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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

FOR RELEASE ON DELIVERY
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STATEMENT OF
ELMER B. STAATS
COMPTROLLER GENERAL OF THE UNITED STATES
BEFORE THE
COMMITTEE ON THE BUDGET,
UNITED STATES SENATE

Mr. Chairman and Members of the Committee:

Thank you for having invited me to discuss with you my recent letter of December 4, 1974, to the Speaker of the House and the President Pro Tempore of the Senate, a copy of which is attached to my statement today. This letter addressed the question whether, under the Impoundment Control Act of 1974, withholdings by the President of budget authority for temporary periods for "fiscal policy" reasons are properly treated as "deferrals" rather than "rescissions." We concluded that such withholdings are properly reported as deferrals, so long as their duration is proposed to be less than the current fiscal year. We came to this conclusion after detailed consideration of the law and its legislative history and, I might add, after hearing advocates for both sides of the question.

[DEFERRALS VERSUS RESCISSIONS]

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At the outset we would point out that in our opinion the Act strengthens congressional control over impoundments in that it establishes orderly procedures by which Congress may consider and act on the merits of any impoundment the President may propose. This has not been the case in the past.

The Act divides impoundments into two categories. The first, described as "rescissions", is dealt with under section 1012. The term -- usually meaning to revoke, repeal or cancel -- suggests that these impoundments would result in a permanent excission of budget authority, not a mere delay in its exercise. The Act is quite clear on what procedures apply where the President proposes a permanent withholding of budget authority. Congress' decision on the merits of the proposed impoundment is made by enacting, or failing to enact, a rescission bill. If the Congress fails to act within 45 days, the President must release the funds.

The second category, covered by section 1013, is characterized as "deferrals". Again the term itself seems to suggest its plain meaning -- the withdrawal of budget authority that would amount to a temporary suspension, not a permanent removal. The term is defined in sections 1011 and 1013 of the Act as a withholding or delaying of budget authority that does not extend beyond the fiscal year in which it is proposed. And again, the Act clearly establishes the procedure by which Congress decides upon the merits of

a proposed deferral. If either House passes a simple resolution disapproving a proposed deferral then the President must release the authority.

As stated earlier, the legal controversy revolves around whether the Act contemplates application of the rescission procedures or the deferral procedures when the President, for "fiscal policy" reasons, proposes a temporary suspension of budget authority. Simply put, our view is that the answer depends on the proposed duration of the withholding. If the duration of the impoundment does not extend beyond the end of the fiscal year in which it is proposed, and if the proposed temporary suspension does not have the effect of permanently rescinding budget authority, the deferral procedures apply.

The other interpretation is that the rescission procedures apply, regardless of the duration of the proposed withholding of budget authority, if the withholding is not supported by legal authority provided by the Antideficiency Act, as amended by section 1002 of the Impoundment Control Act.

The Act itself is difficult to interpret and the legislative history of the conflicting philosophies expressed in earlier Senate and House bills, merged in conference, is largely ambiguous. However, the Antideficiency Act, as amended by section 1002 of the Impoundment Control Act, spells out conditions under which reserves may be

established and says that there is no other authority <u>except as specifically provided by particular appropriation acts or other laws.</u> We have concluded that the procedures for handling withholdings of budget authority set out in other sections of the Act are "other laws" and therefore withholdings for temporary periods for "fiscal policy" reasons can be considered as proposed deferrals rather than rescissions if such withholdings are for limited periods. To otherwise construe the language of section 1002 would create an inconsistency with the clear import of section 1013, which provides for deferrals for less than a current fiscal year of <u>any</u> budget authority.

The rationale for our conclusions is summarized on page 13 of our letter of December 4, 1974.

In our letter of December 4, 1974, we pointed out that the matter at issue is a close question involving difficult issues of interpretation of statutory language and legislative history, and suggested that the Congress may want to re-examine the Act and clarify its intent through further legislative action.

Mr. Chairman, in your most recent letter that I received this Monday and answered yesterday, you raised a number of specific questions about our position on this matter. My response, which I have attached to this testimony, sets forth each question and provides an answer immediately following the specific question.

This concludes my statement. We will be glad to answer any questions you may have.

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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Speaker of the House
President pro tempore of the Senate

The purpose of this letter is to provide you with our views concerning the interpretation and application of the Impoundment Control Act of 1974, Title X of Public Law 93-344, 88 Stat. 297, 332 (July 12, 1974).

Recent years have witnessed disagreement between the Executive Branch and the Legislative Branch over which has ultimate control over Government program and fiscal spending policy. The Executive Branch, largely on grounds of fiscal responsibility, has sought to curtail or eliminate numerous programs funded by the Congress. The courts have held, for the most part, that such Executive attempts to avoid implementation of Government programs through the withholding of budget authority constituted illegal impoundments. Nevertheless, and despite a reasonably clear understanding of the limits of Executive authority, the power to impound budget authority was easy to exercise and challenges to that power difficult and time consuming to resolve.

The Impoundment Control Act of 1974 was designed to tighten congressional control over impoundments and establish a detailed procedure under which the Legislative Branch could consider the merits of impoundments proposed by the Executive Branch. The act fundamentally calls for the Executive Branch to report and explain to the Congress all proposed impoundments with ultimate authority to effectuate such proposals dependent upon congressional action. The basic scheme of the act's operative provisions is contained in four key elements:

1. All budget authority to be withheld by the Executive Branch from obligation or expenditure--either permanently or temporarily--must be reported to the Congress.

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2. Budget authority intended for permanent withdrawal must be released for obligation and expenditure if the Congress fails within 45 days to pass legislation authorizing the withdrawal.

3. Budget authority intended for temporary withdrawal within a fiscal year may be withheld as proposed if the Congress fails to act; either House may require release of such deferred budget authority by passing a simple resolution to that effect.

4. The Comptroller General of the United States is empowered to seek court enforcement of any required release of budget authority.

The net result of the procedure established is that the propriety of any proposed impoundment will depend upon action (or inaction) by the Congress in connection with a contemporaneous consideration of such proposal. Earlier actions by the Congress either authorizing or denying authority for particular impoundments are of no ultimate consequence except as they might affect the outcome of considerations under the act of 1974.

A controversy has developed over whether application of the act as outlined above serves to strengthen or weaken congressional control over impoundments. With respect to permanent withdrawals of budget authority, it is clear that the intent is to require an act of Congress to clothe the Executive Branch with requisite authority. If the Congress fails to act, the President may not impound.

As to temporary withdrawals, however, it is contended that the President by virtue of congressional inaction acquires authority to defer where otherwise none exists--that the President, by proposing a deferral of budget authority, becomes vested through congressional inaction with authority which the Congress otherwise may have previously denied him. Under this interpretation, the act, in legitimizing otherwise impermissible deferrals of budget authority, might be regarded as weakening rather than strengthening congressional control over impoundments, albeit either House has it within its power to deny deferral authority through passage of a simple resolution.

The Impoundment Control Act of 1974 and its legislative history are considerably less than clear concerning the act's intended design. The act cannot be analyzed without producing a series of anomalous

results which its history fails to explain away. Nevertheless there is an unmistakable philosophy underlying the act that does provide a rational and realistic basis for viewing the act as a means by which the Congress strengthened its control over Executive impoundments.

The fact is that prior to enactment of the Impoundment Control Act, the Executive Branch engaged in numerous impoundments, whether authorized or not, often without the Congress having a clear picture of precisely what was involved. Under the act, however, each withdrawal of budget authority becomes highly visible, allowing the Congress to consider its merit as of the time it is proposed. Rescissions or permanent withdrawals of budget authority are made difficult for the Executive Branch in that both Houses of Congress must support them through positive action to establish the requisite authority. Deferrals or temporary withdrawals are made easier in that inaction by the Congress establishes the requisite authority. However, to counterbalance this ease, the act allows either House on its own to void such proposed action. There is no question but that a recission is the more significant type of impoundment over which congressional control is unmistakably absolute. The essential difference is that simple inaction on a rescission proposal automatically results in release of the budget authority after 45 days. Congressional control over the less significant deferral is no less absolute, though afirmative action is required in the exercise of that control.

To point up the full ramifications of the provisions of the act, and their operative effect, there follows a detailed analysis of the issues involved.

THE BASIC PROVISIONS

The Impoundment Control Act of 1974 was the result of a conference that combined features of two differing approaches to impoundment control. As the Conference Report, H.R. Rep. No. 93-1101, 93d Cong., 2d Sess. 76-77 (1974), states, the House bill that went to conference provided for a procedure that would require impoundment actions to be reported to the Congress by the President within ten days after they were taken. In the event that either House passed a resolution of disapproval within sixty calendar days of continuous session after the date on which the Presidential message was received by Congress the impoundment would have to cease. The Senate bill considered by the conferees

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circumscribed the authority in the Antideficiency Act, 31 U.S.C. §665, to place funds in reserve, and prohibited the use of budgetary reserves (except as provided specifically in appropriation acts or other laws) for fiscal policy purposes, or to achieve less than the full objectives and scope of programs enacted and funded by the Congress. The Senate bill authorized the Comptroller General to bring a civil action in the U.S. District Court for the District of Columbia to enforce those provisions.

Section 1001 of the act is a disclaimer section, stating, among other things, that nothing in the title shall be construed as asserting or conceding the constitutional powers or limitations of either the Congress or the President.

Section 1002 amends the Antideficiency Act to authorize reserves solely (except as provided specifically in appropriation acts or other laws) to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations. The section continues the requirement that whenever an officer responsible for making apportionments and reapportionments determines 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 that amount.

Section 1011 is a definition section.

Section 1012 provides that if the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of the programs, or that such budget authority should be rescinded for fiscal policy or other reasons, including the termination of authorized projects or whenever all or part of budget authority provided for only one fiscal year (one-year money) is to be reserved from obligation for such fiscal year, he shall transmit a special message to Congress requesting rescission of the budget authority. The message is to include the amount of budget authority involved; the appropriation account [illegible] affected; the reasons for the requested rescission or placing the budget authority in reserve; the fiscal, economic, and budgetary effect; and all facts, circumstances, considerations, and [illegible] the proposed rescission or reservation. Unless both Houses of Congress complete action on a rescission bill within 45 days (of continuous session) of receipt of the message, the budget authority for which rescission was requested must be made available for obligation.

Section 1013 provides for a second type of special message concerning proposed deferrals. This category includes any withholding or delaying of the availability for obligation of budget authority within the current fiscal year (whether by establishing reserves or otherwise), or any other type of Executive action or inaction that effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law. Such action or inaction may occur at the level of the Office of Management and Budget, as through the apportionment process, or at the departmental and agency level. The deferral special message from the President shall contain basically the same types of information included in a rescission special message. However, the procedure for congressional action is different in that the President will be required to make the budget authority available for obligation only if either House of Congress passes an "impoundment resolution" disapproving such proposed deferral at any time after receipt of the special message. The authority to propose deferrals is limited to the fiscal year in which the special message making the proposal is submitted to the House and Senate.

Section 1014 provides that each Presidential special message--whether for rescission or for deferral--shall be referred to the appropriate committee of the House of Representatives and the Senate and printed as a document of each house and in the Federal Register. It further provides that a copy of each special message shall also be transmitted to the Comptroller General, who shall review each message and inform both houses of the facts surrounding the proposed action and its probable effects. In the case of deferrals, the Comptroller General must state whether or not (or to what extent) he determines the proposed deferral to be in accordance with existing statutory authority. Any revisions of proposed rescission or deferrals must be transmitted by the President in a supplementary message.

Section 1015 provides that if the Comptroller General finds that an action or inaction that constitutes a reserve or deferral has not been reported to Congress in a special message as required, he shall report to Congress on such reserve or deferral. His report will have the same effect as if it had been transmitted by the President in a special message. Moreover, if the Comptroller General believes that the President has classified an action incorrectly,

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by covering it in a deferral special message when in fact a rescission is involved, or vice versa, he shall report to both houses setting forth his reasons.

Section 1016 provides that if budget authority is not made available for obligation as required by the act, the Comptroller General is empowered, through attorneys of his own choosing, to bring a civil action in the United States District Court for the District of Columbia in order to obtain any decree, judgment, or order that may be necessary or appropriate to make such budget authority available for obligation. However, no such action may be brought until the expiration of 25 calendar days of continuous session after the Comptroller General files with the Speaker of the House of Representatives and the President of the Senate an explanatory statement setting forth the circumstances giving rise to the action contemplated. The section provides that the courts must give precedence to this type of civil action.

Finally, section 1017 provides that congressional action with respect to a proposed rescission or deferral shall take the form of a "rescission bill" or an "impoundment resolution." Any rescission bill or impoundment resolution shall be referred to the appropriate committee of the House of Representatives or the Senate. If the committee fails to report a rescission bill or impoundment resolution at the end of 25 calendar days of continuous session after its introduction, it is in order to move to discharge the committee from further consideration. 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.

BACKGROUND

In the past the Executive Branch generally has asserted three bases for its authority to impound funds: (1) the statutory provisions of a particular program; (2) statutory limitations upon overall budget outlays; and (3) the Antideficiency Act, 31 U.S.C. §665. In an opinion to the Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, B-135564, July 26, 1973, Committee Print 183, 93d Cong., 2d Sess., (1974), (hereafter "Committee Print"), we offered a detailed review of these assertions. Committee Print, pages 14-23.

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The Antideficiency Act as general authority for the impoundment of funds probably has been the most contested of the bases claimed, with the President claiming broad impoundment powers thereunder. Our analysis of this statute concluded that the Antideficiency Act could not be viewed as authorizing the President to withhold funds for general economic, fiscal, or policy reasons. Committee Print, pages 17-20.

The Impoundment Control Act of 1974 is, in part, the Congressional response to claims by the Executive Branch that the Antideficiency Act granted general authority to impound funds. The act accomplishes two objectives: first, it amends the Antideficiency Act to clarify and limit its terms and, second, it establishes a procedure that provides a means for the Congress to pass upon Executive Branch desires to impound budget authority.

Prior to passage of the Impoundment Control Act, the relevant provisions of the Antideficiency Act, 31 U.S.C. §665(c)(2), stated:

> "In apportioning any appropriation, reserves may be established to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements greater efficiency of operations, <u>or other developments subsequent to the date on which such appropriation was made available</u>. 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 purposes 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." (Emphasis added.)

This subsection was amended by §1002 of the act to read as follows:

> "<u>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.</u> Whenever it is determined by an officer designated

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> 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." (Emphasis added.)

The reason for this amendment was that the "other developments" language in 31 U.S.C. §665(c)(2) was being construed as encompassing--

> "* * * any circumstances which arise after an appropriation becomes available for use, which would reasonably justify establishment of a reserve." Committee Print, p. 19.

In this light, impoundments motivated by fiscal policy considerations were being justified on the basis that they were within the "other developments" language of the Antideficiency Act.

The legislative history of the amendment to 31 U.S.C. §665 underlines Congress' clear intent that the Antideficiency Act not be used as authority to withhold funds for fiscal policy reasons. Rather, it was to be used only to establish reserves to provide for contingencies or to effect savings. For example, a statement by Representative Matsunaga, during the House debate on the Conference Report on H.R. 7130, the bill that became, in part, the Impoundment Control Act of 1974:

> "One of the most important features of the bill, Mr. Speaker, is the impoundment title, which tightens the language of the Anti-Deficiency Act, thereby prohibiting 'reserves' for fiscal purposes. This provision is key to maintaining the balance of power among the three branches of Government." 120 Cong. Rec. H5205 (daily ed. June 18, 1974). (Emphasis added.)

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Senator Muskie, during debate of S. 1541, the bill that was the Senate-approved version of H. R. 7130, stated:

> "The purpose of title X [the impoundment control provisions of the Senate bill] is to define and clarify the authority of the President and other officers and employees of the executive branch to place appropriated funds in reserve. * * * the 'other developments' clause would be deleted by this bill because it has been treated by some officials of the executive branch as a justification for establishing reserves because of economic or other developments. Clearly that use was never intended by the Congress. It is that use which has provoked this controversy over impoundments.
>
> Section 1001 further defines the boundaries of the Antideficiency Act for fiscal policy purposes or to achieve less than the full objectives and scope of programs enacted and funded by Congress. The apportionment process is to be used only for routine administrative purposes such as to avoid deficiencies in executive branch accounts, not for the making of policy or the setting of priorities. * * * Moreover, nothing in the language or legislative history of the Antideficiency Act suggests in any way the Congress intended the executive branch to place funds in reserve as part of economic policy." 120 Cong. Rec. S4091 (daily ed. March 21, 1974).

See also Senator Muskie's comments at 120 Cong. Rec. S3997 (daily ed. March 20, 1974); Senator Irvin's summary of the Antideficiency Act amendment at 120 Cong. Rec. S3835 (daily ed. March 19, 1974); Senator Metcalf's statement at 120 Cong. Rec. S3846 (daily ed. March 19, 1974); the report of the Committee on Rules and Administration on S. 1541, S. Rep. No. 93-688, 93d Cong., 2d Sess., 30, 72-75 (1974); and the Conference Report on H.R. 7130, H.R. Rep. No. 93-1101, 93d Cong., 2d Sess., 76 (1974).

Thus, in light of the section 1002 amendment to the Antideficiency Act and the clear and extensive legislative history of this provision, we conclude that budget authority may not be withheld except to provide for contingencies or to effect savings, or as specifically provided for in appropriations acts or other laws.

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However, apart from this, there currently exists disagreement as to whether the act did or did not have the effect, in some circumstances, of providing authority, at the initiative of the President and with Congressional concurrence, to defer budget authority temporarily from obligation. Generally speaking, one interpretation is that the act provides no such authority while the other interpretation is that it does. These contrasting views are discussed below.

THE TWO INTERPRETATIONS

The First Interpretation

Section 1002 requires the Executive Branch to report the establishment of all reserves to the Congress, and permits creation of reserves solely to provide for "contingencies" or to effect "savings" or as may otherwise be authorized by other law. Remaining portions of the Impoundment Control Act of 1974 are not viewed as "other law."

It is further contended that section 1012, relating to "rescissions", prescribes the sole procedure available to the President when he wishes to avoid expenditure of all or part of budget authority (1), which he does not believe will be required to carry out the full objectives or scope of programs for which it is provided, (2), the expenditure of which should be avoided for fiscal policy or other reasons, or (3), in the case of one-year funds, which he wishes to reserve from obligation for the entire year. Both Houses of Congress must pass a rescission bill within 45 days in response to his proposed rescission or the budget authority must be made available for obligation.

Section 1013 relating to deferrals is viewed as merely providing a mechanism for reports required by section 1002. Congress may, by resolution of either House, direct the obligation of reserves established pursuant to the Antideficiency Act or any other specific statutory authority, and reported under section 1013. Otherwise, the budget authority may be deferred as proposed under previously existing authority.

Therefore, under the first interpretation, whenever the President proposes to withhold budget authority for a purpose not authorized by the Antideficiency Act or other specific law, he must propose a rescission under section 1012. This conclusion is deemed supported by section 1013(c), which specifies that section 1012 is the exclusive recourse for the President whenever any of the three types of impoundments specified in section 1012 are involved.

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Finally, when the President, either by act or omission, fails to submit a required message or, if he submits a message under section 1013 which should have been sent under section 1012, or vice versa, the Comptroller General, through his report pursuant to §1015(b), effectively rectifies the incorrectly classified message and converts it to the proper category.

In summary, this view of the act, stated simply, is that deferrals of budget authority may be proposed under section 1013 only if they are authorized by the Antideficiency Act, as amended by section 1002, or by appropriation acts or other laws; no deferral may be proposed under section 1013 on other grounds. It is urged, therefore, that if grounds other than those already authorized are the motivation for a proposed withholding of budget authority, the President must seek a rescission of the budget authority and transmit a special message under section 1012. Put another way, any budget withholding action for which the President lacks statutory authority to undertake must be proposed under section 1012.

The Second Interpretation

Section 1002, which amends the Antideficiency Act, requires the Executive Branch to report the establishment of all reserves to the Congress. It authorizes the establishment of reserves pursuant to the Antideficiency Act itself, as amended, or as specifically provided in particular appropriations acts or other laws. Under this interpretation, the term "other laws" includes the remainder of the Impoundment Control Act of 1974.

Section 1012 provides the procedure when the President wishes permanently to withhold the obligation of all or part of budget authority. Both Houses of Congress must pass a rescission bill within 45 days or the budget authority must be made available for obligation.

Section 1013 applies when the President wishes to delay, for any period up to the end of the fiscal year in which the delay is proposed, the obligation of budget authority. Unless either House passes a resolution disapproving the proposed delay the delay may continue for the period proposed.

Thus, under the second interpretation, the difference between sections 1012 and 1013 is not based on the existence or lack of prior

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legal authority supporting the proposed withholding of budget authority, but rather on the proposed duration of the withholding-- permanent under section 1012, temporary under section 1013.

An important aspect of the control provided by the act under the second interpretation lies in the provisions for full disclosure to the Congress of Executive Branch plans with an opportunity for Congressional oversight and the exercise of a veto power. Finally, subsection 1015(a) requires the Comptroller General to monitor the budgetary actions of the executive branch. When the Comptroller finds that an action tantamount to deferral or rescission of budget authority has taken or will take place and that a required Presidential special message has not been sent, he is to report this to Congress, together with essentially the same facts required for the Presidential special message that should have been sent. Such a Comptroller General's report triggers the procedures under sections 1012 and 1013 in the same manner as if a Presidential special message had been sent.

Subsection 1015(b) requires the Comptroller General to report when, in his view, a Presidential special message has been "mislabeled," i.e., sent in accordance with the wrong section. Generally, this report is informational. However, if the Comptroller General finds, in the case of a proposed deferral, that funds could be expected with reasonable certainty to lapse before they could be obligated or would have to to be obligated imprudently to avoid that consequence, the action by the President is to be construed as a de facto rescission. The Comptroller General would then, in addition to the subsection 1015(b) message, send a section 1012 message, which section 1012 message would become the Congressional action document. The President's deferral message would become a nullity by virtue of the fact that subsection 1013(c) provides that section 1013 will not apply to actions required to be sent under section 1012.

DISCUSSION OF THE INTERPRETATIONS

Both interpretations outlined above have considerable merit. The act contains complex and difficult provisions, on whose interpretation reasonable men may differ. The legislative history, while helpful in some areas, is in large part ambiguous. However, on balance, we must conclude that the second interpretation is the correct one, based primarily on the plain reading of the title.

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First, 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. The language is so broad, in fact, that it would include rescissions except that subsection 1013(c) specifically excludes "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." 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 whatever.

Second, we conclude further that the Impoundment Control Act of 1974, apart from section 1002, is "other law" within the meaning of section 1002. This is the necessary conclusion to be drawn from the fact that section 1002 is in fact an amendment to a statute (the Antideficiency Act) separate and apart from the remainder of the sections making up the Impoundment Control Act of 1974.

Third, the language of sections 1012 and 1013 conveys a clear impression that the use of the two sections depends not on the purpose or legal authority of a proposed withholding action, but upon its duration. If it is to be a permanent withholding of funds; i. e., the funds will never be spent, section 1012 is to be used. If the withholding action is to be only temporary, section 1013 is to be used.

Our interpretation of the provisions of the Act may lead, at first glance, to some apparently anomalous results. In particular, it means that an action by the President that is authorized by statute (e. g., a deferral clearly authorized by the Antideficiency Act) may be made unauthorized and terminated by a simple resolution by only one House. Similarly, a rescission that is authorized by a particular statute may, when submitted under section 1012, be rendered unauthorized and illegal if the Congress fails to pass a rescission bill within 45 days. We believe these results are understandable and reasonable in the context of the Act as a design to give the President the opportunity to initiate reconsideration of, and Congress the opportunity to reconsider, the expenditure of program

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funds under circumstances that may be different from those in existence when the original program was enacted. In addition, it should be noted that no program may be terminated without action by both Houses, and deferral actions cannot delay program funds for longer than one year.

A central premise of the argument against the second interpretation appears to be that the act cannot be interpreted so as to provide new authority for impoundments because, it is argued, the legislative history shows that the Senate, by its amendments to the Antideficiency Act, intended to reduce substantially the basis for Presidential impoundment, and all features of the Senate bill necessary to that purpose were incorporated in the Conference Report. In addition, it is said that the House version of the act merely provided a reporting and veto mechanism in the event unauthorized impoundments occurred. Therefore, it is argued, since the Senate bill would have reduced the President's power to impound and since the House bill would not have enlarged it, any argument that the act confers new power to the President to impound would mean that the sum of the legislative process in this case is greater than its parts. Finally, it is argued that the act cannot be interpreted to delegate new power of deferral by inadvertence or implication.

We cannot agree with this view of the act. As shown above, the plain language of the act supports the second interpretation. The legislative history of the act, particularly in the latter stages of floor debate after the House-Senate conference, is ambiguous, in part. However, some important light is shed by that history. The key point is the history of section 1013, which is virtually identical to the language of earlier bills developed in the House.

On March 6, 1973, Rep. Mahon introduced H. R. 5193. This bill is the basis for much of the act and clearly was the blueprint for section 1013. The bill was reviewed and revised by the House Committee on Rules. Rather than report out the bill with amendments, a new bill, H. R. 8480, was introduced. The substituted bill, however, retained the basic philosophy underlying H. R. 5193; i. e., the establishment of an impoundment control procedure through which Congress would review all impoundments and disapprove them through affirmative action. In the absence of affirmative action, the impoundment involved would stand. H. R. 8480 was, in turn, referred to the House Committee on Rules. Simultaneously, the House was studying another measure--H. R. 7130--which, in part, was also designed to deal with Executive Branch impoundment of funds. H. R. 7130, which was introduced on

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April 18, 1973, contained two titles. Title II, an impoundment control section, was adopted from H.R. 8480. See H.R. Rep. No. 93-658, 93d Cong., 1st Sess. 16 (1973). H.R. 7130 passed the House on December 5, 1973, and subsequently was the House bill that went to conference and led to the enactment of section 1013.

During the debate on H.R. 8480, it became clear that the Members of the House did consider that the bill would, to the extent that it allowed an impoundment to continue unless Congress acted affirmatively to stop the impoundment, grant the President an additional means to impound budget authority. See, generally, 120 Cong. Rec. H6597-6630 (daily ed. July 25, 1973). For example, Rep. Harrington said:

> "That measure [H.R. 8480] tinkers with the rules of the appropriations process, to make an Executive impoundment more accountable to the Congress. But it fails to address the underlying affront of impoundment to congressionally established priorities. <u>In short, the bill makes a clear case for the legality of such actions by the Executive.</u>
> <u>Some have tried to argue that procedural legislation like H.R. 8480 does not legitimize the impoundment practice. But the facts show the opposite: if Congress does not act on the impoundment, it is legal--by necessary implication. If I were a judge, I could reach no other conclusion.</u> It will not do to act on the supposition that congressional action implies no judgment on the impoundment of funds from substantive programs." 120 Cong. Rec. E5121 (daily ed. July 26, 1973). (Emphasis added.)

Similarly, Rep. Leggett, while supporting H.R. 8480, expressed these reservations during the debate (comparing the House and Senate bills):

> "While H.R. 8480 attempts to limit the President's ability to impound, <u>both measures extend to the President de facto authority to impound for at least 60 days. The Madden [H.R. 8480] bill allows the President to impound pending congressional</u>

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> disapproval, while the Ervin bill would have impoundments lapse after 60 days if not approved by Congress. A dangerous precedent is set in both instances." 120 Cong. Rec. H6619 (daily ed. July 25, 1973). (Emphasis added.)

And Rep. Danielson, speaking for an amendment to H.R. 8480, said:

> "The last point I wish to make is simply this: We must always be cautious in this Congress to cease delegating our powers to the Executive, be he Republican or Democrat. His party makes no difference. We must rid ourselves of this tendancy to delegate.
>
> Witness what can happen. In this instance, by a simple majority vote, 50 percent plus 1, we could delegate to the President the power to impound subject only to Congressional veto.
>
> Suppose we want to get this power back in the future? A President, Republican or Democrat might enjoy having this power of impoundment. So if we try to take back this power, what do we have to do?
>
> We have to pass another law repealing this law, and the President can very well veto it, whether he be Republican or Democrat." 120 Cong. Rec. H6600 (daily ed. July 25, 1973). (Emphasis added.)

In fact, this concern over the granting of "de facto authority" by H.R. 8480 was so great that several amendments were introduced that would have changed H.R. 8480 to the Senate approach of of requiring the impoundment action to cease in the absence of positive congressional action within a certain period of time. The most important of these was an amendment by Rep. Pickle, which was defeated 318-96. 120 Cong. Rec. H6603 (daily ed. July 25, 1974).

While recognizing that the provisions of H.R. 8480 would indeed give the President said "de facto authority", the apparent philosophy behind the House bill was expressed by one of the floor leaders of the bill, Rep. Bolling:

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> "Mr. Chairman, I do not really know how to go about opposing this [Pickle] amendment. I know it is well-intended.
>
> No. 1. It imputes to the bill before us the ratifying of the President's power to impound. It does no such thing.
>
> The bill before us, H.R. 8480, is completely neutral. It deals with a fact, not a theory.
>
> There are impoundments. There are not hundreds of impoundments but there are thousands of impoundments. Some are the kinds of impoundments apparently some of my friends feel are the only impoundments; but there are a great many impoundments.
>
> * * * * *
>
> "What H.R. 8480 seeks to do is to provide for a regular procedure for dealing with the exceptional case when the Congress decides that a President has changed the policy--by impoundment unilaterally--that the Congress has already made, and the Congress does not approve the change.
>
> It is a very limited, very self-disciplined, very carefully contrived process.
>
> The committee very carefully considered the alternatives, because, after all, the other body has passed the other version a number of times, and we heard from the Senator from North Carolina; he was a witness before the committee. This was a matter which was very carefully considered." 120 Cong. Rec. H6602 (daily ed. July 25, 197?).

In other words, while the House bill was not considered a ratification of any impoundment power, it was a recognition that impoundment was taking place; that some impoundments, perhaps, should take place; and that Congress ought to have a means for control over impoundments and disapproving those it considered unwise or unjustified.

In summary, the House, while not ratifying or approving any particular impoundments, clearly did provide that, if the Congress did not disapprove a proposed impoundment, the impoundment would

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stand. In this sense, the House bill expanded Executive authority to impound.

The purpose of the Senate bill that went to conference clearly was different. S. 373, introduced on January 16, 1973, by Senator Ervin and others, set forth a procedure to deal with impoundment of funds. Significantly, and unlike H.R. 8480, this bill required affirmative congressional action within a certain period of time to authorize impoundments. The Senate passed S. 373 on May 10, 1973. The House amended the Senate-passed version of the bill and both chambers appointed conferees. That bill died in conference. S. 1541 was introduced on April 11, 1973, by Senator Ervin and five other members of the Senate. The original version of this bill as well as that version of S. 1541 that was reported out of the Senate Committee on Government Operations on November 28, 1973, did not contain any impoundment control provisions. However, the bill was then referred to the Committee on Rules and Administration on November 30, 1973. The latter Committee reported S. 1541 (S. Rep. No. 93-688, 93d Cong., 2d Sess.) in a modified form--a form which did incorporate an impoundment control title. As was the case in the House of Representatives, the Senate was concerned that there be made available to the Congress a means through which impoundments could be scrutinized. The Senate bill that went to conference tightened the authority in the Antideficiency Act to place funds in reserve by deleting the "other developments" clause. It also prohibited, except where provided for by appropriations act or other laws, the use of budgetary reserves for fiscal policy purposes or to achieve less than the full objectives and scope of programs enacted and funded by the Congress, and authorized the Comptroller General to bring a civil suit action in the U.S. District Court for the District of Columbia to enforce those provisions.

The Senate, on March 22, 1974, substituted the agreed upon text of S. 1541 for the language of H.R. 7130. It was in this light that the two chambers went to conference.

The legislative history following the conference deliberations is ambiguous in that support can be found for either interpretation. See generally 120 Cong. Rec. H5177-5202 (daily ed. June 18, 1974); and 120 Cong. Rec. S11221-11257 (daily ed. June 21, 1974).

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In addition, we understand that some who participated in the debate adhere to an interpretation opposite to that which one would conclude from a reading of the record. Under the circumstances, this portion of the history is not helpful as an aid to interpretation of the language of the act.

Finally, other arguments that have been raised against the second interpretation include the arguments (1), that the disclaimer section (section 1001) and the Antideficiency Act amendment (section 1002) preclude any assertion or concession of Presidential power to impound, except pursuant to explicit statutory authorization, and (2), that nowhere else in the act is there found such an assertion or concession.

These arguments ignore the fact, however, that the history of section 1013 in the House clearly shows that that provision was intended as a mechanism whereby impoundments could be reviewed and approved or disapproved by Congress, regardless of the presence or lack of independent statutory authorization. Thus, the disclaimer disclaims any assertion or concession of Presidential constitutional power, or approval of any impoundment except pursuant to statutory authorization. Section 1013 in a sense does provide such authorization, provided the Congress does not disapprove a proposed deferral. Similarly, the section 1002 amendment to the Antideficiency Act provides that no reserves shall be established other than as authorized by the Antideficiency Act, or "except as specifically provided by particular appropriation acts or other laws." Section 1013, we believe, as discussed above, must be included in the category "other laws."

CONCLUSION

We view the Impoundment Control Act of 1974 as providing a means for Congress to review Executive Branch actions or inactions amounting to withholding budget authority from obligation; a mechanism for Congress to affirm or disapprove withholdings that are based on statutory authority outside of the act and to reconsider (contemporaneous with the circumstances at the time proposed) and approve or disapprove withholdings that are submitted under the section 1013 procedure, but which otherwise have no statutory authority. As such, it does not, as section 1001 makes clear, assert or concede the constitutional powers or limitations of either Congress or the President.

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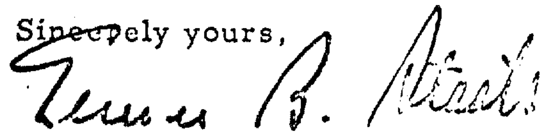
As we have stated, the act contains complicated provisions, the legislative history of which are, in large part, far from clear. Because of this, the title has presented difficult problems of interpretation. In addition, because of the act's importance, its interpretation and implementation have been the subject of keen interest by members of Congress and others. Consequently, because it is a close question involving difficult issues of interpretation of statutory language and legislative history, we suggest that Congress may want to re-examine the act and clarify its intent through further legislative action.

Sincerely yours,



Comptroller General
of the United States

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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The Honorable Edmund S. Muskie
Chairman, Committee on the Budget
United States Senate

Dear Senator Muskie:

We have received your letter of December 13, 1974, raising certain questions concerning our interpretation of the Impoundment Control Act of 1974, as expressed in our opinion dated December 4, 1974. Set forth below are your questions and our answers to them.

QUESTION:

> "First, what principles of statutory interpretation were used in reaching the conclusions contained in the December 4, opinion?"

No single canon of interpretation can purport to give a certain and unerring answer to the question of legislative intent or the meaning of a statute. Before the true meaning of a statute can be determined where there is genuine uncertainty as to how it should apply, consideration must be given to the problem in society to which the legislature addressed itself, prior legislative consideration of the problem, and the legislative history of the statute in question. See Sutherland, Statutory Construction, 4th Ed., §§45.05 and 45.02.

In this case, the problem addressed by the Congress, and even more the legislative response it fashioned, are the very matters in contention. Review of prior legislative considerations, and of the legislative history of the bill that emerged from Conference, was not particularly helpful. At the end, we relied upon the traditional principle that Congressional intent must be ascertained essentially from the language of the statute itself.

QUESTION:

"Second, <u>your opinion contained a number of assertions and conclusions for which no authority was cited.</u> Please indicate all authorities upon which you relied for the following statements:

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"A. On page two, you described the 'basic scheme' of the Act as follows:

"2. Budget authority intended for permanent withdrawal must be released for obligation and expenditure if the Congress fails within 45 days to pass legislation authorizing the withdrawal.

"3. Budget authority intended for temporary withdrawal within a fiscal year may be withheld as proposed if the Congress fails to act; either House may require release of such deferred budget authority by passing a simple resolution to that effect. (Emphasis added)

"What is the authority for such conclusions? Where in the legislative history of Public Law 93-344 are the words 'permanent' or 'temporary' used to describe recissions and deferrals respectively?"

"F. On page thirteen, you state, 'The language of section 1012 and 1013 conveys a clear impression that the use of the two sections depends not on the purpose or legal authority of a proposed withholding action, but upon its duration.'

"What is the authority for that assertion? Where in the conference report or in the floor debates in either House is there support for that assertion?"

Our basis for these conclusions is the language of §§1002 and 1012-1013 of the act itself. The Conference Report and the floor debates following the Conference throw little light on this problem.

In §§1002 and 1012 a "rescission" is to be recommended when funds are not required to carry out the objectives and scope of the appropriation. As used in these sections, a "rescission" appears to mean that budget authority is to be permanently revoked. This meaning is consistent with that ordinarily accorded the term "rescission."

The term deferral is explained by §§1011 and 1013 as any withholding or delaying of budget authority that does not extend beyond the fiscal year in which it is proposed. Moreover, Section 1013, by its own provisions, deals with impoundments not covered by §1012 (see §1013(c)).

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Reading the two sections together, the conclusion seems inescapable that a "deferral" is what we characterize as a "temporary" withdrawal of authority, and a rescission is a "permanent" withdrawal.

"B. On page two, you state, 'The Impoundment Control Act of 1974 and its legislative history are considerably less than clear concerning the Act's intended design.' What is the basis for that conclusion?"

Primarily it is the legislative history of the act that is unclear in large part. See pages 18-19 of our December 4, 1974, opinion concerning the ambiguity of the legislative history following the House-Senate Conference. Had the Act itself been as clear as all would desire it would not have been subject to two reasonable but mutually exclusive interpretations.

"C. On page nine, you state, 'We conclude that budget authority may not be withheld except to provide for contingencies or to effect savings, or as specifically provided for in appropriations acts or other laws.' How is that conclusion consistent with your later conclusion that the President may use the deferral procedure for fiscal policy purposes?"

"D. On page thirteen, you state, 'Second, we conclude further that the Impoundment Control Act of 1974, apart from 1002, is 'other law' within the meaning of section 1002. This is the necessary conclusion to be drawn from the fact that section 1002 is in fact an amendment to a statute (the Anti-Deficiency Act) separate and apart from the remainder of the sections making up the Budget Impoundment and Control Act of 1974.' What is the authority for this assertion and conclusion?"

Section 1002 states explicitly that it is an amendment to the Antideficiency Act, 31 U.S.C. 665. The remainder of the act is not an amendment to 31 U.S.C. 665, and constitutes a structurally separate statute. Therefore, it appears the amendment to the Antideficiency Act was designed to eliminate that statute as the

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claimed basis for so-called policy impoundments. See pages 6-10 of our December 4, 1974 opinion. This in no way would affect the possibility that other statutes could serve as a basis for policy impoundments. Section 1002 appears to recognize this:

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

Also, it must be emphasized that a policy impoundment will prevail only in those circumstances where the President proposes a deferral and neither of the Houses of Congress passes an impoundment resolution. Under these circumstances, §1013 of the act provides "other law" for withholding of budget authority.

Finally, if one construes the language of §1002 to mean that fiscal policy reserves cannot be established under any other law, then the creation of such reserves, it has been argued, would have to be proposed as "rescissions". Such a construction would be inconsistent with the clear import of §1013, which provides for the President proposing to defer for less than the fiscal year any budget authority.

"D. On page thirteen, you state, 'First, the clear language of section 1013 does not limit the authority for the proposed deferrals.' How do you reconcile that assertion with the 'clear language' of section 1012 which provides that the President is to seek rescission when he 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 for obligation for such fiscal year?

> "How do you reconcile your interpretation of Section 1013 with the 'clear language' of Section 1013(c) which states, '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'?"

The language of §1013 provides that an impoundment message should be sent pursuant to the section whenever it is proposed that budget authority be deferred. The language is so broad, in fact, that it would include rescissions except that subsection 1013(c) specifically excludes "budget authority proposed * * * in a special message required to be transmitted under §1012."

The fact that §1012 specifically lists "fiscal policy" rescissions as reportable under that section, and §1013 does not refer to "fiscal policy" deferrals, cannot be construed as meaning that all fiscal policy withholdings of whatever duration must be reported under §1012. The list of several purposes for impoundments under §1012, including for the purpose of "fiscal policy," virtually exhausts all reasonable possibilities of the purposes for which the President may propose to revoke obligational authority. Section 1013 lists no purposes whatever for which the President may propose to delay obligational authority. If §1012 were construed to embrace exclusively all withholdings undertaken pursuant to the purposes listed therein (including "fiscal policy"), then fiscal policy deferrals could not be proposed under §1013. But the language of §§1012 and 1013 simply does not support this result. The more reasonable interpretation, viewing the act as a whole, is that §1012 encompasses only those impoundments for fiscal policy or other reasons, the durations of which extend beyond the fiscal year in which they are proposed, i.e., "permanent."

> "G. On page fourteen, you state, 'Deferral actions cannot delay program funds for longer than one year.' Yesterday in testimony before the Senate Budget Committee, Director Ash of OMB testified that the President could defer program funds for as many years as he wanted, so long as the authorization for such budget authority did not expire. Is Director Ash's interpretation of the law correct?

If the Director's interpretation is not correct, will the Comptroller General reclassify such deferrals as recissions and then sue to release the money if the Executive does not spend it?"

We agree with Director Ash's interpretation so long as the deferral is resubmitted each fiscal year, and only so long as there does not arise a de facto rescission due to the lack of sufficient remaining time to prudently obligate the funds involved. See page 12 of our December 4, 1974 opinion. The GAO under its responsibilities would, of course, question repeated deferrals to see if they should be submitted as rescissions.

"H. On page eighteen, you describe the legislative history of the Impoundment Control Act in the Senate. You state that the Senate Rules Committee reported S. 1541 in 'a form which did incorporate an impoundment control title.' What is the legislative history in the Senate of Title X of S. 1541?"

As discussed at page 18 of our December 4, 1974, opinion, S. 1541 was introduced on April 11, 1973, by Senator Ervin and five others. It was referred to the Committee on Government Operations and subsequently reported out on November 28, 1973, without an impoundment control title. See S. Rep. No. 93-579.

The bill was later referred to the Committee on Rules and Administration on November 30, 1973. This Committee did report out the bill with impoundment control provisions. See S. Rep. No. 93-688.

The Senate passed S. 1541 on March 22, 1974, but then substituted its agreed upon text for H. 7130 on March 22, 1974. This bill was modified in conference.

"I. On page one, you state, 'The act fundamentally calls for the Executive Branch to report and explain to the Congress all proposed impoundments with ultimate authority to effectuate such proposals dependent upon congressional action.' When the

President proposes a rescission, may the funds be withheld during the 45-day period pending Congressional action?"

Yes. We think the act provides that funds may be withheld during the pendency of a rescission request. Section 1012 states that, if after 45 days, a rescission bill has not been passed, the budget authority must be made available for obligation. To us, this implies that during the 45 days the money need not be made available for obligation.

QUESTION:

"Third, does section 1013 provide any legal authority or statutory authority for an impoundment of budget authority? Did H.R. 7130 as passed by the House purport to provide any such legal or statutory authority to the President to defer budget authority temporarily from obligation?"

Yes, provided it is sustained by Congressional concurrence. Further, the legislative history of H.R. 7130 in the House makes it clear that the House recognized that H.R. 8480, the predecessor to H.R. 7130, did provide additional authority to the President, subject to Congressional concurrence. See pages 14-19 of our December 4, 1974, opinion.

Sincerely,

SIGNED ELMER B. STAATS

Comptroller General
of the United States