is in violation of his duties . . . to implement the Economic Opportunity Act. No nonjusticiable political question is presented in this case.").

216. In State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973), the court
of "manageable standards" for determination of whether the Water Pollution Control Act Amendments of 1972 require the allotment of all authorized funding. Resolution of this issue necessitates only declaratory or injunctive relief: a determination by the court that the Amendments either do or do not compel allotment, which in turn is determined by the language and history of the statute itself.217

Even if the duty to allot is deemed discretionary—as the courts in Campaign Clean Water concluded218—review of administrative action should not be precluded for lack of "judicially discoverable and manageable" standards. Rather, a court then should invoke settled principles of administrative law and inquire into the permissible scope of that discretion. Section 701 of the Administrative Procedure Act (APA)219 does make unreviewable (but not on "political question" grounds) agency action "committed to agency discretion." The Administrator of EPA has claimed that his exercise of discretion over allotment of funds is therefore unreviewable.220 But the Supreme Court has indicated that section 701 is a "very narrow exception" to the general rule of reviewability, and is limited to those "rare instances" in which a statute is so broadly drawn that there is no "'law to apply.'"221 The 1972 Amendments do not seem to meet this strict

217. See, e.g., Florida v. Train, No. Civ.-T.D.-73-156, at 4-5 (N.D. Fla. Feb. 4, 1974), appeal docketed, No. 74-1790, 5th Cir., April 3, 1974 ("The Court perceives the issue not to be the power of the executive in spending vis a vis the Congress but to be whether Congress intended that the funds in question must be allotted to the States . . . ."); City of New York v. Ruckelshaus, 358 F. Supp. 669, 675 (D.D.C. 1973), aff'd sub nom. City of New York v. Train, 494 F.2d 1033 (D.C. Cir.), cert. granted, 94 S. Ct. 1991 (1974). ("[T]he Court is being asked by plaintiff to require the Administrator to perform what it alleges to be a purely ministerial duty under the Act, that of allotting . . . the sums authorized to be appropriated in Section 207 of the Act.").

218. See notes 125 & 139 and accompanying text supra.


Moreover, the APA certainly was not intended to commit to agency discretion the question of whether that agency is acting consistently with congressional intention; such a delegation, perhaps in itself unconstitutional, would preclude any meaningful oversight of administrative activity. Therefore, judicial review of the Administrator's refusal to allot pollution control funds should remain available, even if a court reaches the conclusion that allotment is not mandatory.

It is important to distinguish, however, between unreviewable action "committed to agency discretion" and a political question that is unreviewable for lack of "judicially discoverable and manageable standards." When the former issue arises, the threshold determination should be whether the legislature intended to commit a particular function to agency discretion; with regard to the latter issue, a court need only decide whether it is equipped with sufficient specialized knowledge or expertise to resolve the particular problem. The distinction is a fine one, and easy to misunderstand, as one court did in an early impoundment decision. But the distinction is impor-

222. See, e.g., the explicit criteria for guiding administrative discretion in Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, §§ 203, 204, 86 Stat. 816. See also note 150 supra.

223. Accord, 489 F.2d at 498.

224. Cf. K. Davis, Administrative Law Text § 28.05, at 516 (3d ed. 1972): "[W]henever a court . . . holds [that action is committed to agency discretion], a party who thinks that discretion has been abused is denied meaningful judicial check. The natural tendency of courts to cut off review in these circumstances may sometimes mean that injustice remains uncorrected."

225. See notes 105-12 and accompanying text supra, arguing that allotment should be considered mandatory.

226. According to Professor Davis, this is the common practice. See Davis, supra note 224, § 28.05, at 515. In the absence of clear legislative intent, Davis suggests that the courts themselves determine what issues are appropriate for judicial review. This latter determination, of course, would be essentially the same as the political question inquiry: the court would be required to consider its own capability to review esoteric or highly technical fact issues. See Davis, supra § 28.05, at 515-18. However, the legislative intent of the Water Pollution Control Act, with its emphasis on facilitation of long-term planning, belies any suggestion of an intent to commit funding thereunder to unreviewable agency discretion. See notes 105-12 and accompanying text supra.

227. Housing Authority v. HUD, 340 F. Supp. 654 (N.D. Cal. 1972). Plaintiffs challenged the Department's refusal to release $150 million for various urban renewal projects authorized by Pub. L. No. 91-609, amending Housing Act of 1937, 42 U.S.C. §§ 1401-35 (1970). In a somewhat curious opinion, the court determined that since full expenditure of the funds was not mandatory, and, since there was no indication of the level of funding that Congress did intend to require, the case raised a nonjusticiable political question (lack of "judicially discoverable standards"). See 340 F. Supp. at 656-57. While the court's reading of the statute probably was correct, the decision itself seems shortsighted. The court did not suggest that spending in this instance was unreviewable as action "committed to agency discretion" under the APA. See 5 U.S.C. § 701 (1970). Therefore, the court should have directed HUD to set forth reasons justifying its with-
tant. The "committed to agency discretion" exception should occur only rarely; if sufficient standards are not available for a court to evaluate agency action, the court should remand the case and require the agency to provide support for the action it has taken.228 With this procedure available, it is unnecessary for a court simply to dismiss a challenge to agency action for lack of "discoverable standards" for resolving the issue. Invocation of the political question doctrine in the same situation to foreclose review would not encourage administrative agencies to act responsibly or as intended, since a judicial check on agency action would be unavailable. Moreover, frequent "political question" abstention would encourage Congress to draw strictly circumscribed delegations of agency authority which, while facilitating judicial review, might frustrate administrative flexibility and economic efficiency.229

To summarize, the courts so far have agreed that executive impoundment of appropriated funds presents an issue of statutory construction, and that, when confronted with an impoundment suit, inquiry into the constitutional dimensions of presidential and legislative spending authority is unnecessary.230 This statutory construction approach to the controversy has enabled the courts to avoid grappling with issues truly "political" in the constitutional sense. Justice Brennan emphasized in Baker v. Carr that he was advocating judicial abstention from political questions, not political cases: "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."231 Of course, politics and intragovernmental conflict play a continuing role in the impoundment controversy, but the issue as presented to the courts has not as yet satisfied any of the traditional political question criteria.

holding of funds, as did the court in Campaign Clean Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973). See note 141 and accompanying text supra. This is also the procedure recommended by Davis, supra note 224, § 2.08, at 45. To rule, as did the Housing Authority court, that the litigation raised an unreviewable political question is to foreclose all future judicial scrutiny of the Department’s action. Arguably, then, the Department could refuse to spend any of the authorized $150 million and escape judicial discipline. In essence, the Housing Authority rationale leaves Congress with two unpalatable alternatives: to draw a statute so narrowly that the exercise of administrative flexibility is precluded or to allow the President, with judicial review unavailable, to "veto" legislation through impoundment. See note 213 supra.

229. Moreover, strictly drawn delineations of agency authority would contravene the intent and spirit of the Antideficiency Act. See note 44 supra.
230. Several courts have, however, considered tangentially the constitutional implications of impoundment. See note 43 supra.
The commentators have been proven incorrect in their prognoses that the impoundment issue would never reach the courts; their conjectures have been corroborated, however, to the extent that no court has passed on the legality of impoundment per se. The Administration therefore can continue to withhold appropriated funds, rightfully maintaining that impoundment has not been declared unconstitutional or even generally impermissible. But the statutory context in which the courts have viewed impoundment disputes indicates that the Administration's hopes of keeping the issue entirely unresolved, through the political question barrier, are not likely to be realized.

VI. CONCLUSION: THE LEGISLATIVE RESPONSE

Although executive impoundment of appropriated funds appears only to raise the question of whether Congress is empowered to require the President to release federal revenues, the judiciary has framed the issue differently. The question that the courts have answered is not whether Congress can force the President to spend, but whether it can so limit executive spending discretion as to ensure


233. While the Nixon Administration has suggested that it will impound appropriated funds less frequently, the President has made clear his intent to continue his refusal to allot pollution control funds, still claiming that this is not "impoundment." See notes 10 & 90 supra. Semantics may be immaterial, however, after the Supreme Court rules on the issue during its 1974 term.

234. In City of New York v. Train, 494 F.2d 1033 (D.C. Cir.), cert. granted, 94 S. Ct. 1991 (1974), the Administration did not even appeal the "political question" issue. Perhaps that argument has been abandoned in the face of growing judicial impatience—particularly in the District of Columbia where many impoundment suits are initiated:

It is time this litany [political question] was displaced by a modicum of common sense. When Congress directs that money be spent and the President . . . declines to permit the spending, the resulting conflict is not political. The President . . . believes he has the power . . . to refuse to spend at his discretion. Yet he is charged by the Constitution faithfully to execute the laws. If the President is in all good faith mistaken as to the meaning and effect of the law . . . what is more normal and consistent with our American system of government than for the courts to interpret the law and thus resolve the apparent conflict . . .

. . . To say that the Constitution forecloses judicial scrutiny in these circumstances is to urge that the Executive alone can decide what is best . . . These cases should move to higher courts for prompt, definitive determination shorn of the confusing inconsequential defenses so typical of Government legalese these days. National Council of Community Mental Health Centers, Inc v, Weinberger, 361 F. Supp. 897, 900-01 (D.D.C. 1973).
that presidential priorities will not be substituted for congressional initiatives.\textsuperscript{235} Thus, the determinative question recurring throughout impoundment litigation has been, "Is the executive branch in compliance with the terms of the legislation at issue?" In the overwhelming majority of instances the answer has been in the negative.\textsuperscript{236} The courts have approached impoundment disputes in this manner because the legislation in question generally has not reflected an intent to mandate full expenditure;\textsuperscript{237} moreover, this approach has enabled the courts to avoid a thorny constitutional issue involving two coequal branches of government.

Even though no court has specifically held that Congress may require the expenditure of funds, a critical element of the impoundment controversy at least tentatively has been resolved. Central to that controversy is the issue of whether, given the discretionary nature of most appropriations acts,\textsuperscript{238} the President may consider factors other than those intended by Congress in determining the amount of federal funding to be released. Among these other factors, on which the Administration has defended its impoundment practices, have been the rate of inflation,\textsuperscript{239} program "effectiveness" in the Administration's view\textsuperscript{240} and the President's own budget policies.\textsuperscript{241} With virtual unanimity the courts have agreed that such considerations do not justify executive impoundment; only Congress

\textsuperscript{235} E.g., "It is not within the discretion of the Executive to refuse to execute laws passed by Congress but with which the Executive presently disagrees." Pennsylvania v. Lynn, 362 F. Supp. 1363, 1372 (D.D.C. 1973), rev'd on other grounds, No. 73-1835 (D.C. Cir. July 19, 1974) (circuit court found President had acted consistently with congressional intention).

\textsuperscript{236} As of late 1973, the Library of Congress noted, the "box score" of court rulings on impoundment stood at thirty-eight to two, against the Administration's position. U.S. News & World Rep., October 22, 1973, at 8.

\textsuperscript{237} Rather, the legislation at issue usually has conferred spending discretion; the legal question has been whether the executive can consider factors other than the specific terms of a particular statute or act in determining the level of funding to be released. See note 180 supra; notes 238-42 and accompanying text infra.

\textsuperscript{238} See, e.g., 1973 Hearings 367 (statement of J.T. Sneed, Deputy Attorney General).

\textsuperscript{239} See, e.g., State Highway Comm'n v. Volpe, 479 F.2d 1099, 1115 (8th Cir. 1973) (impoundment of Federal-Aid Highway Act funds) ("[I]t is apparent that the Secretary does not have the authority to withhold funds for anti-inflationary purposes."); Oklahoma v. Weinberger, 360 F. Supp. 724, 728 (W.D. Okla. 1973).

\textsuperscript{240} See, e.g., Pennsylvania v. Lynn, 362 F. Supp. 1363, 1372 (D.D.C. 1973), rev'd, No. 73-1835 (D.C. Cir. July 19, 1974) (suspension of several Housing Act programs which, in view of President, had "failed").

\textsuperscript{241} See, e.g., Government Employees Local 2677 v. Phillips, 358 F. Supp. 60, 73 (D.D.C. 1973) ("The defendant contends that because the budget message of the President . . . requests no funds for OEO to operate after June 30, 1973, the fiscally responsible course . . . is to phase out the [Community Action Agency] program . . . ").
may prescribe the conditions on which funds will be released or withheld.\footnote{242}

Of course, the water pollution control act cases dealt only with the issue of whether the Administrator of the EPA is required to allot all authorized funds, and not whether those funds, once allotted, must be spent or obligated. It therefore might be argued that the courts' statutory interpretation approach to the allotment question might not have been deemed appropriate had the actual expenditure of funds been at issue. But other courts have looked to statutory intent in reaching decisions that effectively will require the expenditure of funds.\footnote{243} The courts have found no independent executive authority, apart from that granted by the specific terms of a particular statute, to control the release of congressionally authorized appropriations. This is the most significant lesson to be drawn from the judicial inclination to resolve impoundment disputes by reviewing legislative intention.

When the Nixon Administration impounded the entire ten million dollar appropriation authorized for the construction of a National Aquarium, Casper Weinberger explained that the President had "given Congress another opportunity to consider the relative importance of the fish."\footnote{244} No scholarly analysis should be required to substantiate the conclusion that the President lacks constitutional authority to give Congress "another opportunity" to consider legislation that he has not vetoed. But Weinberger went even further and offered the proposition that, when the President terminates a program through the withholding of funds, only he can determine whether he has properly exercised his executive responsibility.\footnote{245} The recent round of

\footnote{242. See, e.g., Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 694 (D.S.D. 1973) ("The Administrator's discretion is limited to the determination of qualifications."); Pennsylvania v. Lynn, 362 F. Supp. 1363, 1371-72 (D.D.C. 1973), \textit{rev'd on other grounds}, No. 73-1835 (D.C. Cir. July 19, 1974) ("The Secretary has the discretion to accept or refuse approval of particular applications in accordance with statutory and regulatory criteria."); Pealo v. FHA, 361 F. Supp. 1320, 1323 (D.D.C. 1973) (Secretary's discretion limited by terms of the statute). Moreover, even when a court has indicated that consideration of such factors as inflation might be appropriate in establishing the level of federal spending, that conclusion was deemed consistent with congressional intent. See Texas v. Fri, Civil Action No. A-73-CA-38, at 5 (W.D. Tex. October 2, 1973), \textit{appeal docketed}, Nos. 73-3965, 73-4026, 5th Cir., Jan. 9, 1974 ("The logical interpretation seems to be that Congress intended to make a definite financial commitment . . . while . . . giving the Administrator some discretion in the rate of spending to ease inflationary pressures.").}

\footnote{243. See, e.g., cases cited in notes 239-42 supra. Again, it should be emphasized that no court literally has directed the executive to spend money. But a reading of the cited authorities makes clear that once the congressionally established conditions precedent are satisfied by potential recipients of federal funds, the executive has no choice but to spend.}

\footnote{244. \textit{1971 Hearings} 140.}

\footnote{245. \textit{Id.} at 138.
impoundment decisions, however, has repudiated this assertion of un-reviewable executive authority. The courts have indicated that Congress is the only branch of government authorized to condition the expenditure of appropriated funds, and that the judiciary will ensure that only Congress' conditions are imposed. The approach to impoundment adopted by the courts will more effectively foster the realization of legislative objectives than would judicial recognition of congressional authority to mandate expenditure. Few would support the wisdom or expediency of a demand that the President spend the entirety of all appropriations. Much more important, therefore, is the recognition of Congress' ability to provide executive spending discretion and, at the same time, to ensure that only those factors Congress deems relevant will influence spending decisions.

A recent attempt to deal with impoundment legislatively reflects the wise policy of providing executive spending discretion to promote administrative flexibility and efficiency, while retaining sufficient congressional control to ensure that delegated discretion is not abused. Although the Nixon Administration had steadfastly opposed enactment of any comprehensive anti-impoundment legislation, in July the President signed into law the Congressional Budget and Impoundment Control Act of 1974. If the Act is implemented as intended, and is complied with by the President, the need for continued case-by-case resolution of impoundment disputes could be measurably reduced.

At the outset, the Act eliminates what the Administration has characterized as the "most explicit" congressional sanction of impoundment: the statutory authorization, provided by the ADA, to withhold funding in the face of "other developments" occurring after an appropriations bill is enacted. Reserves may now be established "solely to provide for contingencies or to effect savings" made possible by changed requirements or more efficient operations. This amendment should preclude impoundment for such reasons as a program's failure, in the Administration's opinion, to satisfy its objectives—a failure described in the past as an "other development" justifying impoundment.

The Impoundment Control Act also resolves the problem of de-
fining or specifying what constitutes an "impoundment" by looking to the intent of a presidential withholding of funds. Two alternatives are provided. If the President determines that all or any part of available "budget authority" will be unnecessary to achieve the objectives of a statutory program, or that fiscal considerations dictate that some portion of that budget authority be withheld, he must recommend that Congress rescind appropriation of the unneeded or unwanted amount. On the other hand, if the President intends only to "defer" the release of budget authority—that is, to slow the rate at which it is made available—he must transmit a special message informing Congress of his intent. The choice between recommending rescission and proposing deferral is significant. If the President chooses the former course, his recommendation is denied unless both Houses of Congress approve it within 45 days; if Congress fails to act, all budget authority must be made available. If he chooses the latter alternative, the President's proposal is rejected only if either House disapproves at any time after the special message is transmitted. Obviously, the President bears a heavier burden in seeking approval of a recommended rescission. The apparent logic of the statutory scheme, however, is compelling. Rescission of all or a substantial portion of budget authority for a particular program often will be no different from program termination. It should be more difficult for the President effectively to terminate a program than merely to retard its implementation through deferral.

252. See note 4 supra.
253. Budget authority is defined as "authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds." H.R. 7130, 93d Cong., 2d Sess. § 3(a)(2) (1974).
255. "Deferral" is broadly defined as "withholding or delaying the obligation or expenditure of budget authority," or "any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority . . . ." H.R. 7130, 93d Cong., 2d Sess. §§ 1011(1)-(A)-(B) (1974).

The latter part of this definition seems on its face to reach executive action such as the refusal to allot Water Pollution Control Act authorizations. Therefore, in the future, the Administration's hesitancy to characterize the withholding of allotments as "impoundment," see note 90 supra, should be immaterial. At the same time, this new definition will have no bearing on the Supreme Court's resolution of the current Water Pollution Control Act impoundment dispute. See note 268 infra.
258. H.R. 7130, 93d Cong., 2d Sess. § 1012(b) (1974).
260. It should be noted that a deferral may continue only for the duration of the fiscal year during which it is initiated. See H.R. 7130, 93d Cong., 2d Sess. § 1013(a) (1974). Therefore, the President cannot circumvent the Act by indefinitely deferring budget authority instead of proposing rescission.
Additional provisions included in the Act seem calculated to ensure effective congressional oversight of executive funding decisions. The President must specify reasons for his proposed actions and, to the extent practicable, must estimate the likely fiscal, economic and budgetary effects of a pending rescission or deferral. The Comptroller General is required to inform Congress if the President unilaterally rescinds or defers budget authority. Moreover, the Comptroller General must report his conclusion to Congress if he finds that the President has classified as a deferral a spending decision that should be considered a rescission, or vice versa. Finally, the Comptroller General is authorized to initiate judicial proceedings if an executive agency fails to release budget authority after a recommended rescission has been rejected or a proposed deferral disapproved.

It would be premature, however, to conclude that the Impoundment Control Act will eliminate the possibility of future withholdings of appropriated funds. A cryptic disclaimer preceding the substantive portion of the Act declares that "[n]othing contained in this Act . . . shall be construed as . . . asserting or conceding the constitutional powers or limitations of either the Congress or the President . . . ." No explanation of this disclaimer is provided by the "explanatory statement" accompanying the conference report of the bill, but its inclusion in the law may represent the price paid for the President's signature. As noted above, an important element of the Administration's impoundment defense arises from an interpretation of the Constitution, notably an interpretation of the article II powers of the President. Therefore, regardless of the strictures imposed by the new Act, a President might in some instances continue to impound, citing his constitutional responsibilities—which, of course, cannot be negated by an act of Congress.

Most importantly the new Act is designed to encourage administrative flexibility and efficiency, while ensuring that executive spending discretion will not be used to frustrate congressional policy. The Act may not entirely preclude presidential impoundment, and it will have no bearing on the legal resolution of the Water Pollution Control Act controversy. Nonetheless, if a President complies with the terms of

267. See note 42 supra.
268. The disclaimer to the Act also declares that no part of it shall be construed as (2) ratifying or approving any impoundment heretofore or hereafter executed
the Act, and if the Comptroller General fulfills his enforcement responsibilities, the oppressive costs of duplicative impoundment litigation could be considerably reduced. Furthermore, the Act could lead to an improved planning and operational capability on the part of local governments, since the future availability of federal revenues hopefully will become more predictable. And finally, the ability of the executive branch to reorder congressional priorities will be substantially foreclosed.

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or approved by the President . . .

(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment; or

(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.

H.R. 7130, 93d Cong., 2d Sess. §§ 1001(2)-(4) (1974). It therefore appears that the withholding of funds authorized for appropriation pursuant to the Water Pollution Control Act remains a live controversy for the Supreme Court to resolve this term.