

# PRESIDENTIAL SPENDING DISCRETION AND CONGRESSIONAL CONTROLS

LOUIS FISHER\*

On the basis of the Constitution and traditional legislative prerogatives, Congress lays claim to exclusive control over the purse. Nevertheless, while it is up to Congress to appropriate funds, it is also true that the President and the executive branch enjoy considerable discretion as to how those funds are spent. Existing studies tell us how the President formulates the budget and how Congress acts on the budget requests he submits. Surprisingly, we know relatively little about how the money, once appropriated, is actually spent. A notable exception in this field is a work by Lucius Wilmerding, Jr., published three decades ago.<sup>1</sup>

The purpose of this article is to present a more contemporary account of executive spending discretion, to show its impact on public policy, and to point to some of the techniques and procedures used by Congress to preserve its power of the purse. Although the President's spending discretion may seem essentially a twentieth century phenomenon, resulting primarily from the Budget and Accounting Act of 1921,<sup>2</sup> it has been a problem since George Washington's first administration. A number of early examples underscore that fact and add historical perspective and balance to this presentation.

The material is organized under seven main headings: lump-sum appropriations, covert financing, transfers between classes, reprogramming, transfers in time, impoundment, and unauthorized commitments. Within those broad categories are smaller sections on such topics as contingency funds, military assistance, no-year money, accelerated procurement, and coercive deficiencies. A number of these categories overlap, resulting in a certain arbitrariness in organization.

## I

### LUMP-SUM APPROPRIATIONS

#### A. History

Executive spending discretion produced sharp partisan clashes during the early years of the national government. We are told that the Federalists advocated executive discretion while the Jeffersonian Republicans insisted on legislative restraint. That kind of distinction is quite artificial, fabricated more from party rhetoric than from administrative practice.

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\* Analyst, Congressional Research Service, The Library of Congress. Author, *PRESIDENT AND CONGRESS: POWER AND POLICY* (1972).

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<sup>1</sup> L. WILMERDING, JR., *THE SPENDING POWER* (1943).

<sup>2</sup> Act of June 10, 1921, ch. 18, 42 Stat. 20.

For instance, after Jefferson's election as President in 1801, he told Congress that it would be prudent to appropriate "specific sums to every specific purpose susceptible of definition."<sup>3</sup> Hamilton promptly denounced that recommendation as "preposterous," declaring that nothing was "more wild or of more inconvenient tendency." He was indeed correct. Jefferson's Secretary of the Treasury, Albert Gallatin, admitted that it was impossible for Congress to foresee, "in all its details, the necessary application of moneys, and a reasonable discretion should be allowed to the proper executive department." Jefferson himself, as President, recognized that "too minute a specification has its evil as well as a too general one," and thought it better for Congress to appropriate in gross while trusting in executive discretion.<sup>4</sup>

Lump-sum appropriations become particularly noticeable during emergency periods of war and national depression. During the Civil War, an act provided for \$50 million to pay two- and three-year volunteers; \$26 million for subsistence; another \$14 million to cover transportation and supplies; and \$76 million for an assortment of items, to be divided among them "as the exigencies of the service may require . . ."<sup>5</sup> During World War I, President Wilson received \$100 million for "national security and defense" (to be spent at his discretion) and \$250 million to be applied to construction costs under the Emergency Shipping Fund.<sup>6</sup>

Emergency relief programs during the Great Depression set aside billions to be spent at the President's discretion. An act of 1934 appropriated \$950 million for emergency relief programs and the Civil Works Program, making the money available "for such projects and/or purposes and under such rules and regulations as the President in his discretion may prescribe . . ."<sup>7</sup> The Emergency Relief Appropriation Act of 1935 appropriated \$4 billion for eight general classes of projects, the money to be used "in the discretion and under the direction of the President."<sup>8</sup> A study published in the June-July 1937 issue of *The Congressional Digest* estimated that Congress, since March 4, 1933, had given President Roosevelt discretionary spending authority over \$15,428,498,815. That compared with a total of \$1,687,112,500 in discretionary spending power given to *all* Presidents in the periods from 1789 to 1933.<sup>9</sup>

### B. Budget Itemization

Lump-sum figures do not always reflect the actual scope of Presidential spending discretion. For instance, legislative control over lump-sum appropriations can be exercised by holding the President to his itemized budget requests, even though that itemization is not included in the appropriation bill. The Budget and Account-

<sup>3</sup> I U.S. PRESIDENT, A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 329 (J. Richardson ed. 1896).

<sup>4</sup> 7 THE WORKS OF ALEXANDER HAMILTON 256-57 (H. Lodge ed. 1904); 3 THE WRITINGS OF ALBERT GALLATIN 117 (H. Adams ed. 1879); 4 THE WRITINGS OF THOMAS JEFFERSON 529-30, 533 (H. Washington ed. 1854).

<sup>5</sup> Act of Feb. 25, 1862, ch. 32, 12 Stat. 344.

<sup>6</sup> Act of Apr. 17, 1917, ch. 3, 40 Stat. 28; Act of June 15, 1917, ch. 29, 40 Stat. 182.

<sup>7</sup> Act of Feb. 15, 1934, ch. 13, 48 Stat. 351.

<sup>8</sup> Act of Apr. 8, 1935, ch. 48, 49 Stat. 115.

<sup>9</sup> 16 CONG. DIG. 172 (1937).

ing Act of 1921 provided that estimates for lump-sum appropriations "shall be accompanied by statements showing, in such detail and form as may be necessary to inform Congress, the manner of expenditure of such appropriations and of the corresponding appropriations for the fiscal year in progress and the last completed fiscal year."<sup>10</sup>

The use of executive budget estimates as a substitute for line-item appropriations is illustrated by the public works appropriations act of 1971. A lump sum of \$1.9 billion was made available to the Atomic Energy Commission for "operating expenses."<sup>11</sup> Theoretically, the money could be spent for just about anything, and yet there exists a moral understanding between the Commission and the appropriations subcommittees that the money will be spent in accordance with the Commission's budget estimates, as amended by congressional actions and directives included in committee reports. This kind of nonstatutory control depends on a "keep the faith" attitude among agency officials and a trust by subcommittees in the integrity of administrators. If the AEC were to violate that trust and abuse its discretionary powers, it would face the prospect the next year of budget cutbacks and line-item appropriations.

### C. Contingency Funds

Since future events cannot be anticipated, or anticipated with great precision, Congress has had to provide special funds to cover contingencies and emergencies. Emergency funds were particularly large during World War II. In statutes from June 13, 1940, to October 26, 1942, Congress appropriated a total of \$425 million in funds for "emergencies affecting the national security and defense,"<sup>12</sup> plus another \$320 million in funds for temporary shelters in areas suffering from the housing shortage brought about by the war.<sup>13</sup>

To cite a contemporary example of emergency funding, President Johnson decided in July 1965 to increase American fighting forces in Vietnam. This decision resulted in a \$1.7 billion Emergency Fund for Southeast Asia over which the executive branch enjoyed complete discretion. Upon determination by the President that such action was necessary in connection with military activities, the Secretary of Defense could transfer the money to any appropriation available to the Defense Department for military functions.<sup>14</sup>

The Defense Department also receives money for a separate Emergency Fund,

<sup>10</sup> Act of June 10, 1921, ch. 18, § 204(b), 42 Stat. 21.

<sup>11</sup> Pub. L. No. 92-134, tit. I, 85 Stat. 365 (Oct. 5, 1971). See M. KIRST, *GOVERNMENT WITHOUT PASSING LAWS* (1969).

<sup>12</sup> Act of June 11, 1940, ch. 313, 54 Stat. 297; Act of June 13, 1940, ch. 343, 54 Stat. 377; Act of Apr. 5, 1941, ch. 40, 55 Stat. 94; Act of Dec. 17, 1941, ch. 591, 55 Stat. 818; Act of July 25, 1942, ch. 524, 56 Stat. 705; Act of Oct. 26, 1942, ch. 629, 56 Stat. 995.

<sup>13</sup> Act of Mar. 1, 1941, ch. 9, 55 Stat. 14; Act of May 24, 1941, ch. 132, 55 Stat. 198; Act of Dec. 17, 1941, ch. 591, 55 Stat. 818.

<sup>14</sup> Act of Sept. 29, 1965, Pub. L. No. 89-213, 79 Stat. 872. See 2 U.S. PRESIDENT, *PUBLIC PAPERS OF THE PRESIDENTS: LYNDON B. JOHNSON, 1965*, at 794-96 (1966); S. Doc. No. 45, 89th Cong., 1st Sess. (1965).

used primarily to support the exploitation of new scientific developments and technological breakthroughs. The House and the Senate appropriations committees have both criticized the use of the fund for other than emergency purposes. In 1963 the House Appropriations Committee complained that the Emergency Fund "has been resorted to in too many instances when no scientific or technical breakthrough was involved. It seems that the Emergency Fund has been considered by some as a general purpose fund from which to finance low priority or unbudgeted programs."<sup>15</sup> Two years later the Senate Appropriations Committee observed that the fund was tapped frequently during the closing weeks of the fiscal year: "Such action lends credence to the suspicion that the fund is being employed for other than emergency purposes which would tend to subvert the congressional review and appropriation process."<sup>16</sup> From a level of \$150 million in fiscal 1963, the Emergency Fund for the Department of Defense dropped to \$50 million by fiscal 1972.

Other sources of emergency funds are found in statutes that provide for disaster relief. The Federal Disaster Act of 1950 and subsequent statutes offer financial assistance to state and local governments whenever the President declares a major disaster. From 1951 through 1970, the President issued 338 declarations and allocated \$857 million from the disaster relief fund.<sup>17</sup>

Contingency funds are sometimes used for purposes not even vaguely contemplated by Congress when it appropriated the money. For instance, on March 1, 1961, President Kennedy issued an executive order establishing the Peace Corps.<sup>18</sup> Not until seven months later did Congress appropriate funds for the agency.<sup>19</sup> In the meantime, the President financed the Peace Corps by using more than a million dollars in contingency funds from the Mutual Security Act.<sup>20</sup> Several years later, the sum of \$450,000 was taken from the Defense Department's contingency fund to pay a portion of the expenses of the President's Commission on Civil Disorders.<sup>21</sup>

When the executive branch abuses its authority over contingency funds, Congress can reassert its control over the purse by passing more stringent legislation. As an example, in a 1959 report the Foreign Operations Subcommittee of the House Appropriations Committee specifically denied funds for an Incentive Investment Program which the Administration had proposed. The subcommittee's denial was omitted from the final appropriation bill passed by Congress, at which point the Administration proceeded to use money from the President's contingency fund to initiate the program. The House Appropriations Committee, charging that the contingency fund was being used to nullify the actions of Congress, recommended

<sup>15</sup> H.R. REP. No. 439, 88th Cong., 1st Sess. 63 (1963).

<sup>16</sup> S. REP. No. 625, 89th Cong., 1st Sess. 53 (1965).

<sup>17</sup> Act of Sept. 30, 1950, ch. 1125, 64 Stat. 1109; Act of Nov. 6, 1966, Pub. L. No. 89-769, 80 Stat. 1316; Act of Dec. 31, 1970, Pub. L. No. 91-606, 84 Stat. 1744. The number of declarations and total allocations were obtained from the Office of Emergency Preparedness. Figures include actions by the Housing and Home Finance Agency in 1951-52 when it administered disaster relief programs.

<sup>18</sup> Exec. Order No. 10,924, 3 C.F.R. 447 (1961).

<sup>19</sup> Act of Sept. 30, 1961, Pub. L. No. 87-329, tit. V, 75 Stat. 72.

<sup>20</sup> See H.R. REP. No. 1115, 87th Cong., 1st Sess. 66 (1961).

<sup>21</sup> S. REP. No. 1576, 90th Cong., 2d Sess. 28 (1968).

language the next year to curb this executive practice. The resulting appropriation bill stipulated that none of the funds appropriated for the President's special authority and contingency fund "shall be used for any project or activity for which an estimate has been submitted to Congress and which estimate has been rejected." The Act also prohibited the use of any of the funds to finance any of the activities under the Investment Incentive Program.<sup>22</sup>

## II

### COVERT FINANCING

Appropriations during World War II were often lumped together under a general heading to prevent analysis by the enemy. The atomic bomb project, for instance, was financed for several years from funds set aside for "Engineer Service, Army" and "Expediting Production." When larger sums for manufacturing the bomb could no longer be concealed by such methods, a few legislative leaders were told of the project and asked to provide funds without letting other legislators know how the money would be spent. Accordingly, the money was tucked away unnoticed in an appropriation bill. Total appropriations for the Manhattan Project came to over \$2 billion. Members of the House Appropriations Committee told Elias Huzar that about \$800 million had been spent on the project before they knew about it.<sup>23</sup>

According to the Budget and Accounting Procedures Act of 1950, it is the policy of Congress that the accounting of the government shall provide "full disclosure of the results of financial operations, adequate financial information needed in the management of operations and the formulation and execution of the Budget, and effective control over income, expenditures, funds, property, and other assets."<sup>24</sup> Despite that general policy, it has been estimated that, in a fiscal 1972 budget of \$229.2 billion, secret funds may amount to as much as \$15-20 billion.<sup>25</sup>

#### A. Free World Forces

The financing of the war in Vietnam illustrates how billions can be spent for programs known to relatively few Congressmen.<sup>26</sup> In September 1966, President Johnson expressed his "deep admiration as well as that of the American people for the action recently taken by the Philippines to send a civic action group of 2,000 men to assist the Vietnamese in resisting aggression and rebuilding their country."<sup>27</sup> Other announcements from the White House created the impression

<sup>22</sup> H.R. REP. NO. 712, 86th Cong., 1st Sess. 8 (1959); H.R. REP. NO. 1798, 86th Cong., 2d Sess. 13 (1960). Act of Sept. 2, 1960, Pub. L. No. 86-704, § 106, 74 Stat. 777. See also S. REP. NO. 1849, 86th Cong., 2d Sess. 10 (1960) and W. MORROW, CONGRESSIONAL COMMITTEES 165-67 (1969).

<sup>23</sup> E. HUZAR, THE PURSE AND THE SWORD 338 (1950). See J. MARTIN, MY FIRST FIFTY YEARS IN POLITICS 100-01 (1960); L. GROVES, NOW IT CAN BE TOLD 360-61 (1962).

<sup>24</sup> Act of Sept. 12, 1950, ch. 946, § III, 46 Stat. 834.

<sup>25</sup> CONG. Q. WEEKLY REP., Aug. 21, 1971, at 1786.

<sup>26</sup> Most of the material in the following sections on covert financing first appeared in Fisher, *Executive Shell Game: Hiding Billions From Congress*, THE NATION, Nov. 15, 1971, at 486. This article is reprinted in 117 CONG. REC. S18,232 (daily ed. Nov. 11, 1971) (inserted by Senator Fulbright).

<sup>27</sup> 2 U.S. PRESIDENT, PUBLIC PAPERS OF THE PRESIDENTS: LYNDON B. JOHNSON, 1966, at 1029 (1967).

that not only the Philippines but also Thailand, South Korea, and other members of the "Free World Forces" had volunteered their assistance.

### 1. *Congressional Investigations*

However, hearings held by the Symington subcommittee in 1969 and 1970 revealed that the United States had offered sizable subsidies to these countries. It was learned that the Philippines had received river patrol craft, engineer equipment, a special overseas allowance for their soldiers sent to Vietnam, and additional equipment to strengthen Philippine forces at home. It cost the United States \$38.8 million to send one Filipino construction battalion to Vietnam. Senator Fulbright remarked that it was his own feeling that "all we did was go over and hire their soldiers in order to support our then administration's view that so many people were in sympathy with our war in Vietnam."<sup>28</sup>

The Philippine Government denied that U.S. contributions represented a subsidy or a fee in return for the sending of the construction battalion, but an investigation by the General Accounting Office (GAO) confirmed that "quid pro quo assistance" had indeed been given. Moreover, there was evidence that the Johnson Administration had increased other forms of military and economic aid to the Philippines for its commitment of a battalion to Vietnam.<sup>29</sup>

The Symington subcommittee also uncovered an agreement that the Johnson Administration had made with the Royal Thai Government in 1967 to cover any additional costs connected with the sending of Thai soldiers to Vietnam. The State Department estimated that U.S. support to Thai forces—including payment of overseas allowances—came to approximately \$200 million. A number of other expenses were also involved, such as modernization of Thai forces and the deployment of an anti-aircraft Hawk battery in Thailand.<sup>30</sup> The Foreign Ministry of Thailand denied that the United States had offered payments to induce Thailand to send armed forces to Vietnam. Nevertheless, GAO investigators reported that U.S. funds had been used for such purposes as the training of Thai troops, payment of overseas allowances, and payment of separation bonuses to Thai soldiers who had served in Vietnam. An interim GAO report estimated that the U.S. government had invested "probably more than \$260 million in equipment, allowances, subsistence, construction, military sales concessions, and other support to the Thais for their contribution under the Free World Military Assistance program to Vietnam."<sup>31</sup>

U.S. subsidies were used once again to support the sending of South Korean forces to Vietnam. Assistance included equipment to modernize Korean forces at home,

<sup>28</sup> *Hearings on United States Security Agreements and Commitments Abroad: The Republic of the Philippines (part 1) Before the Senate Comm. on Foreign Relations*, 91st Cong., 1st Sess. 261, 358 (1969).

<sup>29</sup> N.Y. Times, Nov. 20, 1969, at 13 col. 1; 116 CONG. REC. S4453 (daily ed. Mar. 25, 1970).

<sup>30</sup> *Hearings on United States Security Agreements and Commitments Abroad: Kingdom of Thailand (part 3) Before the Senate Comm. on Foreign Relations*, 91st Cong., 1st Sess. 625-57 (1969).

<sup>31</sup> N.Y. Times, Dec. 16, 1969, at 10, col. 1; 116 CONG. REC. S19,743 (daily ed. Dec. 9, 1970).

equipment and all additional costs to cover the deployment of Korean forces in Vietnam, additional loans from the Agency for International Development, and increased ammunition and communications facilities in Korea. To assure that the sending of Korean forces to Vietnam would not weaken the defensive capabilities of the Republic of Korea, the Johnson Administration agreed to finance the training and replacement of forces deployed in Vietnam and to improve South Korea's anti-infiltration capability. From fiscal 1965 to fiscal 1970, U.S. costs resulting from the dispatch of Korean forces to Vietnam were estimated at \$927.5 million.<sup>32</sup>

## 2. *Legislative Authority and Restrictions*

The legal basis for this assistance to Free World Forces in Vietnam goes back to authorization and appropriation statutes of 1966. Funds were made available to support Vietnamese "and other free world forces in Vietnam, and related costs . . . on such terms and conditions as the Secretary of Defense may determine." Assistance was broadened in 1967 to include local forces in Laos and Thailand.<sup>33</sup> Reports on such expenditures were submitted only to the armed services and appropriations committees of each house. One would not know from the general language of the statutes what type of financial arrangements the Administration might enter into, or with what country. Staff people, who had access to the reports, told me they did not know the nature and dimension of financing the Free World Forces until hearings were held by the Symington subcommittee.

Legislation in 1969 and 1970 tightened up the language of the statutes somewhat by placing a ceiling on the funds that could be given to Free World Forces. Standards were also established for payments of overseas allowances.<sup>34</sup> The ceiling of \$2.5 billion, which exceeded the amounts spent in previous years, did not constitute much of a restriction. The fiscal 1971 appropriation bill for the Defense Department included a proviso stating that nothing in the Act should be construed as authorizing the use of funds "to support Vietnamese or other free world forces in actions designed to provide military support and assistance" to the governments of Cambodia and Laos. The force of that restriction was diluted by another provision which declared that nothing in the Act should be construed "to prohibit support of actions required to insure the safe and orderly withdrawal or disengagement of U.S. Forces from Southeast Asia, or to aid in the release of Americans held as prisoners of war."<sup>35</sup> On February 8, 1971, after the United States had provided support for South Vietnam's intervention in Laos, the State Department justified the U.S. support partly on the ground that it "will protect American lives."<sup>36</sup>

<sup>32</sup> *Hearings on United States Security Agreements and Commitments Abroad: Republic of Korea (part 6) Before the Senate Comm. on Foreign Relations, 91st Cong., 2d Sess. 1529-47 (1970).*

<sup>33</sup> Act of Mar. 15, 1966, Pub. L. No. 89-367, § 401, 80 Stat. 37; Act of Mar. 25, 1966, Pub. L. No. 89-375, § 102, 80 Stat. 82; Act of June 5, 1967, Pub. L. No. 90-22, § 301, 81 Stat. 53; Act of Sept. 29, 1967, Pub. L. No. 90-96, § 639, 81 Stat. 248.

<sup>34</sup> Act of Nov. 19, 1969, Pub. L. No. 91-121, § 401, 83 Stat. 206; Act of Oct. 7, 1970, Pub. L. No. 91-441, § 502, 84 Stat. 905.

<sup>35</sup> Act of Jan. 11, 1971, Pub. L. No. 91-668, § 838(a), 84 Stat. 2037.

<sup>36</sup> N.Y. Times, Feb. 9, 1971, at 17, col. 6.

The fiscal 1972 authorization bill for the Defense Department repeated the ceiling of \$2.5 billion for Free World Forces, along with the restriction on actions by Vietnamese and other Free World Forces in Cambodia and Laos.<sup>37</sup> Despite those restrictions, the Administration had provided funds to support thousands of Thai forces in Laos. The State Department denied that this support represented a violation of legislative restrictions. The State Department explained to Senator Symington that the "Thai forces in Laos are composed exclusively of volunteers, most of whom have served in the Thai Army, but have been discharged."<sup>38</sup> Another explanation rested on the theory that the soldiers were not really Thais but rather ethnic Lao from northwest Thailand. After a trip to Vietnam, Congressman Jerome Waldie said that Souvanna Phouma, in the presence of Ambassador Godley, told him "those troops aren't Thais—they are really Laotians living in Thailand." And he told us this with a straight face!<sup>39</sup>

The theories of "volunteers" and "ethnic Lao" were not supported by newspaper accounts. Reports in the *Washington Post* and in the *Washington Evening Star* described the Thai soldiers serving in Laos as regular army troops of Thailand who had been asked to accept special assignment in Laos for extra pay.<sup>40</sup>

### B. CIA Financing

Covert financing has been used to finance, through the Central Intelligence Agency, such diverse activities as military operations in Laos and the broadcasting of U.S. information to Eastern Europe and Russia. The CIA can do this because of its extraordinary authority over the transfer and application of funds. The Central Intelligence Act of 1949 provides that the sums made available to the CIA "may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds . . ." For objects of a confidential nature, such expenditures are accounted for solely on the certificate of the CIA Director, with each certificate deemed a sufficient voucher for the amount certified.<sup>41</sup> The Act also authorizes the CIA to transfer to and receive from other government agencies "such sums as may be approved by the Bureau of the Budget" for the performance of any functions or activities authorized by the National Security Act of 1947. Other government agencies are authorized to transfer to or receive from the CIA such

<sup>37</sup> Act of Nov. 17, 1971, Pub. L. No. 92-156, § 501, 85 Stat. 427 (repeated in the fiscal 1972 appropriations bill for the Defense Department, Pub. L. No. 92-204, § 738, 85 Stat. 734 [Dec. 18, 1971]).

<sup>38</sup> 117 CONG. REC. S15,769 (daily ed. Oct. 4, 1971).

<sup>39</sup> 117 CONG. REC. E4910 (daily ed. May 24, 1971).

<sup>40</sup> Newspaper accounts by D. E. Ronk in the *Washington Post*, Aug. 9, 1971, and Tammy Arbuckle in the *Washington Evening Star*, Sept. 23, 1971, appear in 117 CONG. REC. S15,768-69 (daily ed. Oct. 4, 1971). Staff members of the Senate Foreign Relations Committee reported in 1972 that Thai irregulars were "recruited by the Royal Thai Army from all over Thailand" and that "no special effort was made to recruit ethnic Lao as distinct from other Thai." The cost of maintaining the Thai irregular force for a year in Laos was estimated at approximately \$100 million. STAFF OF THE SENATE FOREIGN RELATIONS COMM., 92D CONG., 2D SESS., THAILAND, LAOS, AND CAMBODIA: January 1972, at 19-20 (Comm. Print 1972).

<sup>41</sup> 50 U.S.C. § 403j(b) (1970).



sums "without regard to any provisions of law limiting or prohibiting transfers between appropriations."<sup>42</sup>

### 1. *Radio Free Europe and Radio Liberty; Laos*

Early in 1967 it was reported in the press that the CIA had been secretly subsidizing religious organizations, student groups, labor unions, universities, and private foundations. President Johnson appointed a three-member committee, headed by Under Secretary of State Katzenbach, to review the relationships between the CIA and private American voluntary organizations. On March 29 the committee reported that covert CIA assistance had been made available by the last four administrations, dating back to October 1951. The committee recommended that "[no] federal agency shall provide any covert financial assistance or support, direct or indirect, to any of the nation's educational or private voluntary organizations." President Johnson accepted the committee's statement of policy and directed all agencies of the government to implement it fully.<sup>43</sup>

A footnote to the committee's report explained that its statement of policy did not entirely close the door to covert financing of private voluntary organizations. Exceptions might be necessary: "Where the security of the nation may be at stake, it is impossible for this committee to state categorically now that there will never be a contingency in which overriding national security interests may require an exception—nor would it be credible to enunciate a policy which purported to do so."<sup>44</sup>

The CIA continued to finance the broadcasting that had been conducted by Radio Free Europe to Eastern Europe and by Radio Liberty to Soviet Russia. The continuation could have been justified either on the ground of national security or by identifying RFE and RL as foreign-based institutions—as distinct from "any of the nation's educational or private voluntary organizations." The latter had been the thrust of the Katzenbach report.

In an address delivered in January 1971, Senator Case said that several hundred million dollars had been expended from CIA budgets over the previous two decades for RFE and RL broadcasting. He introduced a bill to require that future broadcasting of the two stations be subject to annual authorizations passed by Congress.<sup>45</sup> President Nixon recommended in May 1971 that Congress create a tax-exempt non-profit corporation to finance and supervise the two stations.<sup>46</sup> The Senate Foreign Relations Committee rejected the President's recommendation, and on August 2 the full Senate upheld the committee.<sup>47</sup> During subsequent months the House and the Senate differed on the precise means of supporting the radio stations, but the

<sup>42</sup> 50 U.S.C. § 403f (1970).

<sup>43</sup> "CIA Support to Private Organizations," 3 WEEKLY COMP. PRES. DOC. 556-57 (1967). See also 23 CONG. Q. ALMANAC 358-61 (1967).

<sup>44</sup> 3 WEEKLY COMP. PRES. DOC. 557 (1967).

<sup>45</sup> S. 18, 92d Cong., 1st Sess. (1971); 117 CONG. REC. S130 (daily ed. Jan. 25, 1971).

<sup>46</sup> N.Y. Times, May 24, 1971, at 5, col. 1.

<sup>47</sup> S. REP. NO. 319, 92d Cong., 1st Sess. (1971); 117 CONG. REC. S12,756 (daily ed. Aug. 2, 1971).

form of interim financing was no longer covert. A supplemental appropriations act, for example, provided a conditional \$32 million grant to Radio Free Europe and Radio Liberty.<sup>48</sup>

Senator Case, who sits on both the Appropriations and the Foreign Relations Committees, apparently had to rely on an article in the *Christian Science Monitor* to learn that the Administration had agreed to finance Thai troops in Laos.<sup>49</sup> Further investigation by Senate staff members disclosed that the CIA was covertly financing 4,800 Thai troops fighting in northern Laos in support of the Laotian government. The cost of the operation was initially estimated at between \$10 million to \$30 million a year, but a staff report prepared for the Senate Foreign Relations Committee later disclosed that the CIA had spent at least \$70 million in Laos during fiscal 1971.<sup>50</sup> During debate on the military authorization bill for fiscal 1972, Senator Symington offered an amendment to establish, with one exception, a ceiling of \$200 million on U.S. expenditures in Laos during the fiscal year 1972. The exception was the costs connected with combat air operations by U.S. forces over the Ho Chi Minh trail area in southern Laos. He later raised that ceiling to \$350 million. The Senate adopted his amendment by a vote of 67 to 11, and it was included in the bill signed into law.<sup>51</sup>

## 2. Congressional Controls

There appears to be little legislative supervision of CIA expenditures. Senator Symington is a member of a five-man Armed Services subcommittee responsible for reviewing CIA programs. On November 10, 1971, he said that the subcommittee had yet to meet during the year.<sup>52</sup> The other subcommittee in the Senate charged with overseeing the CIA is in the Appropriations Committee. With regard to the CIA operation in Laos, Senator Ellender, former chairman of that committee, said that he "did not know anything about it." He did not ask whether CIA funds were being used to carry on the war in Laos: "It never dawned on me to ask about it."<sup>53</sup> This frank exchange then took place between Senators Cranston and Ellender:

Mr. Cranston. . . . I am sure I never would have thought to ask such a question. But it appeared in the press that perhaps that was happening. I would like to ask the Senator if, since then, he has inquired and now knows whether that is being done?

Mr. Ellender. I have not inquired.

Mr. Cranston. You do not know, in fact?

<sup>48</sup> Pub. L. No. 92-184, 85 Stat. 640 (Dec. 15, 1971).

<sup>49</sup> 117 CONG. REC. S7503 (daily ed. May 20, 1971).

<sup>50</sup> Washington Post, May 22, 1971, at A17, col. 1; STAFF OF THE SENATE FOREIGN RELATIONS COMM., 92D CONG., 1ST SESS., LAOS: APRIL 1971, at 3 (Comm. Print 1971). The \$70 million figure is not cited directly; it represents the balance after deducting military assistance and AID figures from the fiscal 1971 total.

<sup>51</sup> 117 CONG. REC. S15,762-82 (daily ed. Oct. 4, 1971); Pub. L. No. 92-156, § 505, 85 Stat. 428 (Nov. 17, 1971).

<sup>52</sup> 117 CONG. REC. S17,996 (daily ed. Nov. 10, 1971).

<sup>53</sup> 117 CONG. REC. S19,527 (daily ed. Nov. 23, 1971).

Mr. Ellender. No.

Mr. Cranston. As you are one of the five men privy to this information, in fact you are the No. 1 man of the five men who would know, then who would know what happened to this money?

The fact is, not even of the five men, and you are the chief one of the five men, know the facts in the situation.

Mr. Ellender. Probably not.<sup>54</sup>

Senator McGovern introduced a bill on July 7, 1971, to require that proposed appropriations, estimated expenditures, and appropriations for the CIA shall appear in the budget as a single item. His bill would also prohibit the use of funds appropriated to other departments or agencies from being spent by the CIA. McGovern explained that a single sum in the budget would permit members of Congress to judge whether that amount was too small, too large, or fully adequate to meet the needs of intelligence gathering. It would, in short, enable Congress to do what it is supposed to do, decide priorities. Moreover, Congress and the taxpayer would know for the first time the exact amount of money going into other government programs. The current practice is to inflate certain agency and departmental budgets in order to conceal CIA money. "As a result," McGovern observed, "we are led to believe that some programs are better financed than, in fact, they are. We have no way of knowing what these programs and agencies might be."<sup>55</sup> During a recent debate on a bill to provide funds for military intelligence, Senator Fulbright commented: "When you look at an item in this bill you wonder if it is really the amount of money for the A-14, for example, or if it is for the NSA. One cannot tell what it is."<sup>56</sup>

### C. Military Assistance

On the basis of a GAO report, Senator Edward Kennedy charged that money appropriated for refugee programs, public health, agriculture, economic and technical projects, and for the "Food for Peace" program, had been diverted to pay for CIA-directed paramilitary operations in Laos. The term "refugee" was a euphemism used by the Agency for International Development to cover the development and support of these operations. Hearings in 1972 confirmed that AID funds had been used to supply Lao military and paramilitary forces with food and medical care and supplies.<sup>57</sup> AID continues to supply these services as before, but funds are now advanced by the CIA and the Defense Department to cover the costs.

<sup>54</sup> *Id.* at S19,529. House supervision of the CIA does not appear to be much better. Rep. Lucien N. Nedzi, chairman of one of the two subcommittees in the House responsible for overseeing intelligence work, suggested that only the Budget Bureau and the Kremlin had a full understanding: "Perhaps they are the only ones. We simply don't have that kind of detailed information. . . . I have to be candid and tell you I don't know whether we are getting our money's worth." *Washington Post*, Dec. 21, 1971, at A28, col. 1.

<sup>55</sup> S. 2231, 92d Cong., 1st Sess. (1971); 117 CONG. REC. S10,527 (daily ed. July 7, 1971).

<sup>56</sup> 117 CONG. REC. S19,526 (daily ed. Nov. 23, 1971).

<sup>57</sup> *Hearings on Problems of War Victims in Indochina (Part II: Cambodia and Laos) Before the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 38-39, 41 (1972). See *Washington Post*, Feb. 7, 1971, at A2, col. 8; *Washington Sunday Star*, Feb. 7, 1971, at A1, col. 1.

This is simply one example of how funds can be appropriated for economic and social programs and yet end up financing a secret war.

During hearings held in January 1971, the Joint Economic Committee discovered that nearly \$700 million in Food for Peace funds had been channeled into military assistance programs over the past six years. Since 1954, in fact, when Public Law No. 480 was enacted, \$1.6 billion of funds generated by Food for Peace have been allocated to military assistance.<sup>68</sup> Statutory authority exists for this use,<sup>69</sup> but few members of Congress were aware that Food for Peace was such a capacious vehicle for military assistance. Nor could they have gained that understanding by reading the budget, which describes Food for Peace in these terms: "The United States donates and sells agricultural commodities on favorable terms to friendly nations under the Agricultural Trade Development and Assistance Act (Public Law 480). This program combats hunger and malnutrition, promotes economic growth in developing nations, and develops and expands export markets for U.S. commodities."<sup>60</sup>

Senator Proxmire castigated this use of rhetoric to conceal the full scope of the Food for Peace program. "This seems to me," he said, "to be kind of an Orwellian perversion of the language; food for peace could be called food for war."<sup>61</sup> He joined with Senators Humphrey, McGovern, and Mansfield in introducing a bill to repeal a provision which presently bars military aid to any country receiving Food for Peace surplus unless that country agrees to permit the use of U.S.-held foreign currencies for military procurement.<sup>62</sup>

No one can determine from a present-day budget how much is spent for military assistance. The budget for fiscal 1972 estimates 1971 outlays for military assistance at \$1.175 billion in Defense Department funds, plus an additional \$504 million in supporting assistance.<sup>63</sup> The total is apparently \$1.679 billion. In January 1971, however, Senator Proxmire obtained from the Defense Department its estimates for the Military Assistance Program (MAP) and foreign military sales. The amount of military assistance for fiscal 1971 was as follows: (1) \$3.226 billion in MAP, "military assistance service funded," and related programs; (2) \$600 million in supporting assistance; (3) \$7 million in additional public safety programs; (4) \$143 million for Food for Peace funds for common defense purposes; and (5) \$2.339 billion in military export sales. The total: \$6.317 billion.<sup>64</sup>

<sup>68</sup> *Hearings on Economic Issues in Military Assistance Before the Joint Economic Comm.*, 92d Cong., 1st Sess. 2, 293 (1971) [hereinafter cited as *Economic Issues*].

<sup>69</sup> 7 U.S.C. § 1704(c) (1970).

<sup>60</sup> U.S. OFFICE OF MANAGEMENT AND BUDGET, *THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1972*, HOUSE DOC. NO. 15, pt. 1, 92d Cong., 1st Sess., 101 (1971) [hereinafter cited as *THE BUDGET (FISCAL 1972)*].

<sup>61</sup> *Economic Issues* 61.

<sup>62</sup> S. 905, 92d Cong., 1st Sess. (1971). The substance of this bill was included in the Foreign Assistance Act of 1971, enacted into law on Feb. 7, 1972, as Pub. L. No. 92-226, § 201(c), 86 Stat. 25. Enactment does not affect the basic authority to use Food for Peace funds for military purposes, but such use would be more voluntary. See note 59 *supra*.

<sup>63</sup> *THE BUDGET (FISCAL 1972)* 86, 96.

<sup>64</sup> *Economic Issues* 203. The total is \$2 million higher than the sum of its parts, since the latter are rounded off.

Prior to 1965, the scope of military assistance was essentially defined by the Military Assistance Program, which was administered by the State Department and authorized by the Foreign Relations and Foreign Affairs committees. With the build-up in Vietnam, however, military aid to Saigon was taken out of MAP and placed under a category called military assistance service funded (MASF). The effect was to transfer budget control to the Pentagon and place authorization decisions under the jurisdiction of the armed services committees. In 1966, military assistance to Laos and Thailand was also switched from MAP to MASF. Service-funded assistance to South Vietnam, Laos, and Thailand totaled more than \$10 billion for the period from fiscal 1966 to fiscal 1971.<sup>65</sup>

On March 8, 1971, Senator Proxmire introduced a bill to remove from the Defense Department its present involvement in service-funded military aid. All remaining military assistance programs would be put under the Department of State. The object would be to return to the Foreign Relations and Foreign Affairs committees the responsibility for authorizing military assistance funds.<sup>66</sup>

### III

#### TRANSFERS BETWEEN CLASSES

##### A. History

Specific Congressional authorization sometimes permits the President to take funds that have been appropriated for one class of items and to re-apply those funds elsewhere. This practice has been the source of dispute for almost 180 years. In 1793, Representative Giles of Virginia offered a number of resolutions that charged Hamilton with improper use of national funds. The first resolution stated that "laws making specific appropriations of money should be strictly observed by the administrator of the finances thereof." Representative Smith of South Carolina proceeded to refute Giles point by point, arguing that the Administration ought to be free to depart from Congressional appropriations whenever the public safety or credit would thereby be improved. When exercised for the public good, executive spending discretion would "always meet the approbation of the National Legislature."<sup>67</sup> The Giles resolutions were subsequently voted down by the House.

This appears to be a typical collision between the legislative and executive branches, but the dispute was not as much constitutional as it was partisan and personal. It was Hamilton's colleague in the Cabinet, Thomas Jefferson, who had

<sup>65</sup> *Id.* at 190. See Kaufmann, *Double-Talk Bookkeeping*, THE NATION, Nov. 1, 1971, at 429.

<sup>66</sup> S. 1129, 92d Cong., 1st Sess. (1971); 117 CONG. REC. S2566-71 (daily ed. Mar. 8, 1971). The Foreign Assistance Act of 1971 (not enacted until February 7, 1972) shifted Thai military assistance from the armed services committees to the Foreign Relations and Foreign Affairs committees. Pub. L. No. 92-226, § 513, 86 Stat. 25. The Foreign Assistance Act of 1972, as reported out by Foreign Relations, attempted to do the same thing for military assistance to South Vietnam and Laos. S. REP. No. 823, 92d Cong., 2d Sess., p. 10 (1972). The Senate rejected the bill by a 42-48 roll-call vote. 118 CONG. REC. S11, 672 (daily ed. July 24, 1972).

<sup>67</sup> 3 ANNALS OF CONG. 902 (1793).

drafted the resolution for Giles. The author of Smith's effective rebuttal was none other than Hamilton himself.<sup>68</sup>

Jefferson's strictures against transfers were excessively narrow and failed to halt the practice. During his own Administration, one Congressman explained that it was sometimes necessary to allow expenditures to deviate from appropriations by taking funds from one account and applying them to another. Such transfers were technically illegal, but "its being the custom palliates it."<sup>69</sup> Proposals to abolish transfers altogether were countered by two arguments. Secretary of the Treasury Crawford told Congress in 1817 that legislators, in receiving reports of transfers, automatically learned where appropriations had been redundant and where deficient, thus providing a convenient guide for future appropriation bills. Furthermore, removal of transfer authority would encourage executive departments to submit inflated estimates as a cushion against unexpected expenses. Crawford warned Congress: "The idea that economy will be enforced by repealing the provision will, I am confident, be found to be wholly illusory. Withdraw the power of transfer, and the Departments will increase their estimates."<sup>70</sup>

Statutes over the next few decades permitted transfers under various circumstances.<sup>71</sup> Beginning in 1868, Congress repealed all previous acts authorizing transfers and stipulated that "no money appropriated for one purpose shall hereafter be used for any other purpose than that for which it is appropriated."<sup>72</sup>

Nevertheless, during periods of great emergency, Congress delegates broad transfer authority to the executive branch. The 1932 Economy Act cut federal spending so indiscriminately that Congress permitted the Administration to transfer funds from one agency to another to repair the damage.<sup>73</sup> The Lend Lease Act of 1941 appropriated \$7 billion for ordnance, aircraft, tanks, and for other categories of defense articles. The President could transfer as much as twenty per cent of the appropriations from one category to another, provided that no appropriation would be increased by more than thirty per cent.<sup>74</sup> In 1943 the Budget Director was authorized to transfer ten per cent of military appropriations made available for fiscal 1944, subject to certain conditions. Appropriations in that particular act came to about \$59 billion.<sup>75</sup> Contemporary examples of this transfer authority include the Defense Department appropriation act for fiscal 1971, which permitted the Secretary

<sup>68</sup> 6 THE WRITINGS OF THOMAS JEFFERSON 168 (P. Ford ed. 1899); 2 B. MITCHELL, ALEXANDER HAMILTON 260-63 (1957).

<sup>69</sup> 11 ANNALS OF CONG., 320 (1801) (remarks of Congressman Bayard).

<sup>70</sup> 30 ANNALS OF CONG. 421 (1817).

<sup>71</sup> Act of May 1, 1820, ch. 52, § 5, 3 Stat. 568; Act of July 3, 1832, ch. 154, 4 Stat. 558; Act of June 30, 1834, ch. 171, 4 Stat. 742; Act of July 2, 1835, ch. 268, § 2, 5 Stat. 78; Act of Apr. 6, 1838, ch. 54, 5 Stat. 223; Act of Aug. 26, 1842, ch. 202, § 23, 5 Stat. 533; Act of Aug. 10, 1846, ch. 177, § 5, 9 Stat. 101; Act of Mar. 3, 1847, ch. 48, 9 Stat. 171.

<sup>72</sup> Act of Feb. 12, 1868, ch. 8, § 2, 15 Stat. 36.

<sup>73</sup> Act of June 30, 1932, ch. 314, § 317, 47 Stat. 411; see L. WILMERDING, *supra* note 1, at 180-84.

<sup>74</sup> Act of Mar. 27, 1941, ch. 30, § 1(c), 55 Stat. 54.

<sup>75</sup> Act of July 1, 1943, ch. 185, § 3, 57 Stat. 367.

of Defense to transfer up to \$600 million.<sup>76</sup> That authority was increased to \$750 million for fiscal 1972 as a means of giving the Secretary of Defense greater flexibility in coping with Congress's \$3 billion reduction in the defense budget.<sup>77</sup>

### B. Aid to Cambodia

Current law states that "Except as otherwise provided by law, sums appropriated for the various branches of expenditures in the public service shall be applied solely to the objects for which they are respectively made, and for no others."<sup>78</sup> Exceptions to that general rule are fairly common, however, as evidenced by the use of transfer authority by President Nixon in extending financial assistance to Cambodia after his intervention there in the spring of 1970.

At the end of 1970 the President appealed to Congress for \$255 million in military and economic assistance for Cambodia. Of that amount, \$100 million was to restore funds which the President had *already* diverted to Cambodia from other programs. Operating under the authority of Section 610 of the Foreign Assistance Act of 1961,<sup>79</sup> the Nixon Administration borrowed \$40 million from aid programs originally scheduled for Greece, Turkey, Taiwan, and the Philippines; took another \$50 million from funds that had been assigned largely to Vietnam; and diverted still other funds until a total of \$108.9 million in military assistance had been given, or committed, to Cambodia.<sup>80</sup>

In the waning days of the Ninety-first Congress, legislators tried to place two restrictions on Presidential actions in Cambodia. The Special Foreign Assistance Act of 1971 barred the use of funds to finance the introduction of U.S. ground troops into Cambodia or to provide U.S. advisers to Cambodian forces in Cambodia.<sup>81</sup> Those restrictions were blunted by the remarks of House conferees, who accepted the restrictions only on the understanding that (1) U.S. troops could be used in border sanctuary operations designed to protect the lives of American soldiers, (2) U.S. military personnel could be provided to supervise the distribution and care of U.S. military supplies and equipment deliveries to Cambodia, and (3) U.S. military advisers could train Cambodian soldiers in South Vietnam.<sup>82</sup> Moreover, in the Administration's bombing operations in Cambodia, air power was interpreted in such broad terms as to circumvent much of the legislative restriction. When

<sup>76</sup> Act of Jan. 11, 1971, Pub. L. No. 91-668, § 836, 84 Stat. 2036.

<sup>77</sup> Pub. L. No. 92-204, § 736, 85 Stat. 733 (Dec. 18, 1971); see 117 CONG. REC. H12,567 (daily ed. Dec. 14, 1971). Transfers made under this authority are to be submitted to the Committees on Appropriations as "reprogramming actions" (to be explained in the next section of this article) requiring prior approval; H.R. REP. NO. 754, 92d Cong., 1st Sess. 16 (1971).

<sup>78</sup> 31 U.S.C. § 628 (1970).

<sup>79</sup> 22 U.S.C. § 2360 (1970). Under this section, the President may transfer up to ten per cent of the funds from one program to another, provided that the second program is not increased by more than twenty per cent.

<sup>80</sup> *Hearings on Supplemental Foreign Assistance Authorization, 1970, Before the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess. 2, 78 (1970).

<sup>81</sup> Pub. L. No. 91-652, § 7(a), 84 Stat. 1943 (Jan. 5, 1971).

<sup>82</sup> H.R. REP. NO. 1791, 91st Cong., 2d Sess. 5 (1970).

helicopter gunships have the capability of patrolling at treetop level, the distinction between air power and "ground troops" begins to disappear.<sup>83</sup>

Some restrictions do remain on the extent of Presidential discretion under the Special Foreign Assistance Act of 1971. For example, the President is prohibited from exercising certain transfer authorities granted to him for the purpose of providing additional assistance to Cambodia unless he notifies the Speaker and the Foreign Relations Committee in writing at least thirty days prior to the date he intends to exercise his authority, or ten days if he certifies in writing that an emergency exists requiring immediate assistance to Cambodia. The notification to the Speaker and the Foreign Relations Committee would include the authority under which he acts and the justification for, and the extent of, the exercise of his authority.<sup>84</sup> A more recent act, the Foreign Assistance Act of 1971 contains a provision which prevents the President from exercising his transfer authority under certain sections of the Foreign Assistance Act of 1961, as amended, unless he gives the Congress advance notice prior to the date he intends to exercise those authorities.<sup>85</sup>

#### IV

##### REPROGRAMMING

Reprogramming is a term used to describe the shifting of appropriated funds from the original purpose to a new purpose. Unlike transfers, reprogramming does not depend on statutory authority. Instead, it operates on an informal clearance and reporting procedure worked out by executive agencies and Congressional committees. Furthermore, reprogramming does not involve the shifting of funds from one appropriation account to another (as with transfers), but rather the shifting of funds *within* an account. For instance, if an appropriation bill provides a billion dollars for a single account, that figure could be broken down into perhaps a hundred separate subaccounts on budget justification sheets or in committee reports. Thus, when funds are shifted from an original purpose to a new purpose, the shift would take place between these nonstatutory subaccounts rather than between statutory accounts.

The reprogramming procedure is partly a remedy for the long period of time that exists between an agency's justification of programs and its actual expenditure of funds. During that interval new and better applications of funds come to light. New factors arise to prompt the use of funds in a manner different from that called for in the appropriations act or committee report. The House Appropriations Committee has explained that reprogrammings are effectuated for a number of reasons,

<sup>83</sup> Another provision in the Special Foreign Assistance Act of 1971 stipulated that military and economic assistance to Cambodia "shall not be construed as a commitment by the United States to Cambodia for its defense." *Id.* § 7(b). The discussion in the final section of this article, regarding unauthorized commitments, makes it clear that a commitment nonetheless exists.

<sup>84</sup> *Id.* § 8.

<sup>85</sup> Pub. L. No. 92-226, § 652, 86 Stat. 28 (Feb. 7, 1972).



including "unforeseen requirements, changes in operating conditions, incorrect price estimates, wage rate adjustments, legislation enacted subsequent to appropriation action, and the like."<sup>86</sup> Reprogramming takes place in such areas and agencies as public works, the Atomic Energy Commission, foreign assistance, the District of Columbia, and the Defense Department.

In recent years military reprogramming has run to more than a billion dollars a year. During fiscal 1970, for instance, the House Appropriations Committee received reprogramming requests from the Defense Department for a total dollar change of more than \$4.7 billion (299 increases totaling \$2.4 billion and 422 reductions totaling \$2.3 billion).<sup>87</sup> Although defense reprogramming at the multibillion-dollar level is relatively recent, the transition from the Eisenhower to the Kennedy Administrations resulted in heavy use of reprogramming. Budget revisions by the Kennedy Administration brought the fiscal 1961 reprogramming figure for the Defense Department to at least \$3.8 billion.<sup>88</sup>

#### A. Clearance Procedures

The appropriations committees, while recognizing the need for some degree of flexibility for the executive branch, are also aware that excessive reliance on reprogramming can downgrade the appropriation process. In 1955 the House Committee on Appropriations requested the Defense Department to submit semi-annual reports on all reprogramming actions. The Pentagon responded by issuing a set of instructions to define the scope of reporting requirements and to set forth criteria for what would constitute a "major reprogramming" action.<sup>89</sup> The following year the House Appropriations Committee expressed its dissatisfaction with certain reprogrammings. This dissatisfaction arose from such Defense Department practices as describing backlogs in maintenance and repair work and then taking funds appropriated for those purposes and using them for something else. As a result, the committee directed that there be no diversion in the future of funds appropriated for repair and maintenance.<sup>90</sup>

A 1959 report by the House Appropriations Committee observed that while the semi-annual reports had been helpful, they had not been sufficiently timely. Moreover, the practice of having the military services advise the committee informally of major reprogrammings had become "virtually inoperative." As a result, the committee directed that the Defense Department report periodically—but in no case less than thirty days after departmental approval—the approved reprogramming actions involving \$1 million or more for operation and maintenance, \$1 million or

<sup>86</sup> H.R. REP. No. 493, 84th Cong., 1st Sess. 8 (1955).

<sup>87</sup> H.R. REP. No. 1570, 91st Cong., 2d Sess. 6 (1970).

<sup>88</sup> HOUSE COMM. ON ARMED SERVICES, 89TH CONG., 1ST SESS., DEPARTMENT OF DEFENSE REPROGRAMMING OF APPROPRIATED FUNDS: A CASE STUDY 32 (Comm. Print 1965).

<sup>89</sup> H.R. REP. No. 493, 84th Cong., 1st Sess. 8 (1955); DOD instructions are included in *Hearings on Budgeting and Accounting Before the Senate Comm. on Government Operations*, 84th Cong., 2d Sess. 113-19 (1956).

<sup>90</sup> H.R. REP. No. 2104, 84th Cong., 2d Sess. 13 (1956).

more for research, development, test, and evaluation, and \$5 million or more for procurement. New instructions were prepared by the Pentagon to accommodate the Committee's request.<sup>91</sup>

A report by the House Appropriations Committee in 1962 noted "with some concern" that there had been no revision of Defense Department instructions for reprogrammings since 1959, although "significant changes based on mutual understandings" had occurred since that time. The committee asked that the instructions be revised immediately.<sup>92</sup> The revised DOD directive called for prior approval by the committees, not only by the appropriations committees, but also by the authorizing committees. Prior approval of selected items and programs was required of the armed services and the appropriations committees from both houses. In situations where prior approval was not required, the committees were to be "promptly notified" (that is, within two working days) of approved reprogramming actions.<sup>93</sup>

Current DOD practices include calling for semi-annual reports, obtaining prior committee approval on certain items and programs, and making prompt notification to the committees on other reprogrammings. A DOD directive describes "prior approval" by the committees in the following way: in the event the Secretary of Defense is not informed of approval or disapproval within fifteen days of receipt by the committees of a reprogramming request, it would be assumed that there was no objection to implementing the proposed reprogramming.<sup>94</sup> In actual fact, prior approval means *explicit* approval, whether it takes the committees fifteen days, a month, or longer.

### B. Circumventing Committee Control

It is evident that reprogramming can become a convenient means of circumventing the normal authorization and appropriation stages. Instead of obtaining approval from Congress as a whole, agency officials need only obtain approval from a few subcommittees. An agency could request money for a popular program, knowing that Congress would appropriate the funds, and then try to use the money later for a program that might not have survived scrutiny by the full Congress.

Reprogramming is used on occasion to undo the work of Congress and its committees. A recent example concerns the Defense Intelligence Agency. DIA had requested \$66.8 million for fiscal 1971. The House Appropriations Committee cut that request by \$2 million, in large part on the conviction that DIA was heavily overstaffed. DIA reduced its budget by only \$700,000, having successfully prevailed upon the Defense Department to request reprogramming for \$1.3 million to make

<sup>91</sup> H.R. REP. NO. 408, 86th Cong., 1st Sess. 20 (1959); DEPARTMENT OF DEFENSE REPORT ON REPROGRAMMING OF APPROPRIATED FUNDS, DEPARTMENT OF DEFENSE INSTRUCTION NO. 7250.5 (Oct. 23, 1959).

<sup>92</sup> H.R. REP. NO. 1607, 87th Cong., 2d Sess. 21 (1962).

<sup>93</sup> DEPARTMENT OF DEFENSE REPROGRAMMING OF APPROPRIATED FUNDS, DEPARTMENT OF DEFENSE DIRECTIVE NO. 7250.5 (Mar. 4, 1963).

<sup>94</sup> DEPARTMENT OF DEFENSE REPROGRAMMING OF APPROPRIATED FUNDS, DEPARTMENT OF DEFENSE DIRECTIVE NO. 7250.5, at 3 (May 21, 1970). See S. HORN, UNUSED POWER 192-95 (1970).

up the difference. Representative Jamie L. Whitten was incensed by this maneuver: "Am I to understand that after Congress developed the record and made reductions on that basis, we are to have them come in here and ask for restoration, which is what it amounts to, of funds that the Congress saw fit to eliminate?"<sup>95</sup> House Appropriations allowed the Defense Department to reprogram \$700,000 for DIA.

Another extraordinary use of reprogramming involved the Defense Special Projects Group (DSPG). The Defense Department wanted to initiate a research project that would cost \$4 million. On any new research project of \$2 million or more, the Defense Department must submit the request for committee review. In this case, however, DSPG was advised by the Defense Department to use \$1 million to begin the project. The Pentagon would then supplement that later by transferring \$3 million from the Emergency Fund. By the time the reprogramming request reached Congress, the project was three months underway. Representative Whitten described the attempted circumvention of the \$2 million threshold in these terms: "You took a million dollars and got it started, and now you come up here and we are caught across the barrel. You have already started with a million dollars, but the million dollars was part of something which cost more than \$2 million and clearly comes within the reprogramming agreement."<sup>96</sup>

The House Appropriations Committee rejected this reprogramming request. Not only that, the request helped pique the committee's interest. DSPG was a new name for the Defense Communications Planning Group (DCPG). Congress was under the impression that DCPG—having been responsible for the electronic battlefield ("McNamara Line")—would be disbanded and the program transferred to the military services. Instead, DCPG adopted a new name and dreamed up new research projects to keep itself alive. To the question "what in the world are they doing over there?" the legislative answer was not favorable. The House Appropriations Committee characterized the attempt to perpetuate DSPG as "a classic example of bureaucratic empire building and of the bureaucratic tendency to never end an organization even after the work for which it was created has been concluded."<sup>97</sup> Appropriations committees in both houses agreed to terminate the agency.<sup>98</sup>

### C. Broader Legislative Control

Reprogramming procedures, as they have evolved over the past few decades, now include a larger number of legislators in the review role. In earlier years requests for defense reprogramming were handled by the chairmen and ranking minority members of the defense appropriations subcommittees. At the present time, in House

<sup>95</sup> *Hearings on Department of Defense Appropriations for 1972 (part 2) Before the House Comm. on Appropriations*, 92d Cong., 1st Sess. 331 (1971).

<sup>96</sup> *Id.* at 610.

<sup>97</sup> H.R. REP. No. 666, 92d Cong., 1st Sess. 118-19 (1971).

<sup>98</sup> *Id.* at 118; S. REP. No. 498, 92d Cong., 1st Sess. 197 (1971); H.R. REP. No. 754, 92d Cong., 1st Sess. 14 (1971).

Appropriations, approval is granted by the full defense subcommittee. In Senate Appropriations, reprogrammings for minor matters were formerly decided by the chairman and ranking minority member of the defense subcommittee. The full subcommittee was brought together only for major reprogrammings. Beginning in 1972, all prior-approval reprogrammings—whether major or minor—were brought before the full subcommittee during regular hearings on the defense budget.

With regard to authorizing committees, the full House Armed Services Committee acts on reprogramming requests. In earlier years the Senate Armed Services Committee used to delegate such decisions to the committee chairman, ranking minority member, and committee counsel. In 1970 a separate Subcommittee on Reprogramming of Funds was established. Depending on the issue involved, this five-member subcommittee may decide the request or else pass it on to the full committee. The tendency has been toward greater involvement by the full committee.

Legislative efforts to monitor reprogramming occasionally go beyond the review responsibilities of designated committees. For instance, early in 1971 Secretary Laird expressed interest in obtaining funds to begin a fourth nuclear-powered carrier (CVAN-70). If it became necessary to submit a budget amendment or initiate a reprogramming request, he would be willing to give up \$139.5 million that had been requested for an oil tanker and three salvage ships.<sup>99</sup> Senators Case and Mondale were able to enlist the support of Senator Ellender, chairman of the Appropriations Committee, and of Senator Stennis, chairman of Armed Services. The two chairmen agreed that reprogramming would be an improper technique for providing funds. The Administration would have to follow normal budgetary procedures: a budget request from the President followed by Congressional authorization and appropriation. The Administration decided to postpone making that request until a subsequent fiscal year.<sup>100</sup>

Thus, in the case of controversial reprogramming requests, the review role extends beyond the designated committees to involve Congress as a whole. To take another example, the Defense Department submitted a reprogramming request in 1971 for an additional \$61.2 million for the Cheyenne helicopter. That covered approximately \$35 million to reimburse the contractor for services performed, \$9.3 million to continue the development program during fiscal 1972, and approximately \$17 million to continue it during fiscal 1973. Since the Cheyenne had been under attack by members of Congress in recent years, only the reimbursement portion of the reprogramming request was approved. The House Appropriations Committee denied the request for fiscal 1973 development on the ground that "it did not seem

<sup>99</sup> *Hearings on Fiscal Year 1972 Authorization for Military Procurement, Research and Development, Construction and Real Estate Acquisition for the Safeguard ABM and Reserve Strengths (part 1) Before the Senate Armed Services Comm.*, 91st Cong., 1st Sess. 97, 258-59, 978 (1971).

<sup>100</sup> N.Y. Times, Apr. 18, 1971, at 40, col. 3; Washington Post, Apr. 28, 1971, at A8, col. 5. The correspondence between Senators Case and Mondale and Senator Ellender is reprinted in *Hearings on Department of Defense Appropriations for Fiscal Year 1972 Before the Senate Comm. on Appropriations*, 92d Cong., 1st Sess. 1344-45 (1971).

proper to anticipate the will of Congress with respect to the Cheyenne program that far in advance."<sup>101</sup> With regard to fiscal 1972 development, \$9.3 million was placed in the appropriation bill as a separate and identifiable item so that the full Congress could work its will on the request.<sup>102</sup>

A still broader review by Congress over the reprogramming of funds is contemplated in a bill introduced by Senator Lawton Chiles in March 1971.<sup>103</sup> His bill would require the Comptroller General to compile information on reprogramming and to furnish such information to all committees and to all members of Congress.

## V

### TRANSFERS IN TIME

In addition to being transferred from one class of appropriations to another, or within a class, funds may be transferred from one year to the next. Congress enacted legislation in 1795 to restrict this practice. With certain exceptions, any unexpended funds remaining in the Treasury for more than two years were to be transferred to a surplus fund. At that point the appropriation would lapse.<sup>104</sup> Nevertheless, administrative actions could nullify the law's intent. For instance, Congress passed legislation in 1819 to suppress the slave trade and to punish crimes of piracy. In so doing, it neglected to appropriate funds to pay for these new responsibilities. President Monroe supplied the necessary vessels by using old balances remaining on the books of the Navy Department. When legislators protested that this violated the two-year limit, they were told that the balances were exempt from the law because they had been in the hands of the *Treasurer* (who acted as agent for the military departments), rather than being in the Treasury itself.<sup>105</sup>

An 1820 statute directed the Secretary of the Treasury to place funds that had been left unexpended by the departments of War and Navy into a surplus fund. Implementation of that statute, however, depended on a statement from the secretary of the department that "the object for which the appropriation was made has been effected."<sup>106</sup> By failing to make such a declaration the department could have access to those funds in future years.

A more stringent provision appeared in 1852. Congress directed that any moneys unexpended after two years be carried immediately to a surplus fund, with the appropriation regarded as having ceased. Decisions by the Attorney General quickly diluted the force of that restriction. In cases of contracted items, personal service, or other claims on the government, appropriations would remain available from

<sup>101</sup> H.R. REP. No. 666, 92d Cong., 1st Sess. 105 (1971).

<sup>102</sup> S. REP. No. 498, 92d Cong., 1st Sess. 18 (1971); H.R. REP. No. 754, 92d Cong., 1st Sess. 13 (1971).

<sup>103</sup> S. 1333, 92d Cong., 1st Sess. (1971). A similar bill (H.R. 10429) was introduced by Representative Fascell on August 5, 1971.

<sup>104</sup> Act of Mar. 3, 1795, ch. 45, § 16, 1 Stat. 437.

<sup>105</sup> 35 ANNALS OF CONG. 807-09 (1819); see L. WILMERDING, *supra* note 1, at 83-94.

<sup>106</sup> Act of May 1, 1820, ch. 52, § 1, 3 Stat. 567.

year to year until the obligation was fully discharged. In such situations "unexpended" came to mean "unobligated," and the appropriation did not lapse into the surplus fund.<sup>107</sup> In a second decision, the Attorney General held that it was proper for a department to begin a year by first expending old balances. Since old money would be used first, the Attorney General explained that it would be impossible for a balance of two or more years to exist "unless the balance of a previous year exceed in amount the whole expenditure of the present year . . ."<sup>108</sup>

#### A. No-Year Money

New statutes appeared in 1870 and 1874 to restrict the use of unexpended balances. Specifically excluded from those restrictions, however, were appropriations for projects funded by permanent or indefinite appropriations, such as rivers and harbors, lighthouses, fortifications, and public buildings.<sup>109</sup> Current law permits appropriations to "remain available until expended" for public works under the Bureau of Yards and Docks and for public buildings.<sup>110</sup> Such appropriations are referred to as no-year money. Appropriations in this form permit the President to release funds when he determines that they can be spent in the most effective manner, depending on the availability of labor and materials and on the state of technical development.

According to article I, section 8, of the Constitution, appropriations to raise and support armies shall not be for a longer term than two years. Yet no-year financing for military procurement has been upheld in several opinions by the Attorney General. A 1904 opinion argued that to raise and support an army was one thing; to equip it was another. The constitutional prohibition applied only to the former. That sounds a little like a distinction without a difference, but the opinion also argued that the power to arm and equip armies followed from the constitutional power to declare war, to raise and support armies, to provide forts, magazines, and arsenals and to levy and collect taxes to provide for the common defense.<sup>111</sup>

In the Department of Defense, appropriations for procurement and for research, development, test, and evaluation (R.D.T. & E.) have generally been made available on a no-year basis. For fiscal 1970, the amount of no-year funds for those categories came to \$25.5 billion.<sup>112</sup> In an effort to bring carryover balances under closer legislative control, the fiscal 1971 appropriation bill for the Defense Department adopted a multi-year approach. Appropriations for major procurement became available for only three fiscal years (except for shipbuilding, which requires a five-year term), while appropriations for R.D.T. & E. were made available for only a two-year period.<sup>113</sup>

<sup>107</sup> Act of Aug. 31, 1852, ch. 108, § 10, 10 Stat. 98; 7 OP. ATT'Y GEN. 1 (1854).

<sup>108</sup> 7 OP. ATT'Y GEN. 14 (1854).

<sup>109</sup> Act of July 12, 1870, ch. 251, § 5, 16 Stat. 251; Act of June 20, 1874, ch. 328, § 5, 18 Stat. 110.

<sup>110</sup> 31 U.S.C. §§ 635, 682 (1970).

<sup>111</sup> 25 OP. ATT'Y GEN. 105 (1904); see also 40 OP. ATT'Y GEN. 555 (1948).

<sup>112</sup> Act of Dec. 29, 1969, Pub. L. No. 91-171, tits. IV & V, 83 Stat. 475-79.

<sup>113</sup> Act of Jan. 11, 1971, Pub. L. No. 91-668, § 842(a), 84 Stat. 2037.

## B. Carryover Balances

When the Administration accumulates large unobligated balances, the traditional Congressional response is to treat this as a sign of poor financial planning and a threat to legislative control. To a certain extent, the executive branch thereby in fact becomes independent of legislative action. As a result, the appropriations committees have tended to take into account these "carryover balances" in their decisions on new funding requests.

It is to the advantage of the executive branch to report as low a figure as possible for carryover balances, and several techniques have been tried, not always successfully, toward this end. For example, an executive department may try to obligate as much of the funds as possible. Sometimes this means prematurely obligating funds before testing or developmental work has been completed. In the case of weapons systems such as the Sheridan armored vehicle and Cheyenne helicopter, this tactic can prove embarrassing if not counter-productive for the Administration. The House Appropriations Committee has remarked that "Budgetary considerations based on fear of losing funding authority have often dictated such decisions rather than sound technical judgment."<sup>114</sup> Large obligations become especially suspicious when they take place in the closing months of a fiscal year ("June buying"), or when emergency and contingency funds are used at the end of a fiscal year.

Carryover balances can also be minimized by the executive departments by underestimating the amount of unobligated funds that will be carried forward into the next fiscal year. For example, the Army estimated that \$30.1 million in unobligated funds for R.D.T. & E. would be carried forward into fiscal 1962; the actual amount carried forward was more than \$89 million. For this same period, the comparable figures for R.D.T. & E. in the Navy was \$26.7 million estimated and \$134.3 million actual. Where there is a pattern of underestimating unobligated balances, the appropriations committees may make budget reductions to avoid overfunding.<sup>115</sup> Budget cutbacks may also be made when there is too much unobligated money being carried forward from year to year. One such action occurred in 1967 when the House Appropriations Committee ordered a decrease in weapons procurement funds (primarily Navy) because the military services were maintaining excessive unobligated balances.<sup>116</sup>

Despite these legislative actions, a huge volume of funds continues to flow from one year to the next. The budget for fiscal 1973 shows an estimated 266.7 billion in unspent authority available from prior years. Of that amount, only \$98.3 billion was expected to be spent in fiscal 1973, with the remainder carried forward once

<sup>114</sup> H.R. REP. No. 698, 91st Cong., 1st Sess. 48 (1969).

<sup>115</sup> H.R. REP. No. 1607, 87th Cong., 2d Sess. 48-49, 51 (1962).

<sup>116</sup> H.R. REP. No. 349, 90th Cong., 1st Sess. 35-36 (1967).

again to later years.<sup>117</sup> All of the \$266.7 billion is appropriated money or the equivalent. Some of it consists of authorization to borrow from the Treasury; some of it is authority to incur obligations without further action by Congress, as with the Highway Trust Fund. Hence, whether in the form of appropriated money or the equivalent, the amount of \$266.7 billion was available for expenditure without further Congressional action.<sup>118</sup> In justifying this discretion budget officials maintain that "full funding"—even though it results in large unobligated balances—leads to better management of public funds than appropriating for projects and programs in bits and pieces.

### C. Accelerated Procurement

The Eisenhower Administration used "accelerated procurement" as an anti-recession measure in 1958. Public works were accelerated, Housing and Home Finance programs speeded up, and government supply levels raised, all in an effort to pump more money into the economy and to stimulate recovery. This technique was not without its drawbacks. Advance procurement adds to the cost of storage space and inventory checks. It also creates administrative complications by forcing agencies to depart from prior schedules and long-term contractual commitments.<sup>119</sup> Moreover, with a fixed amount appropriated for these programs, acceleration at some point must be balanced by deceleration unless new funds are provided. Thus, at the very moment when the recovery phase needs reinforcement, the depletion of allotted funds has a retarding effect. That is especially serious since the automatic stabilizers, in the recovery phase, reverse direction and have a retarding effect of their own.

In 1961, President Kennedy also relied on accelerated procurement to combat recession. He directed the Veterans Administration to speed up the payment of \$258 million in life insurance dividends, making that amount available in the first quarter instead of spread over the entire year. A special dividend payment of \$218 million was made later, thereby reinforcing the speed-up with new funds and contributing a permanent boost to the economy. Kennedy also directed the heads of each department to accelerate procurement and construction wherever possible; he hastened payments to farmers under the price support program, increased the annual rate of free food distribution to needy families from about \$60 million to more than \$200 million, and made immediately available to the states the balance of federal-aid highway funds (\$724 million) that had been scheduled for the entire fiscal year.<sup>120</sup>

<sup>117</sup> U.S. OFFICE OF MANAGEMENT AND BUDGET, *THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1973*, at 42 (1972).

<sup>118</sup> U.S. OFFICE OF MANAGEMENT AND BUDGET, *SPECIAL ANALYSES OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1973*, at 97-105 (1972).

<sup>119</sup> W. LEWIS, JR., *FEDERAL FISCAL POLICY IN THE POSTWAR RECESSIONS 221-27* (1962).

<sup>120</sup> *Id.* at 250-72. See also, U.S. PRESIDENT, *PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY, 1961*, at 41 (1962); U.S. PRESIDENT, *ECONOMIC REPORT OF THE PRESIDENT, 1962*, at 97-98 (1962).



## VI

## IMPOUNDMENT

Impoundment of funds is a "transfer in time" that deserves separate treatment. During the past three decades, Presidents have withheld funds from such programs as the B-70 bomber, Air Force groups, antimissile systems, flood control projects, highways, supercarriers, urban renewal projects, and Model Cities. By refusing to spend appropriated funds, the President provokes the charge that he is obligated under the Constitution to execute the laws, not hold them in defiance—obligated to interpret appropriation bills not as mere permission to spend but as a mandate to spend as Congress directed. Otherwise, the argument runs, he encroaches upon the spending prerogatives of Congress, violates the doctrine of separated powers, and assumes unto himself a power of item veto that is neither sanctioned by the Constitution nor granted by Congress.

A number of authors of law journal articles, in advancing this line of argument, invoke phrases from Supreme Court decisions to bolster their case. Examination of those decisions, however, suggests that they have only the most tenuous relationship to the issue of impoundment and offer little hope of resolving the dispute.<sup>121</sup> The decisive appeal over the years has not been to legal principles and court decisions but to constituencies and agency support. In the words of one author, the President "can and may withhold expenditure of funds to the extent that the political milieu in which he operates permits him to do so."<sup>122</sup>

Political leverage is maximized, of course, by claims of constitutional support, and both sides therefore invoke the separation doctrine and the "intent of the framers" to their own advantage. The efforts largely cancel one another. When Congress appropriates and the President refuses to spend, legislators chastise him for encroaching upon their spending prerogatives. Yet if Congress tried to compel the President to spend the funds, he could charge usurpation of administrative responsibilities.

## A. Basis for Impoundment

Instead of introducing into this discussion pieces of evidence from prior court decisions, I think it is more instructive to understand the larger political, economic, and legal framework within which impoundment takes place. It has long been the practice of the executive branch to treat appropriations as permissive rather than mandatory. President Jefferson, for example, notified Congress in 1803 that the sum of \$50,000 appropriated for gunboats remained unexpended: "The favorable and peaceable turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary . . ."<sup>123</sup> An opinion by the Attorney General in 1896 main-

<sup>121</sup> Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124 (1969).

<sup>122</sup> Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 43 N.C.L. REV. 502, 533 (1965).

<sup>123</sup> I A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 360.

tained that an appropriation was not mandatory "to the extent that you are bound to expend the full amount if the work can be done for less . . . ."<sup>124</sup> The Hoover Commission report in 1949 recommended that the President should have authority to impound funds, provided that "the purposes intended by the Congress are still carried out."<sup>125</sup>

When the President impounds funds on that basis, few legislators are likely to challenge him. George Mahon, chairman of the House Appropriations Committee, has said that "the weight of experience and practice bears out the general proposition that an appropriation does not constitute a mandate to spend every dollar appropriated. . . . I believe it is fundamentally desirable that the Executive have limited powers of impoundment in the interests of good management and constructive economy in public expenditures."<sup>126</sup>

Not only is the President permitted limited powers of impoundment to be exercised at his discretion; in some cases he is required by law to withhold expenditures. By law, the President is expected to set aside funds for contingencies or to effect savings whenever they are made possible "by or through changes in requirements, greater efficiency of operations, or other developments" that take place after funds have been appropriated.<sup>127</sup> The vague and undefined terms of this provision obviously give the President wide latitude to impound funds: what, for example, constitutes "changes in requirements," or "greater efficiency of operations," or "other developments"?

Other statutes require that funds be withheld under conditions and circumstances spelled out by Congress. The 1964 Civil Rights Act empowers the President to withhold funds from federally financed programs in which there is discrimination by race, color, or national origin.<sup>128</sup> On the basis of that provision, special desegregation grants may be terminated when school districts violate civil rights requirements. A 1968 act requires states to update their welfare payment standards to reflect cost-of-living increases.<sup>129</sup> Failure to comply with the act can lead to a cutoff of federal welfare assistance. The Revenue and Expenditure Control Act of 1968 required expenditure reductions, most of which were achieved by administrative action.<sup>130</sup> The spending ceilings adopted by Congress for fiscal years 1969, 1970, and 1971 pro-

<sup>124</sup> 21 OP. ATT'Y GEN. 415 (1896). Similar statements appear at 21 OP. ATT'Y GEN. 392, 422 (1968).

<sup>125</sup> THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, BUDGETING AND ACCOUNTING, A REPORT TO THE CONGRESS 17 (1949).

<sup>126</sup> Letter from Representative George Mahon to Senator Sam J. Ervin, Jr., Feb. 25, 1969 (copy obtained from Mr. Eugene B. Wilhelm, staff assistant, House Committee on Appropriations).

<sup>127</sup> 31 U.S.C. § 665(c)(2) (1970).

<sup>128</sup> 42 U.S.C. § 2000d-1 (1970).

<sup>129</sup> 42 U.S.C. § 602(a)(23) (1970). For accounts of threats made by HEW during 1971 to cut off relief funds from Calif., Ind., Neb., and Ariz., see the Washington Post, Jan. 9, 1971, at A2, col. 1; N.Y. Times, Jan. 20, 1971, at 15, col. 1; Washington Post, Jan. 28, 1971, at A18, col. 1; N.Y. Times, Mar. 29, 1971, at 19, col. 1; and N.Y. Times, Apr. 1, 1971, at 24, col. 3.

<sup>130</sup> 31 U.S.C. § 11 (1970). See L. FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 107-08 (1972).

vided the executive branch with additional authority to withhold funds.<sup>131</sup> Foreign assistance acts have directed the President to withhold economic assistance in an amount equivalent to the amount spent by any underdeveloped country for the purchase of sophisticated weapons systems, unless he informs Congress that the withholding of such assistance would be detrimental to the national security.<sup>132</sup>

### 1. *Military Procurement*

Presidents have also withheld funds on their own initiative after determining that it would be wasteful or unwise to spend money on weapons systems. President Eisenhower, for instance, impounded funds for the production of antiballistic missiles, insisting that funds should not be released until developmental tests were satisfactorily completed.<sup>133</sup> A major clash between legislative directives and executive discretion occurred in 1961 when Congress added \$180 million to the \$200 million requested by the Kennedy Administration for development of the B-70 bomber (later designated RS-70). Defense Secretary McNamara, after stressing the U.S. advantage over the Soviets in bombers and the deterrent capability of American missile strength, refused to release the unwanted funds. The House Armed Services Committee threatened to "direct" the Administration to spend money for production, but later removed the language at the urging of President Kennedy.<sup>134</sup> Even if Congress had followed through with its threat to mandate expenditures, the President could well have argued that there were too many developmental unknowns, too many technical problems unresolved, and therefore no justification for proceeding beyond the prototype stage.

In such situations it is contended that the President thwarts the will of Congress. It is not always easy, however, to know what that will is. President Truman's impoundment of Air Force funds in 1949 would appear to be a clear denial of legislative intent, and yet the issue was not at all that simple. The House had voted to increase Air Force funds, while the Senate sided with the President in opposing the increase. The matter lay deadlocked in conference committee, with adjournment close at hand and the military services in need of funds to meet their payrolls. A Senate motion to vote continuing appropriations was rejected by the House. To break the impasse, the Senate reluctantly accepted the extra Air Force funds, but with the understanding, as Senator Thomas said, that "if the money is appropriated it may not be used" by the President.<sup>135</sup> In light of that legislative history, it is clearly an oversimplification to say that Truman's impoundment of funds represented a denial of "the will of Congress."

<sup>131</sup> See FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY*, *supra* note 130, at 106-10.

<sup>132</sup> See, e.g., Act of Feb. 9, 1970, Pub. L. No. 91-194, § 119, 84 Stat. 10.

<sup>133</sup> U.S. PRESIDENT, *PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY, 1960-61*, at 54-55, 414 (1961).

<sup>134</sup> For discussion on this dispute and other impoundment controversies, see Fisher, *The Politics of Impounded Funds*, 15 *AD. SCI. Q.* 361 (1970).

<sup>135</sup> 95 *CONG. REC.* 14,355 (1949). Note also the exchange between Senators Ferguson and Saltonstall at 95 *CONG. REC.* 14,855 (1949); Fisher, *The Politics of Impounded Funds*, *supra* note 134, at 366-67.

## 2. *Impounding Funds to Promote Executive Domestic Priorities*

In the cases cited thus far, funds were withheld in response to statutory directives or justified as good management of funds for weapons procurement. A different situation developed under the Nixon Administration; funds were withheld from domestic programs because the President considered those programs incompatible with his own set of budget priorities. Priorities and impoundment were at issue in 1969 when President Nixon announced plans to reduce research health grants, defer Model Cities funds, and reduce grants for urban renewal. During that same period he proceeded with his own preferences, such as the supersonic transport, a new manned bomber, a larger merchant marine fleet, and the Safeguard ABM system.<sup>186</sup>

In the spring of 1971 the Nixon Administration announced that it was withholding more than \$12 billion, most of which consisted of highway money and funds for various urban programs. When Secretary Romney appeared before a Senate committee in March, he explained that funds were being held back from various urban programs because there was no point in accelerating programs that were "scheduled for termination." He was referring to the fact that Congress had added funds to grant-in-aid programs, whereas the Administration wanted to consolidate those programs and convert them into its revenue-sharing proposal.<sup>187</sup> To impound funds in this prospective sense—holding on to money in anticipation that Congress will enact an Administration bill—is a new departure for the impoundment technique. Money is not being withheld to avoid deficiencies, or to effect savings, or even to fight inflation, but rather to shift the scale of budget priorities from one Administration to the next, prior to Congressional action.

Another example of how the Nixon Administration used impoundment to promote its domestic priorities involved public works projects. The Administration went ahead with the projects it had recommended to Congress but deferred, without exception, all of the additional projects that Congress had wanted. The Deputy Director of the Office of Management and Budget offered this explanation to a House subcommittee: "Given the necessity for retrenchment in some areas, I think it is inevitable that the President would feel that the items he included were items that should be released first."<sup>188</sup> The subcommittee did not ask the Administration to identify its authority for giving priority to its programs while deferring Congressional add-ons.

### B. Legislative Remedies

As a partial remedy for the withholding of funds by the President, Congress has adopted "floors," or minimum levels, below which the Administration could not go.

<sup>186</sup> Fisher, *The Politics of Impounded Funds*, *supra* note 134, at 372.

<sup>187</sup> *Hearings on The Withholding of Funds for Housing and Urban Development Programs, Fiscal Year 1971, Before the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 1st Sess. 163, 165 (1971).

<sup>188</sup> *Hearings on Public Works for Water and Power Development and Atomic Energy Commission Appropriations (part 6) Before the House Comm. on Appropriations*, 92d Cong., 1st Sess. 22 (1971) [hereinafter cited as *Public Works*].

In 1958, for instance, the Eisenhower Administration<sup>1</sup> wanted to reduce the strengths of the Army Reserve and the Army National Guard, both of which had strong support in the local communities. Congress retaliated by providing mandatory language to maintain the strengths at higher levels.<sup>139</sup>

Political pressure has also been used to pry loose impounded funds. After the November 1966 elections, President Johnson announced a \$5.3 billion reduction in federal programs. Sensitive to criticism from the states, he released some of the money in February 1967 and, on the eve of a conference the following month with governors, released additional amounts.<sup>140</sup> Pressure also came into play in the fall of 1970 after President Nixon had withheld some education funds. Two weeks before the November elections, in the midst of widespread criticism from school districts, the Administration announced that the money was being released. When a Cabinet officer was asked whether the pending elections had prompted the Administration to reverse its position and free the funds, he replied, smiling, that there was "no connection whatsoever."<sup>141</sup>

These pressure tactics and confrontations, even when successful, are not wholly satisfactory to the mayors of large cities dependent on federal funds. They must take time from their busy schedules to come to Congress in support of authorization bills for urban programs. They testify a second time in behalf of an appropriation bill. Now they must come to Congress and to the Administration a third time to see that the money, having already been authorized and appropriated, is actually spent.

In March 1971, the Senate Subcommittee on Separation of Powers held hearings for the purpose of establishing better legislative control over impounded funds. Senator Sam J. Ervin, Jr., chairman of the subcommittee, introduced a bill several months later to require the President to notify Congress within ten days whenever he impounds funds appropriated for a specific purpose or project. The President's message would include the amount of funds impounded, the specific projects or functions affected, and the reasons for impounding the funds. Congress would then have sixty days to pass a joint resolution disapproving the impoundment.<sup>142</sup> Senator Ervin introduced a subsequent bill in September to provide that an impoundment action by the President shall cease at the end of sixty calendar days unless Congress approves the action by concurrent resolution.<sup>143</sup> This bill is stronger than its predecessor in two respects: it provides for affirmative approval instead of a resolution of disapproval, and it relies on a concurrent resolution (which cannot be vetoed) instead of a joint resolution (which must be presented to the President).

<sup>139</sup> Act of Aug. 22, 1958, Pub. L. No. 85-724, 72 Stat. 715. See S. REP. NO. 1578, 87th Cong., 2d Sess. 5 (1962).

<sup>140</sup> Fisher, *The Politics of Impounded Funds*, *supra* note 134, at 370-71.

<sup>141</sup> Washington Post, Oct. 23, 1970, at A6, col. 1 (remarks of HEW Secretary Richardson).

<sup>142</sup> S. 2027, 92d Cong., 1st Sess. (1971); *Hearings on Executive Impoundment of Appropriated Funds Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971).

<sup>143</sup> S. 2581, 92d Cong., 1st Sess. (1971).

This kind of legislation assumes that Congress has the power to compel expenditures. While it is true that a legal memorandum issued by an official in the Nixon Administration affirms the power of Congress to mandate expenditures for the impacted areas program,<sup>144</sup> the President could exert his prerogatives elsewhere. In the area of defense procurement, in particular, the President could take the position that Congress cannot deprive him of his judgment and discretion in the administration of programs and management of funds.

Another approach for legislative control is to take back from the Administration some of its reasons for impounding funds. As a result of the spending ceilings adopted by Congress in recent years, the Administration has argued that certain funds have to be withheld in order to avoid the risk of exceeding the ceiling. Congress did not adopt a spending ceiling for fiscal 1972. Rep. Joe L. Evins explained to a budget official that "the Congress feels that they don't want to give you a flexible ceiling which you could use as a tool to freeze and impound funds as you did in the past."<sup>145</sup>

During debate on the Revenue Act of 1971, the Senate considered an amendment by Senator Humphrey to require the President to transmit to Congress and to the Comptroller General a report on impounded funds. The report would include such features as the amount of funds impounded, the date of impoundment, the departments affected, the reasons for impoundment, and the period of time during which the funds are to be impounded. The Senate adopted the amendment by a vote of 48 to 18,<sup>146</sup> but the amendment was not considered in conference because of questions raised regarding its germaneness under House rules.<sup>147</sup>

The Foreign Assistance Act of 1971 contained a provision which made the obligation or expenditure of funds available under the Foreign Assistance Act and the Foreign Military Sales Act contingent upon the release of certain impounded funds. The Comptroller General would have to certify that the Administration had released, by April 30, 1972, a little over \$2 billion in funds for programs administered by the Department of Agriculture, the Department of Health, Education, and Welfare, and the Department of Housing and Urban Development.<sup>148</sup>

## VII

### UNAUTHORIZED COMMITMENTS

Article 1, section 9, of the Constitution provides that "No money shall be drawn from the Treasury but in consequence of appropriations made by law." Presidents have nevertheless found it expedient at times to enter into financial

<sup>144</sup> Memorandum by William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Dec. 1, 1969, reprinted at 116 CONG. REC. S158 (daily ed. Jan. 20, 1970).

<sup>145</sup> *Public Works*, *supra* note 138, at 13.

<sup>146</sup> 117 CONG. REC. S18,485 (daily ed. Nov. 13, 1971).

<sup>147</sup> H.R. REP. NO. 708, 92d Cong., 1st Sess. 59 (1971).

<sup>148</sup> Pub. L. No. 92-226, § 658, 86 Stat. 32 (Feb. 7, 1972). See 117 CONG. REC. S21,903 (daily ed. Dec. 17, 1971). The GAO subsequently reported that these funds, as of the deadline, had been released. See 118 CONG. REC. H4098 (daily ed. May 3, 1972).

obligations not authorized by Congress. Jefferson, for instance, agreed to accept France's offer to sell the whole of Louisiana for \$11,250,000—plus an additional \$3,750,000 to cover private claims against France—even though the offer exceeded instructions set forth by Congress.<sup>149</sup> Jefferson also relied on the executive prerogative in June 1807, after a British vessel had fired on the American ship *Chesapeake*. Without statutory authority, Jefferson ordered military purchases for the emergency and disclosed his actions to Congress when it came back in session. "To have awaited a previous and special sanction by law," he said, "would have lost occasions which might not be retrieved."<sup>150</sup>

In 1861, after the firing on Fort Sumter, and while Congress was adjourned, Lincoln directed his Secretary of the Treasury to advance \$2,000,000 to three private citizens, the money to be used for "military and naval measures necessary for the defense and support of the Government . . . ."<sup>151</sup> Also in this category of unauthorized commitments was the decision by Theodore Roosevelt to send an American fleet around the world, despite Congressional threats not to finance the expedition. Roosevelt answered that he had enough money to take the fleet halfway around the world. "[I]f Congress did not choose to appropriate enough money to get the fleet back, why, it would stay in the Pacific. There was no further difficulty about the money."<sup>152</sup>

The Supreme Court has occasionally reviewed some of the financial initiatives taken by executive officers. In one case, decided in 1833, the Court addressed itself to the question of whether the head of an executive department could allow payments not authorized by law. A unanimous decision observed that "A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for every thing he does. No government could be administered on such principles."<sup>153</sup> Another Court decision involved an agreement made between a government contractor and Buchanan's Secretary of War, John B. Floyd. The contractor, lacking sufficient funds to complete the order, was allowed to draw time-drafts and have them purchased by his suppliers as a means of providing interim assistance. The government subsequently accepted drafts of \$5 million, but over a million dollars remained unpaid. Holders of the unpaid drafts contended that Secretary Floyd's acceptances were binding on the

<sup>149</sup> I A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 357. Congress initially appropriated \$2,000,000 to be applied toward the purchase of New Orleans and the Floridas. 12 ANNALS OF CONG. 370-71 (1803); Act of Feb. 26, 1803, ch. 8, § 1, 2 Stat. 202. Supplemental appropriations: Acts of Nov. 10, 1803, ch. 2 and 3, 2 Stat. 245, 247.

<sup>150</sup> I A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 428.

<sup>151</sup> 6 *id.* at 78.

<sup>152</sup> 20 THE WORKS OF THEODORE ROOSEVELT 540 (rev. ed. 1927).

<sup>153</sup> United States v. Macdaniel, 32 U.S. (7 Pet.) 1, 14 (1833).

government. The Court, however, dismissed their claim, denying that Floyd possessed either constitutional or statutory authority to enter into his agreements.<sup>154</sup>

In trying to prevent unauthorized commitments, Congress has had to soften statutory language at times in order to allow army and navy supply agencies to sign contracts in advance of appropriations. Otherwise, the material would not have been available on time. Thus, when Congress prohibited unauthorized commitments in 1820, an exception was allowed for contracts for subsistence and clothing for the army and navy, as well as for contracts by the Quartermaster's Department. Legislative delays in passing appropriation bills (enacted after one-fourth to one-third of the year had elapsed) forced departments to make commitments and expenditures not legally authorized. The Secretary of the Navy reported to Congress in 1825 that his department, for nearly half the year, acted in "perfect ignorance of the law under which it is bound to act." As a result "The law is, necessarily, not complied with, because it is passed after the act is performed."<sup>155</sup>

Administrative discretion in the handling of funds regularly provoked the ire of Congress. The Gilmer Committee reported in 1842 "Under color of what are termed regulations, large amounts of money are often applied to purposes never contemplated by the appropriating power, and numerous offices are sometimes actually created in the same way."<sup>156</sup> Funds generated from such governmental activities as the postal service or customs collection invited executive discretion as to their use. William T. Barry, Postmaster General from 1828 to 1835, borrowed large sums of money on the credit of the Post Office. His practice was defended on the grounds that the Post Office Department "created its own funds" and that bank loans were therefore simply a claim on future postal revenues.<sup>157</sup> A Senate report in 1834 roundly condemned such practices and justifications.<sup>158</sup> In 1842 the House Committee on Public Expenditures complained that the Secretary of the Treasury was using customs revenue to finance a naval force for the collection of revenue. "He appropriates and pays," the committee said, "without the sanction of Congress, and even without its knowledge."<sup>159</sup>

#### A. Coercive Deficiencies

A statute passed in 1870 prohibited executive departments from spending in a fiscal year any sum in excess of appropriations for that year; nor could any department involve the government in any contract for the future payment of money

<sup>154</sup> *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666 (1868).

<sup>155</sup> Act of May 1, 1820, ch. 52, § 6, 3 Stat. 568. Secretary of the Navy, *Report to the U.S. Congress*, in 2 AMERICAN STATE PAPERS: NAVAL AFFAIRS 101 (1860). The 1820 contract authority evolved into the "Feed and Forage" Law, passed in 1861 and still part of the U.S. Code. In advance of authorizations or appropriations, the Departments of the Army, Navy, and Air Force are permitted to make contracts or purchases for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, to cover the necessities of the current year. 41 U.S.C. § 11(a) (1970).

<sup>156</sup> H.R. REP. No. 741, 27th Cong., 2d Sess. 17-18 (1842).

<sup>157</sup> See L. WHITE, *THE JACKSONIANS* 265-66 (1954).

<sup>158</sup> S. REP. No. 422, 23d Cong., 1st Sess. (1834).

<sup>159</sup> H.R. REP. No. 756, 27th Cong., 2d Sess. 6 (1842).



in excess of such appropriations.<sup>160</sup> The thrust of that law was regularly blunted by the incurring of deficiencies. If the departments ran out of money before the end of the fiscal year there was little that Congress could do except pass a supplementary appropriation. The fault was not entirely that of the departments, however. James A. Garfield, who had been chairman of the House Appropriations Committee from 1871 to 1875, made this observation: "One of the vicious party devices too often resorted to for avoiding responsibility for extravagance in appropriations is to cut down the annual bills below the actual amount necessary to carry on the government, announce to the country that a great reduction has been made in the interest of economy, and after the elections are over, make up the necessary amount by deficiency bills."<sup>161</sup>

The Antideficiency Act of 1905 introduced the technique of monthly or other allotments to prevent "undue expenditures in one portion of the year that may require deficiency or additional appropriations to complete the service of the fiscal year . . . ."<sup>162</sup> In the Antideficiency Act of 1906, Congress stipulated that apportionments could be waived or modified in the event of "some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment . . . ."<sup>163</sup> That constituted an admission by Congress that regardless of spending patterns anticipated when passing appropriation bills—or even after apportioning the funds—changing conditions might necessitate a different course for expenditures.

Contemporary regulations on unauthorized commitments are far more explicit than the Constitution. The U.S. Code contains the following admonition:

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.<sup>164</sup>

Despite the rigorous nature of that language, there are a number of cases where the Administration has presented Congress with a *fait accompli* and in effect compelled it to appropriate the necessary funds.

The commitments of troops to Korea by President Truman is one postwar example. Military intervention began prior to the second United Nations resolution of June 27, 1950, and, despite the provisions of the United Nations Participation Act of 1945, no attempt was made to obtain Congressional approval for the venture.<sup>165</sup> The war in Southeast Asia—notwithstanding the adoption of

<sup>160</sup> Act of July 12, 1870, ch. 251, 16 Stat. 251.

<sup>161</sup> L. WILMERDING, *supra* note 1, at 141.

<sup>162</sup> Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257-58.

<sup>163</sup> Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 49.

<sup>164</sup> 31 U.S.C. § 665(a) (1970). *But see* "Feed and Forage" Law, *supra* note 155.

<sup>165</sup> L. FISHER, *supra* note 130, at 194-95.

the Tonkin Gulf Resolution—has been another case of Presidential commitment first and Congressional support second. The executive branch initiated the covert war carried out prior to the Tonkin Gulf incident. Executive decisions were also responsible for filling out the scope of the commitment, including the bombing of North Vietnam and the introduction of American ground forces. Executive commitments are evident even in peace negotiations. Dr. Henry A. Kissinger, Assistant to the President for National Security Affairs, told reporters on January 26, 1972, that the Administration had offered North Vietnam “a massive reconstruction program for all of Indochina in which North Vietnam could share to the extent of several billion dollars.”<sup>166</sup> It was later reported that the plan contemplated a five-year aid program of \$5 billion for South Vietnam, Laos, and Cambodia, and \$2.5 billion for North Vietnam.<sup>167</sup>

### B. Cambodian Intervention

Another executive-inspired commitment resulted from the Cambodian intervention of the spring of 1970. Following his intervention there, President Nixon asked Congress for \$255 million in military and economic assistance for Cambodia. The executive branch clearly involved the government in an obligation in advance of appropriations, not only for the expenses resulting from the Cambodian operation itself, but for future expenses as well. As Secretary of State Rogers explained to the Senate Foreign Relations Committee, on December 10, 1970: “I think it is true that when we ask for military assistance and economic assistance for Cambodia we do certainly take on some obligation for some continuity.”<sup>168</sup> In an interview with a Washington, D.C., reporter, the Cambodian foreign minister said that he felt there was an unwritten treaty between the two countries: “I am convinced that there really is a moral obligation of the United States to help. We are confident that the United States will continue to help us.”<sup>169</sup>

The extent of this support was indicated in October 1971 when the Senate debated an amendment to the Foreign Assistance Act which would limit the total expenditure in Cambodia to \$250 million for fiscal 1972. The Administration opposed the restriction, contending that it would threaten the capacity of the Cambodian Government to defend itself. John N. Irwin, III, Acting Secretary of State, offered Senator Fulbright this appraisal: “We believe that with continued United States assistance at the levels requested by the Administration, the Cambodians with some external logistics and maintenance support will continue to make progress in defending their country from foreign invasion.”<sup>170</sup>

On October 29, during debate on the Foreign Assistance Act of 1971, the Senate

<sup>166</sup> 8 WEEKLY COMP. PRES. DOC. 128 (1972).

<sup>167</sup> Washington Post, Jan. 28, 1972, at A1, col. 2.

<sup>168</sup> *Hearings on Supplemental Foreign Assistance Authorization, 1970, Before the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess. 27 (1970).

<sup>169</sup> Interview with Henry Bradsher, Washington Sunday Star, May 23, 1971, at A5, col. 1.

<sup>170</sup> 117 CONG. REC. S16,390 (daily ed. Oct. 19, 1971).

voted to increase the ceiling on expenditures in Cambodia from \$250 million to \$341 million. The latter was the figure requested by the Administration. Thus, while the Senate agreed to give the Administration what it wanted, it also asserted the right of Congress to set limits on expenditures. The ceiling could not be circumvented by special powers and authorities, such as the ability of the Pentagon to declare defense articles "excess" and give them to Cambodia, or the broad authority of the Defense Department and the CIA to transfer funds from one area to another. If it turned out that more than \$341 million was required, this provision required the Administration to return to Congress for additional authorization.<sup>171</sup>

The \$341 million ceiling did not apply to combat air operations over Cambodia. Moreover, the House accepted the ceiling in conference, but only with amendments which specifically excluded the obligation or expenditure of funds attributable to South Vietnamese operations in Cambodia.<sup>172</sup> The President signed the Foreign Assistance Act on February 7, 1972.<sup>173</sup>

### C. GAO Controls

It is generally assumed that the General Accounting Office is empowered to decide the legality of a payment of public funds and that such decisions are binding on the Administration. Several decisions have indeed been issued by the Comptroller General to disapprove expenditures by the executive branch.<sup>174</sup> However, it is also possible for the executive branch to invoke its own prerogatives and oppose a GAO decision. Thus, in a letter directed to the Secretary of State on December 13, 1960, the Comptroller General advised that program funds under the Mutual Security Act would no longer be available because of the Secretary's failure to forward certain documents and records to the GAO or to Congress, as required by the Act. The Attorney General rejected that opinion on the ground that Congress could not infringe on the right of "executive privilege" by forcing the President to release information which he considers to be injurious to the national security or the public interest.<sup>175</sup>

As another example, in 1960 the Defense Department entered into a written agreement with a consortium of five NATO countries formed to produce Hawk surface-to-air missiles in Europe. The Pentagon, lacking sufficient funds to fulfill its part of the agreement, inserted a clause stating that the U.S. commitment was "subject to availability of funds." GAO took the position that no express authorization existed in law allowing DOD to enter into the purchase agreement, the commit-

<sup>171</sup> 117 CONG. REC. S17,169-75 (daily ed. Oct. 29, 1971).

<sup>172</sup> S. REP. No. 590, 92d Cong., 1st Sess. 28 (1971).

<sup>173</sup> Pub. L. No. 92-226, § 655, 86 Stat. 29 (Feb. 7, 1972).

<sup>174</sup> See, e.g., 42 COMP. GEN. 226 (1962). A GAO report states that decisions of the Comptroller General "are final and conclusive on the executive branch and are binding on the General Accounting Office in its audit." *Functions of the General Accounting Office*, S. Doc. No. 96, 87th Cong., 2d Sess. 21 (1962).

<sup>175</sup> 41 OP. ATT'Y GEN. 507 (1960).

ment did not comply with the intent of the Antideficiency Act, and that the Pentagon had firmly committed the United States to buy four missile systems at an unknown cost. Although GAO advised the Pentagon to take certain actions, the Defense Department in December 1970 stated that it did not agree that there had been any violation of law and that it did not consider any corrective action necessary.<sup>176</sup>

The GAO also clashed with the executive branch over the legality of the "Philadelphia Plan." In order to work on federally assisted projects, contractors had to set specific goals for hiring members of minority groups. On August 5, 1969, the Comptroller General issued a decision in which he held that the Plan conflicted with the 1964 Civil Rights Act, which prohibited the setting up of any kind of preferential treatment on the basis of race, color, or national origin. The Comptroller General said it did not matter whether one designated the hiring commitment as a "goal" or a "quota."<sup>177</sup> The Secretary of Labor promptly announced that the Administration would continue to press ahead with the Philadelphia Plan. He said that interpretation of the Civil Rights Act had been vested by Congress in the Department of Justice and that the Department had approved the plan as consistent with the Act.<sup>178</sup> Moreover, the Secretary of Labor said that the Comptroller General had ignored the President's Executive Order "as an independent source of law."<sup>179</sup> The U.S. Court of Appeals for the Third Circuit later upheld the legality of the Philadelphia Plan. The court justified this use of Presidential power partly on the Chief Executive's implied power—as it relates to economical procurement policy—to assure that "the largest possible pool of qualified manpower be available for the accomplishment" of federal projects.<sup>180</sup>

GAO reviews, as in the case of payments to Free World Forces, have been hampered by administrative delays and by refusals on the part of executive agencies to allow GAO investigators access to future planning information, routine evaluative reports, and program evaluation group reports.<sup>181</sup> To offset such difficulties, it has been proposed that the Comptroller General should have subpoena authority to compel agencies to make available books, accounts, and other contractor records required for a GAO investigation. At least forty executive agencies, independent boards, and commissions have subpoena powers now.<sup>182</sup>

<sup>176</sup> GENERAL ACCOUNTING OFFICE, REPORT TO THE SENATE COMM. ON FOREIGN RELATIONS ON UNITED STATES ECONOMIC AND MILITARY FOREIGN ASSISTANCE PROGRAMS 36-37 (Comm. Print 1971).

<sup>177</sup> 49 COMP. GEN. 59 (1969), reprinted at 115 CONG. REC. S9176-79 (daily ed. Aug. 5, 1969).

<sup>178</sup> 42 OP. ATT'Y GEN. 37 (1969), reprinted at 115 CONG. REC. S11,318 (daily ed. Sept. 25, 1969).

<sup>179</sup> 115 CONG. REC. S9954 (daily ed. Aug. 13, 1969).

<sup>180</sup> *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 171 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971).

<sup>181</sup> *Hearings on Executive Privilege: The Withholding of Information by the Executive Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 303-15 (1971).

<sup>182</sup> *Hearings on the Capability of GAO to Analyze and Audit Defense Expenditures Before the Senate Comm. on Government Operations*, 91st Cong., 1st Sess. 105-06 (1969). During the fall of 1970 the Senate passed a bill (S. 4432, 91st Cong., 2d Sess.) designed to strengthen GAO access to departmental records, but the bill was not acted upon by the House.

## CONCLUSION

We know from other studies, with a fair amount of detail, the discrepancies that exist between the President's budget requests and the amounts authorized by Congress. Comparable gaps exist between what is authorized and what is appropriated. On these areas of the budget process we know a great deal. In contrast, we know embarrassingly little about the expenditure phase. Why are there discrepancies between what is appropriated and what is spent? What, if anything, should be done about it?

The information supplied in this paper should provide advocates of reform with a little better understanding of what the problem is and why past efforts at reform have not always produced beneficial and predictable results. It frequently happens that the adoption of a reform proposal, intended to drive out one evil, simply creates another that proves harder to extirpate. Take away the power to make transfers, and agency officials pad their budgets. Eliminate discretionary authority altogether, and agency officials incur deficiencies. Give the President the power to allot funds—as a means of preventing deficiencies—and he uses that power to impound funds and further his own policies.

The reform advocate is therefore advised to regard executive spending discretion as an essential, ineradicable feature of the budget process. Expenditures deviate from appropriations for a number of reasons. Appropriations are made many months, and sometimes years, in advance of expenditures. Congress acts with imperfect knowledge in trying to legislate in fields that are highly technical and constantly undergoing change. New circumstances will develop to make obsolete and mistaken the decisions reached by Congress at the appropriation stage. It is not practicable for Congress to adjust to these new developments by passing large numbers of supplemental appropriation bills. Were Congress to control expenditures by confining administrators to narrow statutory details it would perhaps protect its power of the purse but it would not protect the purse itself. Discretion is needed for the sound management of public funds.

While there no doubt exists a need for executive flexibility, that is an abstract term capable of hiding much mischief. The executive branch complains about the vast amount of "uncontrollables" in the budget and yet somehow comes up with a hundred million dollars to finance the Cambodian intervention. It is evident that in a number of areas, including covert financing, impoundment, reprogramming, transfers, and unauthorized commitments, Congress has yet to discover a satisfactory means of controlling expenditures. Public policy is then decided by administrators rather than by elected representatives and the funds they provide.

The results are often incongruous. Congress goes through the formality of authorizing and appropriating funds but the money is never spent. On the other hand, Congress can find itself locked into paying for administrative commitments

it never authorized. The expenditure process is one in which administrators must enjoy substantial discretion in exercising judgment and in taking responsibility for their actions, but those actions ought to be directed toward executing Congressional, not administrative, policy. It is up to Congress to make that policy clear and consistent.