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THE IMPOUNDMENT CONTROL ACT OF 1974: LEGISLATIVE HISTORY AND IMPLEMENTATION

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THE IMPOUNDMENT CONTROL ACT OF 1974

Summary and Background

The Impoundment Control Act is Title X of the Congressional Budget and Impoundment Control Act of 1974. It was enacted into law on July 12, 1974 and took effect on that date. The purpose of this report is to provide a section by section legislative history and analysis of the Act as well as to describe its early implementation. This report generally covers implementation through the first session of the 94th Congress. It thus encompasses 15 months of experience with the new procedures, sufficient time to discern patterns of implementation by Congress and the Executive Branch.

Title X of the Congressional Budget and Impoundment Control Act establishes a procedure for congressional review and control of impoundments. It also amends the Antideficiency Act to limit the purposes for which reserves may be established. Under the new law, funds may be withheld (that is, reserved from apportionment) only for contingencies or when they no longer are needed because of changed requirements or efficiency of operations.

Title X distinguishes between the rescission and deferral of budget authority and applies different procedures to each. Rescissions may be proposed when the President does not anticipate any future need for the funds or when the withheld funds would lapse if not obligated before the end of the fiscal year. Deferrals are to be proposed when the President anticipates future but not current need for the funds. The President may not propose the deferral of one-year money for the full year or funds which would expire by the end of the fiscal year. For both proposed rescissions and deferrals, the President is to transmit a special message to Congress providing certain required information concerning his action.

In the case of rescissions, the funds must be released unless Congress approves the action (by means of a rescission bill) within 45 days of continuous session after it has been notified by the President. A rescission may be approved in whole or in part and a rescission bill can encompass several Presidential actions. In the case of proposed deferrals, the President's action may continue unless disapproved by either the House or Senate. There is no time limit for congressional disapproval of a deferral. However, the House or Senate cannot amend or only partly disapprove a President's proposed deferral.

The new law gives the Comptroller General responsibility for overseeing implementation of the impoundment controls. The Comptroller General must inform Congress if the President has failed to report an impoundment or if a proposal has been improperly classified. In addition, the Comptroller General is to review the facts, legal authority, and probable effect of each proposed rescission or deferral and submit his findings to Congress. Finally, the Comptroller General is empowered to bring suit to enforce the new impoundment procedures.

Title X establishes special floor procedures for the consideration of rescission bills and impoundment (deferral) resolutions in the House and Senate. It also has a clause disclaiming any intent to ratify or approve any impoundment, assert or concede a power or limitation on the President or Congress, affect the claims of parties to impoundment litigation, or supersede any provision of law requiring the obligation of budget authority.

Development of the Legislation

Although the impoundment of funds is not a new practice--some historians trace it as far back as 1803 when President Jefferson did not spend funds appropriated for gunboats--the new law establishes the first procedures for congressional control of this type of executive action.

The common ingredient of all impoundments is the failure to spend funds appropriated by Congress, but as a leading researcher has commented, impoundment "comes in many shapes and colors, legitimate in one case and highly suspect in another."[1/] In recent years impoundments have become increasingly controversial because funds have been withheld in order to substitute executive policies for those established by Congress. Many impoundments are noncontroversial, involve no deviation from legislative policy, and represent only the savings made possible by efficient operations or the prudent reservation of funds for future contingencies. These routine impoundments are authorized by the Antideficiency Act which was initially passed to ensure that Federal agencies do not spend at a rate that would necessitate deficiency appropriations. That Act--prior to its amendment in 1974--authorized the establishment of reserves for contingencies, to effect savings through greater efficiency of operations, or because of developments which occurred after the appropriations was made.[2/]

However, impoundments have another use which goes beyond routine financial management and involves efforts by the President or his aides to alter the programs and policies adopted by Congress. Policy impoundments are of comparatively recent origin and were first applied on a large scale during World War II when President Roosevelt curtailed public works spending on the ground that the resources were needed for the war effort. During the 1950s and 1960s, there were a number of sharp controversies over the refusal of successive Presidents to spend money on weapons systems authorized by Congress.

1/ Louis Fisher, "Impoundment of Funds: Uses and Abuses," 23 Buff. L. Rev., 142 (1973).
2/ 31 U.S.C. 665.

These executive-legislative confrontations involved the President's constitutional role as Commander-in-Chief and were limited to a narrow range of issues, generally the procurement of a particular weapon. During the Vietnam War, there was a broader use of impoundments as President Johnson ordered the deferral of billions of dollars of spending in an effort to restrain an overheated economy. However, these actions were taken in consultation with congressional leaders, were generally of a temporary nature, and did not provoke a confrontation between the two branches. 3/

Following the 1972 elections, President Nixon embarked on a large scale impoundment of funds from programs which he wanted to terminate or curtail. According to some estimates, the impoundments--predominantly for policy purposes--totalled in excess of $18 billion, double the amount acknowledged by the administration and **are far above the comparable action of any previous** President. 4/ The justifications advanced in support of the President's action centered on his obligation to manage the economy prudently and to abide by the statutory debt limit imposed by Congress. However, the impoundments were not applied across the board to all programs. Defense programs were spared all but routine reserves while dozens of domestic programs suffered deep cuts. Half of the $18 billion authorized by Congress for water treatment facilities was impounded on Presidential order. A moritorium was imposed on subsidized housing programs, disaster assistance was cutback, rural and community development activities were suspended. Almost $2 billion appropriated for the Departments of Labor and HEW was withheld. Among the

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3/ See Louis Fisher, "The Politics of Impounded Funds," 15 Ad. Sci. Q., 361 (1970).

4/ See Allen Schick, "Presidential Impoundment of Funds," memorandum to Congressman Robert Leggett, 119 Cong. Rec. E 1586 (daily ed. March 15, 1973).

agriculture programs ticketed for elimination or curtailment were rural environmental assistance, rural electrification, water and sewer grants, emergency farm loans, and the water bank program.

Dozens of court suits were brought during 1973 and 1974 to compel the release of impounded funds. Most were decided against the Administration but the cases generally were judged in terms of particular statutory provisions and they therefore did not test the constitutional power of the President.[5/] The U.S. Supreme Court heard arguments in two challenges to the impoundment of water treatment funds, but its decision was made in 1975 after the new law was in effect. In a unanimous decision that rested on statutory construction rather than constitutional interpretation, the Court held that Congress had not provided the executive "with the seemingly limitless power to withhold funds from allotment and obligation."[6/]

Dozens of bills dealing with the impoundment problem were introduced during the 93d Congress. In the Senate, the leading bill was S. 373 (introduced by Senator Ervin) which was reported by the Senate Committee on Government Operations on April 17, 1973 and passed the Senate on May 10.[7/] S. 373 subsequently also passed the Senate as a rider to the Par Value Modification and the Debt Ceiling Bills, but in both cases it was dropped in conference.[8/] The main feature of S. 373 was a requirement that the President notify Congress whenever he impounds funds and that the impoundment cease unless it was approved by concurrent resolution of Congress within 60 days. Congress could disapprove any impoundment by concurrent resolution during the 60-day period and the funds

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5/ See Louis Fisher, "Court Cases on Impoundment of Funds: A Public Policy Analysis," Congressional Research Service multilith 74-61 GGR (March 15, 1974), and Stuart Glass, "Presidential Impoundment of Congressionally Appropriated Funds: An Analysis of Recent Federal Court Decisions," Congressional Research Service multilith 74/82A (March 25, 1974).

6/ Train v. City of New York. 420 US 35 (1975).

7/ S. Rept. No. 93-121 (1973).

8/ The Par Value Modification bill was S. 929; the Debt Ceiling bill, H.R. 8410.

would have to be released at once. S. 373 also had a ceiling on fiscal 1974 expenditures, but this title would have been applicable only to a single fiscal year.

In the House, Congressman Mahon introduced a bill (H.R. 5193) to prohibit an impoundment if both Houses of Congress pass a resolution of disapproval within 60 days. A clean bill, H.R. 8480, was reported by the House Rules Committee on June 27, 1973 as a substitute for the Mahon proposal.[9/] As passed by the House on July 25, 1973, H.R. 8480 provided for the cessation of any impoundment disapproved by either the House or the Senate within 60 days. It also had a one-year spending ceiling. The House and the Senate were not able to reconcile their differences in conference and after only one meeting, the conferees deferred action on the impoundment legislation pending consideration of the congressional budget bill.

The House Rules Committee attached a modified version of H.R. 8480 as a separate title to H.R. 7130, the budget bill.[10/] During House consideration of H.R. 7130, a floor amendment to delete the impoundment title was rejected by a vote of 186-221.[11/] However, S. 1541, as reported by the Senate Government Operations Committee, did not contain any impoundment provision. A number of Senators felt that they should not risk a House-Senate deadlock on budget reform because of differences over impoundment and that no action was preferable to the single-House veto endorsed by the House. But other Senators believed that the lack of an impoundment control feature in S. 1541 would place the Senate at a disadvantage during a conference on the congressional budget legislation.

9/ H. Rept. No. 93-336 (1973).

10/ H. Rept. No. 93-658 (1973). Title II of H.R. 8480 limiting fiscal 1974 expenditures was not incorporated in H.R. 7130. In addition, adjustments were made in the power of the Comptroller General to bring a court action to enforce the impoundment controls. Finally, as passed by the House, H.R. 8480's impoundment provisions would have been effective only for one year. H.R. 7130 made them permanent.

11/ 119 Cong. Rec. H-10706 (daily ed., December 15, 1973).

A new approach to impoundment control was offered in S. 3034, introduced by Senator Ervin and incorporated into S. 1541 by the Senate Committee on Rules and Administration. S. 3034 restricted the purposes for which reserves may be established under the Antideficiency Act, prohibited the use of reserves for fiscal policy purposes or to achieve less than the full scope and objectives of programs funded by Congress, and set a procedure for the Comptroller General to bring suit to enforce the impoundment controls. In the eyes of its sponsors, S. 3034 differed from all previous approaches in that "whereas those [earlier] bills undertook to grant the President a limited power to impound funds," S. 3034 "would prohibit the practice altogether except for the very narrow managerial purposes permitted in the Antideficiency Act."12/

The conferees combined elements of the S. 373 and H.R. 8480 into Title X of the Congressional Budget and Impoundment Control Act of 1974. The amendment to the Antideficiency Act was adapted from S. 3034. Also, impoundments were divided into two types: rescissions and deferrals. The procedure for rescissions comes close to the concept of S. 373 in that a rescission proposal requires approval by both Houses of Congress. In the case of deferrals, the procedure conforms to that adopted in H.R. 8480 and later incorporated in H.R. 7130 in that the deferral prevails unless disapproved by either the Senate or the House.

12/ 120 Cong. Rec. S-1955 (daily ed., Feb. 21, 1971). Remarks of Senator Ervin.

IMPLEMENTATION OF THE IMPOUNDMENT CONTROL ACT

The Impoundment Control Act became effective on its date of enactment, July 12, 1974. Three days later, the final report under the superceded Federal Impoundment and Information Act was submitted to Congress.[13/] The first rescission and deferral proposals pursuant to the new law were reported to Congress on September 20, 1974. Much of the delay was due to the fact that during the interval between enactment and activation of the impoundment control process, Richard Nixon resigned as President and was succeeded to office by Gerald Ford.

While there was much confusion and controversy when the new process was initiated, impoundment control has settled into a three-stage process involving presidential recommendations and reports, Comptroller General review, and congressional action. At each of these stages, Congress has been confronted with a great amount of documentation and paperwork, much required by the law itself, and some growing out of the manner in which it has been implemented. Each proposed rescission or deferral must be accompanied by a Presidential explanation and the Comptroller General must review the proposal and inform Congress of his findings. In addition, many of the impoundment proposals have spurred the introduction of resolutions and other legislative measures. By the close of the first session of the 94th Congress (the cutoff date for this report), hundreds of re-

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13/ Title IV of Public Law 92-599 was repealed by section 1003 of the Impoundment Control Act.

scission and deferral messages had been submitted to Congress, the Comptroller General had forwarded more than 40 communications, half a dozen bills had been considered, and more than 100 impoundment resolutions had been introduced in the House and the Senate. Most of the particulars with regard to these activities are discussed in the section by section analysis of the Impoundment Control Act. This section of the report provides an overview of the first 15 months of operation under the Act.

Rescissions. During fiscal 1975, the President proposed 87 rescissions totalling $2,732,678,218 This amount takes into account supplemental messages revising a number of the original impoundment proposals. In addition to these Presidential submissions, the Comptroller General notified Congress of two rescission actions not reported by the President and he reclassified seven reported deferrals as rescissions.The four reports of the Comptroller General added $1,559,813,000 to the list of proposed rescissions, raising the total during fiscal 1975 to $4,292,500,218.[14/] Congress enacted three rescission bills during the fiscal year--Public Laws 93-529, 94-14, and 94-15. The 39 rescissions approved in these measures totalled $391,295,074, less than 15 percent of the amount proposed by the President and only about 9 percent of the adjusted amount reported by the Comptroller General.

During the first six months of fiscal 1976, the President proposed 27 rescissions totalling $2,341,569,655. Approximately $35 million of this amount involves funds appropriated for the July-September 1976 transition period. Two rescissions--$62.5--were approved in Public Laws 94-111

14/ In order to avoid confusion, the amounts used in this report are derived from tables prepared by the staff of the House Appropriations Committee which has developed a computerized system for tracking impoundment actions.

and 94-134.[15/] However, the 45-day period for many of the proposed rescissions did not expire during 1975, so they were carried over into 1976, between the period covered by this report. A summary of 1975 and 1976 rescission proposals and bills is presented in Tables 1 and 2.

In responding to rescission proposals, Congress appears to have drawn a fairly clear distinction between routine and policy impoundments. With few exceptions, Congress has approved routine rescissions involving no change in government policy, such as when funds no longer are needed to accomplish the purposes for which they were appropriated. In cases of policy rescissions, when the President has sought to eliminate funds appropriated in excess of his budget requests, Congress generally has refused to approve the rescission. Congress has not wanted to give the President a "second chance" to accomplish by means of the new impoundment process that which it had denied to him only weeks or months earlier in the course of the appropriations process. The 85 percent rejection rate indicates that the President was repeatedly rebuffed in his efforts to convert impoundment control into reordering the budget priorities established by Congress. However, the fact that 45 percent (39 out of 87) of the FY1975 proposals eventuated in a rescission indicates that many of the rescissions did not involve substantial questions of policy. Most of the routine cases concerned comparatively small amounts of money while the policy impoundments often dealt with very large amounts. The median amount proposed for rescission in the approved cases was less than $3 million; in the rejected rescissions the median was $14 million.

15/ P.L. 94-134 is not a standard rescission measure but the 1976 Department of Transportation Appropriation Act. A provision of the Act rescinded $25 million in accord with the President's proposal but provided $10 million in new funds for the same program. Hence, the net rescission attributed to the Act is $15 million.

TABLE I

SUMMARY OF RESCISSION ACTIONS

	Number Proposed	Amount Proposed	Amount Rescinded
FY1975			
Presidential Message	87	$2,732,678,218	$391,295,074
GAO Reclassification	7	415,313,000	0
GAO Notification	2	1,144,500,000	0
FY1976 (Through December 31, 1975)			
Presidential Message	27	2,341,569,655	62,500,000

Source: House Appropriations Committee

TABLE 2

RESCISSION BILLS CONSIDERED BY CONGRESS

Bill	Rescissions Covered	Amount Proposed	Amount Rescinded	Public Law
H.R. 17501	R75-1 through R75-7	$ 672,116,092	$131,481,000	93-529
H.R. 3260	R75-8 through R75-46 and D75-48	949,443,172	243,359,370	94-14
H.R. 4075	R75-47 through R75-81 and D75-141 through 145, and D75-148	1,248,674,954	16,454,704	94-15
H.R. 6573	R75-83 through R75-86	238,323,000	0	--
H.R. 9600	R76-1 through R76-8, except for R76-2	188,888,000	47,500,000	94-111
H.R. 8365 (DOT Appropriation)	R76-2	25,000,000	15,000,000	94-134

Source: House Appropriations Committee

Further confirmation of this distinction between routine and policy impoundments derives from a close examination of the 39 fiscal 1975 cases in which Congress approved a rescission. In 24 of these, Congress rescinded precisely the amount proposed by the President. In another ten cases--all involving operation and maintenance accounts of Defense Department agencies--Congress rescinded exactly half of the amount proposed by the President. The remaining rescissions involved policy determinations by Congress. Moreover, in most of the routine cases, the House and Senate initially voted to rescind the same amount, while in the policy cases there tended to be differences between the House and Senate versions which had to be reconciled in conference. Table 3 displays the pattern of congressional action on approved rescissions.

During their first year, the rescission features of the Impoundment Control Act worked fairly well except for problems associated with the 45-day period allowed for congressional action. In several cases, a rescission bill was passed after the expiration of this period; in other cases, the sine die adjournment of Congress had the effect of prolonging the "waiting period" substantially beyond 45 calendar days. When the 45 days was added to late enactment of appropriation bills, the effect was to prolong the period of uncertainty about how much money would be available for expenditure through much of the fiscal year. In response to these problems a number of bills have been introduced to provide that no rescission shall take effect unless specifically approved by Congress. The various issues relating to the 45-day period are discussed below in the analysis of sections 1011 and 1012.

TABLE 3

RESCISSIONS APPROVED BY CONGRESS-FISCAL 1975

Rescission Number	Did Congress Rescind Amount Proposed by the President?	Were the House and Senate Amounts Initially the Same?
1	yes	yes
4	yes	yes
5	yes	yes
6	yes	yes
7	yes	yes
8	no	no
11	yes	yes
13	yes	yes
14	yes	no
15	no	no
16	yes	yes
17	½	no
18	½	no
19	½	no
20	½	no
21	½	no
22	½	no
23	½	no
24	½	no
25	½	no
26	½	no
28	no	yes
32	yes	yes
33	yes	yes
34	yes	no
35	yes	yes
36	yes	yes
37	yes	yes
38	yes	yes
39	yes	yes
41	yes	no
44	yes	yes
45	yes	yes
46	yes	yes
49	no	yes
52	yes	no
53	yes	yes
54	yes	yes
81	no	no

Deferrals. During fiscal 1975, President Ford submitted 161 deferral messages to Congress, seven of which were subsequently reclassified as rescissions by the Comptroller General. These deferrals totalled approximately $25.3 billion, with two-thirds of the funds concentrated in Federal grants to States for the construction of highways and water pollution control facilities. During the fiscal year, 82 impoundment resolutions were introduced in Congress and 16 were adopted.[16/] The deferrals disapproved by the House or the Senate totalled $9.3 billion and an additional $9 billion of water pollution funds were released pursuant to a Supreme Court ruling. The President also revised many of his deferrals, reducing the amount withheld so that by the end of the fiscal year less than $5 billion were still deferred.

Some of these funds were re-deferred at the start of the 1976 fiscal year. During the period between July 1 and December 31, 1975, the President submitted 85 deferral messages totalling approximately $3.7 billion to Congress and the Comptroller General notified Congress of a failure to report the deferral of $10 million of youth conservation funds. During the first session of the 94th Congress, 14 deferrals of 1976 funds were disapproved by the House or the Senate, compelling the President to release $244 million. Table 4 summarizes Presidential and congressional actions on deferrals during fiscal years 1975 and 1976, through December 31, 1975.

The distinction between routine and policy impoundments applies to deferrals. In his various reports to Congress, the Comptroller General

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16/ This tally does not include S. Res. 61 disapproving Deferral D75-48 because the Comptroller General reclassified the deferral as a rescission.

TABLE 4

SUMMARY OF DEFERRAL MESSAGES AND IMPOUNDMENT RESOLUTIONS

	Deferrals Reported	Resolutions Introduced	# of Deferrals Affected	Deferrals Disapproved	Amount Disapproved
FY 1975	161	82	30	16*	$9,318,217,441
FY 1976	85	29	26	14	$ 244,224,000

*Does not include D75-48 which was reclassified as a rescission by the Comptroller General

identified almost half of the deferrals as being authorized by the Antideficiency Act and a dozen other deferrals as actions not requiring the submission of a special message under the Impoundment Control Act.

Congressional activity in the form of impoundment resolutions was concentrated on policy deferrals. The 82 resolutions filed during fiscal 1975 related to only 30 impoundments, almost half of which attracted resolutions in both the House and the Senate. In one case--the deferral of HUD "701" funds--2 resolutions were introduced during the 93d Congress and 10 during the 94th. In virtually every instance that impoundment resolutions were introduced in both the House and Senate, the deferral was disapproved.

With regard to fiscal 1976 deferrals, 29 resolutions were introduced and more than half were adopted. (In two cases, both the House and Senate adopted impoundment resolutions even though action by a single House suffices to disapprove a deferral.) These 29 resolutions pertained to 26 deferrals. Thus, only about 20 percent of the 1975 deferrals and 30 percent of the 1976 deferrals led to the introduction of impoundment resolutions. The vast majority of deferrals did not generate any congressional action because they were routine financial transactions involving no change in governmental policy. Tables 5 and 6 list the impoundment resolutions adopted for fiscal 1975 and 1976 funds while Tables 7, 8, 9, list the resolutions introduced during the period covered by this report. Two additional tables complete the overview portion of this report. Table 10 lists the rescission and deferral messages submitted by the President while Table 11 offers a comprehensive list of all GAO communications to Congress pursuant to the Impoundment Control Act.

TABLE 5

DEFERRALS DISAPPROVED BY CONGRESS*
FY 1975

Deferral	Resolution	Amount
D75-17	S. Res. 69	$ 9,136,486,441
D75-81	H. Res. 241	43,945,000
D75-82	H. Res. 242	14,503,000
D75-83	H. Res. 243	900,000
D75-84	H. Res. 244	17,955,000
D75-85	H. Res. 245	2,525,000
D75-86	H. Res. 246	1,730,000
D75-94	H. Res. 309	4,073,000
D75-107	S. Res. 23	50,000,000
D75-111	S. Res. 80	8,000,000
D75-112	S. Res. 79	6,700,000
D75-113	S. Res. 78	2,700,000
D75-114	S. Res. 77	8,000,000
D75-115	S. Res. 32	4,000,000
D75-116	S. Res. 76	4,700,000
D75-117	S. Res. 75	12,000,000
		$ 9,318,217,441

* This Table does not include S. Res. 61 disapproving D75-48 because the Comptroller General reclassified this deferral as a rescission.

TABLE 6

DEFERRALS DISAPPROVED BY CONGRESS
FISCAL 1976--THROUGH DECEMBER 31, 1975

Deferral	Resolution	Amount
D76-13	S. Res. 226	$ 1,030,000
D76-49	S. Res. 267	16,500,000
D76-68	S. Res. 313, H. Res. 910*	7,570,000
D76-69	S. Res. 324, H. Res. 911*	6,314,000
D76-70	H. Res. 912	90,000,000
D76-72	H. Res. 914	50,000,000
D76-73	H. Res. 915	22,500,000
D76-74	H. Res. 916	4,960,000
D76-79	H. Res. 920	2,000,000
D76-80	H. Res. 921	4,600,000
D76-81	H. Res. 922	3,750,000
D76-82	H. Res. 923	10,000,000
D76-83	H. Res. 924	15,000,000
Youth Conservation**	S. Res. 205	10,000,000
		$ 244,224,000

* Although only one-House action was necessary, both the House and Senate adopted impoundment resolutions.

** No Presidential Message; GAO informed Congress of a deferral.

TABLE 7

IMPOUNDMENT RESOLUTIONS INTRODUCED DURING THE 93D CONGRESS*

Deferral	Resolutions
D75-48	S. Res. 446
D75-84	H. Res. 1507
D75-107	H. Res. 1491, S. Res. 451
D75-111	H. Res. 1498, S. Res. 455
D75-112	H. Res. 1499, S. Res. 456
D75-113	H. Res. 1500, S. Res. 457
D75-114	H. Res. 1501, S. Res. 458
D75-115	H. Res. 1514, S. Res. 450
D75-116	H. Res. 1502, S. Res. 459
D75-117	H. Res. 1503, S. Res. 460
D75-119	H. Res. 1504, S. Res. 461
D75-121	H. Res. 1505, S. Res. 461

*None of these were acted upon during the 93d Congress, but comparable resolutions relating to all of these deferrals were introduced in the 94th Congress.

Table 8

IMPOUNDMENT RESOLUTIONS INTRODUCED DURING THE 94TH CONGRESS--FY 1975 DEFERRALS

Deferral	Resolutions
D75-9	H. Res. 49, S. Res. 70
D75-17	S. Res. 61, H. Res. 229
D75-24	S. Res. 230
D75-48	S. Res. 69
D75-54	H. Res. 231
D75-60	H. Res. 232
D75-63	H. Res. 233
D75-71	H. Res. 234
D75-72	H. Res. 235
D75-81	H. Res. 241
D75-82	H. Res. 242
D75-83	H. Res. 243, S. Res. 82
D75-84	H. Res. 244
D75-85	H. Res. 245
D75-86	H. Res. 246
D75-94	S. Res. 102, H. Res. 218, 221, 240, 258, 266, 309
D75-107	S. Res. 23, H. Res. 55, 56, 57, 90, 95, 98, 130, 165, 281
D75-111	S. Res. 80, H. Res. 210
D75-112	S. Res. 79, H. Res. 211
D75-113	S. Res. 78, H. Res. 212
D75-114	S. Res. 77, H. Res. 213
D75-115	S. Res. 32, H. Res. 91, 137, 253
D75-116	S. Res. 76, H. Res. 214
D75-117	S. Res. 75, H. Res. 215
D75-119	S. Res. 74, H. Res. 216
D75-121	S. Res. 73, H. Res. 217
D75-129	H. Res. 265
D75-153	S. Res. 149
D75-160	H. Res. 423, 490
HEW Funds (GAO notice)	H. Res. 119

Table 9

IMPOUNDMENT RESOLUTIONS INTRODUCED DURING THE 94TH CONGRESS
FISCAL 1976 (THROUGH DECEMBER 31, 1975)

Deferral	Resolutions
D76-13	S. Res. 226
D76-31	S. Res. 248, 277
D76-32	S. Res. 249, 278
D76-33	S. Res. 250, 279
D76-42	H. Res. 655
D76-43	H. Res. 656
D76-44	H. Res. 657
D76-49	S. Res. 267
D76-59, 60, 61, 62, 63	H. Res. 829
D76-68	S. Res. 313, H. Res. 910
D76-69	S. Res. 321, H. Res. 911
D76-70	S. Res. 324, H. Res. 912
D76-71	H. Res. 913
D76-72	H. Res. 914, 932
D76-73	H. Res. 915
D76-74	H. Res. 916
D76-79	H. Res. 920
D76-80	H. Res. 921
D76-81	H. Res. 922
D76-82	H. Res. 923
D76-83	H. Res. 924
Youth Conservation (GAO notice)	S. Res. 205

TABLE 10

PRESIDENTIAL MESSAGES REPORTING PROPOSED RESCISSIONS AND DEFERRALS
SEPTEMBER 20, 1974 THROUGH DECEMBER 31, 1975

Fiscal Year 1975

Date of Special Messages	Congressional Reprint	Federal Register Reprint	General Accounting Office Comment
1) Sept. 20, 1974	H. Doc. 93-361 S. Doc. 94-5	39 Fed. Reg. 34221 (Sept. 23, Part III)	H. Doc. 93-394 S. Doc. 94-13
2) Oct. 4, 1974	H. Doc. 93-365	39 Fed. Reg. 36213 (Oct. 8, Part V)	H. Doc. 93-391 S. Doc. 94-15
3) Oct. 31, 1974	H. Doc. 93-385 S. Doc. 94-8	39 Fed. Reg. 39230 (Nov. 5, Part III)	H. Doc. 93-395 S. Doc. 94-17
4) Oct. 31, 1974	H. Doc. 93-386 S. Doc. 94-7	39 Fed. Reg. 39255 (Nov. 5, Part III)	H. Doc. 93-395 S. Doc. 94-17
5) Nov. 13, 1974	H. Doc. 93-387	39 Fed. Reg. 40702 (Nov. 19, Part III)	H. Doc. 93-410 S. Doc. 94-20
6) Nov. 26, 1974	H. Doc. 93-398	39 Fed. Reg. 42521 (Dec. 5, Part IV)	H. Doc. 94-15
7) Dec. 27, 1974	H. Doc. 94-17	40 Fed. Reg. 1637 (Jan. 8, Part IV)	H. Doc. 94-35 S. Doc. 94-26
8) Jan. 30, 1975	H. Doc. 94-39	40 Fed. Reg. 5629 (Feb. 6, Part III)	H. Doc. 94-50
9) Apr. 18, 1975	H. Doc. 94-108 S. Doc. 94-36	40 Fed. Reg. 18358 (Apr. 25, Part V)	H. Doc. 94-147 S. Doc. 94-54
10) Apr. 18, 1975	H. Doc. 94-109 S. Doc. 94-37	40 Fed. Reg. 18330 (Apr. 25, Part IV)	H. Doc. 94-147 S. Doc. 94-54
11) May 8, 1975	H. Doc. 94-139 S. Doc. 94-50	40 Fed. Reg. 21643 (May 16, Part IV)	H. Doc. 94-165 S. Doc. 94-62

Table 10 - Continued

Fiscal Year 1976

Date of Special Messages	Congressional Reprint	Federal Register Reprint	General Accounting Office Comment
1) July 1, 1975	H. Doc. 94-206 S. Doc. 94-70	40 Fed. Reg. 28999 (July 9, Part V)	H. Doc. 94-217
2) July 26, 1975	H. Doc. 94-225 S. Doc. 94-93	40 Fed. Reg. 32041 (July 30, Part II)	H. Doc. 94-240 S. Doc. 94-100
3) Sept. 10, 1975	H. Doc. 94-248 S. Doc. 94-103	40 Fed. Reg. 42695 (Sept. 15, Part V)	S. Doc. 94-106
4) Sept. 24, 1975	H. Doc. 94-261 S. Doc. 94-105	40 Fed. Reg. 44741 (Sept. 29, Part V)	S. Doc. 94-120
5) Oct. 3, 1975	H. Doc. 94-272 S. Doc. 94-107	40 Fed. Reg. 47437 (Oct. 8, Part VII)	H. Doc. 94-300 S. Doc. 94-121
6) Oct. 20, 1975	H. Doc. 94-282 S. Doc. 94-111	40 Fed. Reg. 49739 (Oct. 23, Part III)	H. Doc. 94-301 S. Doc. 94-123
7) Nov. 18, 1975	H. Doc. 94-309	40 Fed. Reg. 54191 (Nov. 20, Part VI)	H. Doc. 94-322
8) Nov. 29, 1975	H. Doc. 94-311 S. Doc. 94-137	40 Fed. Reg. 56801 (Dec. 4, Part II)	H. Doc. 94-336 S. Doc. 94-148

Source: Richard Kogan, Congressional Research Service.

GENERAL APPRAISAL OF THE IMPOUNDMENT CONTROL ACT

The Impoundment Control Act has established a workable, if cumbersome, procedure for congressional review of Presidential impoundments. It does not reach to the ultimate constitutional issues of legislative-executive relations and Presidential powers, but it offers a method of settling impoundment disputes without raising these more portentious questions. Congress has been able to prevent the President from unilaterally withholding funds, and the President has been able to manage the financial affairs of the government prudently. The impoundment battles of the early 1970's have not been ended by Title X, but they now are being fought through agreed upon means. Compared to the contests of the Nixon era, Title X provides for limited warfare and, in most cases, for resolution of differences within a limited period of time.

Yet, Title X has raised a number of problems of its own, and these merit brief consideration apart from questions of executive and legislative power. Four such problems are presented below: differences between rescissions and deferrals; the paperwork burden; delays in the availability of funds; and congressional knowledge of executive actions.

Deferrals versus rescissions. There is a marked difference in the effects of Title X procedures on proposed rescissions and deferrals. Almost every rescission proposed by the President is overturned by congressional inaction; almost every deferral proposed is sustained by congressional inaction. As indicated, in dollar terms, only about 15 percent of the rescissions proposed have been enacted; if Comptroller General notifications are included, the percentage drops substantially. For deferrals, however, only about 12 percent have been disapproved by Congress.

Part of this remarkable difference is due to the greater likelihood that rescissions represent policy changes, while deferrals often are routine financial moves. Part also is due to the logic of Title X that if the effect of the impoundment is to preserve the ultimate availability of the funds, the deferral route is to be used, while rescissions are to apply when the impoundment would terminate all use of the funds. Nevertheless, the difference between the two classes of impoundments reserves to the President a considerable measure of policy discretion vis a vis Congress. Except for misclassifications detected by the Comptrolier General, it is the President, not Congress, who determinines which impoundment procedure is to apply.

Paperwork burden. The flow of messages and documents generated by Title X has been extraordinary and has burdened the Appropriations Committees. The volume of paper is due primarily to three factors: (1) the number of impoundments proposed by the President; (2) the comprehensive definition of impoundment in Title X; and (3) the backup protection provided by the Comptroller General in monitoring Presidential actions.

The effects of this burden on Title X outcomes is difficult to assess, but the probable effects include: (1) giving the President an advantage in deferrals, for their large number undermines congressional ability to detect every policy implication, (2) deterring Congress from approving some routine rescissions proposed by the President. In other words, the paperwork burden has contributed to congressional inaction, favoring the President in deferrals and penalizing him in rescissions.

Delays in Funding. This surely is the most difficult problem and is discussed with regard to sections 1011 and 1012. The President has achieved

months of delay through the impoundment control procedures. He has exploited the procedures to give himself a "second crack" at programs funded in excess of his budget recommendations. He has been able to put such programs in cold storage for most of the fiscal year, thereby frustrating congressional intent and impairing program effectiveness. Delay has been sought for its own sake and, possibly, for political advantage as well. Whatever the motive, Congress thus far has been virtually helpless when the President has manipulated the rescission rules to hold up programs.

Congressional knowledge of executive actions. Title X offers only an imperfect monitoring capability for Congress. Presidential messages do not--and probably cannot--provide every relevant bit of information. The Comptroller General cannot inspect every administrative action affecting the availability of funds. Congress cannot always distinguish between the delay legitimately caused by prudent management and the delay prompted by policy motives. Inadequate information lends to underreporting and delayed reporting of impoundments and to the congressional inactions discussed above.

SECTION-BY-SECTION ANALYSIS

Section 1001. Disclaimers

SEC. 1001. Nothing contained in this Act, or in any amendments made by this Act, shall be construed as—

(1) asserting or conceding the constitutional powers or limitations of either the Congress or the President;

(2) ratifying or approving any impoundment heretofore or hereafter executed or approved by the President or any other Federal officer or employee, except insofar as pursuant to statutory authorization then in effect;

(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment; or

(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.

Legislative History

Both S. 373 and H.R. 8480 had disclaimer clauses for the purpose of disavowing any possible interpretation of the new impoundment controls as constituting approval of any past or future impoundment or of the authority of the President to impound funds. By means of a disclaimer, it was feasible to set up a legislative control procedure without reaching to the constitutional issue of whether the President possesses any inherent power to impound.

S. 373 disclaimed any interpretation of the Act as "a ratification or approval of any impounding of budget authority by the President or any other Federal employee, in the past or in the future, unless done pursuant to statutory authority in effect at the time of such impoundment." H.R. 8480 had three specific disclaimers, taken from H.R. 6020 introduced by Representative Culver, relating to the constitutional powers of Congress and the President, the ratification of any past or future impoundment, and the claims or defenses of parties to litigation.

These disclaimers were incorporated into Title X of the Act, but with the third clause in section 1001 abbreviated by the deletion (after the word "impoundment") of "ordered or executed before the date of enactment of this Act." The original intent of the third disclaimer was to assure that law suits challenging executive impoundments would not be mooted or affected by the new procedure.[17] Inasmuch as numerous court actions were in process at the time that the budget and impoundment legislation was under consideration, and the trend of early decisions generally was adverse to the President's position, it was felt that judicial remedies should not be aborted by the new law. There is no legislative record concerning the deletion of the final segment of the third disclaimer and while some have suggested that the change was "inadvertent,"[18] an alternative explanation is that its intent was to assure that Title X not be used in court as a defense of any future (as well as any past) impoundment.[19] There is no reason to believe that the deletion was intended to restrict Title X to future impoundments for, as will be discussed below, other provisions of the Act suggest an intent to apply Title X to any impoundment in effect after the date of enactment, regardless of when it was initially executed.

The fourth disclaimer was added in conference to assure that the general procedures in the Act not be applied to override specific provisions of other laws requiring the expenditure of funds. As explained by Senator Ervin, its purpose is to disavow "any intention by Congress to supersede any law which requires the mandatory obligation of budget authority, since several such

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17/ See Impoundment Reporting and Review, hearings before the Committee on Rules, House of Representatives, 93rd. Cong., 1st Sess., p. 342 (1973). Testimony of Representative John Culver.

18/ Supra note 6, at 9.

19/ During Senate consideration of the Conference report, Senator Ervin specifically anticipated future litigation by commenting that the authority granted to the Comptroller General to bring suit to enforce. Title X "is not intended to infringe upon the right of any other party to initiate litigation." 120 Cong. Rec. S. 11222 (daily ed. June 21, 1974).

statutes have been enacted in response to the wholesale impoundment of funds appropriated for specific programs."[20] Thus, if another law mandates an expenditure, the President would not have recourse to the reservation, deferral, or rescission options of Title X.

Implementation: **Date of Effectiveness**

The date of effectiveness of Title X is covered by section 905 of the Congressional Budget and Impoundment Control Act which provides that all but certain designated titles and sections are to take effect on the date of enactment. However, the Attorney General and the Comptroller General have issued conflicting opinions as to whether Title X applies to impoundments made prior to July 12, 1974, the date of enactment. In his first (September 20, 1974) message to Congress under the new law, President Ford listed a number of impoundments which had been effectuated before July 12. Concerning these pre-enactment actions, the President asserted:

> ... the Attorney General has determined that this act applies only to determinations to withhold budget authority which have been made since the law was approved.
>
> However, I am including in today's submission to the Congress reports on some actions which were concluded before the effective date of the act. While these items are not subject, in the Attorney General's opinion, to congressional ratification or disapproval as are those addressed in the recent law, I believe that it is appropriate that I use this occasion to transmit this information of the Congress.[21]

20/ Ibid.
21/ 10 Weekly Compilation of Presidential Documents, 1974 (1974).

The President went on to acknowledge that "reasonable men frequently differ on interpretation of law" and he urged "that the executive and legislative branches develop a common understanding" as to the operation of the new law. Approximately half of the $20 billion in proposed rescissions and deferrals listed in the September 20 message involved actions taken prior to the effective date.[22]

The Attorney General's ruling was dated October 10, 1974, three weeks after it had been cited by the President as authority for his position. In his opinion, the Attorney General conceded that the language of the relevant portions of the Act was "ambiguous" but he grounded his conclusion on the disclaimer section, in particular paragraph (3). He argued that "it is impossible to give any meaningful content to the portion of section 1001 (3) preserving existing defenses unless a past impoundment already in litigation at the date of the Act was not intended to be subject to the Congressional approval provision."[23] He also pointed to the second disclaimer "as expressing the assumption that valid prior impoundments will not be subject to the Congressional approval requirement of the Act." Similar arguments were presented to the Supreme Court in the Government's supplementary brief on the water pollution impoundment case.[24]

22/ Although $10.6 billion in deferrals of highway funds certainly were initiated prior to July 12, they were not identified in the President's message as pre-enactment actions. One possible explanation is that the President has conceded that any change in an "old" impoundment subjects it to the new procedures.

23/ Communication from the Attorney General to the President, October 10, 1974. Reprinted in Train v. Campaign Clear Water, Inc., Docket Nos. 73-1377 and 73-1378 U.S. Supreme Court, October Term, 1974, pp. 15-20 [Supplemental Brief for the Petitioner].

24/ Ibid., pp. 5-14.

The Comptroller General relied in part on the disclaimer section in reaching the opposite conclusion--that the Act "applies to deferrals of budget authority made prior to the date of the statute's enactment."[25] He also pointed to the definition of "deferral of budget authority" in section 1011 (1) as any "action or inaction" in support of his opinion: "In our view, 'inaction' is not limited to one-time measures, but rather is of a continuing nature."

At the core of the conflicting opinions is a dispute over the general authority of the executive branch to impound funds. The Administration's position is that the President has an inherent authority to impound, subject only to congressional mandates to spend or to procedures for legislative review. The congressional position, however, generally has been that the President lacks unilateral impoundment power and that the disclaimers were inserted in the law to avert an implicit or unintended ratification of impoundments. In line with this, Congress did not want to stop litigation challenging the President's power to impound. Without the disclaimers, such litigation might have been halted by Court application of the new procedures.

25/ Communication from the Comptroller General No. B-115398, October 15, 1974.

Although it was important when the impoundment control process was initiated, the dispute over pre-enactment impoundments was a factor in only one controversy between the executive and legislative branches. Six of the first seven rescissions proposed by the President predated the Act as did 44 of the first 80 deferrals.[26/] Despite this potential for widespread conflict, both branches acted in ways that limited the controversy to a single impoundment. With regard to the seven pre-enactment rescissions, Congress rescinded five of the items in its first rescission bill,[27/] the President released the funds for a sixth program,[28/] and funds for the seventh program lapsed shortly after expiration of the 45-day period.[29/] Consequently, none of the pre-enactment rescissions provoked controversy, although the problem of funds lapsing within or shortly after expiration of the 45 days has been troublesome in a few other programs.

Problems with regard to the 44 pre-enactment deferrals were minimized by the fact that only one was disapproved by Congress, so that there was only one occasion for contesting the differing interpretations of the new Act. One pre-enactment deferral involved $9 billion in contract authority for water pollution projects, but all of the funds were released following a

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26/ Special Messages of September 20, 1974 and October 4, 1974. H. Doc. 93-361 and H. Doc. 93-365.

27/ Public Law 93-529 enacted rescissions 75-1, 75-4, 75-5, 75-6, and 75-7.

28/ On December 11, 1974, one day after the Senate gave final approval to the first budget rescission bill, the President released $455.6 million for rural electrification loans. H. Doc. 94-10.

29/ $85 million for agricultural conservation program lapsed on December 31, 1974, 10 days after the first rescission bill became law. H. Doc. 94-10.

Supreme Court ruling that the President had exceeded the discretion granted by Congress.[30] Another major deferral pertained to $10 billion for highway construction, but although a substantial portion of these funds had been withheld prior to enactment of the new law, the President conceded that any change effected after July 12, 1974 would bring the entire impoundment under the scope of the Act. Consequently, when the Senate disapproved of the deferral of highway funds, the President released them in accord with Title X.[31]

The pre-enactment issue which reached the courts involved a reported deferral of funds for homeownership assistance programs.[32] This deferral was reclassified as a rescission by the Comptroller General but the President refused to release the funds at the end of the 45-day period. Moreover, to assure that the funds would not be tied up in litigation over the reclassification issue, the Senate passed an impoundment resolution treating the matter as if it was a deferral.[33] When the Comptroller General brought suit under section 1016 the Administration did not defend its action primarily in terms of the exemption of pre-enactment impoundments. Rather its main contention was that the Impoundment Control Act violates the separation of powers doctrine by vesting the Comptroller General with executive

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30/ Train v. City of New York. 420 US 35 (1975). The Supreme Court decided the case on February 18, 1975. $4 billion was released on January 31; the remaining $5 billion on February 21, 1975. H. Doc. 94-77, p. 18.

31/ S. Res. 69, 94th Cong., 1st Sess. (1975)

32/ D75-48 involved $264 million in funds for the section 235 program. The full details of this controversy are discussed in section 1016 below.

33/ S. Res. 61, 94th Cong. 1st Sess. (1975)

authority. The issue was settled when the Administration released the impounded funds and the suit was dropped.

Effects of the Disclaimers on Impoundment Actions. The section 1001 disclaimers have had a bearing on at least two impoundment issues. First, in the case of Train v. City of New York, decided after the enactment of the Impoundment Control Act, the Supreme Court cited the third disclaimer to conclude that "the Act thus would not appear to affect cases such as this one, pending on the date of enactment of the statute."[34/]

Second, prior to Senate passage of rescission bill H.R. 3260, the 45-day period for the rescissions considered therein expired. During floor debate, Senator Hathaway proposed and the Senate adopted an amendment striking a reference to the Impoundment Control Act from the enacting clause.[35/] However, the reference to this Act was restored in conference, provoking a point of order in the House and a parliamentary inquiry in the Senate. The point of order rested on the argument that inasmuch as the 45 days had expired, the rescission bill violated the Impoundment Control Act. However, the Speaker ruled that although the bill did not meet the technical definition of a "rescission bill", it could be considered under the general legislative powers of Congress:

34/ Train v. City of New York, n. 8.

35/ 121 Cong. Rec. S. 4079 (daily ed. March 17, 1974).

> The act itself recognizes the power of Congress to pass such a bill after 45 days by providing in section 1001 that nothing contained in the act shall be construed as conceding the constitutional powers of the Congress. 36/

A similar finding was made by the presiding officer in the Senate who pointed to section 1001 (1) in support of his ruling that Congress "has the power to act on a rescission bill irrespective of the act...." 37/

Some suggestions have been advanced, notably by the Comptroller General, that section 1001 was a transitional provision whose objectives have been realized and that its repeal would not affect the operation of the Act. 38/ Yet section 1001 offers a hedge against some future development which might generate renewed controversy over the impoundment power of the executive branch. The disclaimers serve to protect against a possible interpretation of the Impoundment Control Act which might restrict the authority of Congress. It thus might be better to retain this standby provision than to discard it merely because it serves no presently identifiable purpose. Nevertheless, the disclaimers have no effect whatsoever on constitutional questions relating to the impoundment powers of the President.

36/ 121 Cong. Rec. H. 2275 (daily ed. March 25, 1975).

37/ 121 Cong. Rec. S. 5046 (daily ed. March 26, 1975).

38/ Communication of the Comptroller General to the Chairman of the House Budget Committee, November 20, 1975.

Section 1002. Amendment to Antideficiency Act

SEC. 1002. Section 3679(c)(2) of the Revised Statutes, as amended (31 U.S.C. 665), is amended to read as follows:

"(2) In apportioning any appropriation, reserves may be established solely to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations. Whenever it is determined by an officer designated in subsection (d) of this section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the full objectives and scope of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations. Except as specifically provided by particular appropriations Acts or other laws, no reserves shall be established other than as authorized by this subsection. Reserves established pursuant to this subsection shall be reported to the Congress in accordance with the Impoundment Control Act of 1974."

Legislative History

This section is adapted from S. 1541 as reported by the Senate Committee on Rules and Administration and passed by the Senate. It restricts the purposes for which reserves may be established under the Antideficiency Act.

Prior to adoption of this admendment, the Antideficiency Act permitted the establishment of reserves "to provide for contingencies, or to effect savings whenever savings are made possible through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available." The Nixon Administration took the position that the Antideficiency Act--and in particular its

"other developments" clause--gave the executive branch broad discretion to impound funds.[39] This argument was contested by the Comptroller General who offered a restrictive interpretation of the purpose of the Antideficiency Act and the reserves permitted pursuant to it:

> We believe...that the authority to reserve appropriated funds conferred by the Antideficiency Act applies only to actions which are designed to achieve the most economical and efficient application of particular appropriations to their intended purposes.[40]

In other words, the Antideficiency Act could not be used as authority for the unilateral termination or curtailment of unwanted programs by the executive branch.

Although most of the anti-impoundment legislation introduced in 1973 (including S. 373 and H.R. 8480) bypassed the Antideficiency Act and concentrated on devising legislative control procedures, proposals to curb the President's power to reserve funds from apportionment were made by Congressman Robert Leggett[41] and Ralph Nader.[42] However, when the impoundment legislation was stalled in conference, the Senate Rules and Administration Committee sought an alternative approach which would offer the possibility of breaking the impasse between the two houses. This alternative was to utilize the concept of impoundment control devised in S. 3034 and introduced by Senator Ervin on February 21, 1974. Senator Ervin regarded S. 3034 as more restrictive than any of the bills previously introduced in that it would

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39/ Impoundment of Appropriated Funds by the President, joint hearings before the Committee on Government Operations and the Committee on the Judiciary, U.S. Senate, 93rd Cong., 1st. Sess. pp. 269 ff and 344 ff. Testimonies of Roy Ash and Joseph T. Sneed. (Hereinafter cited as Joint Hearings.).

40/ Communication from the Comptroller General, Ibid., pp. 105-114, at 108.

41/ Impoundment Reporting and Review, see supra note 13, at 189-93. Prepared statement of Congressman Robert L. Leggett.

42/ Joint Hearings, p. 43.

not delegate any limited impoundment power to the President. As explained by Senator Ervin:[43/]

> At the time the Senate and House passed their respective impoundment bills, however, very few lawsuits challenging impoundments had been brought. Memoranda, rulings, and decisions have now been rendered in more than 30 cases at the Federal district court level, and a few cases have reached the appellate courts. While no single ruling has yet emerged, and the Supreme Court has refused original jurisdiction of one case that squarely presented the constitutional issue, an unmistakable trend has emerged at the district court level against an unbridled presidential discretion to impound. In light of this trend, I feel it would be unwise for Congress to delegate the power which the Constitution gives it rather than the President--the power of the purse.
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> Furthermore, Congress is on the threshold of enacting budget reform legislation which will for the first time in generations enable it to consider all of the ramifications of the appropriations and spending process at one time. Congress soon will force itself to consider rescissions of appropriations, or to increase revenues or the debt ceiling when it devises a budget each year. When it does so, the political justifications for impoundments will evaporate, and an outright prohibition of impoundments for political or fiscal purposes will be feasible.
>
> Mr. President, the time has come for Congress to get off dead center on the impoundment issue: It must not delegate the power of the purse nor acquiesce in its abuse by the Executive. Instead, it must take positive steps to reform its budget procedures and to prohibit the wholesale and unlawful impounding of appropriated funds.

As passed by the Senate (in S. 1541), the amendment to the Antideficiency Act provided that reserves may be established solely for contingencies or savings, thereby dropping the "other developments" basis for reserves. It further provided that "reserves shall not be established for fiscal policy purposes or to achieve less than the full scope and objectives of programs enacted

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43/ 120 Cong. Rec. S. 1955 (daily ed. February 21, 1974).

and funded by Congress." Finally, the amendment required the President to propose the rescission of appropriations when he determined that the full scope and objectives of a program could be achieved without use of all the appropriated funds.

The amendment to the Antideficiency Act was combined with provisions from S. 373 and H.R. 8480 to form Title X. Several changes were made by House and Senate conferees. The main change was deletion of the sentence explicitly barring the use of reserves for fiscal policy purposes and the addition of a final sentence requiring the President to report all reserves under the procedures prescribed by the new Act. The legislative record is not entirely clear as to why the "fiscal policy" clause was dropped and the matter has provoked considerable controversy involving the relationship of section 1002 to other provisions of the Act. This controversy will be discussed in the implementation section below, but for the present two reasonable but possibly contradictory explanations for removal of the fiscal policy clause are: (1) the clause was superfluous because the amendment already limits reserves solely to contingencies and savings; or (2) the clause might unduly restrict the power of the President to manage the economy.

Implementation

A related issue is whether section 1002 is the only source of Presidential authority to withhold funds or merely one of several such sources provided in the Act. The issue arose following submission of the President's September 20, 1974 message on proposed rescissions and deferrals, the first report under the new Act. Among the actions reported by the President were a number of deferrals proposed primarily on grounds of fiscal policy. If section 1002 is the only authority for the establishment of reserves and if this section

precludes the use of reserves for fiscal policy, the only avenue open to the President under the Act would have been to propose rescissions in accord with the section 1012 procedures. However, if the deferral procedures in section 1013 confer an additional authority upon the President and are not restricted by the provisions of section 1002, it would have been appropriate for the President to take the deferral route in withholding funds for purposes of fiscal policy.

In deciding this issue, a key question is the meaning of the next to last sentence in section 1002:

> Except as specifically provided by particular appropriation Acts or other laws, no reserves shall be established other than as authorized by this subsection. (Emphasis added)

Do the rescission and deferral sections of Title X constitute "other laws" which provide additional authority to the President to reserve funds, or are they part of the same law as section 1002 and, therefore, do not add to the President's authority? Generally, Members of the Senate have been associated with the more restrictive interpretation of Title X while House Members have put forth a more expansive interpretation. In a letter to the Comptroller General dated October 10, 1974, 15 Senators, including the Majority Leader, the Majority Whip, and the chairmen of 13 standing committees urged a narrow interpretation of the new law:

> The structure of Part A [containing the amendment to the Antideficiency Act] and Part B [providing for proposed rescissions and deferrals] of Title X leave no doubt that Congress delegated extremely limited authority to the President to create "reserves" in Part A. Part B established the procedures under which Congress reviews Presidential actions authorized in Part A or other existing statutory authority. Part B delegates no additional authority to the President.

The clashing interpretations of Title X can be traced back to the different positions taken by the House and Senate in H.R. 8480 and S. 373 respectively. In authorizing the continuation of impoundments unless disapproved by at least one House, H.R. 8480 would have **implied** a de facto Presidential power to impound. Without reaching the constitutional question of whether the President ought to have such power, H.R. 8480 would have provided a method for stopping the Presidential action in case of legislative disapproval. S. 373, (as well as S. 3034) however, began with the opposite premise, that the President has no legal power whatsoever to impound other than that accorded to him by statute. In the absence of specific statutory authority, S. 373 would not have recognized any valid power of the President (other than that delegated during the waiting periods) to impound appropriated funds. Hence its requirement that impoundments cease unless upheld by both Houses of Congress.

These antagonistic perspectives were sidestepped in Title X by providing a rescission procedure that conforms to the method sought by the Senate in S. 373 and a deferral process that conforms to the method adopted by the House in H.R. 8480. But while the legal mechanics were resolved by the distinction between deferrals and rescissions, the constitutional issue remained in dispute and was pushed to the forefront again by the question of whether the President has any impoundment authority other than that allowed in section 1002.

In a ruling dated December 4, 1974, the Comptroller General held that section 1002 functions separately from sections 1012 and 1013 and that the latter two sections therefore confer additional power on the President to propose the rescission or deferral of appropriations. The Comptroller

General offered three reasons for reaching this conclusion and he backed these with **relevant** citations from the legislative history of Title X. First, "the clear language of section 1013 does not limit the authority for proposed deferrals." (This matter will be further considered in section 1013 below.) Second, "the Impoundment Control Act of 1974, apart from section 1002, is 'other law' within the meaning of section 1002." This interpretation was based on the fact that section 1002 is exclusively an amendment to another law, the Antideficiency Act. Third, the distinction between sections 1012 and 1013 "depends not on the purpose or the legal authority of a proposed withholding action, but upon its duration."[44/]

The Comptroller General concluded his interpretation with an acknowledgement that the Act "contains complicated provisions, the legislative history of which are, in large part, far from clear" and he suggested that "Congress may want to re-examine the act and clarify its intent through further legislative action."[45/] However, in view of the authority given the Comptroller General in Title X, his opinion is likely to be controlling unless Congress changes the law, or his interpretation is challenged in court. **In the year since the Comptroller General ruled, the issue has not been revived, though the chairman of the Senate Budget Committee continues to hold the view that policy improvements can be made only by means of the section 1012 rescission procedures.**[46/]

44/ Communication from the Comptroller General, H. Doc. 93-404, 93rd Cong., Cong., 2d. Sess., pp. 9-10.

45/ Ibid., p. 14.

46/ See Analysis of Executive Impoundment Reports. Senate Committee on the Budget, 94th Cong. 1st Sess. p. 4 (1974).

Amending Section 1002. Approximately half of the deferrals and a smaller proportion of the rescissions proposed under Title X have been reported under authority of the Antideficiency Act. Although these routine actions raise no policy issues, they are fully subject to the reporting requirements of sections 1012 and 1013. Not only do they burden the executive branch and Congress, they also make it somewhat difficult to focus attention on the policy impoundments for which careful legislative review is necessary.

The Comptroller General has suggested that Antideficiency Act impoundments be completely exempted from the reporting requirements of the Impoundment Control Act.[47/] However, in view of the past use of the Antideficiency Act to justify policy impoundments, it might be appropriate to retain some reporting procedures so that Congress can assure itself that the antideficiency route is being used only for authorized purposes. The informational needs of Congress could be met either by restricting the reporting of antideficiency actions to the cumulative monthly reports or by devising a "short form" for notifying Congress of such actions. Either approach would protect the interests of Congress while cutting down on needless paperwork.

A completely different approach would be to do away with all of Title X except for section 1002. The effect would be to limit the authority to impound to the purposes specified in the Antideficiency Act. Policy impoundments would no longer be authorized and only the

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47/ Communication of the Comptroller General to the chairman of the House Budget Committee, November 20, 1975.

routine actions listed in section 1002 would be permitted.

Repeal of the Impoundment Control Act might rekindle the "impoundment wars" of the past decade and lead to renewed strife over the powers and practices of the executive branch in withholding or delaying the expenditure of funds. Whatever its problems, the overriding virtue of Title X is that it establishes an executive-legislative procedure for handling impoundments without forcing the issue of impoundments to the brink of political or judicial resolution. In its first year, impoundment control has proved to be a workable, if a sometimes flawed procedure.

Section 1003. Repeal of Federal Impoundment and Reporting Act

SEC. 1003. Section 203 of the Budget and Accounting Procedures Act of 1950 is repealed.

Legislative History

The Federal Impoundment and Reporting Act was enacted into law on October 27, 1972 as Title IV of Public Law 92-599. It was subsequently amended to require regular quarterly reports. The first report under that law was submitted on February 5, 1973; the final one on July 15, 1974.

The provisions of the Federal Impoundment and Reporting Act were superceded by the new Impoundment Control Act which requires a special message for each proposed rescission or deferral and cumulative monthly reports on all outstanding rescissions and deferrals.

Implementation

In his opinion of October 10, 1974 arguing that the new law does not apply to pre-enactment impoundments, the Attorney General suggested that "past impoundments would no longer have to be reported under the repealed statute and would not fall within the new legislation." Because he regarded this gap as inadvertent, the Attorney General advised the President "in the interest of keeping Congress fully informed, to report continuing past impoundments in the future even though such reporting is not required." The President has complied with this suggestion and his reports under the new law have identified pre-enactment actions. However, if the Comptroller General's view that the new law applies to past impoundments is correct, there would be no reporting gap inasmuch as all impoundments--regardless of when they were executed--would have to be reported to Congress.

Section 1011. Definitions

SEC. 1011. For purposes of this part—

(1) "deferral of budget authority" includes—

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or

(B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law;

(2) "Comptroller General" means the Comptroller General of the United States;

(3) "rescission bill" means a bill or joint resolution which only rescinds, in whole or in part, budget authority proposed to be rescinded in a special message transmitted by the President under section 1012, and upon which the Congress completes action before the end of the first period of 45 calendar days of continuous session of the Congress after the date on which the President's message is received by the Congress;

(4) "impoundment resolution" means a resolution of the House of Representatives or the Senate which only expresses its disapproval of a proposed deferral of budget authority set forth in a special message transmitted by the President under section 1013; and

(5) continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain shall be excluded in the computation of the 45-day period referred to in paragraph (3) of this section and in section 1012, and the 25-day periods referred to in sections 1016 and 1017(b)(1). If a special message is transmitted under section 1012 during any Congress and the last session of such Congress adjourns sine die before the expiration of 45 calendar days of continuous session (or a special message is so transmitted after the last session of the Congress adjourns sine die), the message shall be deemed to have been retransmitted on the first day of the succeeding Congress and the 45-day period referred to in paragraph (3) of this section and in section 1012 (with respect to such message) shall commence on the day after such first day.

Legislative History

This section defines some of the key elements in the impoundment control process, including deferrals, rescission bills, and impoundment resolutions. It also sets the rules for computing the 45-day period after which certain funds must be released and the 25-day periods for the discharge of congressional committees and for suits by the Comptroller General. These waiting periods do not include recesses of more than three days and their continuity is broken by the sine die adjournment of Congress. If Congress adjourns during a 45-day period, such period shall recommence at the start

of the next Congress. It is not clear whether the 25-day period for suits by the Comptroller General would also begin with a new Congress, but it would appear so. The computation rules are adapted from H.R. 8480.

Deferral of budget authority. The definition of deferrals is based on the definition of impoundments in section 4 of S. 373 and section 103 in H.R. 8480. The Senate bill was somewhat more specific in detailing the types of action which would constitute an impoundment, but both bills intended a broad scope for the term, as is indicated in the following excerpts from the reports of the House and Senate committees on the impoundment legislation:

The House Rules Committee commented:

> The definition of "impoundment" in section 103 is intentionally written in broad terms so as to ensure that no executive action of any kind which holds up the expenditure of funds that the Congress intended to be expanded will go unreported. The fact that a given impoundment may be permissible under the Anti-Deficiency Act or other statutory authority, or may be only temporary in nature, does not relieve the President of his obligation to notify the Congress by special message.48/

The Senate Government Operations Committee included in its definition of impoundment:

> Any type of executive action or inaction which effectively precludes or delays the obligation or expenditure of authorized budget authority. The Committee added the words "or delays" and "appropriated funds." It also added the words "or inaction" in order to specifically include impoundments which may result from a failure on the part of the Executive to take action required to expend or obligate budget authority.

48/ H. Rept. No. 93-336 (1973) p. 7.

> The Committee regrets the necessity for such an extensive and comprehensive definition of impoundment. However, the interpretations and practices of the Administration permit no other alternative. In recent years, in its good faith efforts to obtain information on impoundment from the executive branch, Congress has been led through a conceptual and semantic labyrinth. The procedures in S. 373, as amended, allowing Congress to pass judgment on impoundment actions, are futile unless there is full and open disclosure. 49/

In veering toward the more general House language, the conference committee did not intend to exclude any type of executive action from its definition; rather it felt that there was no need to list specific types of impoundments actions in the legislation itself.

It is significant that the definition given to deferrals corresponds to that earlier accorded to impoundments in the House and Senate bills. Section 1011 does not define rescissions--which together with deferrals comprise all types of impoundments, and in fact it is possible to read the definition of deferrals to cover the rescission actions provided for in section 1012. However, this interpretation is precluded by section 1013 (c) which excepts proposed rescissions from the deferral process. In order to obtain a full and accurate understanding, the definition of deferrals in section 1011 (1) must be read together with the first paragraph of section 1012 (a) and the exception clause of section 1013 (b). In effect, a deferral is any type of impoundment which is not a rescission. 50/ Rescissions are not defined in the Act because the term has a standard meaning and because section 1012 (a) spells out the conditions under which rescissions may be proposed.

49/ H. Rept. No. 93-121 (1973) p. 25.

50/ This interpretation was discussed in a floor colloquy between Senators Ervin and McClellan on the conference report in 120 Cong. Rec. S. 11230 (daily ed. June 21, 1974).

The definition of deferrals includes funds withheld through the establishment of reserves under the Antideficiency Act. Such reserves would have to be reported to Congress as deferrals, and, though authorized by law, would have to cease if disapproved by either the Senate or House. The definition also explicitly covers any "inaction" which precludes the expenditure of funds. This word was added to S. 373 by the Senate Government Operations Committee to ensure that the impoundment control process is not confined only to instances where funds are withheld through affirmative actions. Inclusion of "inactions" in the definition of deferrals has a bearing on the dispute over the applicability of Title X to pre-enactment impoundments. The Comptroller General has held that the phrase "action or inaction" clearly makes the definition of deferrals

> applicable to those presidential determinations not to apportion, obligate, or make available for obligation budget authority which were made prior to July 12, 1974. In our view "inaction" is not limited to one-time measures, but rather is of a continuing nature. Accordingly, executive "inaction" to make funds available for obligation prior to the date of the statute would continue after July 12, 1974. 51/

However, in his communication to the President holding that the Act does not apply to pre-July 12 impoundments, the Attorney General discussed the "continuing" versus "single" act issue without reference to the inclusion of inactions in the definition of deferrals. 52/

Rescission bills. The concept of a rescission bill is adapted from S. 373 but with the important difference that S. 373 would have utilized concurrent resolutions as the means of ratifying executive impoundments

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51/ Communication from the Comptroller General, No. B-115398, October 15, 1974.
52/ Communication from the Attorney General to the President, October 10, 1974, see supra note 19.

while the Act provides for rescissions to be effectuated by legislative enactments. S. 373 would have provided a 60-day period, upon the expiration of which any impoundment not approved by Congress would cease. The Act reduces this to a 45-day period.

Congress may rescind budget authority through regular legislative measures other than the rescission bills provided for here and, in fact, section 404 of the Act contemplates rescissions as part of the appropriations process. In the context of impoundment control, rescission bills differ in two significant ways from other rescissions which might be considered by Congress. First, if a rescission bill is not enacted, impounded funds must be released. There is no such trigger connected to other rescission measures. Second, rescission bills are accorded an expedited legislative process (such as discharge of committees, limitations on debate, and conference consideration) while other rescissions are subject to the regular legislative procedures.

Because it is a legislative enactment, a rescission bill can amend a President's proposal. For example, a rescission bill might rescind only a portion of the amount requested by the President. No matter other than rescissions made pursuant to a special message of the President may be included in a rescission bill.

Impoundment resolutions. These are simple resolutions of either the House or Senate disapproving a deferral proposed by the President. If an impoundment resolution is passed, the President must release the deferred funds. Unlike H.R. 8480, after which this concept was modelled, there is no time limit for congressional action on a deferral resolution. In H.R. 8480, the deferral would have been terminated only if a resolution was adopted within 60 days, while the Act allows disapproval any time during the fiscal year to which the deferral relates.

The Act provides for an all-or-nothing legislative veto of a proposed deferral, but Congress may not amend (or partly disapprove) a deferral, Paragraph (4) defines an impoundment resolution as a resolution "which only expresses its disapproval of a proposed deferral of budget authority." This limited scope is in contrast to a rescission bill which may rescind budget authority "in whole or in part." This distinction also appears in section 1017 (c) and (d) which established procedures for the consideration of rescission bills and impoundment resolutions in the House and Senate. Rescission bills--but not impoundment resolutions--may be amended on the floor.

H.R. 5193--the original impoundment bill considered by the House Rules Committee--provided that a resolution of disapproval "with respect to any impoundment may express the disapproval of the Congress of any amount thereof and may set forth the basis on which the impoundment is disapproved." This feature was criticized at Rules Committee hearings by Professor Arthur Maass of Harvard University who argued that the amendment of executive impoundments should require a full legislative process rather than a congressional veto:

> In legislative veto actions of this sort, the President's plans have always been nonamendable. Congress may approve them as proposed or reject them. It has had no alternatives.
>
> This is for good reason. If Congress had the authority to amend the President's plans it could, in effect, legislate without the necessity for Presidential approval, and the President would be denied his constitutional authority to veto.53/

53/ Impoundment Reporting and Review, see supra note 13 at 411.

In response to the Maass objection, H.R. 8480 did not allow the House or the Senate to amend Presidential impoundments. The Rules Committee report on H.R. 8480 explained the bar against amendments:

> The prohibition on amendments appears in the bill because a resolution containing anything more than a simple disapproval of an impoundment might be of doubtful legality. For example, a resolution not merely disapproving an impoundment but also directing the President to spend a sum less than what was specified, in a previously enacted appropriation statute could be interpreted as being new legislation and therefore requiring the concurrence of both Houses and the signature of the President, or an overriding of his veto. In this matter, too, H.R. 8480 follows the lead of other legislative veto statutes. 54/

The restriction of legislative vetoes is based on the argument that any modification of a President's proposal would be a positive act which under the Constitution can be accomplished only by means of legislation that is subject to Presidential review. While this argument might be fully applicable to instances in which Congress seeks to establish new conditions by means of a legislative veto, it might not be appropriate when Congress only intends to disapprove part of an executive action. Especially in the case of a proposed deferral, a partial disapproval would be nothing more than the vetoing of a portion of a President's request. If Congress can disapprove the entire request by a simple resolution, why can't it disapprove part of the request? Inasmuch as the legislative veto is a condition imposed by Congress upon its delegation of a particular power to the executive branch, why can't one of the conditions be that a Presidential proposal shall take effect only to the extent not disapproved by either House? 55/

54/ H. Rept. No. 93-336 (1973) p. 8.

55/ For a discussion of legislative vetoes as part of congressional delegations of power, see Edward S. Corwin, The President: Office and Powers, 4th Rev. ed., New York, New York, University Press (1957) p. 130.

Implementation

Deferrals. The intentionally broad definition of deferrals has generated a large volume of special messages. Approximately half of the deferrals reported in fiscal 1975 were for $5 million or less and many of these related to routine financial or administrative actions. As already noted, the Comptroller General has suggested that Antideficiency Act deferrals be excluded from the impoundment control process. He similarly has proposed the exclusion of any other deferral specifically authorized by law as well as any administrative or routine action. In effect, the Comptroller General would limit Title X to policy deferrals.

Impoundment Resolutions. Two divergent interpretations of the bar against the partial disapproval of deferrals are possible: (1) When the President submits a deferral message in which the amount withheld is drawn from a number of distinct programs or accounts, Congress may disapprove the amount deferred for a specific program or account without disapproving the total deferral. (2) A deferral may be disapproved only in toto, even when the deferral is comprised of a number of separable programs or accounts. According to the first interpretation, an impoundment resolution must relate to a single item of deferral; according to the second, it must deal with a single deferral message.

This issue was activated by a deferral of funds from the National Oceanic and Atmospheric Administration (NOAA) submitted to Congress as D75-94.[56/] The Presidential message proposed the deferral of $6.8 million and

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56/ Message from the President, November 26, 1974. H. Doc. No. 93-398.

it identified 9 NOAA programs from which the funds were to be withheld, including the amount to be deferred from each. All of the affected programs are in the same appropriation account and the account happens to be one which in recent years has absorbed a number of previously separate appropriations.[57/] A number of impoundment resolutions were introduced in the House and the Senate; some would have disapproved the entire deferral, and some only the deferral of funds from particular NOAA programs.[58/] The House ultimately adopted a resolution disapproving the entire deferral.[59/]

While there was no formal ruling as to the validity of resolutions disapproving identifiable items of deferral, the House Parliamentarian advised one Member that partial disapprovals would not be in order. Thus, when Rep. AuCoin introduced H. Res. 240, he stated:

> To be very frank, I am not as concerned about the last four programs as I am about the two which are part of our national marine research and development effort. It is unfortunate that, according to the interpretation I have obtained from the Parliamentarian's office, in order to disapprove the President's deferral request for the two marine research programs, one must submit a resolution disapproving the entire deferral request.[60/]

57/ Between 1972 and 1976, one dozen previously separate accounts were absorbed into the NOAA appropriation. See Allen Schick, "Suggested Revisions in Circular A-11 and the Budget Appendix," Congressional Research Service, March 4, 1975.

58/ For a discussion of the various impoundment resolutions relating to this deferral, see Richard Kogan, "Impoundment of Funds from the National Oceanic and Atmospheric Administration," Memo, April 28, 1975.

59/ H. Res. 309, 94th Cong. 1st. Sess.

60/ 121 Cong. Rec. H 1074 (daily ed. March 25, 1975).

In separate memoranda, two Congressional Research Service analysts have interpreted section 1011 (4) in ways that permit the disapproval of discrete items of deferral.[61/] In weighing the various interpretations, the decisive test is the one in which a particular item of deferral can be segregated from other items in the same message. When a single deferral encompasses a number of programs authorized under different appropriation accounts, an impoundment resolution surely can reach to the individual programs without affecting the total deferral.[62/] Otherwise, the President would have the privilege of grouping individual items of deferral into deferral messages which Congress could not subdivide."[63/] At the other extreme, a resolution could not isolate for disapproval only a portion of the amount deferred from a single, indivisible program. There are many in-between cases, however, and each must be judged on its particulars. The NOAA deferral had features (such as the enumeration of the separate programs from which funds were to be withheld) making the components separable from one another.

The Comptroller General has suggested that section 1011 be amended to permit partial disapproval in all circumstances. Under his proposal, a resolution would be able to disapprove less than the full amount deferred from a particular item.[64/] Such a revision would resolve the "whole or in

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61/ Richard Kogan, op. cit. and Stuart Glass, "The Impoundment Control Act of 1974--Power of Members to Introduce Impoundment Resolutions Regarding Single Act of Deferral," Memo, February 13, 1975.

62/ A case in point is D76-86 which combines into a single deferral the withholding of funds from 10 separate appropriation accounts. See Message from the President, January 6, 1976, H. Doc. No. 94-328.

63/ Glass, op. cit., p. 9.

64/ Communication of the Comptroller General to the Chairman of the House Budget Committee, November 20, 1975.

part" issue but it also would introduce new complications arising out of possible differences between the House and the Senate as to the amount to be disapproved. In such cases, the disapproval could be decided (1) by means of a concurrent resolution process including conferences between the two Houses; (2) by disapproving only the amount adopted by the House that acts first; or (3) by disapproving the greater of the amounts in the House and the Senate resolution.

A question related to partial disapprovals is whether a single impoundment resolution can disapprove more than one deferral. The prevailing practice is to limit a resolution to a single deferral with a consequent increase in congressional workload and paperwork.[65/] The grouping of related deferrals into a disapproval resolution would reduce time and effort but it probably would have to be accompanied by a revision of section 1017 to permit floor amendments to impoundment resolutions.

The 45-day period. The 45-day period for congressional consideration of rescission proposals probably has been the most troubling feature of the Impoundment Control Act. Much controversy has developed with regard to the status of funds and programs during the 45 days, the inability of Congress to overturn proposed rescissions before the end of the period, and the occasional lapsing of funds either within or shortly after the expiration of the waiting period. These issues are examined in connection with section 1012.

65/ An exception is H. Res. 829, 94th Cong. 1st Sess. which deals with five consecutively numbered deferrals.

Irrespective of the status of funds during and after the 45 days, the manner in which the days are computed has presented considerable difficulty for Congress. Because the 45 days do not include congressional recesses in excess of three days and are broken by the sine die adjournment of Congress, the interval between submission of the President's message and expiration of the waiting period often is substantially in excess of 45 days. Table 11 displays the period of time between the submission of a rescission proposal and the enactment of a related rescission bill. The table does not report on those sets of rescission messages which did not eventuate in the enactment of rescissions. In every case, the interval has been substantially longer than 45 days. There have been two main reasons for the time overruns: (1) In a number of cases computation of the waiting period was broken by sine die adjournment. In fact, more than one third (39 of 114) of the rescissions proposed between September 20, 1974 and December 31, 1975 were submitted less than 45 days before sine die adjournment. (2) Congress generally has not acted on a rescission bill until the 45 days period has neared an end and in some cases a bill was enacted after the period had expired.

The 45 days have had the effect of prolonging the period of time during which federal agencies are uncertain about the funds available for expenditure. When the 45 days are added to the late enactment of appropriations and legislative-executive conflicts over appropriations, the uncertainty is extended into the third quarter of the fiscal year and in some instances into the fourth quarter. Thus, rescissions proposed in November 1974 were not finally decided until April 1975, leaving the affected agencies with less than

TABLE 11

CONGRESSIONAL ACTION ON PROPOSED RESCISSIONS

Rescission Proposal	Date Proposed	Date of Enactment Rescission Bill	Days between Proposal and Enactment
R75-1, 2	Sept. 20, 1974	Dec. 21, 1974	92
R75-3 through R75-7	Oct. 4, 1974	Dec. 21, 1974	78
R75-8 through R75-46	Nov. 26, 1974	April 8, 1975	133
R75-47 through R75-81	Jan. 30, 1975	April 8, 1975	68
R76-1, 3	July 1, 1975	Oct. 13, 1975	104
R76-4 through R76-8	July 26, 1975	Oct. 13, 1975	79
R76-2**	July 1, 1975	Nov. 24, 1975	146

* This Table only lists sets of rescissions relating to which a rescission bill was enacted.

** This enactment, long after expiration of the 45 days, was in an appropriation, not a rescission bill.

90 days to obligate the funds. A similar complication emerged with regard to rescissions proposed in November 1975, the 45 day period for which continued into 1976.

Amelioration of these problems could be obtained by a procedure allowing Congress to terminate a proposed rescission during the 45 days, a remedy to be discussed in section 1012. Short of this revision, some relief could be provided by (1) computing the 45 days on a calendar-day basis with no interruption for recess or adjournment or (2) counting only days of continuous session but not breaking the count for sine die adjournment. If the second option were adopted, the count would be resumed when the next session of Congress convenes.

Section 1012. Rescission of Budget Authority

SEC. 1012. (a) TRANSMITTAL OF SPECIAL MESSAGE.—Whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of authorized projects or activities for which budget authority has been provided), or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year, the President shall transmit to both Houses of Congress a special message specifying—

(1) the amount of budget authority which he proposes to be rescinded or which is to be so reserved;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific project or governmental functions involved;

(3) the reasons why the budget authority should be rescinded or is to be so reserved;

(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed rescission or of the reservation; and

(5) all facts, circumstances, and considerations relating to or bearing upon the proposed rescission or the reservation and the decision to effect the proposed rescission or the reservation, and to the maximum extent practicable, the estimated effect of the proposed rescission or the reservation upon the objects, purposes, and programs for which the budget authority is provided.

(b) REQUIREMENT TO MAKE AVAILABLE FOR OBLIGATION.—Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved.

Legislative History

This section sets forth the conditions under which the President is to propose a rescission of budget authority and provides for the transmittal of rescission proposals to Congress by means of special messages. Subsection (b) requires the release of funds proposed for impoundment unless Congress approves a rescission bill within a 45-day period.

The President may propose a rescission when (a) "the full objectives or scope" of a program can be achieved without expenditure of all the appropriated funds; (b) he wishes to reduce Federal spending for purposes of fiscal policy; (c) funds available for only one year are to be reserved; or (d) for any

reason the President proposes to spend less than has been appropriated. Thus there appears to be no restriction on the authority of the President to propose a rescission, but there are circumstances where only a rescission--and not a deferral--must be requested. The basic test is that when the President contemplates no future use of appropriated funds or when a reservation would preclude future expenditure, he is to submit a rescission proposal. Only when the President anticipates future use of the funds and current withholding would not rule out future expenditure, may the President recommend a deferral rather than a rescission.

For this reason, the Act does not permit deferral of one-year money for the full fiscal year. If such a deferral were permitted, the funds would lapse at the end of the year and there would have been a de facto rescission without recourse to the section 1012 process. For this reason, also, although the law is not explicit on the point, the President may not defer multi-year funds for the full last year of their availability. This situation was discussed in a colloquy between Senators Ervin and McClellan on the conference report.[66/]

> Mr. McClellan. Can the President propose the deferral of multiyear funds beyond the end of any fiscal year?
>
> Mr. Ervin. No, he can propose a deferral only to the end of the fiscal year in which he proposes the deferral. If the Congress does not disapprove the proposed deferral, he must then make all the funds available for obligation in the next fiscal year--unless he proposes deferral of part of the remaining funds in a new message in that fiscal year.

66/ 120 Cong. Rec. S 11229 (daily ed. June 21, 1974).

> For example, the President could, under section 1013, propose to defer all or part of a 3-year appropriation for procurement for the first fiscal year of its availability. At the end of that fiscal year, he would be required to make the budget authority available for obligation or submit another proposal covering the second year. This can go on until the last year of availability. At that time, if the President proposed further deferral, section 1012 would apply--since deferral to the end of that year would result in the termination of the procurement program. This would require a rescission bill. Of course, should such a deferral have, at any time, the effect of terminating all or part of a program--even during the first fiscal year--the President would be required to comply with section 1012.

The clear intent of section 1012 also would make improper annual deferrals (until the last year) of multiyear funds when the President does not want any future use of the funds but prefers not to risk the failure of getting a rescission bill approved. For example, it would not be within the intent of the law for the President to defer 3-year funds in each of their first two years and to propose a rescission in the third year unless the deferrals were made with a good faith expectation of future use.

Neither section 1012 nor the legislative history is clear concerning the deferral of one-year funds for a portion of the fiscal year. In his colloquy with Senator McClellan, Senator Ervin initially implied that one-year funds may be deferred for a portion of the year:[67/]

> Mr. McClellan. Can the President under section 1013 of the bill, propose to "defer" any 1-year budget authority for the entire fiscal year for which that budget authority is provided?

67/ Ibid.

> Mr. Ervin. No, that would be a proposed reservation of the budget authority under section 1012. Thus, the exception in section 1013 (c) would deny the President the authority to propose a "deferral" for the entire fiscal year. The President would be obliged to proceed under section 1012 if his intent was to defer the obligation of 1-year budget authority for the entire fiscal year.
>
> Mr. McClellan. Then, insofar as 1-year money is concerned, section 1013 merely provides a procedure under which the President can propose the deferral of expenditures to a later point in the fiscal year involved but, in no event, can such proposed deferral extend to the end of that year?
>
> Mr. Ervin. Yes, that is correct.

But later in the same exchange, the two Senators apparently came to a different conclusion, that it would be improper to propose a deferral of one-year funds for part of the year:[68/]

> Mr. McClellan. I am not sure whether additional language is needed in section 1013 in order to avoid a possible ambiguity regarding the limitation of the applicability of that section to multiyear appropriations.
>
> Mr. Ervin. It is implied. Section 1013 is intended to apply to multiyear appropriations because Congress in effect expresses its intent that single-year funds be obligated during the year of their availability by making them single-year funds in the first place.

A less difficult case would be presented by a deferral of funds for all but a fraction of the year, thereby precluding effective use of the funds before they would lapse. If this were done, the intent of Title X to disallow rescissions, except when approved by Congress, would be thwarted. Accordingly, in the colloquy on the conference report, Senator Ervin responded to an inquiry on this matter by stating that a rescission would have to be proposed.[69/]

68/ Ibid., S 11230.
69/ Ibid.

> Mr. McClellan. What happens if a "deferral" of budget authority is proposed for single-year funds so that the effect of the deferral would be to withhold or delay funds until a point in the fiscal year such that the programs or projects to which those funds would be applied are effectively stymied or changed?
>
> Mr. Ervin. The situation you describe cannot occur since such action would not be a bona fide proposed "deferral" but in fact a proposed reservation which must be reported under section 1012. The language of section 1012 "to be reserved from obligation for such fiscal year" would apply to that kind of action and thereby require the President to proceed under section 1012.

Informational Requirements. A special message proposing a rescission must specify (1) the amount of budget authority proposed for rescission, (2) the account or agency and the "specific" project or function from which the funds would be withdrawn, (3) the reasons for the rescission, (4) the estimated fiscal and budgetary impact, and (5) all facts bearing on the proposed rescission and its effect on the affected programs. This set of requirements supplants those prescribed in the Federal Impoundment and Information Act,[70/] which was repealed by section 1003 of the new law. Generally, the new requirements are more specific and detailed than the old, but they do not include the date on which the impoundment was ordered as one of the items in the special message. Presumably, this deletion is due to the fact that the new law regards impoundments as proposals rather than as executive actions. For the same reason, the requirement in both S. 373 and H.R. 8480 that the special message be submitted within 10 days is not applicable to a process which deems rescissions to be proposals to Congress.

70/ P.L. 92-599, Title IV.

The managers statement on the conference report strongly insists on better reporting of impoundments than was provided under the old law:

> The managers recognize that each proposed impoundment action may be unique, reflecting a complex mixture of various forces. Rather than a few generalized codes to cover all impoundments--which has been the practice of the Office of Management and Budget in implementing the Federal Impoundment and Information Act--the managers expect that the monthly reports and the special messages will provide more specialized treatment. A narrative section should explain clearly and completely the factors that prompted the Administration to propose to impound the funds. 71/

Implementation

During the period between September 20, 1974 and December 31, 1975, the President submitted 114 rescission proposals to Congress. Each proposed rescission was separately identified and numbered, so that the grouping of many proposed rescissions in a single message did not impair the ability of Congress to review the President's proposals. The record of executive and legislative action on rescissions is provided in pages 9-14 of this report.

When Do the 45 Days Begin? Inasmuch as money proposed for rescission must be made available for expenditure if Congress has not approved a rescission within 45 days, the date of commencement determines when the period comes to an end. The Act clearly establishes the starting date as the day on which a Presidential message or a section 1015 report by the Comptroller General has been submitted to Congress, whichever is earlier. This means that withholdings prior to the

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71/ H. Rept. No. 93-1101 (1973) p. 78.

reporting date do not affect the computation of the 45 day period. A case in point was R76-13, the proposed rescission of $768 million in higher education funds. The President's message was filed on November 18, 1975, but GAO informed Congress that the withholding had commenced on October 21, 28 days earlier. The Comptroller General protested this delay but acknowledged that nothing could be done retroactively:

> This delay affects the starting date of the prescribed 45-day time period causing an unwarranted extension of time before the rescission can be rejected. We are aware that under the Act, rescissions are not required to be reported to the Congress until the President signs the special message. ...In this instance, were we aware of HEW's actions of October 21, or OMB's actions of October 29, we would have informed the Congress of an unreported proposed rescission and the 45 days of continuous session would have started running from the date of that letter. 72/

The start of the 45 days is not affected by the submission of a supplementary message (pursuant to section 1014). The starting date is established when the initial message is submitted.73/ Any other interpretation would enable the President to subvert the impoundment control process by submitting a succession of supplementary messages prior to expiration of a 45 day period.

A more complicated situation developed during 1975 when the President filed a rescission message subsequent to the issuance of a deferral report by the Comptroller General. On January 10, 1975, the General Accounting Office notified Congress that OMB had not apportioned certain Labor-HEW funds within 30 days following the enactment of an appropriation as required by the Antideficiency

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72/ Communication from the Comptroller General to Congress, December 12, 1975, H. Doc. No. 94-322.

73/ Communication from the Comptroller General, December 11, 1974, S. Doc. No. 94-20.

Act. It thus concluded that this delay "constitutes a deferral of budget authority."[74/] On January 30, the President submitted a message proposing the rescission of some of the unapportioned funds.[75/] The Comptroller General then advised Congress that the 45-day period was triggered by his January 10 notification, not by the later rescission message.[76/] However, the President refused to release the funds until 45 days after the January 30 reporting date He based this action on a Justice Department opinion that the Act establishes a basic distinction between deferrals and rescissions:

> The Act does not provide that, in the event the President first reports the deferral of certain funds and subsequently decides to propose their rescission, the 45-day period for Congressional action on a rescission bill is triggered by the message on the deferral rather than by the rescission message. Under § 1011(3), the event which commences the 45-day period is receipt by Congress of the Presidential message regarding the rescission. Nothing in the Act or its legislative history justifies a different result when a deferral, subsequently altered to a rescission, is brought to the attention of Congress by the Comptroller General, rather than by the President.[77/]

74/ Communication from the Assistant Comptroller General, January 10, 1975, S. Doc. No. 94-25.

75/ H. Doc. No. 94-39.

76/ Communication from the Acting Comptroller General, February 7, 1975, H. Doc. No. 94-46.

77/ Letter From Antonin Scalia, Assistant Attorney General, Office of Legal Counsel to the Honorable James T. Lynn, Director, Office of Management and Budget, March 1, 1975.

This is a strong argument but its persuasiveness is attenuated by the circumstances of the case. When he reported on January 10, the Comptroller General had no certain knowledge that a rescission was being planned. Therefore, he could only interpret the withholding as a de facto deferral. But when later events clearly indicated that the original withholding really was a rescission action, the Comptroller General properly notified Congress that the 45 days should run from the earlier date. Unlike the Justice Department's example of a rescission following a deferral, this turned out to be a case in which there was no deferral, only a proposed rescission of funds. Precisely because the Act draws a fundamental distinction between rescissions and deferrals, the first actions could not--in retrospect--be classified as deferrals.

Regardless of when the 45 days start, the Act poses a difficulty with regard to enforcement of the Comptroller General's interpretation. Inasmuch as section 1016 mandates a 25 day waiting period prior to the commencement of legal action, in almost every case of disputed computation, the 45 days will have expired (regardless of how they are computed) before a suit is initiated.

De facto Rescissions. The dispute over the starting date for the proposed rescission of Labor-HEW funds is an example of a de facto rescission. Such a rescission occurs when the facts in the case clearly indicate that the executive branch does not intend, or will not be able, to spend funds concerning which it has not filed a rescission message. The authority of the Comptroller General to notify Congress of de facto rescissions derives from section 1014 of the Act.

Some de facto rescissions present no difficulty in interpretation; others create problems because the full extent of executive action or intent may not be known for some time. A clearcut de facto rescission exists where funds will

lapse before a deferral ends. But what of instances in which funds will remain available but not for a sufficient duration to permit their effective use? This situation generally is covered by the colloquy between Senators Ervin and McClellan quoted above. As Senator Ervin stated, such a situation would constitute a proposed rescission which must be reported under section 1012. In accord with this interpretation, the Comptroller General reclassified D75-48, the funds would have been deferred through June 30, 1975, leaving only 52 days before they would have lapsed.[78/] The question of whether the action was a deferral or rescission was not prominent during subsequent litigation of the case, a matter discussed in section 1016.

It is not always possible to judge in advance whether sufficient time will be available for the present obligation of funds prior to their lapsing. Sometimes it is possible to accelerate the administrative process of funds so that funds are obligated in less time than ordinarily is required. This is exactly what happened with regard to HEW emergency school aid funds. On March 28, 1975, the Comptroller General notified Congress of a de facto rescission, stating "the probability that part of the budget authority will lapse on June 30 because it cannot be prudently obligated by then."[79/] The Comptroller General based his judgment in large part on the amount of time required for the processing of applications in the previous year. However, on May 9, 1975, the Comptroller General reported that HEW had revised its administrative procedures, reducing from four months to 13 days the time between the submission of applications and the rewarding of grants. As a consequence, he noted, "the rescission anticipated

78/ Communication from the Comptroller General, November 6, 1974. H. Doc. No. 93-391.

79/ Communication from the Comptroller General, March 28, 1975, H. Doc. No. 94-95.

by our March 28 letter will not occur.[80/]

In cases such as this, the Comptroller General has little recourse but to file a rescission notice when the possibility of non-obligation of funds becomes evident.[81/] If he waited until the situation was completely clarified the likelihood of lapsing would substantially increase.

Lapsing During the 45 Days.

Although a rescission message is only a Presidential proposal, when the funds lapse before the expiration of the waiting period, Congress has no opportunity to overturn the President's action. R75-87, the last rescission proposed during fiscal 1975, posed this problem. A rescission message was submitted to Congress on May 8, 1975 involving funds for the Community Services Administration. The Comptroller General protested that the Impoundment Control Act "cannot be effectively applied to a rescission proposed this late in a fiscal year.... In this instance, the continuing resolution budget authority for the Youth Recreation and Sports Program will lapse on June 30 before the 45-day period expires on July 2." [82/]

The problem recurred with two subsequent rescissions of Community Service Administration funds. R76-7 and R76-8 were proposed on July 25, 1975, with the 45 days running to October 22. However, the funds lapsed almost a month

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80/ Communication from the Comptroller General, May 9, 1975.

81/ In his November 20, 1975 communication to the Chairman of the House Budget Committee, the Comptroller General recommended revision of section 1011 (2) to define rescissions to include "situations where an amount of budget authority cannot be prudently obligated within its remaining period of availability". But while this would give explicit authority to report de facto rescissions, it would not relieve the uncertainty with regard to whether the funds could be effectively spent.

82/ Communication from the Comptroller General, May 21, 1975, H. Doc. No. 94-165.

earlier on September 30, so that the fact that Congress did not concur in the proposed rescissions did not effectuate the release of funds.[83] Both the House and Senate Appropriations Committees urged that the funds be obligated before September 30 to avoid their lapsing. In the words of the Senate Committee.

> The Committee feels very strongly that if these funds are allowed to lapse the budgetary process and Congressional prerogative would be seriously undermined. Further the Committee has clearly indicated its position on the use of these funds in past appropriation measures. The late rescission request by the Executive Branch will cause unnecessary and very harmful program delays as well as the setting of a very negative precedent. [84]

One possible way to remedy this problem would be to bar the submission of a rescission proposal unless more than 45 days remain before the funds would lapse. However, it may not always be possible to compute the duration of the 45 days in advance, for the scheduling of congressional recesses and adjournments can affect the count. Moreover, this approach would prohibit the offering of routine rescission proposals when the Administration becomes aware that the funds are not needed late in the fiscal year.

A more promising approach, therefore, might be to amend the Impoundment Control Act to require that impounded budget authority be recorded as obligations of the United States for such time as may be necessary to permit the orderly operation of the section 1012 procedures for congressional review of proposed rescissions. If Congress approves the rescission, the funds no longer would

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83/ Communication from the Comptroller General, December 15, 1975, H. Doc. No. 94-324.

84/ S. Rept. No. 94-403 (1975).

be available for obligation; if the rescission is not approved, the funds would continue to be available even if they otherwise would lapse. The Comptroller General successfully obtained court application of this procedure to avoid the lapsing of section 235 funds during litigation and he has recommended that Congress amend Title X to provide this remedy whenever needed.

Status of funds during the 45 days. The possible lapsing of funds during the 45 days is part of a larger problem: exactly what is the status of funds during the waiting period? The Impoundment Control Act appears to be somewhat ambiguous on this issue: on the one hand, rescission messages are nothing more than executive proposals to Congress and have no force unless Congress enacts as rescission; on the other hand, the funds are withheld during the 45 days. The waiting period thus is not completely neutral in its effects on programs and finances. By means of the rescission process, the executive branch can withhold funds from agencies for the duration of the waiting period. Moreover, under Title X Congress has no sure means of influencing the course of events prior to the expiration of the period. Even when there is no prospect of legislative approval, a rescission proposal stops the flow of funds for a considerable--and sometimes critical--period of time.

One possible method of resolving this dilemma might be for Congress to act on rescissions during the 45 days, with its acceptance of some rescissions conclusively demonstrating to the executive branch its rejection of all others. For example, if 20 days after the receipt of a special message proposing $100 million in rescissions, Congress were to enact a bill rescinding $20 million, it would thereby manifest its rejection of $80 million in proposed rescissions.

There has been some indication that GAO and OMB might interpret such congressional action to require the immediate release of the $80 million not rescinded, but no firm precedent has been established thus far.[85/] The bare words of section 1012(b) do not compel any release of funds prior to the passage of 45 days. A more serious complication might arise if speedy action by Congress on part of a rescission was intended merely to remove uncertainty concerning a noncontroversial proposal, not to signify its disapproval of the remaining parts. There could be confusion concerning legislative intent and the operation of the impoundment control process.

During the first session of the 94th Congress, a number of bills were introduced to clarify the status of funds during the 45 day period and to provide Congress with a means to disapprove a rescissions before the period has expired. S. 2392 by Senator Mondale would amend section 1012 to provide that no funds may be withheld from obligation unless their rescission is approved within the 45 days. A similar approach is taken by H.R. 2434 (and 9 identical bills) introduced by Rep. Drinan and approximately 80 co-sponsors.[86/] The Drinan bills would amend section 1012 to specify that no proposed rescission is to become effective until and unless Congress enacts a rescission. The Mondale and Drinan bills would seem to require an uninterrupted flow of funds during the 45 days, but they provide no method of assuring this outcome or of dealing with routine cases where the funds no longer are needed to achieve the program objectives.

85/ See 122 Congressional Record, H. 877-8 (daily ed. February 10, 1976). Remarks of Reps. Mahon and Chappell.

86/ The identical bills introduced by Rep. Drinan are: H.R. 2434, 4670 5007, 5317, 5346, 5661, 5872, 5999, 6662, and 11358.

A different approach would be to vest Congress with a procedure for disapproving a rescission proposal during the 45 days. H.R. 3827 and H.R. 4595 by Rep. Baucus would provide for disapproval by concurrent resolution; the Comptroller General has suggested use of a simple resolution to express House or Senate disapproval of rescission requests.[87/] In both approaches, withheld funds would have to be released upon adoption of a disapproval resolution.

Release of Funds. Section 1012(b) clearly rules out successive rescission requests as a means of withholding funds beyond the prescribed 45 days. When Congress fails to approve a rescission, it would violate the intent as well as the letter of the Act to resubmit a rescission proposal. The only possibility for renewing a rescission proposal would occur if circumstances changed so substantially after termination of the initial rescission proposal to justify the submission of a second request on completely different grounds.

Although successive rescissions have not occurred, the issue of deferrals after the rejection of a rescission request has arisen. However, the circumstances were such as to offer conclusive evidence that the executive branch was proceeding in accord with congressional intent. On July 1, 1975, the President proposed a rescission of $90 million (R76-1) in certain Federal highway funds. The 45 days expired on September 22, 1975 without congressional enactment of the rescission. But in their consideration of the rescission bill, both the House and Senate Appropriations Committees suggested that the Administration defer the funds in order to allow more time for consideration of the issue.[88/] This position also was announced during floor

87/ A simple resolution probably should suffice to indicate that the rescission will not pass if the 45 days were permitted to run their course.

88/ H. Rept. No. 94-496 and S. Rept. No. 94-403. (1975).

debate on the rescission bill.[89] The Senate Budget Committee, however, advanced the view that a deferral could not be submitted subsequent to the lapsing of a rescission request unless authority for such action were provided in statutes other than the Impoundment Control Act.[90]

In accord with the congressional suggestion, the President proposed the deferral of the highway funds on September 24, 1975 (D76-55). In his review of that message, the Comptroller General declared:

> We believe the Act does not provide authority in this particular case for the President to submit a deferral message following rejection by theCongress of a rescission proposal for the same funds, but since the deferral is offered in response to the express wishes of the Appropriations Committees of the Congress, we plan no action pending further congressional actions. [91]

Because of the special circumstances of this case, no precedent has been established to allow a deferral following rejection of a rescission.

89/ 121 Congressional Record, H 9073 (daily ed. September 24, 1975) Remarks of Rep. Yates.

90/ S. Rep. No. 94-403 (1975). Because of Senate procedures, the views of Senate Appropriations and Budget Committees are incorporated in the same report.

91/ Communication from the Comptroller General, November 4, 1975. S. Rept. No. 94-120.

Section 1013. Deferrals of Budget Authority

SEC. 1013. (a) TRANSMITTAL OF SPECIAL MESSAGE.—Whenever the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any officer or employee of the United States proposes to defer any budget authority provided for a specific purpose or project, the President shall transmit to the House of Representatives and the Senate a special message specifying—

(1) the amount of the budget authority proposed to be deferred;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific projects or governmental functions involved;

(3) the period of time during which the budget authority is proposed to be deferred;

(4) the reasons for the proposed deferral, including any legal authority invoked by him to justify the proposed deferral;

(5) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed deferral; and

(6) all facts, circumstances, and considerations relating to or bearing upon the proposed deferral and the decision to effect the proposed deferral, including an analysis of such facts, circumstances, and considerations in terms of their application to any legal authority and specific elements of legal authority invoked by him to justify such proposed deferral, and to the maximum extent practicable, the estimated effect of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

A special message may include one or more proposed deferrals of budget authority. A deferral may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral is transmitted to the House and the Senate.

(b) REQUIREMENT TO MAKE AVAILABLE FOR OBLIGATION.—Any amount of budget authority proposed to be deferred, as set forth in a special message transmitted under subsection (a), shall be made available for obligation if either House of Congress passes an impoundment resolution disapproving such proposed deferral.

(c) EXCEPTION.—The provisions of this section do not apply to any budget authority proposed to be rescinded or that is to be reserved as set forth in a special message required to be transmitted under section 1012.

Legislative History

This section establishes the procedure for the President to propose deferrals and for the House or the Senate to disapprove them. Two specific limitations are placed on the deferral process: (1) a deferral may not be proposed beyond a single fiscal year, though annual deferrals may be proposed in successive years, and (2) a deferral may not be proposed for any matter covered by the rescission process in section 1012. In addition, therefore, a full-year deferral may not be proposed for funds that would lapse at the end of that fiscal year.

The information required in deferral messages is comparable to that required for rescissions, except that the President also has to specify any legal authority used to justify the deferral. The President must release deferred funds if either the House or the Senate passes a resolution of disapproval during the fiscal year to which the deferral applies.

Most of the issues relating to the interpretation of the deferral process have been discussed in connection with other provisions of the law. Thus, the Comptroller General has ruled that section 1013 supplements the authority granted to the President under the Antideficiency Act as amended by section 1002. Moreover, the definition of deferrals depends on the interpretation of subsection (c) as well as provisions of sections 1011 and 1012. Deferrals must be regarded as a residual category, covering impoundments which are not required to be rescissions.

However, the composition of this residual category is not entirely clear from the face of the Act. Section 1012 (a) specifies a number of circumstances for which a rescission is to be proposed, while section 1013 (a) merely provides for the President to submit a special message whenever he proposes a deferral. Two conflicting interpretations are possible: (1) that deferrals are precluded for purposes enumerated in section 1012 (a); or (2) that deferrals may be proposed as long as they do not conflict with specific requirements of the law, for example, that impoundments of one-year money be treated as rescissions. Probably the main difference between the two interpretations relates to fiscal policy impoundments, one of the items listed in section 1012 (a). According to the first interpretation, funds may not be deferred on fiscal policy grounds; according to the second interpretation, the President has the option to propose either a rescission of deferral, depending on his future intentions regarding the funds.

The Comptroller General has ruled in favor of the second interpretation, basing his argument on the broad language of section 1013:

> ...the clear language of section 1013 does not limit the authority for proposed deferrals. The language of the section is very broad, providing that a message should be sent pursuant to the section whenever it is proposed that budget authority be deferred.... Clearly the plain language permits the proposal of deferrals for any reason. It has been suggested that since section 1012 specifically lists "fiscal policy" withholdings as being reportable under that section, and section 1013 does not, all fiscal policy withholdings must be reported under section 1012. However, in that event, no deferrals could be proposed under section 1013, since the list of purposes under section 1012 is comprehensive, and section 1013 lists no purposes whatsoever. 92/

Implementation

During the period between September 20, 1974 and December 31, 1975, the President submitted 246 deferral messages to Congress involving approximately $30 billion in budget authority. Congress disapproved 30 of these deferrals, compelling the release of $9.6 billion in budget authority. An analysis of these developments is presented in pages 15-22 above.

There appears to be a nominal conflict between the Administration's interpretation of deferrals and that stipulated in the law. Throughout, Title X identifies deferrals (and rescissions) as proposals. However, while the Presidential messages speak of "proposed" rescissions, they refer to deferrals as if they have already occurred. In practice, there is no problem because even though funds have been withheld, a deferral is merely a proposal in the sense that the funds must be released if it is subsequently disapproved by the House or Senate.

What is a deferral? As noted, the distinction between deferrals and rescissions sometimes has been troublesome, particularly when policy matters are in-

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92/ Communication from the Comptroller General, H. Doc. 93-404, p. 9.

volved. Definitional problems also have emerged when funds have been held up by routine administrative actions or by delays in processing paperwork. The Comptroller General has ruled on a number of occasions that failure to apportion appropriated funds within the 30 days provided by the Antideficiency Act constitutes a deferral for which a section 1013 message (or a section 1015 report) is required.[93/] The validity of this position is borne out by the fact that a number of delayed apportionments have been followed by rescission proposals.

However, the Comptroller General does not regard all administrative delays as de facto deferrals. When payments are held up in order to check on the validity of a claim, the action does not constitute a deferral within the meaning of the Impoundment Control Act.[94/] Countless other administrative routines--for example, delaying the award of contracts until bids have been examined or grants until applications have been reviewed--would not be deferrals unless they were intended to delay the implementation of a program. Were it not for this reasonable interpretation, Title X might be read to require the submission of thousands of routine reports each year.[95/]

Release of Funds. Much of the discussion regarding the mandatory release of funds when Congress fails to enact a rescission (section 1012) applies to the release of funds when an impoundment resolution has been adopted. It would violate the impoundment control procedures to defer funds after approval of an

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93/ Communication from the Assistant Comptroller General, November 1, 1974, S. Doc. No. 94-14.

94/ Letter from the Comptroller General to State of Michigan Senators and Representatives, October 16, 1975.

95/ In his November 20, 1975 communication to the House Budget Committee concerning possible revisions of Title X, the Comptroller General urged that routine administrative actions be specifically excluded from the impoundment control process.

impoundment resolution or after a rescission proposal has been rejected.[96/]

Deferral of multi-year or no-year funds during successive fiscal years does not violate the Act but in some instances a rescission message might be a more appropriate course. But the deferral route should not be used to "buy time" until a rescission is proposed. The combination of deferrals and rescission messages can produce lengthy delays in program implementation and even when they are within the procedures of Title X they can be used to thwart the will of Congress. On July 26, 1975, the President proposed the deferral of certain funds authorized under a continuing resolution.[97/] Almost four months later, after regular appropriations had been enacted, the President proposed the rescission of some of the previously deferred funds.[98/] Because the rescissions came less than 45 days before sine die adjournment, the period for congressional action will extend into March 1976. Thus, through a combination of deferrals and rescissions, the President will be able to delay program funding for about 8 months. In this instance, the deferrals and rescissions were proposed with regard to different statutory authorities (a continuing resolution and an appropriations law) but the effect nonetheless was to withhold funds for a far greater length of time than might have been possible by means of only one of the impoundment procedures.

In at least one important case, passage of an impoundment resolution secured the formal release but not the actual obligation of all the affected funds. S. Res. 69 disapproved the deferral of $9.1 billion in highway funds, but committee reports and floor debate on the resolution established the expectation that

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96/ In his November 20, 1975 communication, the Comptroller General suggested that re-deferrals and re-rescissions be permitted for "circumstances or conditions unknown at the time the original deferral or rescission was considered."

97/ H. Doc. No. 94-225.

98/ On this matter, see Communication from the Comptroller General, December 12, 1975, H. Doc. No. 94-322.

not all of the funds would be spent during the current and next fiscal years. In a letter to the Senate Subcommittee on Transportation Appropriations, the Chairman and ranking minority member of the Public Works Committee indicated that because the Impoundment Control Act does not permit partial disapproval of a proposed deferral, S. 69 would disapprove the entire impoundment. However,

> In taking its action, Members of the Committee emphasized their desire to enter into a dialogue with the Executive Branch to determine the funding level for the Federal-aid highway program in fiscal year 1976. The Committee on Public Works will work with the Executive Branch to develop a proper level for the Federal-aid program next year that may not require the obligation of the full $8.7 billion remaining impounded following the recent voluntary release of $2 billion. 99/

This approach was endorsed by the Senate Budget Committee, in its review of the impoundment resolution.[100/] During floor consideration, Senator Randolph emphasized "that it may not be possible...to use this amount of money in the next fiscal year."[101/] Following adoption of the resolution, the Comptroller General confirmed that the money had been released but he noted that the Federal Highway Administration "has advised its regional administrators that they would be provided a new limitation on obligations effective July 1, 1975, based on a new deferral message for FY76."[102/]

As things turned out, no additional deferral was proposed for fiscal 1976, but a limitation was written into the 1976 Transportation Appropriation bill.

99/ S. Rept. No. 94-83. Because of Senate procedures for deferrals and rescissions, the views of the Senate Budget, Appropriations, and Public Works Committees were considered in this case. These procedures are discussed in section 1017.

100/ Ibid., p. 12.

101/ 121 Cong. Rec. S 6711 (daily ed. April 24, 1975).

102/ Communication of the Assistant Comptroller General, April 30, 1975.

Senator Randolph offered a floor amendment limiting obligations for fiscal 1976 and the transition quarter to $9 billion, several billion dollars below the amount that might otherwise be obligated.[103] This limitation was fixed in consultation with executive officials and members of the Senate Budget and Appropriations Committees and it was adopted by voice vote. House and Senate conferees retained the limitation in their conference report, but the issue provoked heated debate in the House with some Members defending the limitation as consistent with the new congressional budget process and others claiming that congressional impoundment now was replacing executive impoundment as a means of withholding funds.[104] However, the limitation was approved as part of the 1976 DOT Appropriation Act.[105]

Adequacy of information. In his review of some of the early impoundment reports, the Comptroller General commented on the inadequacy of the explanations provided by the executive branch. In one report, the Comptroller General noted that the special messages generally were deficient in three areas:

> 1. The proposed deferrals, generally, provide either no information on related fiscal impacts or only a brief one or two sentence statement without providing supporting data that there is no impact....
> 2. There is a lack of sufficient data covering the extent to which the achievement of program objectives is affected.
> 3. ...there is insufficient data given as to...other funds and as to whether their use for these activities affects their availability for other purposes. 106/

Data deficiencies are much more serious in the case of proposed deferrals than rescissions because the former continue in effect unless overturned by

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103/ 121 Cong. Rec. S 13770-13775. (daily ed. July 25, 1975).

104/ 121 Cong. Rec. H 10924-10928 (daily ed. November 11, 1975).

105/ Public Law 94-134, section 316.

106/ Communication from the Comptroller General, October 15, 1974, S. Doc. No. 94-13.

the House or Senate. Inadequate information can induce inaction by Congress in instances where full disclosure might impel adoption of an impoundment resolution.

In a February 1975 staff report to the Senate Budget committee more than half a dozen types of deficiencies were identified: vague language; failure to state effects on programs; errors and omissions; inadequate impact statements; missing breakdowns of data; insufficient information on alternative funding; absence of information on duration of deferrals; and standardized responses.[107/] In more recent messages, the quality and organization of the information appears to have improved and there are fewer complaints concerning them.

Section 1013 (a)(3) requires the President to specify "the period of time during which the budget authority is proposed to be deferred." However, many messages have been open-ended, leaving Congress unsure of the future status or intended use of the funds. The Comptroller General has suggested that section 1013 be amended to require a clear statement on how long the deferral will be in effect, with funds released as scheduled unless a supplementary message proposes to extend the period of impoundment.[108/]

107/ Senate Committee on the Budget, Analysis of Executive Impoundment Reports, Committee Print, 94th Cong. 1st Sess., February 1975, pp. 4-12.

108/ Letter from the Comptroller General to the Chairman of the House Budget Committee, November 20, 1975.

Section 1014. Transmission and Publication of Special Messages

SEC. 1014. (a) DELIVERY TO HOUSE AND SENATE.—Each special message transmitted under section 1012 or 1013 shall be transmitted to the House of Representatives and the Senate on the same day, and shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in session. Each special message so transmitted shall be referred to the appropriate committee of the House of Representatives and the Senate. Each such message shall be printed as a document of each House.

(b) DELIVERY TO COMPTROLLER GENERAL.—A copy of each special message transmitted under section 1012 or 1013 shall be transmitted to the Comptroller General on the same day it is transmitted to the House of Representatives and the Senate. In order to assist the Congress in the exercise of its functions under sections 1012 and 1013, the Comptroller General shall review each such message and inform the House of Representatives and the Senate as promptly as practicable with respect to—

(1) in the case of a special message transmitted under section 1012, the facts surrounding the proposed rescission or the reservation of budget authority (including the probable effects thereof); and

(2) in the case of a special message transmitted under section 1013, (A) the facts surrounding each proposed deferral of budget authority (including the probable effects thereof) and (B) whether or not (or to what extent), in his judgment, such proposed deferral is in accordance with existing statutory authority.

(c) TRANSMISSION OF SUPPLEMENTARY MESSAGES.—If any information contained in a special message transmitted under section 1012 or 1013 is subsequently revised, the President shall transmit to both Houses of Congress and the Comptroller General a supplementary message stating and explaining such revision. Any such supplementary message shall be delivered, referred, and printed as provided in subsection (a). The Comptroller General shall promptly notify the House of Representatives and the Senate of any changes in the information submitted by him under subsection (b) which may be necessitated by such revision.

(d) PRINTING IN FEDERAL REGISTER.—Any special message transmitted under section 1012 or 1013, and any supplementary message transmitted under subsection (c), shall be printed in the first issue of the Federal Register published after such transmittal.

(e) CUMULATIVE REPORTS OF PROPOSED RESCISSIONS, RESERVATIONS, AND DEFERRALS OF BUDGET AUTHORITY.—

(1) The President shall submit a report to the House of Representatives and the Senate, not later than the 10th day of each month during a fiscal year, listing all budget authority for that fiscal year with respect to which, as of the first day of such month—

(A) he has transmitted a special message under section 1012 with respect to a proposed rescission or a reservation; and

(B) he has transmitted a special message under section 1013 proposing a deferral.

Such report shall also contain, with respect to each such proposed rescission or deferral, or each such reservation, the information required to be submitted in the special message with respect thereto under section 1012 or 1013.

(2) Each report submitted under paragraph (1) shall be printed in the first issue of the Federal Register published after its submission.

Legislative History

This section sets forth the procedures for the transmittal, publication, and review of rescission and deferral messages. Each special message, and any supplementary message revising a previous proposal, is to go to Congress and the Comptroller General and is to be published in the Congressional Record. The Comptroller General shall view each message and inform Congress of the circumstances and probable effects of every proposed deferral or rescission. In the case of proposed deferrals, the Comptroller General is to notify Congress as to whether he regards the action as in accord with statutory authority.

Provision also is made for cumulative monthly reports listing all proposed rescissions, deferrals, or reservations for the current fiscal year.

Implementation

The reporting procedures elaborated in this section have led to a stable pattern of special messages, GAO comments, periodic supplementary messages, and monthly cumulative reports.

Special Messages. Rather than separate reports for rescissions and deferrals, the practice has been to combine them into a single document, with separate sections for each type of impoundment. The reports submitted between September 20, 1974 and December 31, 1975 are listed in Table 10 on page 23. In accord with S. Res. 45 defining Senate Committee jurisdiction over impoundment resolutions and rescission bills, the messages are referred to the Senate Appropriations and Budget Committees as well as to any other Senate committee of jurisdiction. 109/

Reports of the Comptroller General. There usually is about a one-month interval between the submission of a special message by the President and its

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109/ See section 1017 for a fuller discussion of the jurisdictional dispute in the Senate and its resolution.

review by the Comptroller General. Only in a few instances has the Comptroller General commented at length concerning a particular deferral or rescission. In most cases, he has merely certified that the facts as presented by the President are accurate and that the action is in accord with existing law. When the facts ascertained by his inquiries are at variance with those reported by the President, the Comptroller General notifies Congress of the true situation. Sometimes the corrections relate to the amount being impounded, sometimes to the legal authority for a deferral, sometimes to the effect of an impoundment on the level or effectiveness of a program. The Comptroller General's inquiry almost always involves questioning of Office of Management and Budget officials and it often also extends to agency personnel. But it is not a full-scale investigation into the purposes and effects of each impoundment. The scope of this review was spelled out in the first message of the Comptroller General to Congress under Title X:

> Our reviews of the special message are also concerned with assessing whether they contain sufficient relevant, factual data about fiscal, budget and program effects to permit the Congress to understand the action proposed and be helpful to it in judging the desirability of the proposal. The data contained in the messages themselves should meet reasonable standards of completeness but they are only one of the data sources available to the Congress when it is considering the proposed action. In our opinion, congressional hearings on large and controversial proposals will be essential to fully develop the facts. 110/

Supplementary messages. In the course of implementation, dozens of supplementary messages have been submitted to Congress, particularly with regard to deferral actions. In many routine impoundments, funds previously withheld for contingencies are released as circumstances change. It has not been an easy

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110/ S. Doc. No. 94-13 (1975), p. 1.

task for Congress to keep track of the flow of special and supplementary messages, though the cumulative reports issued each month have lightened the burden. When the President submits a supplementary message, the time frames for congressional and GAO action are not altered. They start from the date of the original message.[111/]

Some controversy has developed as to whether executive action releasing all funds deferred for a program triggers the section 1014(c) requirement of a supplementary message. A strict reading of subsection (c) would indicate that a message should be submitted whenever "any information ...is subsequently revised." The release of funds and termination of a deferral certainly constitutes a change in the information previously reported. Nevertheless, the practice has been to report the termination of a deferral in the next cumulative report rather than in a supplementary message. This procedure seems to rest on the contention that a supplementary message is required only for an impoundment still in effect, not for deferrals which have lapsed because of changed circumstances or executive action.

This practice provoked a protest by the Chairman of the House Committee on Education and Labor, who took the position that when a deferral is terminated a "supplementary message should be issued by the President to this effect, stating specifically that the funds proposed for a deferral are being obligated in accord with congressional intent." However, the Comptroller General rejected this interpretation, arguing instead that the President is not required to submit a supplementary message "on deferrals that are no longer viable because this information will subsequently be included in the President's monthly status report to the Congress."[112/]

111/ Comptroller General's Report to Congress, December 11, 1974. S. Doc. 94-20.

112/ The Comptroller General's response, dated October 24, 1975 was addressed to Rep. Brock Adams who had asked him to review the problem raised by Rep. Perkins.

There is a clear interest in reducing the paperwork to a necessary minimum, and excessive reporting can only interfere with the ability of Congress to monitor executive actions. But this particular controversy involved a set of deferrals imposed on programs operating under continuing resolution. Once the regular appropriation was enacted, there was a real likelihood that the President would propose to rescind some of the funds. Consequently, Chairman Perkins was seeking a positive statement as to whether the funds would be made available for obligation, not merely a notice that the deferral was to cease. For this purpose, a supplementary message would have provided more information than the monthly report.

Monthly Reports. Subsection (e) seems to require cumulative reports as detailed as the various special messages, but the outcome of such an application would be exceedingly bulky monthly reports. In practice, the Administration has responded to this requirement with summary listings of the key financial details along with brief narrative explanations of the status of rescissions and deferrals. Table 12 lists the monthly reports issued through December 1975.

Table 12

CUMULATIVE REPORTS ON RESCISSIONS AND DEFERRALS

Report for Month of	Congressional Document	Federal Register Publication
October, 1974	H. Doc. 93-393	39 Fed. Reg. 37434 (Oct. 21, Part I)
November, 1974	H. Doc. 93-392	39 Fed. Reg. 40243 (Nov. 14, Part III)
December, 1974	H. Doc. 93-407 S. Doc. 94-19	39 Fed. Reg. 43499 (Dec. 13, Part III)
January, 1975	H. Doc. 94-10	40 Fed. Reg. 3179 (Jan. 17, Part IV)
February, 1975	H. Doc. 94-48 S. Doc. 94-3	40 Fed. Reg. 7355 (Feb. 19, Part III)
March, 1975	H. Doc. 94-77	40 Fed. Reg. 12427 (Mar. 18, Part II)
April, 1975	H. Doc. 94-106 S. Doc. 94-34	40 Fed. Reg. 17411 (Apr. 18, Part IV)
May, 1975	H. Doc. 94-145 S. Doc. 94-55	40 Fed. Reg. 21885 (May 19, Part VI)
June, 1975	H. Doc. 94-180 S. Doc. 94-67	40 Fed. Reg. 25945 (June 19, Part IV)
July, 1975	H. Doc. 94-215	40 Fed. Reg. 30025 (July 16, Part V)
August, 1975	H. Doc. 94-236 S. Doc. 94-99	40 Fed. Reg. 33949 (Aug. 12, Part V)
September, 1975	S. Doc. 94-104	40 Fed. Reg. 42710 (Sept. 15, Part V)
October, 1975	H. Doc. 94-285 S. Doc. 94-110	40 Fed. Reg. 48475 (Oct. 15, Part IV)
November, 1975	H. Doc. 94-304 S. Doc. 94-127	40 Fed. Reg. 52977 (Nov. 13, Part V)
December, 1975	H. Doc. 94-320 S. Doc. 94-140	40 Fed. Reg. 58255 (Dec. 15, Part V)

Section 1015. Omissions and Reclassifications

SEC. 1015. (a) FAILURE TO TRANSMIT SPECIAL MESSAGE.—If the Comptroller General finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any other officer or employee of the United States—

(1) is to establish a reserve or proposes to defer budget authority with respect to which the President is required to transmit a special message under section 1012 or 1013; or

(2) has ordered, permitted, or approved the establishment of such a reserve or a deferral of budget authority;

and that the President has failed to transmit a special message with respect to such reserve or deferral, the Comptroller General shall make a report on such reserve or deferral and any available information concerning it to both Houses of Congress. The provisions of this part shall apply with respect to such reserve or deferral in the same manner and with the same effect as if such report of the Comptroller General were a special message transmitted by the President under section 1012 or 1013, and, for purposes of this part, such report shall be considered a special message transmitted under section 1012 or 1013.

(b) INCORRECT CLASSIFICATION OF SPECIAL MESSAGE.—If the President has transmitted a special message to both Houses of Congress in accordance with section 1012 or 1013, and the Comptroller General believes that the President so transmitted the special message in accordance with one of those sections when the special message should have been transmitted in accordance with the other of those sections, the Comptroller General shall make a report to both Houses of the Congress setting forth his reasons.

Legislative History

Both S. 373 and H.R. 8480 provided for the Comptroller General to notify Congress in the event that the President fails to report an impoundment. Inasmuch as the Presidential messages trigger the impoundment control process, there is a need for "surrogate" reports if the President fails to inform Congress of an executive impoundment. However, the two bills diverged in regard to the commencement of the waiting period for legislative approval or disapproval of impoundments. Under S. 373, the period would have commenced at the time the Comptroller General determined the impoundment to have been made, while H.R. 8480 would have commenced the waiting period at

the time the Comptroller General reported to Congress. The Act conforms to the H.R. 8480 approach and deems a report of the Comptroller General to have the same effect as a special message of the President reporting a proposed deferral or rescission.

Subsection (b) was added by the conference committee to take into account the distinction between rescissions and deferrals and section 1013 (c)'s prohibition against the classification of a rescission as a deferral. If the President misclassifies a rescission or deferral, the Comptroller General is to so report to Congress. While this subsection would apply to any type of misclassification, the Act itself does not prohibit the classification of a deferral as a rescission nor is there much incentive for the executive branch to err in this direction.[113/] Subsection (b) is unclear as to the status of a finding by the Comptroller General that the President has misclassified an impoundment. If the Comptroller General reports that a rescission has been submitted as a deferral, would the 45-day period commence at the time of the report as it does when the President fails to report altogether? If the period does not commence then, there might be no way to compel the President to release the funds unless one House goes along with the deferral classification and adopts an impoundment resolution. However, a reasonable interpretation is that Congress can challenge both a misclassification and Presidential failure to release impounded funds when the Comptroller General reports misclassification under subsection (b), thereby satisfying the subsection (a) procedure as well.

113/ But there are occasions when a recission might be preferred, for example, during the last weeks of a Congress when the President can take advantage of the 45-day waiting period.

Implementation

During the first 15 months of the impoundment control process, the Comptroller General intervened in more than half a dozen instances to report a misclassification or a failure to submit a presidential message. In all but one of the cases, the Administration conforms to the judgment of the Comptroller General. Most of the particulars with regard to these cases are discussed in sections 1012, 1013, or 1016. The salient types of issues in these cases are presented below.

Fairlure to Apportion. The Antideficiency Act (31 U.S.C. 665) requires the apportionment of funds no later than 30 days after enactment of an appropriation. The Comptroller General has ruled that any delay beyond the 30 days constitutes a deferral of budget authority for which a section 1015 report is required. On January 10, 1975, he informed Congress of a failure to apportion budget authority provided in the Labor-HEW appropriation act; [114/] almost a month later he ruled that when the President submitted a rescission message for this budget authority, the 45 days began when Congress convened, not when the President's message was submitted.[115/]

Reclassification of deferrals. Thus far, there has been no reported instance of a proposed rescission that should have been classified as a deferral. As noted, there is little incentive for this type of misclassification.

114/ Communication from the Comptroller General, January 10, 1975, S. Doc. No. 94-25.
115/ Communication from the Comptroller General, February 7, 1975, H. Doc. No. 94-46.

But on a number of occasions, the Comptroller General has notified Congress of a proposed deferral which should have been reported as a rescission. The most celebrated of these involved section 235 housing funds, and the particulars are detailed in section 1016.

On February 14, 1975, the Comptroller General reclassified six reported deferrals as proposed rescissions. In each of these cases, the Administration proposed to set aside appropriated funds pending legislative approval of their transfer to other programs. The Comptroller General ruled that the Administration intended "to permanently withdraw funds from these programs and thereby reduce the activity below the level of budgetary resources provided by the Congress. Any such action constitutes a rescission as defined by the Act."[116/] In other words, rescissions were defined to cover circumstances where (a) the funds would not lapse, (b) they would be used during the fiscal year, but (c) they would not be used for the original appropriation. This set of conditions, however, would not pertain to transfers already authorized by law. In such pre-authorized transfers, there would be no period of time during which funds were withheld, nor any deviation from legislative authority.

Failure to Report. Sometimes the executive branch engages in actions which woul d delay or prevent the expenditure of funds without notifying Congress of the situation. The authority of the Comptroller General under

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116/ Communication from the Comptroller General, February 14, 1975. H. Doc. No. 94-50.

section 1015 (a) to report such executive actions has led to several deferral and rescission cases. On July 9, 1975, the Comptroller General informed Congress that the Administration was contemplating the impoundment of $10 million in funds for the Youth Conservative Corps. Since these funds were for summer programs, their impoundment would prevent use of the money for one year, thereby constituting a de facto deferral. One day later the Senate disapproved this deferral and OMB subsequently released the funds.[117/] However, by the time the funds were released, it was possible to use only $3 million during that summer, with the remaining $7 million earmarked for the next summer's program. Thus, even the expeditious activation of the impoundment control procedures could not avert a long delay in the use of funds.

One failure to report involved an estimated $964 million of college housing funds which the Administration had no evident intention of spending.[118/] After the Comptroller General notified Congress, it transferred the budget authority to a new community development program, thereby resolving the impoundment issue in a way that preserved the funds but not for their original purpose.[119/]

117/ S. Res. 205, 94th Cong. 1st Sess.
118/ Communication from the Comptroller General, June 19, 1975.
119/ The transfer was made in the 1976 HUD Appropriation Act, Public Law 94-116, and reported in the communication from the Comptroller General, December 15, 1975, H. Doc. No. 94-324.

Impoundment by Relation. In another case, GAO initiation of the impoundment process could not prevent the lapsing of budget authority. On June 3, 1975, the Comptroller General reported that delays in the issuance of regulations would force the lapse of $180 million in Housing for the Elderly or Handicapped funds. He regarded this delay as a de facto rescission, but the section 1012 process was of no avail because the funds lapsed before the 45 days expired. As things turned out, all $214 million available in the program lapsed because no regulations were issued by the end of the fiscal year.120/

This case raises difficult questions concerning the effects of administrative regulations on the impoundment control process. In dozens of Federal grant and loan programs, the pace and amount of expenditures are directly affected by regulations governing eligibility, applications procedures, criteria for review, etc. Often revisions in the existing regulations delay the processing of applications and reduce the amount obligated by the Federal agency. If all regulatory delays were regarded as de facto rescissions or deferrals, Congress would be flooded by an avalanche of special messages, only a small fraction of which would have any policy content. But not all regulatory delays are alike. There is a difference between administrative actions which would cause the funds to lapse and actions which would delay but not reduce the program level.

120/ Communciation from the Comptroller General, August 6, 1975.

The Housing for the Elderly or Handicapped program posed the possibility of a de facto rescission, and hence a report by the Comptroller General was an appropriate (but in this case futile) effort to preserve the availability of the funds. When, however, regulatory action would merely hold up a program until regulations were fully developed, the case for Comptroller General intervention would be weaker.

A second distinction relates to the purpose (as opposed to the effect) of a regulatory delay. If the regulatory activity is intended solely to improve program performance or to implement legislative intent, the justification for labelling it as an impoundment would be less compelling than when regulations are used to hinder the implementation of a program. However, it is not always possible to judge the motivations of administrative agencies, and the burden, therefore, should be on the agency to show that the regulatory activity is not intended to interfere with program levels or to achieve a "backdoor" impoundment.

TABLE 13

IMPOUNDMENT REPORTS OF THE COMPTROLLER GENERAL TO CONGRESS, FY 1975

OCTOBER 15, 1975 THROUGH DECEMBER 31, 1975

FY 1975	Subject	Published
	GAO Comments on First Special Message	Oct. 15, 1974
	Notice of Delay of Funds	Nov. 1, 1974
	GAO Comments on 2nd Message	Nov. 6, 1974
	GAO Comments on 3rd and 4th Message	Nov. 18, 1974
	GAO Legal Opinion (prepared by Office of General Counsel)	Dec. 4, 1974
	GAO Comments on 5th Message	Dec. 11, 1974
	GAO Comments on 6th Special Message	Dec. 23, 1974
	Reclassification of D75-48 to Rescission	Dec. 23, 1974
	Legal Authority cited for first four special messages	Dec. 31, 1974
	Notice of Delay of Funds	Jan. 10, 1975
	GAO Comments on 7th Special Message	Jan. 16, 1975
	Summary of Budget Authority and Status of Rescissions	Feb. 7, 1975
	GAO Comments on 8th Special Message	Feb. 14, 1975
	Notice of Delay of Funds	Feb. 28, 1975
	Release of Funds, Sec. 1016 Notice of Civil Action	March 6, 1975
	Release of Funds	March 24, 1975

TABLE 13 - continued

FY 1975	Subject	Published
	Unreported Rescission	March 28, 1975
	Release of Funds	April 1, 1975
	Release of Funds	April 15, 1975
	Release of Funds	April 29, 1975
	Release of Funds	April 30, 1975
	Condition Alters on March 28 Rescission	May 9, 1975
	GAO Comments on 9th and 10th Special Message	May 12, 1975
	Release of Funds	May 15, 1975
	GAO Comments on 11th Message	May 21, 1975
	Unreported HUD Sec. 202 Rescission	June 3, 1975
	Unreported HUD College Housing	June 19, 1975
	Release of Funds	June 23, 1975

TABLE 13. - continued

FY 1976	Subject	Published
	Unreported rescission, Dept. of Agriculture Youth Conservation Funds	July 9, 1975
	GAO Comments on First FY 76 Special Message	July 17, 1975
	Release of Youth Conservation Funds	July 16, 1975
	Section 202 Housing Direct Loan Program	August 6, 1975
	Comments on 2nd FY 76 Special Message	August 12, 1975
	Comments on 3rd FY 76 Special Message	Sept. 26, 1975
	Release of Funds (D76-49)	Nov. 3, 1975
	Comments on 4th Presidential Special Message	Nov. 4, 1975
	Comments on 5th Presidential Special Message	Nov. 5, 1975
	Release of Funds R76-1, R76-2, and R76-3	Nov. 6, 1975
	Comments on 6th Message	Nov. 7, 1975
	Comments on 7th Message	Dec. 12, 1975
	Release of Funds and Status of Impoundments	Dec. 15, 1975

Source: General Accounting Office.

Section 1016. Suits by the Comptroller General

> SEC. 1016. If, under section 1012(b) or 1013(b), budget authority is required to be made available for obligation and such budget authority is not made available for obligation, the Comptroller General is hereby expressly empowered, through attorneys of his own selection, to bring a civil action in the United States District Court for the District of Columbia to require such budget authority to be made available for obligation, and such court is hereby expressly empowered to enter in such civil action, against any department, agency, officer, or employee of the United States, any decree, judgment, or order which may be necessary or appropriate to make such budget authority available for obligation. The courts shall give precedence to civil actions brought under this section, and to appeals and writs from decisions in such actions, over all other civil actions, appeals, and writs. No civil action shall be brought by the Comptroller General under this section until the expiration of 25 calendar days of continuous session of the Congress following the date on which an explanatory statement by the Comptroller General of the circumstances giving rise to the action contemplated has been filed with the Speaker of the House of Representatives and the President of the Senate.

Legislative History

This section authorizes the Comptroller General, after a 25-day waiting period and notification of the Speaker of the House and the President of the Senate, to bring court action to enforce the new impoundment procedures. Federal courts are directed to give precedence to such suits and to issue orders requiring the release of impounded funds. In a floor statement on the conference report, Senator Ervin explained that "this authority is not intended to infringe upon the right of any other party to initiate litigation."[121/]

The origin of this section is in S. 373 and H.R. 8480 which contained identical authorizations of suits by the Comptroller General "expressly empowered as the representative of the Congress." It was felt that unless

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121/ 120 Cong. Rec. S 11222 (daily ed. June 21, 1974). Remarks of Senator Ervin.

Congress had a judicial remedy, the executive branch might choose to ignore legislative disapprovals of impoundments. H.R. 7130 restricted the power of the Comptroller General by requiring him to obtain "the approval of Congress in any particular case" before bringing suit against a Federal agency. S. 1541 contained the authorization to sue as part of its amendment to the Antideficiency Act and it also gave such actions by the Comptroller General precedence in federal courts.

The enacted provision does not designate the Comptroller General as the "representative of the Congress" because such a designation might have been interpreted to bar suits by Members of Congress. However, the Comptroller General is authorized to use his own attorneys.

Computation of the 25-day waiting period is governed by section 1011 (5) which defines "days of continuous session" to exclude recessess in excess of 3 days. The purpose of this period is to enable the Comptroller General to consult with congressional leaders, to provide an opportunity for "cooling off" and, if possible, avoid a confrontation between the legislative and executive branches.

Section 1016 does not mandate a suit by the Comptroller General, if he finds that the executive branch has impounded funds in violation of the new law. The language empowering court actions is discretionary, but inasmuch as the Comptroller General is given such power for the purpose of protecting congressional interests, it is not likely that he would refrain from taking actions necessary to enforce the law, except when circumstances make a court action unwise.

Implementation

Thus far, the Comptroller General has brought one suit under this Title X authority but it was withdrawn before a judicial determination was reached. The case involved the impoundment of Homeownership Assistance (section 235) funds, an action initiated in January 1973 as part of the Nixon Administration's comprehensive moratorium on subsidized housing programs. When Title X was enacted, a court test of this impoundment was pending, but it had no bearing on the later case.[122/]

On October 4, 1974, President Ford informed Congress of the deferral of $264 million of section 235 funds, declaring that because the action was taken before enactment of the Impoundment Control Act, it was not subject to the new procedures.[123/] One month later, the Comptroller General notified Congress that this action "was misclassified and should have been submitted as a rescission," basing his finding on the fact that the funds were scheduled to lapse only 52 days after the deferral would end.[124/] A resolution of disapproval (S. Res. 446) was introduced late in the 93d Congress and was referred to the Senate Appropriations Committee.

122/ Commonwealth of Pennsylvania v. Lynn 501F. 2d 848 (1974), decided on July 19, 1974.
123/ H. Doc. No. 93-365: Deferral No. D75-48.
124/ Communication from the Comptroller General, November 6, 1974, H. Doc. No. 93-391.

While the Committee concurred with the Comptroller General's reclassification, it voted to report the impoundment resolution (thereby treating the matter as a deferral) "in order to obviate any frivolous delays that might be engendered by mistaken interpretation" of the new law.[125/] However, the Committee also recommended that the matter simultaneously be treated as a rescission and that no action be taken on a rescission bill.

No action was taken on S. Res. 446 during the 93d Congress, in part because of a jurisdictional dispute between the Senate Appropriations and Budget Committees. In a floor statement on December 20, 1974, Senator Muskie urged the Senate not to act on the impoundment resolution and to rely instead on a suit by the Comptroller General at the end of the 45-day period provided in the law.[126/] He suggested that adoption of the resolution might "preclude the Comptroller General from effectively suing the President to force a release of these funds" because the Senate already will have gone on record as regarding the matter as a deferral rather than as a rescission. Senator Muskie further argued that inasmuch as the Administration had taken the position that the action was a pre-enactment deferral not subject to the new law, any private suit would be slowed by legal complications.[127/]

125/ S. Rept. No. 93-1373 (194), p. 5.

126/ 120 Cong. Rec., S. 22530 (daily ed. December 20, 1974).

127/ Senator Muskie stated that "should the Senate pass Resolution 446, the Comptroller General probably cannot bring suit when the administration refuses to spend the funds." Ibid. But an alternative interpretation is that the Comptroller General would be able to bring suit to enforce section 1013 (b) which requires the release of funds if either House has passed an impoundment resolution.

On December 23, 1974, the Comptroller General notified Congress that in his judgment the conditions required for commencing the 45-day period had been satisfied by his notification to Congress that the action had been misclassified. He also took the position that the notification of misclassification sufficed for purposes of the section 1015 (a) requirement and that no additional message was required:

> Our reclassification of this deferral action to a rescission effectively nullified the President's deferral message and has the same effect as if it had been a rescission message transmitted by the Presiddent. 128/

The 45 day period expired on February 28, 1975, at which time the 25 day period for court action commenced. The Comptroller General brought suit in the United States District Court for the District of Columbia on April 15, 1975, naming the President, the Director of OMB, and the Secretary of the Department of Housing and Urban Development as defendants.129/

Meanwhile, the Senate considered and adopted S. Res. 61 treating the section 235 matter as a deferral and disapproving the President's action. The purpose of this resolution, however, was not to decide the deferral versus rescission issue but rather to assure that regardless of how the matter was treated, the funds would have to be released; if

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128/ Communication from the Comptroller Genera, December 23, 1974, H: Doc. No. 94-14.

129/ Staats v. Ford, et al. (Civ. Action No. 75-0551, D.D.C. April 15, 1975.) On June 11, 1975, the court dismissed the suit with regard to the President.

as a rescission, because the 45 days had expired; if as a deferral, because an impoundment resolution had been adopted. As explained, in a committee report on S. Res. 61:

> Because of the unique circumstances surrounding the recent implementation of the Section 235 program, the Committee recommends that S. Res. 61, a resolution disapproving the deferral, be passed in addition to our recommendation set forth below refusing to ratify the proposed rescission of these funds.
>
> By taking both actions, and thus denying both rescission and deferral, the Congress will be sending an unmistakable message to the Executive that these funds must be made immediately available and that no further legal justification now exists for delay.
>
> The Committee has delayed action on this deferral resolution until March 5 so as to permit the 45 day rescission period to expire in accordance with the recommendations of the Committee on the Budget. This preserves the Comptroller General's standing to proceed in court under his rescission reclassification. 130/

In court, the key issue was the constitutionality of the Comptroller General's role under section 1016. The Justice Department moved to dismiss the action, noting that "it is apparently the first suit ever brought in the Judicial Branch by the Legislative Branch in its official capacity against the Executive Branch in its official capacity."131/ The motion to dismiss argued that section 1016 violates the Constitution in two ways:

130/ S. Rept. No. 94-30. (1975).
131/ Staats v. Ford, et al (Civ. Action No. 75-0551 D.D.C.) Points and Authorities in Support of Defendants Motion to Dismiss.

> First, by authorizing the Comptroller General, a legislative officer, to perform the executive function of enforcing the law, the provision runs afoul of the constitutional separation of powers. Secondly, by in effect authorizing the Congress to sue the executive, the United States appears on both sides of this action and no justifiable case or controversey is presented within the meaning of Article III. 132/

The Comptroller General countered with the claim that although he was essentially an independent officer who possessed certain legislative functions, he also performed certain executive and other non-legislative functions. With regard to his duties under section 1016, the Comptroller General pointed to the legislative history and to the deletion of his designation as the "respresentative of the Congress" from this section. The Comptroller General thus argued that he was suing in his own right and not as an agent or official of Congress.133/

The court action also involved a number of other impoundment related issues: The Administration claimed that as a pre-enactment impoundment, the case was not subject to Title X; the Comptroller General argued that the impoundment was covered by the new law. Shortly before the section 235 budget authority was scheduled to lapse, the court granted a motion of the Comptroller General requiring the executive branch to record the funds as obligated pending resolution of the suit.134/

On October 17, 1975, the Secretary of Housing and Urban Development announced the reactivation of a revised homeownership program utilizing

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132/ Ibid., p. 3

133/ Opposition of Plaintiff to Defendants' motion to Dismiss, July 28, 1975.

134/ The Comptroller General has suggested that Title X be amended to provide this remedy in all cases where budget authority would lapse during the 45-day period or during litigation.

the heretofore impounded funds. On the basis of this action, the parties stipulated that the suit had been rendered moot and should be dismissed without prejudice.

Thus, the first court test of Title X resulted in the release of impounded funds, but if any court action is brought in the future, it is likely to raise again the constitutional questions left unresolved in this case.

Section 1017 (a) & (b). Referral to and Discharge of Committees

SEC. 1017. (a) REFERRAL.—Any rescission bill introduced with respect to a special message or impoundment resolution introduced with respect to a proposed deferral of budget authority shall be referred to the appropriate committee of the House of Representatives or the Senate, as the case may be.

(b) DISCHARGE OF COMMITTEE.—

(1) If the committee to which a rescission bill or impoundment resolution has been referred has not reported it at the end of 25 calendar days of continuous session of the Congress after its introduction, it is in order to move either to discharge the committee from further consideration of the bill or resolution or to discharge the committee from further consideration of any other rescission bill with respect to the same special message or impoundment resolution with respect to the same proposed deferral, as the case may be, which has been referred to the committee.

(2) A motion to discharge may be made only by an individual favoring the bill or resolution, may be made only if supported by one-fifth of the Members of the House involved (a quorum being present), and is highly privileged in the House and privileged in the Senate (except that it may not be made after the committee has reported a bill or resolution with respect to the same special message or the same proposed deferral, as the case may be); and debate thereon shall be limited to not more than 1 hour, the time to be divided in the House equally between those favoring and those opposing the bill or resolution, and to be divided in the Senate equally between, and controlled by, the majority leader and the minority leader or their designees. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

Legislative History

These subsections provide for the referral of an impoundment resolution or rescission bill "to the appropriate committee" of the House or the Senate, and for the discharge of such committee (under specified procedures) if it has failed to report within 25 days.

The House and Senate bills differed in regard to referral and discharge. S. 373 had no provision relating to these matters because it would have required any impoundment to cease unless approved by both Houses within 60 days. Thus, there was no danger that a President would be able to continue an impoundment because a resolution of disapproval had been bottled up in

committee. However, the House approach required the termination of an impoundment only if it was disapproved and thus there was a risk that an impoundment might be permitted to continue because no committee action had been forthcoming. H.R. 5193 provided for the referral of disapproval resolutions to the House and Senate Appropriations Committees. The Rules Committee added a discharge provision in H.R. 8480 and its main features have been incorporated into the law. A discharge motion must be supported by one-fifth of the House or Senate, may be made only after a committee has had a rescission bill or impoundment resolution for at least 25 days, and is privileged matter.

There is no legislative record as to why the conference report substituted "the appropriate committee" for the designation of the Appropriations Committees in H.R. 8480.

It should be noted that the jurisdiction over the rescission of appropriations accorded to the Appropriations Committees in section 404 of the Act has no bearing on the question of jurisdiction over Title X measures. Rescissions in the context of section 404 refer to actions taken through the regular appropriations process, not those pursuant to the impoundment control process. The origin of section 404 is found in section 154 of the Joint Study Committee bill, in which the concept of "rescissions" and "deferrals" devised in Title X was unknown.

Implementation: Referral to Committee

The first series of rescission and deferral proposals submitted by the President provoked the question as to which committees in the House and Senate should have jurisdiction over rescission bills and impoundment resolutions. At least three possibilities were put forth:

(1) Exclusive jurisdiction by the House and Senate Appropriations Committees;

(2) Appropriations Committee jurisdiction over regular appropriations; other committees to the extent that they have jurisdiction over budget authority legislation;

(3) The Budget Committees for purposes of assessing fiscal policy, national priorities, and the overall impact on the budget; the Appropriations Committees (and/or other committees as provided in the second alternative) for review of particular items.

In the House, the Budget Committee did not press a claim of jurisdiction and rescission bills and impoundment resolutions have been referred to the Appropriations Committee. However, in cases where the budget authority legislation initially was reported by another committee, that committee has been given jurisdiction over related deferrals.[135/]

In the Senate, a jurisdictional dispute between the Budget and the Appropriations Committee remained unsettled at the close of the 93d Congress and the standard practice was to hold rescission bills and impoundment resolutions at the desk pending resolution of the jurisdictional issue. However, there were at least two exceptions to this practice, relating to the first rescission bill passed by Congress[136/] and to a Senate resolution disapproving the proposed deferral of section 235 Homeownership Assistance Funds.[137/]

The jurisdictional deadlock was broken early in the 94th Congress when the chairmen of the Appropriations and Budget Committees jointly sponsored a resolution establishing a procedure for the Budget, Appropriations, and any other committee with jurisdiction over contract or borrowing authority.[138/] The Budget Committees' review deals with macroeconomic issues, impacts on national priorities, and the legality of the President's actions. Time limits are set for action by the various committees so as to assure ample opportunity for Senate consideration.

135/ For example, H. Res. 1460, 93rd Cong. was referred to the Public Works Committee.
136/ 120 Cong. Rec. S 20998-9 (daily ed. December 10, 1974). Remarks of Senator McClellan.
137/ S. Rept. No. 93-1373 (1974).
138/ S. Res. 45, 94th Cong. See 121 Congressional Record (daily ed. January 30, 1975) S 1280 and S 1302.

Committee Action. Thus far, rescission bills have been treated in the same manner as appropriations bills. Action is initiated in the House and Senate consideration does not commence until the bill has been passed by the House. In the House Appropriations Committee, hearings are conducted by the various subcommittees which have jurisdiction over programs proposed for rescission, using the same procedures as are normally applied to supplemental appropriation bills.[139/]

After House passage, the bill is considered in the Senate (as with appropriation bills, no bill is introduced in the Senate), and Senate changes take the form of numbered amendments to the House bill. The numbered amendments are considered in conference, with one or the other House receding or the conferees adopting a substitute to the Senate amendment.

Although most impoundment resolutions have not been reported from committee, the discharge procedures specified in subsection (b) have not yet been used.

139/ In its report on the first budget rescission bill, the House Appropriations Committee explained its procedure: "The Committee will utilize its existing Subcommittee structure to hold hearings and deal with the items as they deem appropriate. The Full Committee will then consider and may report these measures to the House, in much the same manner and fashion as Supplemental Appropriations Bills are now handled." H. Rept. No. 93-1501 (1974)

Section 1017 (c). Floor Consideration in the House

(1) When the committee of the House of Representatives has reported, or has been discharged from further consideration of, a rescission bill or impoundment resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the bill or resolution. The motion shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on a rescission bill or impoundment resolution shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the bill or resolution. A motion further to limit debate shall not be debatable. In the case of an impoundment resolution, no amendment to, or motion to recommit, the resolution shall be in order. It shall not be in order to move to reconsider the vote by which a recission bill or impoundment resolution is agreed to or disagreed to.

(3) Motions to postpone, made with respect to the consideration of a rescission bill or impoundment resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to any rescission bill or impoundment resolution shall be decided without debate.

(5) Except to the extent specifically provided in the preceding provisions of this subsection, consideration of any rescission bill or impoundment resolution and amendments thereto (or any conference report thereon) shall be governed by the Rules of the House of Representatives applicable to other bills and resolutions, amendments, and conference reports in similar circumstances.

Legislative History

This subsection prescribes special procedures to expedite floor consideration of impoundment resolutions and rescission bills in the House of Representatives. In accord with the structure devised for other provisions of the Act, parallel but different procedures are laid out for the House and the Senate. The procedures applicable to Senate consideration are set forth in subsection (d).

Except for paragraph (5), these provisions are adapted from H.R. 8480. The last paragraph was added to assure that there would be no gap in the rules of the House for the consideration of the two types of measures provided for in the subsection. Except for amendments, impoundment resolutions and rescission bills are accorded the same status. Rescission bills may be amended; impoundment resolutions cannot be amended. The reason for this distinction was discussed in regard to section 1011 above and relates to the fact that an impoundment resolution is a simple resolution that functions as a legislative veto of executive actions.

Implementation

Technically, the special procedures for floor consideration have not applied to two rescission actions taken during 1975. (1) The rescission of $25 million in contract authority for highway assistance was contained in the Department of Transportation Appropriation Act (P.L. 94-134), and it therefore fell under section 404 of the Congressional Budget Act rather than under the Impoundment Control Act. (2) Inasmuch as the 45-day period had expired before the House completed action on Rescission Bill H.R. 3260, the Chair ruled that the bill did "not meet the definition of a 'rescission bill' under the terms of the act. The effect of this...is simply to deny to the bill the privilege for initial consideration in the Houe afforded under section 1017."[140/] A similar ruling was made in the Senate.[141/]

140/ 121 Cong. Rec. H. 2275 (daily ed. March 25, 1975).
141/ 121 Cong. Rec. S. 5046 (daily ed. March 26, 1975).

Section 1017 (d) Floor Consideration in the Senate

(1) Debate in the Senate on any rescission bill or impoundment resolution, and all amendments thereto (in the case of a rescission bill) and debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours. The time shall be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(2) Debate in the Senate on any amendment to a rescission bill shall be limited to 2 hours, to be equally divided between, and controlled by, the mover and the manager of the bill. Debate on any amendment to an amendment, to such a bill, and debate on any debatable motion or appeal in connection with such a bill or an impoundment resolution shall be limited to 1 hour, to be equally divided between, and controlled by, the mover and the manager of the bill or resolution, except that in the event the manager of the bill or resolution is in favor of any such amendment, motion, or appeal, the time in opposition thereto, shall be controlled by the minority leader or his designee. No amendment that is not germane to the provisions of a rescission bill shall be received. Such leaders, or either of them, may, from the time under their control on the passage of a rescission bill or impoundment resolution, allot additional time to any Senator during the consideration of any amendment, debatable motion, or appeal.

(3) A motion to further limit debate is not debatable. In the case of a rescission bill, a motion to recommit (except a motion to recommit with instructions to report back within a specified number of days, not to exceed 3, not counting any day on which the Senate is not in session) is not in order. Debate on any such motion to recommit shall be limited to one hour, to be equally divided between, and controlled by, the mover and the manager of the concurrent resolution. In the case of an impoundment resolution, no amendment or motion to recommit is in order.

(4) The conference report on any rescission bill shall be in order in the Senate at any time after the third day (excluding Saturdays, Sundays, and legal holidays) following the day on which such a conference report is reported and is available to Members of the Senate. A motion to proceed to the consideration of the conference report may be made even though a previous motion to the same effect has been disagreed to.

(5) During the consideration in the Senate of the conference report on any rescission bill, debate shall be limited to 2 hours, to be equally divided between, and controlled by, the majority leader and minority leader or their designees. Debate on any debatable motion or appeal related to the conference report shall be limited to 30 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report.

(6) Should the conference report be defeated, debate on any request for a new conference and the appointment of conferees shall be limited to one hour, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee, and should any motion be made to instruct the conferees before the conferees are named, debate on such motion shall be limited to 30 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report. Debate on any amendment to any such instructions shall be limited to 20 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report. In all cases when the manager of the conference report is in favor of any motion, appeal, or amendment, the time in opposition shall be under the control of the minority leader or his designee.

(7) In any case in which there are amendments in disagreement, time on each amendment shall be limited to 30 minutes, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee. No amendment that is not germane to the provisions of such amendments shall be received.

Legislative History

Throughout the Act, the procedures for consideration in the Senate tend to be more detailed than those provided for the House. Among the special provisions in the Senate bill are a bar against nongermane amendments to rescission bills; a 10-hour limit on debate, with a 2-hour limit for any amendment to a rescission bill; limited recommittal permitted for impoundment resolutions; and procedures for Senate consideration of a conference report on a rescission bill and for instructing the conferees. Many of these procedures were devised during conference consideration of the budget reform legislation and do not appear in earlier impoundment bills.

Implementation

Thus far, the special procedures for floor consideration generally have been superseded by unanimous consent agreements under which very little time has been taken for debate. Many of the impoundment resolutions adopted by the Senate have been passed without substantive debate; in only a few cases have rescission bills or impoundment resolutions provoked extended floor discussion. The general brevity of floor debate also has characterized the consideration of these measures in the House.


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