AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

William H. Rehnquist, **Presidential Authority to Impound Funds** (1970)[1]

During President Richard Nixon's first term in office, the White House and Congress were increasingly at odds over the power of the president to "impound," or refuse to spend, appropriated funds. Nixon made much more expansive use of the impoundment power than other presidents had done, using it as a general tool for budget-cutting and targeting a wide range of domestic spending projects that the president thought wasteful. Congress responded with alarm. Assistant Attorney General William H. Rehnquist in the Office of Legal Counsel was assigned the task of examining the president's authority to impound appropriated funds. His focus was on P.L 874. The 1950 statute provided federal funds to public school districts affected by various federal activities. The law provided a strict formula for determining the amount that each district was entitled, and once determined the Commissioner of Education was charged with paying the funds to the schools. Rehnquist concluded that this statute did not leave room for discretion on distributing the funds. That left the constitutional question of whether the president could override the apparent statutory mandate and impound the funds. Rehnquist argued that the president could not, at least in the case of domestic policy that did not otherwise affect a presidential prerogative. Is there anything about Rehnquist's reasoning that would limit the scope of his conclusions to domestic policy?

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With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent. There is, of course, no question that an appropriation act permits but does not require the executive branch to spend funds. But, this is basically a rule of construction, and does not meet the question of whether the President has authority to refuse to spend where the appropriation act or the substantive legislation, fairly construed, require such action.

In 1967 Attorney General Clark issued an opinion upholding the power of the President to impound funds which had been apportioned among the States . . . but had not been obligated through the approval by the Secretary of Transportation of particular projects. This opinion appears to us to have been based on the construction of the particular statute, rather than on the assertion of a broad constitutional principle of Executive authority. . . . [W]e think the case of P.L. 874 is clearly distinguishable, because, among other reasons, impounding the P.L. 874 funds would result not in a deferral of expenditures, but in permanent loss to the recipient school districts of the funds in question and defeat of the Congressional intent . . . .

While there have been instances in the past in which the President has refused to spend funds appropriated by Congress for a particular purpose we know of no such instance involving a statute which by its terms sought to require such expenditure.

Although there is no judicial precedent squarely on point, *Kendall v. United States* (1838), appears to us to be authority against the asserted Presidential power. In that case it was held that mandamus lay to compel the Postmaster General to pay to a contractor an award which had been arrived at in accordance with a procedure directed by Congress for settling the case. The court said:

"There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, the Congress cannot impose upon any executive officer any duty they may think proper, which is not

[1] Excerpt taken from William Rehnquist, "Re: Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools," *Cong. Rec.*, 91st Cong., 2nd sess. 116 (January 20, 1971): 343–345.

repugnant to any right secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character."

It might be argued that *Kendall* is not applicable to the instant situation because the Commissioner of Education's duties are not merely ministerial. On the other hand, while discretion is involved in the computation of the entitlement of the recipient districts, . . . the application of the appropriation to the payment of entitlements . . . might reasonably be regarded as a ministerial duty. . . .

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It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them. Of course, if a Congressional directive to spend were to interfere with the President's authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander-in-Chief of the Armed Forces . . . a situation would be presented very different from the one before us. But the President has no mandate under the Constitution to determine national policy on assistance to education independent from his duty to execute such laws on the subject as Congress chooses to pass.

It has been suggested that the President's duty to "take care that the laws be faithfully executed" might justify his refusal to spend, in the interest of preserving the fiscal integrity of the Government or the stability of the economy. The argument carries weight in a situation in which the President is faced with conflicting statutory demands . . . . But it appears to us that the conflict must be real and imminent for this argument to have validity; it would not be enough that the President disagreed with the spending priorities established by Congress. . . .

If Congress should direct the expenditure of funds in the carrying out of a particular program or undertaking, say, construction of a public building, but without limiting the Executive's discretion in such a way as to designate the recipient of the appropriated funds, a better argument might perhaps be made for a constitutional power to refuse to spend than is available in the formula grant situation presented by P.L. 874. Or this might be viewed simply as a situation in which the duty to spend exists but there is no constitutional means to compel its performance.

[In the case of P.L. 874], technical defenses might prevent recovery by a school district even if the court concluded that the Executive branch had a statutory duty to spend the appropriation.