

## THE PRESIDENT'S CONSTITUTIONAL OBLIGATION TO MAINTAIN CONGRESSIONALLY FUNDED PROGRAMS AND AGENCIES

On January 29, 1973, President Nixon submitted his Budget Message to Congress for fiscal 1974. In that message, the President specifically stated that no funds were being requested for the Office of Economic Opportunity (OEO),<sup>1</sup> a federal agency in the executive branch created by congressional legislation.<sup>2</sup> The President also directed that the functions of the Community Action Agencies (CAA), the local agencies of OEO, be transferred to ongoing programs and local agencies financed by special revenue sharing funds.<sup>3</sup> This action would have made the existence of OEO as a separate federal agency no longer necessary.<sup>4</sup> On that same date, two days before his appointment as Acting Director of OEO, Howard J. Phillips issued a memorandum to all OEO regional offices, stating that CAA funding would terminate on July 1, 1973, since funds had not been requested in the fiscal 1974 Budget Message.<sup>5</sup> Furthermore, no CAA funds would be granted by OEO except for phase-out activities.<sup>6</sup> Failure of a CAA to submit an "acceptable" phase-out plan 120 days prior to the termination date would result in the summary suspension of its OEO funds.<sup>7</sup> The Economic Opportunity Amendments of 1972<sup>8</sup> pro-

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1. OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974 at 105-07, 994 (1973).

2. Economic Opportunity Act of 1964, 42 U.S.C. § 2941(a) (1970).

3. OFFICE OF MANAGEMENT AND BUDGET, *supra* note 1, at 106-07.

4. *Id.*

5. Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 71 (D.D.C. 1973).

6. *Id.* at 72. The funding process consists of four steps: legislative authorization of the program, legislative authorization of funds for the program, executive allotment of the authorized funds, and legislative appropriation of funds to be spent in a fiscal year. Since defendant refused to wait for possible congressional action under the final step, a conflict arose between defendant's directive from the executive branch and the congressional intent as evidenced by Congress' multiple year authorization to maintain CAAs. *Id.* at 74.

7. *Id.* at 66. The memorandum of January 29, 1973, was succeeded by OEO Instr. 6730-3 (March 15, 1973).

8. 42 U.S.C. §§ 2702(b)-2995(d) (Supp. II, 1972), *amending* 42 U.S.C. §§ 2702-2995(d) (1970).

vided that the Director of OEO "shall carry out" the CAA administration of Community Action Programs through June 1975 with such appropriated funds as Congress may authorize,<sup>9</sup> "and shall not delegate his functions under section 221<sup>[10]</sup> . . . to any other agency."<sup>11</sup> Pursuant to this amendment, Congress authorized funds for Community Action Programs through June 1975.<sup>12</sup>

Three lawsuits were instituted to challenge Howard J. Phillips' directives ordering the dismantling of OEO and its programs contrary to congressional authorization of funds for OEO's continued operation. These lawsuits were consolidated in *Local 2677, American Federation of Government Employees v. Phillips*.<sup>13</sup> Plaintiffs in *Phillips* argued that defendant, as a member of the executive branch, was obligated to spend the congressionally appropriated funds for implementing, not terminating, OEO programs under the constitutional responsibility of the President to "take Care that the Laws be faithfully executed."<sup>14</sup> They based their claim on the duty of the Director to "carry out" OEO programs through June 1975, as stated in the legislative authorization,<sup>15</sup> and the subsequent congressional appropriation for OEO through June 1973.<sup>16</sup> Plaintiffs further claimed that

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9. 42 U.S.C. § 2837 (Supp. II, 1972), amending 42 U.S.C. § 2837 (1970).

10. Section 221 of the Economic Opportunity Act of 1964, 42 U.S.C. § 2808 (1970), deals with general provisions for financial assistance to CAAs for Community Action Programs.

11. 42 U.S.C. § 2942 (Supp. II, 1972).

12. 42 U.S.C. § 2702b(c)(2) (Supp. II, 1972) provides:

Notwithstanding any other provision of law, unless expressly in limitation of the provisions of this section, of the amounts appropriated . . . the Director of the Office of Economic Opportunity shall for each such fiscal year reserve and make available not less than \$328,900,000 for programs under section 2808 of this title . . . .

Both 42 U.S.C. § 2837 (1970) and 42 U.S.C. § 2702b(c)(2) (Supp. II, 1972) were legislative authorization bills for which Congress must still appropriate funds through an appropriation bill before the program can operate. Section 2837 is referred to as "legislative authority." It neither authorizes nor appropriates a set amount of funds but confers the legislative authority to do both. Section 2702b(c)(2) authorizes a *specific* amount of funds in pursuance of the "legislative authority." Congress can then appropriate to OEO for each fiscal year any amount up to that listed in the above quoted statute authorizing the maximum amount. ENACTMENT OF A LAW, S. Doc. No. 35, 90th Cong., 1st Sess. 5 (1967).

13. 358 F. Supp. 60 (D.D.C. 1973).

14. U.S. CONST. art. II, § 3.

15. 42 U.S.C. § 2837 (Supp. II, 1972).

16. Act of October 13, 1972, Pub. L. No. 92-607, 86 Stat. 1498.

the congressional authorization lasting until June 1975 required defendant to provide funds to CAAs until either no authorized funds were left or until Congress decided not to appropriate further funds for OEO for the fiscal year 1974-75.<sup>17</sup> Defendant contended that since he could not spend funds until appropriated he must look to the President's Budget Message for future planning.<sup>18</sup> If no funds had been proposed in the Budget Message, he must terminate the program to effect the least waste and prevent financial chaos.<sup>19</sup>

The federal district court rejected defendant's rationale on four grounds: the amended Budget and Accounting Act of 1921; the OEO Act; the history of OEO appropriations; and the Constitution. The court first held that the language of the Budget and Accounting Act of 1921,<sup>20</sup> along with its legislative history,<sup>21</sup> showed that the President's budget was a mere proposal. Furthermore, defendant's order failed to maintain fiscal responsibility as required by the OEO Act<sup>22</sup> and was in violation of congressional intent to keep the CAA programs ongoing through multiple year authorizations.<sup>23</sup> The court stated that Congress had never appropriated funds for OEO before

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17. 358 F. Supp. at 72.

18. *Id.* at 73.

19. *Id.* at 73, 79. The Director relied on the constitutional provisions that "[t]he executive Power shall be vested in a President" and that "he shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, §§ 1, 3.

20. (a) The President shall transmit to Congress during the first fifteen days of each regular session, the Budget, which shall set forth his Budget message, summary data and text, and supporting detail. The Budget shall set forth in such form and detail as the President may determine—

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(5) estimated expenditures and proposed appropriations necessary in his judgment for the support of the Government for the ensuing fiscal year.

31 U.S.C. § 11(a)(5) (1970).

21. H.R. REP. No. 362, 66th Cong., 1st Sess. 7 (1919) states:

[T]he President's responsibility ends when he has prepared the budget and transmitted it to Congress. . . . [T]he proposed law does not change in the slightest degree the duty of Congress to make the minutest examination of the budget and to adopt the budget only to the extent that it is found to be economical. If the estimates contained in the President's budget are too large, it will be the duty of Congress to reduce them. If in the opinion of Congress the estimates of expenditure are not sufficient, it will be within the power of Congress to increase them. *The bill does not in the slightest degree give the Executive any greater power than he now has over the consideration of appropriation by Congress.*

(Emphasis added.)

22. 42 U.S.C. § 2835(d) (1970).

23. 358 F. Supp. at 75.

the beginning of the upcoming fiscal year of the appropriation.<sup>24</sup> Therefore, defendant could not assume that Congress would not appropriate OEO funds for the upcoming fiscal year.<sup>25</sup> The court refused to accept defendant's argument that fiscal chaos would result if Congress did not appropriate further funds since Congress could always provide special termination funding.<sup>26</sup> Finally, the court decided that defendant's order to use Community Action Program funds solely for the program's termination was unconstitutional.<sup>27</sup> Since defendant was a member of the executive branch, the court held that he could not utilize legislative power to terminate congressional programs because the Constitution vests "All legislative Powers" in the Congress.<sup>28</sup> Furthermore, the court believed that an officer of the executive branch could not order the termination of a congressionally enacted program upon the President's failure to request necessary funds in his Budget Message since this action would, in effect, give the President a veto power through his Budget Message that is not granted by the Constitution.<sup>29</sup>

Presidential impoundment of congressionally appropriated funds covers only one area of potential presidential power.<sup>30</sup> The same type of judicial inquiry, however, is made in every case in which there is a dispute over the validity of an executive action.<sup>31</sup> The critical question in each of these cases is whether the President has affirmatively acted contrary to the congressional will.<sup>32</sup> When he does, even the concept of shared powers becomes untenable.<sup>33</sup> The President acted

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24. *Id.* at 74. As an example, the 1973 fiscal year is from June 1972 to June 1973. Congress did not appropriate OEO funds for fiscal year 1973 before June of 1972. Pub. L. No. 92-424, 86 Stat. 688 (Sept. 19, 1972).

25. 358 F. Supp. at 74.

26. *Id.* at 79. The court cited congressional provisions for the termination of the supersonic transport program when funds were cut off for that program. The court would not presume that Congress would act in an irresponsible manner by neither appropriating more funds for OEO nor providing funds for its termination.

27. *Id.* at 75, 76.

28. U.S. CONST. art. I, § 1.

29. 358 F. Supp. at 74.

30. See Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 43 N.C.L. REV. 502, 510-11, 536 (1965).

31. *Id.* at 511, 536.

32. *Id.* at 511.

33. *Id.* at 511, 536. The concept of shared powers contemplates two branches of government that possess constitutional power to act concurrently upon the

in contravention of a congressional statute in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>34</sup> the leading case concerning presidential power. President Truman ordered the Secretary of Commerce to seize and operate the nation's steel mills in order to prevent what he believed would be a disastrous steel strike during the Korean War. The steel companies complied under protest but challenged the action in the federal courts. The Supreme Court held that since Congress had considered and rejected the possibility of presidential seizure when formulating the Taft-Hartley Act, the President could not countermand congressional rejection of this power.<sup>35</sup> In his concurring opinion, Mr. Justice Jackson proposed that the constitutional basis for presidential action taken contrary to congressional legislation is weaker than when the President acts in the absence of congressional legislation.<sup>36</sup> It has been suggested that his explanation of the difference between the two types of presidential action has been accepted as law.<sup>37</sup>

The Supreme Court has invalidated other acts of the executive branch also in violation of specific congressional legislation.<sup>38</sup> The

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same subject. The branches involved almost always are the legislative and the executive. R. NEUSTADT, *PRESIDENTIAL POWER* 33 (1960).

34. 343 U.S. 579 (1952).

35. *Id.* at 586-88. The Court's opinion was based on a strict separation of powers argument that refused to grant the President any legislative power whatsoever. This opinion interpreted the constitutional provision in article I, section 1, which vests *all* legislative power in the Congress, according to the section's plain meaning.

36. 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers *minus any constitutional powers of Congress* over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. 343 U.S. at 637-38 (footnotes omitted; emphasis added).

37. Goostree, *The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-In-Aid to Segregated Activities*, 11 AM. U.L. REV. 32, 41 (1962) [hereinafter cited as Goostree].

38. *Cole v. Young*, 351 U.S. 536 (1956); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); see *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666 (1868).

Court, however, has upheld executive action in the absence of explicit authorization when the executive act constituted a logical extension of a cabinet function created by Congress.<sup>39</sup> In addition, the Court has upheld executive action when Congress, by its continued acquiescence in the executive act, tacitly recognized that the action was an exercise of a power relinquished by Congress to the President or was an outright valid exercise of presidential power.<sup>40</sup> In the impoundment area the Court has ruled, under the "faithfully execute" clause,<sup>41</sup> that the executive branch cannot withhold credit for payments to an individual when Congress has specifically legislated such payment.<sup>42</sup> This decision, however, involved only a ministerial question, not a policy question.<sup>43</sup>

The executive power to determine spending in policy questions depends upon the administrative discretion given to the executive branch by Congress. In *Commonwealth v. Connor*<sup>44</sup> a federal district court held that since a congressional act gave discretion to the Secretary of the Interior to approve a state's contract right arising out of the statute,<sup>45</sup> a claim on such a contract was not of a ministerial nature

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39. *In re Neagle*, 135 U.S. 1 (1890).

40. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915). *See also* *Sioux Tribe v. United States*, 316 U.S. 317, 325 (1942).

41. U.S. CONST. art. II, § 3.

42. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838).

The Court stated:

It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.

To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.

*Id.* at 612. *Accord*, *United States v. Louisville*, 169 U.S. 249 (1898); *United States v. Price*, 116 U.S. 43 (1885); *United States v. Jordan*, 113 U.S. 418 (1885).

43. *Fisher, Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124, 127 (1969).

44. 248 F. Supp. 656 (D. Mass.), *aff'd per curiam*, 366 F.2d 778 (1st Cir. 1966).

45. Federal-Aid Highway Act of 1956, 23 U.S.C. §§ 106(a), 109 (1970).

and thus could not be enforced by mandamus in federal district court.<sup>46</sup> In *McKay v. Central Electric Power Cooperative*<sup>47</sup> the Court of Appeals for the District of Columbia similarly held that when Congress did not expressly command the Secretary of the Interior to spend appropriations for a specified purpose, the Department of the Interior had policy discretion to determine allocations.<sup>48</sup>

There is no executive policy discretion, however, when Congress has specifically stated the policy to be followed. The enunciation of a clear congressional purpose for appropriation was the determining factor in *State Highway Commission v. Volpe*,<sup>49</sup> in which the Eighth Circuit refused to permit the Secretary of Transportation to defer authority to obligate highway funds previously apportioned to states by statute<sup>50</sup> due to inflationary pressures on the economy.<sup>51</sup> The legislative history of the Act clearly forbade presidential impoundment for inflationary reasons.<sup>52</sup> Moreover, the Act included a section stating it was the intent of Congress that funds should neither be impounded nor withheld.<sup>53</sup> The appellate court held that, although the general appropriations act may not have provided a mandate to spend all of the funds appropriated, the Highway Act had circumscribed the Secretary's discretion in spending funds<sup>54</sup> and did not permit the Secretary to withhold his approval of projects for reasons not contemplated within the Act.<sup>55</sup> A federal district court in *City of New York v. Ruckelshaus*<sup>56</sup> similarly held that no portion of the allotments could be impounded when the language and legislative history of an Act,<sup>57</sup> and the subsequently overridden presidential veto of the Act, indicated an understanding that allotment of the authorization in the Act would be mandatory.<sup>58</sup>

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46. 248 F. Supp. at 659.

47. 223 F.2d 623 (D.C. Cir. 1955).

48. *Id.* at 625. The Department of the Interior thus had the discretion to cancel a contract for a subject not within the Department's priorities.

49. 479 F.2d 1099 (8th Cir. 1973).

50. Federal-Aid Highway Act, 23 U.S.C. § 104(b) (1970).

51. 479 F.2d at 1103, 1116.

52. H.R. REP. NO. 1554, 91st Cong., 2d Sess. 13 (1970).

53. 23 U.S.C. § 101(c) (1970).

54. *Id.* § 106(a).

55. 479 F.2d at 1109-10.

56. 358 F. Supp. 669 (D.D.C. 1973).

57. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1285, 1287 (Supp. II, 1972).

58. 358 F. Supp. at 679.

The most frequently cited source for presidential impoundments is the Omnibus Appropriations Act of 1951, which amended the Anti-Deficiency Act of 1905-06. The 1951 provision states:

In apportioning any appropriation, reserves may be established to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available. Whenever it is determined by an officer . . . to make apportionments and reapportionments that any amount so reserved *will not be required to carry out the purposes of the appropriation concerned*, he shall recommend the rescission of such amount . . . .<sup>59</sup>

The legislative history of the amending Act specifically emphasized that this provision could not be used to thwart a major policy of Congress.<sup>60</sup>

Vague terms in a statute give the President considerable latitude in impounding funds.<sup>61</sup> A constitutional issue arises, however, when the President acts contrary to the purpose of an appropriation by canceling or abbreviating a legislative program because he considers the purpose unwise, wasteful or inexpedient.<sup>62</sup>

The constitutional question in *State Highway Commission v. Volpe* concerned a *deferral* of apportioned funds. In *City of New York v. Ruckelshaus* the issue involved a *partial impoundment* of an authorization. But in *Phillips* the authorized funds were to be spent for *entirely terminating* CAA programs that were established under the OEO Act.<sup>63</sup> The total dismantling of a congressional program because of an alternative presidential proposal in the Budget Message was a justification that originated under the Nixon Administration.<sup>64</sup> Previous Administration justifications stressed that impoundment was

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59. 31 U.S.C. § 665(c)(2) (1970) (emphasis added).

60. H.R. REP. NO. 1797, 81st Cong., 2d Sess. 311 (1950).

61. Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROB. 135, 160 (1972) [hereinafter cited as Fisher].

62. Fisher, *supra* note 43, at 125-26.

63. The federal district court said this might be a violation of 31 U.S.C. § 628 (1970), which provides: "Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service *shall be applied solely to the objects for which they are respectively made, and for no others.*" 358 F. Supp. at 76 n.17 (emphasis added).

64. Fisher 162.



necessary to avoid deficiencies,<sup>65</sup> to create savings,<sup>66</sup> or to control inflation.<sup>67</sup>

The executive branch in *Phillips*, unlike in *McKay* and *Connor*, had no policy discretion to allot legislated funds. The court in *Phillips* thus realized that if the executive action was ruled valid the President would be legislating under his statutory obligation to submit a budget<sup>68</sup> and would possess a veto power not found in the Constitution.<sup>69</sup> That court carried these implications one step further by reasoning that there would be no limit on how often the executive branch could ignore other congressional authorizations if defendant, as a member of the executive branch, possessed the power to terminate CAA funding and to dismantle OEO.<sup>70</sup> The court in *Phillips* thus realized that such a result would threaten the viability of the congressional power to legislate under article I of the Constitution since the executive branch could completely usurp the legislative power of Congress.<sup>71</sup> Just as the majority and Mr. Justice Jackson refused to limit the congressional action in *Youngstown*,<sup>72</sup> the district court in *Phillips* similarly refused to undermine the congressional authorization for OEO.

The *Phillips* decision does not automatically prevent the presidential impoundment of congressionally appropriated funds because many budgetary schemes and justifications still exist through which the executive branch can bypass congressional intent.<sup>73</sup> Nevertheless, until the Supreme Court has ruled on the specific issue in this case,

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65. Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 STAN. L. REV. 1240, 1245 (1970); Fisher 162.

66. Church, *supra* note 65, at 1245; Fisher 162.

67. Fisher 162. *See also* Church, *supra* note 65, at 1248. Senator Frank Church (D. Idaho) notes that although Presidents often promise to release impounded funds in the future, the release of such funds has often not been forthcoming. As a result, some congressional programs have been buried.

68. 358 F. Supp. at 75; *see* Goostree 37-38.

69. 358 F. Supp. at 74; *accord*, Goostree 38. *See* U.S. CONST. art. I, § 7.

70. 358 F. Supp. at 77.

71. *Id.* at 76-77; Goostree 37-38. Goostree believes that this result would occur if, under the "faithfully execute" clause of article II, section 3, the President could refuse to execute laws.

72. *See* notes 34-36 and accompanying text *supra*.

73. *See generally* Fisher.

presidential budgetary priorities as a constitutional justification for impounding authorized funds and spending appropriated funds against the congressional purpose are effectively eliminated. Because the impoundment struggle occurs in a political and not a legal arena,<sup>74</sup> the future impact of the *Phillips* decision will depend on how the executive branch interprets its legislative mandate in years to come.

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74. Fisher, *supra* note 43, at 136.