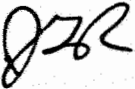


THE WHITE HOUSE

WASHINGTON

August 15, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS, JR. 

SUBJECT: Impoundment Authority

David Chew asked our office for general information on the President's impoundment authority. He originally asked Joe Wright for such information and was provided the packet at Tab A, but thought a clearer exposition was necessary. I talked with Chew to obtain some sense of what he was interested in, and he indicated that the issue of impoundment was raised in general discussions of how to achieve budget goals.

The attached memorandum simply outlines the requirements of the Impoundment Control Act of 1974, 2 U.S.C. §§ 681-688, touches upon the unresolved Chadha issue presented by that Act, and attempts to dampen any hopes that inherent constitutional impoundment authority may be invoked to achieve budget goals. As noted in the memorandum, the question of whether the President has such authority is not free from doubt, but I think it clear that he has none in normal situations, and we should discourage Chew and others from considering impoundment as a viable budget planning option. Our institutional vigilance with respect to the constitutional prerogatives of the presidency requires appropriate deference to the constitutional prerogatives of the other branches, and no area seems more clearly the province of Congress than the power of the purse.

Attachments

THE WHITE HOUSE

WASHINGTON

August 15, 1985

MEMORANDUM FOR DAVID L. CHEW  
STAFF SECRETARY

FROM: FRED F. FIELDING *Orig. signed by FFF*  
COUNSEL TO THE PRESIDENT

SUBJECT: Impoundment Authority

You have requested general guidance on the President's authority to impound funds appropriated by Congress. What follows provides basic background on such authority as exists. It should be evident from the following that impoundment is not a promising avenue for resolving budget disputes with Congress on any significant scale.

Presidential authority to impound funds appropriated by Congress is granted and regulated by the Impoundment Control Act of 1974, 2 U.S.C. §§ 681-688. An impoundment is classified as either a deferral or a rescission. A rescission involves a decision not to spend money appropriated by Congress. A deferral involves the temporary withholding of or delay in obligating appropriated funds. A proposal to "defer" funds from one fiscal year to the next, when the funds are appropriated only for the first fiscal year, is in effect a rescission. For this reason, Congress has specified that a "deferral may not be proposed for any period of time extending beyond the end of the fiscal year" in which the deferral is proposed. 2 U.S.C. § 684. Both rescissions and deferrals are proposed with respect to particular items in a spending bill, not the entire bill.

When the President decides to rescind a particular item of budget authority, he is required to transmit a special message to Congress detailing the rescission proposal. The funds in question must be spent unless, within 45 days, Congress has passed a rescission bill agreeing to all or part of the proposed rescission. 2 U.S.C. § 683.

Proposals to defer budget authority must also be transmitted to Congress. A single message may contain several proposed deferrals. Pursuant to 2 U.S.C. § 684(b), funds proposed to be deferred must be obligated if either House passes a resolution disapproving the proposed deferral. This provision is an unconstitutional legislative veto under Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). The critical question is whether the unconstitutional legislative veto is severable from the grant of authority to defer appropriated funds. If yes, the President would have the authority to defer funds, despite the objections of

Congress, and Congress would be required to pass a bill (over the President's veto) to compel the obligation of deferred funds. If a court rules that the legislative veto is not severable, the Presidential authority to defer would fall with the veto, and the funds would be required to be obligated.

The severability question is very close. To rule that the legislative veto is severable, a court must conclude that Congress would have granted deferral authority without the veto. This is a difficult conclusion, particularly since the President's "authority" to defer is phrased in terms of proposals, not actual deferrals. The end result of a court test in this area could well be the loss of Presidential deferral power. Even if a court were to rule in the President's favor on severability, Congress could be expected to act promptly to amend the Act to remove such unfettered Presidential authority.

The Office of Management and Budget and the appropriations committees on the Hill have reached an informal understanding to avoid the Chadha problem with respect to deferrals. Under this understanding, Congress uses the appropriations process -- or any other bill about to be presented to the President -- to disapprove proposed deferrals, rather than the unconstitutional procedure of 2 U.S.C. § 684 (b).

The issue has been the subject of constitutional confrontation in the past, but, as a general matter, the President has no independent constitutional authority to impound funds. As then Assistant Attorney General William Rehnquist concluded in 1969:

With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent.... It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them....

The foregoing is true with respect to normal spending questions. A different situation may be presented with respect to spending directives in areas reserved to the President by the Constitution, such as his authority as Commander-in-Chief, or his authority over foreign affairs. In such areas an argument could be mounted for inherent authority to defer or rescind, if spending would conflict with a constitutional obligation vested in the President. Another situation that might be considered to involve inherent impoundment authority would be one in which the President was faced with conflicting statutory commands, with one statute directing that

funds be obligated and another forbidding the expenditure. Such a situation may arise in the event of a debt ceiling crisis, but the question of the President's authority to impound funds in such an event is far from clear.

Attachment

FFF/JGR:jmk  
cc: FFFielding  
✓JGRoberts  
subject  
chron.



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

August 13, 1985

MEMORANDUM FOR: DAVID CHEW  
FROM: JOE WRIGHT  
SUBJECT: Impoundment Control Act

The materials at Tab A describe the process under which the Impoundment Control Act was carried out before Chadha.

The Chadha decision did not affect the process with respect to recissions. The potential problem created for deferrals was resolved in the manner described in the memo at Tab B. That is, when the Congress wants to overturn a deferral it does so in appropriations bills rather than through a one-house veto. (As annotated, Dave Stockman agreed with this approach and discussed it with the Chairmen of the Appropriations Committees who also agreed).

Please call me so we can discuss this tomorrow *(if necessary)*



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

BULLETIN NO. 75-15

May 16, 1975

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Impoundment Control Act of 1974

1. Purpose. This Bulletin provides information on the provisions of the "Impoundment Control Act of 1974" (Title X of P.L. 93-344) and guidance on the preparation of agency apportionment and reapportionment requests. In addition, it provides instructions for the preparation of special and supplementary messages on proposed rescissions and on deferrals, pursuant to sections 1012, 1013, and 1014(c) of P.L. 93-344.

2. Background. Title X of P.L. 93-344 repealed the "Federal Impoundment and Information Act" (P.L. 93-9) and prescribed new guidelines and procedures for the establishment of reserves and other withholdings.

a. Antideficiency Act amendment. Section 1002 amended the Antideficiency Act. Under section 1002, reserves may be established "solely to provide for contingencies, or to effect savings." Thus, the Antideficiency Act no longer provides authority to establish reserves as a result of "other developments subsequent to the date on which such appropriation was made available." Sections 1012 and 1013, however, do provide authority for withholding funds for non-Antideficiency Act reasons. Restraints on obligations for any reason--Antideficiency Act, policy, or other--must be reported to the Congress in special messages as proposed rescissions or as deferrals, pursuant to sections 1012 and 1013, respectively, of P.L. 93-344.

b. Rescissions. Section 1012 requires the President to transmit a special message to the Congress proposing a rescission whenever:

- the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided,

- the President determines that budget authority should be rescinded for fiscal policy or other reasons (for example, to terminate low-priority programs), or
- all or part of any budget authority limited to a fiscal year (i.e., annual appropriations or budget authority for the last year of multiple-year appropriations) is to be reserved for the entire fiscal year.

Affirmative action by the Congress in the form of an enacted rescission bill must be completed to rescind funds. During its consideration of the President's proposals, the Congress may adjust amounts proposed for rescission. If both Houses have not completed action on the bill within 45 calendar days of continuous session, funds must be made available for obligation.

c. Deferrals. Under section 1013, the President is also required to report in a special message any Executive action or inaction that withholds or delays the obligation or expenditure of budget authority provided for projects or activities. Either House may then pass an impoundment resolution disapproving the deferral and requiring that the funds be made available for obligation. Section 1013 contains no provision that allows the Congress to adjust amounts deferred by the Executive, nor does it place any time limitations on Congressional action disapproving a reported deferral. If, however, no action is taken by the Congress, the deferral may remain in effect until the end of the fiscal year, unless the special message indicates that an earlier release is planned.

d. Additional reports. Section 1014 of the Act requires the President to transmit supplementary messages to the Congress whenever any information contained in a special message is revised. It also requires that a cumulative report on all deferrals and proposed rescissions previously included in special messages be submitted to Congress by the 10th day of each month.

e. Role of the Comptroller General. The Comptroller General is required, under section 1015(a), to submit reports to the Congress when he finds that the President has failed to report a proposed rescission or deferral action. Actions reported by the Comptroller General under the authority of this section are subject to the same Congressional review and action as those contained in



Presidential messages. Under section 1015(b), the Comptroller General is also required to report to the Congress whenever he believes that the President has incorrectly characterized an action transmitted in a special message. Section 1016 further empowers him to bring suit to compel the Executive to make funds available for obligation pursuant to Congressional action or inaction which necessitates their release.



## XI. IMPOUNDMENT

### Definition

An impoundment is an action or inaction by the executive branch that withholds or delays the obligation or expenditure of budget authority provided by Congress. The Impoundment Control Act (Title X of the Congressional Budget and Impoundment Control Act of 1974) divides impoundment into two categories and establishes distinct procedures for each. A deferral is a delay in the use of funds; a rescission is a presidential request to Congress to rescind (cancel) an appropriation or other form of budget authority. Deferral and rescission are exclusive and comprehensive categories; an impoundment must be classified as either a deferral or a rescission, but not as both.

### Status

If every executive action or inaction that slows the rate of spending were deemed to be an impoundment, there would be many thousands of impoundments each year. In practice, only decisions to curtail spending are reported as impoundments; actions which have other purposes but incidentally affect the rate of spending are not recorded as impoundments. For example, if an agency were to delay the issuance of a contract because of a dispute with a vendor, the delay would not be an impoundment; if the delay was for the purpose of reducing expenditures, it would be an impoundment. The line between "routine" administrative actions and impoundments is not clear and controversy occasionally arises as to whether a particular executive action constitutes an impoundment. Similarly, there has been controversy over "de facto" impoundments. For example, if an agency fails to hire a sufficient number of persons to process applications for Federal grants, it might end up spending less than the amount appropriated by Congress, even though it does not expressly impound the funds. Under the Impoundment Control Act, the Comptroller General must notify Congress when, in his judgment, such actions constitute an impoundment.

### Procedures

To propose a rescission, the President must submit a message to Congress specifying the amount to be rescinded, the accounts and programs involved, the estimated fiscal and programmatic effects, and the reasons for the rescission. More than one rescission can be proposed in a single message. If Congress has not approved a rescission bill by the end of 45 days of "continuous session" (which could be a larger number of calendar days), the President must make the funds available for expenditure. Congress may rescind all, part, or none of the amount proposed by the President.

The President does not have to release the funds prior to expiration of the 45 days. There are no procedures under the Impoundment Control Act by which Congress may disapprove a proposed rescission during the 45-day period. However, some Administrations have followed a policy of releasing funds during this period if either the House or the Senate authoritatively indicates that it does not intend to approve the rescission.

Congress can rescind budget authority after 45 days or at anytime without a presidential proposal, but such legislation would not be deemed a "rescission bill" as defined by the Impoundment Control Act and, consequently, the procedures of the Act would not apply to it.

To propose a deferral, the President must submit a message to Congress setting forth the amount, the affected account and program, the reasons for the deferral, the estimated fiscal and programmatic effects, and the period of time during which the funds are to be deferred. The President may not propose a deferral for a period of time beyond the end of the fiscal year, nor may he propose a deferral which would cause the funds to lapse or prevent an agency from prudently spending its appropriation. In cases where funds remain available for two or more fiscal years, the President may defer the funds again in a successive fiscal year.

The House or Senate may disapprove a deferral by adopting an "impoundment resolution." There is no time limit for action on an impoundment resolution. But an impoundment resolution cannot disapprove only part of a deferral, and it cannot be amended on the floor. However, congress can defer funds by exercising its general legislative powers, in which case it could approve part of a deferral and disapprove the other part. This action would require enactment of a bill or joint resolution.

If a deferral is disapproved by the House or Senate, the funds must be made available for obligation or expenditure. The President may not propose a new deferral after an earlier one was disapproved. Furthermore, after the expiration of the 45-day period for rescissions, he may not propose that the funds be deferred (though some exceptions have been allowed upon the suggestion of congressional committees).

The House Appropriations Committee has jurisdiction over rescissions and deferrals, except in the case of backdoor spending. In the Senate, deferral and rescission messages are referred jointly to the Budget and Appropriations Committees as well as to the legislative committees with jurisdiction over the affected programs.

The Comptroller General reviews all proposed rescissions and deferrals and advises Congress of their legality and possible budgetary and program effects. The Comptroller General also notifies Congress of rescissions and deferrals not reported by the President, and he may challenge the classification of an improperly classified rescission or deferral. In all cases, a notification to Congress by the Comptroller General has the same status as a message from the President.

If the President fails to release funds pursuant to the adoption of an impoundment resolution or at the expiration of the 45-day period for proposed rescissions, the Comptroller General is empowered to bring suit in Federal court to compel the release of the funds. This has been a rare occurrence, however.

#### Documents

Rescission and deferral messages of the President usually are printed as House documents; so, too, are reports from the Comptroller General dealing with impoundments. The President also submits a cumulative report on rescissions and deferrals each month and this usually is published as a House document. Rescissions and deferrals are consecutively numbered, with a separate series for each. (R82-20 would be the twentieth rescission proposed for fiscal year 1982; D82-20 would be the twentieth deferral for the same fiscal year.) This standardized numbering system makes it possible to track executive, legislative, and GAO actions in congressional documents. The House Appropriations Committee maintains a data base on current and past rescissions and deferrals.