



AMERICAN CONSTITUTIONALISM  
 VOLUME I: STRUCTURES OF GOVERNMENT  
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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

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Ramsey Clark, "Power of President to Impound Funds" (1967)<sup>1</sup>

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With both the Vietnam War and the Great Society expanding under the presidency of Lyndon Johnson, the "guns versus butter" debate heated up as deficits and inflation began to rise. In 1966, the president announced that roughly \$3 billion of scheduled federal spending would be cut or deferred in an effort to control inflation. Federal highway funds were high on the president's list of spending to be deferred. Roughly one-quarter of the appropriated highway funds for the 1967 fiscal year were to be deferred to the future.

The secretary of transportation asked acting Attorney General Ramsey Clark for an opinion on the legality of the president's order. The attorney general endorsed the validity of the president's instructions, arguing for the principle that "there is no duty to spend the entire amount that is available." Johnson's impoundment of the highway funds became a key precedent for the Nixon administration's actions to impound a wide variety of appropriated funds in the interest of fighting inflation and deficit spending.

What is the legal basis for impoundment, according to the attorney general? Could Congress force the president to spend the funds? Does it matter whether the funds are impounded temporarily or permanently? What are the purposes of the legislative "power of the purse," and does an executive power to impound funds contradict those purposes?

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An understanding of the legal problems raised by your inquiry will be facilitated by an outline of the pertinent provisions of the Federal-aid highway program. The program involves successive, and distinct, stages of *authorizations, apportionments, programs, projects* and *appropriations*.

The basic *authorization* of appropriations for the Interstate Highway system relating to the 15-year period ending with the Fiscal Year 1972 may be found in the [Highway Act of 1956]. The funds expected to be available with respect to each fiscal year included in these authorizations are *apportioned* among the States on or before the first day of January preceding the fiscal year. . . .

After apportionment, the States submit general *programs* of proposed highway projects for approval. Following the approval of a program by the Secretary, the State submits [surveys and plans] "for each proposed project included in an approved program. . . ." Approval of a specific *project* by the Secretary "shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto."

The amount which may be appropriated in any given year for Federal-aid highway purposes is subject to two limitations: First, it cannot exceed the amounts provided for in the authorization act and, second, it cannot exceed the funds available in the Highway Trust Fund. . . .

It is my conclusion that the Secretary has the power to defer the availability to the States of those funds authorized and apportioned for highway construction which have not, by the approval of a project, become the subject of a contractual obligation on the part of the Federal Government in favor of a State.

. . . [I]t will be useful to consider first the effect of a congressional appropriation of money. The basic function of such legislation to furnish the formal permission required by Article I, section 9, clause 7 of the Constitution for the withdrawal of funds from the Treasury. The courts have recognized that appropriation acts are of a fiscal and permissive nature and do not in themselves impose upon the executive branch an affirmative duty to expend the funds. *Hukill v. United States* (1880). . . .

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<sup>1</sup> Excerpt taken from 42 Op. Att'y Gen. 147 (1967).



Congress, of course, is fully aware of the rule that an appropriation act in itself does not constitute a mandate to spend. The classic exposition of this characteristic of appropriations legislation may be found in the House Appropriations Committee report [of 1950].

"Economy neither begins nor ends in the Halls of Congress \* \* \* The Congress \* \* \* decides the maximum amounts which must be appropriated for \* \* \* various activities, and the annual appropriations bill provides the sums so determined by the Congress.

"Appropriations of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity. . . ."

An appropriation act thus places an upper and not a lower limit on expenditures. The duty of the President to see that the laws are faithfully executed, under Article II, section 3 of the Constitution, does not require the funds made available must be fully expended. This principle has received statutory recognition in the Anti-Deficiency Act [of 1906], which authorizes the executive branch to effectuate savings of appropriated funds . . . .

Many factors must be weighed by the Executive in determining the extent to which funds should be expended. Consideration must be given not only to legislative authorizations and appropriations but also to such factors as the effect of the authorized expenditures on the national economy and their relation to other programs important to the national welfare.

A situation analogous to the present one arose in the early 1940's when the economy of the United States shifted first to defense and later to war production. At that time President Franklin Delano Roosevelt directed that projects having a lower priority would have to be postponed or even cancelled in spite of the availability of appropriated funds. . . .

". . . . While our statutory system of fund apportionment is not a substitute for item or blanket veto power, and should not be used to set aside or nullify the expressed will of Congress, I cannot believe that you or Congress as a whole would take exception . . . which are common to sound business management everywhere. In other words, the mere fact that Congress, by the apportionment process, has made available specified sums for the various programs and functions of Government is not a mandate that such funds must be fully expended. Such a premise would take from the Chief Executive every incentive for good management and the practice of commonsense economy. . . ."

. . .

There is nothing in [the Highway Act] which imposes upon the executive branch the duty to approve all qualifying projects for which apportioned funds are available.

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It is not consistent with this approach to contend that the States have vested rights in the funds apportioned prior to the actual approval of projects. . . . It is approval of a project . . . which constitutes the contractual obligation of the United States. . . .

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I conclude that the recent limitation on the Federal-aid highway funds which may be obligated during the current fiscal year was a valid exercise of Executive authority.