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PRESIDENTIAL POWER TO IMPOUND APPROPRIATED FUNDS: AN EXERCISE IN CONSTITUTIONAL DECISION-MAKING

ARTHUR SELWYN MILLER*

The Negro revolt of the 1960's, as with all social crises in the United States, has brought with it a number of legal and constitutional problems. Not least among them are those involved in the Civil Rights Act of 1964,¹ recommended by President Kennedy in June 1963 and signed by President Johnson in July 1964, a comprehensive attempt to redress some of the injustices forced upon those Americans who had the lack of foresight to be born to parents whose skin was not that delicate shade of off-white pink so prized by that minority of human beings who have European heritages. The merits and demerits of the constitutional basis for such an exercise of federal power have been, and are being, extensively debated elsewhere and need not be of present concern. Suffice it to say that there appears to be legal warrant for the controversial segments of the Civil Rights Act in either the fourteenth amendment or the interstate commerce clause² or both, and that, echoing Mr. Justice John Marshall Harlan I, perhaps the thirteenth amendment may also be used for such a purpose. However, one part of the bill—title VI,³ referring to authorization for the Chief Executive to withhold the expenditure of certain appropriated funds from areas practicing unlawful discrimination—has received relatively little attention. My purpose in this article is to delve into the background constitutional question inherent in title VI, to set forth what little law that exists on the subject, and to suggest certain conclusions relating to a problem that cuts across both of the primary constitutional divisions of power: the federal system and the separation-of-powers. The principal emphasis will be upon the broad question of presidential power

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¹ 78 Stat. 241.

² See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

³ 78 Stat. 252 (1964), 42 U.S.C.A. §§ 2000d to 2000d-4 (1964).

over appropriations; less attention will be accorded title VI—the first congressional use of the spending powers to help achieve positive programs of nondiscrimination. It is too early to do more than list some generalizations regarding executive implementation of that title. What follows is essentially an exposition in the elements of constitutional decision-making, set against the backdrop of the Civil Rights Act of 1964.

The provisions of title VI are both comparatively simple and distressingly vague, but the basic constitutional problem of public expenditures for purposes which may involve separation on the basis of race, color, creed, or national origin is rather more complex. At issue are such matters as the position of racial and ethnic minorities in the American polity, the constitutional power of Congress to permit, but not require, racial discrimination in projects it authorizes and which it finances through the Treasury, the independent power of the President to impound appropriated funds for reasons deemed by the President to be good and sufficient, and the relationship of the states to the central government. These questions are not readily determined by resort to widely-accepted, black-letter law (to “neutral principle,” as some might put it); as with any constitutional problem likely to be under dispute, any or all of the issues posed display a multiplicity of relevant principles, which permit varying conclusions depending on the choice made between them. The answers to constitutional questions, that is to say, are to be found, not solely by searching in a corpus of known legal principle to find the one rule or doctrine applicable, but by an analysis that draws into the crucible of decision-making all of the diverse legal and policy considerations relevant to a given issue, and in so doing, finds principle being created as well as applied. What little the Supreme Court has said in this area is far from determinative of the matters at issue.

The language of title VI as it came from Congress differs considerably from the way it was phrased when first drafted in the Department of Justice. As enacted, the bill is much stronger than that originally contemplated. It now reads in part as follows:

Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Sec. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. . . .⁴

The remainder of section 602 provides for sanctions, mainly termination or refusal to grant or to continue assistance, after a finding of noncompliance; section 603 provides for judicial review of action taken pursuant to section 602; section 604 exempts "employment practice(s)" from the title; finally, section 605, in somewhat baffling terms, reads as follows: "Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract or guaranty."

The earlier version of the act was permissive. It provided a statutory basis for withholding funds but did not require it. Here, however, each department and agency "is authorized and directed" to fulfill the legislative purposes of nondiscrimination because of "race, color, or national origin" in any program or activity receiving financial assistance. On the other hand, excepted from section 602 are contracts "of insurance or guaranty." As will be noted below, this provision seems to relate to President Kennedy's executive order⁵ on housing issued in November 1962. The exception, however, must be read in light of section 605, and also with cognizance of whatever legislative history may exist. Suffice it to say at this time that title VI is a blanket requirement for federal departments and agencies to eliminate discrimination for race, color, or national origin; however, there may be a "hidden joker" (of which more below) in section 602 in the "contract of insurance or guaranty" exception.

⁴78 Stat. 252 (1964), 42 U.S.C.A. §§ 2000d to 2000d-1 (1964). Title VI in the original bill displayed all the earmarks of hasty draftsmanship and a desire to empower the Executive with withholding authority but not to make it mandatory. The title was put into its present form by the House of Representatives.

⁵Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962).

The following discussion is divided into two broad areas: first, the basic constitutional questions behind title VI, and second, some of the questions inherent in that title itself.

I. THE CONSTITUTIONAL CONTEXT

A. Constitutional Provisions

As with any constitutional question, initial resort must be to the basic document itself. It is readily apparent, in the first place, that the Constitution is silent on the questions that are involved in title VI, although some guidance is available in very general terms. Thus Congress has power under article I, section 8, to spend money for a variety of purposes (to promote "the general welfare"), most of which require action by some executive or administrative official to put into effect. Furthermore, article I, section 9, reads in part as follows: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." The system, thus, is one of shared power between the legislature and the executive—not surprisingly, to be sure, in a Constitution which was drafted so as to fragment power. Congress must appropriate, but would find it difficult indeed, if not constitutionally improper, to spend; the President (and the remainder of the public administration) may spend, but not appropriate. That, on the level of highest abstraction, is the law—but while it settles some questions, it fails to come to grips with others. Moreover, Congress may establish a system whereby disbursements are supervised as to their lawfulness; the General Accounting Office has been entrusted with that responsibility⁶ (the one administrative agency which is commonly accepted to be truly an "arm of the Congress"). In sum, accordingly, the language of the Constitution and, what is of greater importance, the practices that have developed in the more than 175 years of American constitutional history indicate that neither the Congress nor the President has complete control and that the relative powers of the two branches are not at all clearly defined with respect to federal spending.

⁶ Accounting and Auditing Act of 1950, 64 Stat. 837, 31 U.S.C. § 67 (1958).

In the great majority of appropriations, of course, no problem of conflict between the two branches develops. Moneys are appropriated routinely and disbursed equally routinely in a system in which Congress by and large either does not care or does not have the competence to be too specific about the precise ends to which the funds are to be put. Agency and departmental budgets are approved, usually with an annual congressional ritual of arguing over relatively minor details, more or less as they come to Congress from the other end of Pennsylvania Avenue. Some chopping and other lopping-off is done by chairmen of some of the congressional committees, who assert thereby their extra-constitutional power of "item veto."⁷ The net result is this: Congress, according to the Constitution, must appropriate—but what is appropriated, speaking very generally, is what is presented to them by the Administration. No doubt what a President sends to Capitol Hill reflects in part an evaluation of what Congress might approve. But the initiative is usually executive, the nay-saying normally legislative. Some—those who are wont to look upon the Constitution as a collection of timeless political verities which can solve any modern constitutional problem by reference to what the fifty-five men now revered as the Founding Fathers said or did not say or might have said or thought—may find it a bit difficult to rationalize a situation where the Constitution says that the President has the veto power but he does not usually use it in appropriation matters, while Congress in fact exercises the veto power although the Constitution does not grant it to the legislators. Thus, the appropriation power which the Constitution puts squarely into legislative hands is, by congressional abdication or cession of power—by the "living" Constitution in action—as much executive as legislative.

Shared power over appropriations, with the formal constitutional authority in Congress but with a growing amount of the effective control in the hands of the Chief Executive, thus seems to be the general pattern, but a number of questions are left dangling. These may be taken up seriatim and set out with a brief discussion of each. In each may be seen the interplay of the modern doctrine of separation of powers, as well as the operation of the federal system. At the outset, it is meet to note that, as Richard Neustadt has recently

⁷ On congressional veto, see Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962).

pointed out,⁸ the term "separation of powers" is a misnomer. Rather than separation of powers, what the Constitution establishes is separate institutions sharing power over the same subject matter—an important, albeit neglected, distinction.

1. *The Power To Condition Expenditures.*—Congress not only has constitutional authority to appropriate money, but indubitably has the power to attach conditions to its appropriation acts through which expenditures may be limited. Accordingly, there is no particular doctrinal problem involved in title VI, whatever might be the situation for the remainder of the Civil Rights Act. The denial of funds to administrative districts which practice racial discrimination in public facilities could have been made an automatic procedure, or it could, with proper "standards" (which could be of such a high level of abstraction as to constitute no barrier to administrative discretion), have been made a matter of delegated power to an administrator.

The latter course was the one followed. Under the act, there must be "an express finding on the record, after opportunity for hearing, of a failure to comply" with any regulations issued.⁹ But the only requirement, other than presidential approval, is that the rules or regulations "be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."¹⁰ This provides the administrator with no guidelines at all.¹¹ Congress has turned the task of legislating specific rules over to the Executive Branch. Even so, the validity of the delegation seems to be beyond question—for several reasons. In the first place, the statutory language in section 601 is sufficiently precise to give little leeway to the administrator. Secondly, the finding of discrimination and imposition of sanctions is placed under strong procedural safeguards—for the political entity found to be discriminating, but not, be it noted, for the person who is the object of the discrimination. (See section II, below.) Finally,

⁸ NEUSTADT, *PRESIDENTIAL POWER* 33 (1960).

⁹ § 602, 78 Stat. 252, 42 U.S.C.A. § 2000d-1 (1964).

¹⁰ *Ibid.*

¹¹ The tendency of Congress to legislate generally and to turn the details over to the public administration has long been characteristic of the federal government. Cf. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962); HORSKY, *THE WASHINGTON LAWYER* (1952). What this means is that the administrator perforce is vested with considerable law-making power, whether he operates by rule or by adjudication. See Miller, *The Public Interest Undefined*, 10 J. PUB. L. 184 (1961).

the constitutional law of delegation, largely based on the *Schechter*¹² and *Panama Oil*¹³ cases of the 1930's, seems to have been overruled or superseded.¹⁴ This is true even though there might be an incidental "invasion" of matters normally committed to state control, as the Supreme Court made amply clear in *Oklahoma v. Civil Service Commission*.¹⁵ In that case, which involved the application of the Hatch Act¹⁶ to state officials involved in the disbursement of federal highway funds, the Court upheld the application of national power, including the sanction of cutting off funds when it was found that the act had been violated by a state official: "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states may be disbursed."¹⁷ That statement echoed an earlier pronouncement in *Perkins v. Lukens Steel Co.*,¹⁸ a 1940 decision in which the Court upheld the Walsh-Healey Public Contracts Act¹⁹ through the terms of which federal contractors are required to pay certain minimum wages as fixed by the Secretary of Labor. Said the Court in part: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."²⁰ (That statement does not, of course, go to the question of relative power between Congress and the Executive. And is it valid? Do private individuals have the power Mr. Justice Black says they have—"to fix the terms and conditions . . ." ? Is not that a resultant of a process of negotiation?)

But even though the tenth amendment is no barrier, there is a limit to the power to condition. Congress could not seek an unconstitutional end, such as that of enacting a statute that would require that funds be disbursed only to "separate-but-equal" schools. Although there are no express limits to the power to spend, save that it be for the "general welfare" (a concept peculiarly within the

¹² A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

¹³ Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

¹⁴ See 1 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.01-2.16 (1958).

¹⁵ 330 U.S. 127 (1947).

¹⁶ 53 Stat. 1148 (1939), 5 U.S.C. § 118i (1958).

¹⁷ 330 U.S. at 143.

¹⁸ 310 U.S. 113 (1940).

¹⁹ 49 Stat. 2036 (1936), 41 U.S.C. §§ 35-45 (1958).

²⁰ 310 U.S. at 127.

congressional prerogative to define), certainly there are implied limitations.²¹ Thus an attempt to appropriate funds to establish an official church would no doubt founder upon the shoals of the first amendment, as would any other contravention of the Bill of Rights. There are no cases on point, but *Reid v. Covert*²² might provide an apt analogy. In *Reid*, the Supreme Court invalidated the section of the Uniform Code of Military Justice that permitted trial by court-martial of civilians accompanying the armed forces abroad,²³ the Court finding a Bill of Rights limitation on the power of Congress to make rules and regulations for governing the military. And in *United States v. Lovett*²⁴ a bald attempt by Congress to force the Executive to discharge certain civilian employees from government service by prohibiting the disbursement of funds for their salaries was found to be a bill of attainder and thus constitutionally invalid. It was not a bill of attainder in the historical sense, as Mr. Justice Frankfurter noted in a concurring opinion;²⁵ but since the majority of the Court said it was, then it was. Possibly, a better rationale would have been to say that the rider to an appropriation act, which could not be vetoed by itself because the President has no item veto and the principal part of the act was too important to veto, was an invasion of the executive power to run that coordinate branch of government and thus improper under the separation-of-powers doctrine. In any event, the lesson to be learned from *Lovett* is that Congress cannot overtly invade that executive province, save in the Senate's advising and consenting to certain high-level appointments. (This has some relevance to a problem to be discussed below—the power of Congress to *require* certain expenditures.) But this is not to say that such action is not taken covertly, as the unhappy episode of the late Senator McCarthy and his marauding adventures into the realm of State Department personnel bears testimony. What Congress could not do directly before a determined Chief Executive, Senator McCarthy, acting alone, did indirectly—in itself a rather revealing episode in the evolution of congressional-executive relations.²⁶

²¹ See THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 144-49 (Small & Jayson eds. 1964).

²² 354 U.S. 1 (1957).

²³ 64 Stat. 109 (1950).

²⁴ 328 U.S. 303 (1946).

²⁵ *Id.* at 318.

²⁶ Cf. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964).

If Congress' power to condition expenditures is clear, does the President have an independent power to do so? Can the Chief Executive attach limitations upon the disbursement of funds without prior congressional approval? There are no Supreme Court cases directly on point. But an executive practice of conditioning expenditure of funds by contract has been in existence for more than twenty years. The principal example may be the nondiscrimination-in-employment clause, which, since President Roosevelt first issued Executive Order 8802 in 1942,²⁷ has been a requirement in all federal contracts. But there are others. For example, the industrial security program of the Department of Defense, under the terms of which contractor employees are screened for security reasons, is based on executive power only.²⁸ Award of contracts is subject to contractor acceptance of the condition that those of its employees having access to classified matter must be approved by the government. Another illustration is the Executive Order²⁹ issued in 1962 by President Kennedy, under the terms of which federal agencies are to take action to prevent discrimination in financially assisted housing programs. In addition, there are many examples of standard federal contract clauses which are wholly of executive origin.³⁰

Here, then, are several examples of presidential conditioning of expenditures without congressional approval. What of their legality? There is no ready black-letter answer. The Court has not spoken definitively, and until it has done so there are some who would say that no law existed on the matter. But that seems to be a manifest absurdity, for law there is whether or not it may be found in statute or judicial pronouncement. The question, technically at least, is whether the President has an independent law-making power of his own. And on this broader problem the Court has spoken, as is its wont, in cryptically inconsistent terms. The cases are few: they include *Perkins v. Lukens Steel Company*,³¹ *Greene v. McElroy*,³² *Kent*

²⁷ Exec. Order No. 8802, 6 Fed. Reg. 3109 (1942).

²⁸ See *Green v. United States*, 376 U.S. 149 (1964); *Green v. McElroy*, 360 U.S. 474 (1959).

²⁹ Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962).

³⁰ The most elaborate development of contract clauses, most of which are examples of executive law-making, may be found in section VII of the Armed Services Procurement Regulation. 32 C.F.R. §§ 7 to 7.505-1 (1961).

³¹ 310 U.S. 112 (1940).

³² 360 U.S. 474 (1959).

v. Dulles,³³ *Cole v. Young*,³⁴ and the *Steel Seizure Case*.³⁵ These are interesting decisions, all meriting analysis on the point at issue. However, since the power to condition spending is closely allied to the question of presidential power to impound federal funds, such an analysis will be deferred temporarily until reference may be made to another set of circumstances under which a practice of Executive power may be set forth.

2. *Presidential Power to Impound Appropriated Funds*.—The question of whether the President must spend moneys appropriated by Congress is another of those problems that the Supreme Court has not gotten around to considering. Does the shared constitutional power over expenditures include the power of the President to act directly contrary to express congressional will? The answer, indubitably, is "no" if it is a question of spending money for something forbidden or not authorized.³⁶ The Comptroller General and the General Accounting Office would certainly see to that. But such a definitive reply can scarcely be given—either way—in response to the question of whether the President may impound funds appropriated for a particular purpose.

A common view among the few constitutional scholars (mostly political scientists) who have considered the question is that an appropriation is *permissive* rather than *mandatory*.³⁷ By this it is meant that the Executive Branch is *authorized* but not *required* to spend funds up to a given amount for designated purposes. Thus Professor Edward S. Corwin stated that the provision in article 1, section 9, of the Constitution "assumes that expenditure is primarily an executive function, and conversely that the participation of the legislative branch is essentially for the purpose simply of setting bounds to executive discretion—a theory confirmed by early

³³ 357 U.S. 116 (1958).

³⁴ 351 U.S. 536 (1956).

³⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³⁶ But see WILMERDING, *THE SPENDING POWER* (1943), who indicates that it is not quite as simple as the textual statement indicates. At times the Executive has committed the government, and Congress has had to appropriate later. (Could this be called appropriation by *fait accompli*?)

³⁷ I am not developing the question of whether anyone would have "standing" to challenge either an appropriation or a failure to spend, although it has been generally believed since *Massachusetts v. Mellon*, 262 U.S. 447 (1923), that a taxpayer does not possess the requisite characteristics to have standing to get a judicial determination of the validity of an appropriation. A fortiori it would seem that a failure to spend would present no justiciable controversy.

practice under the Constitution.”³⁸ Under that view, then, the President would have discretion to spend or not to spend, a view that is supported by practice over the past twenty and more years. As Dean Ernest S. Griffith put it, “Occasionally the President diverts, or leaves unused, funds appropriated for some specific purpose which he does not approve.”³⁹ And Robert A. Wallace, whose 1960 study is an exposition of congressional-executive relations in spending, had this to say:

The federal budget system makes direct provision for the Presidential impounding of agency funds. The Bureau of the Budget has justified this power (in acting on behalf of the President) to place appropriated money in reserve as follows:

In requiring that moneys be placed in reserve, the Bureau proceeds also on the principle that ordinarily an appropriation is merely an authorization and not a mandate to spend money for the specified purpose. This principle has been recognized and affirmed by the Court of Claims in *Hukill v. United States* (26 Ct. Cl. 316). In the former case the Court said: “An appropriation by the Congress of a given sum of money for a named purpose is . . . simply legal authority to apply so much of any money in the Treasury to the indicated object.”

President Franklin D. Roosevelt, in asserting this power, did not claim its extensiveness to be equal to the item veto. But, in a letter to Senator Richard Russell, of Georgia, dated August 18, 1942, he asserted: “the mere fact that Congress, by the appropriation process, has made available specified sums for the various programs and functions of the Government is not a mandate that such funds must be fully expended.”⁴⁰

Thus a presidential practice of impounding funds in certain instances runs at least as far back as 1942. The effect of this is to give the President an item veto by administrative action, even though the Constitution permits only a general power to veto entire bills. Such an item-veto-in-fact has been exercised several times by several Presidents:⁴¹

³⁸ CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 127-28 (4th ed. 1957).

³⁹ GRIFFITH, *CONGRESS: ITS CONTEMPORARY ROLE* 40 (3d ed. 1961).

⁴⁰ WALLACE, *CONGRESSIONAL CONTROL OF FEDERAL SPENDING* 145 (1960).

⁴¹ *Id.* at 144, 146; CORWIN, *op. cit. supra* note 38, at 137. For other discussions of the question of impounding, see WILLIAMS, *THE IMPOUNDING OF FUNDS BY THE BUREAU OF THE BUDGET* (INTER-UNIVERSITY CASE SERIES No. 28, 1955); Goostree, *The Power of the President to Impound Appropriated Funds*, 11 AM. U.L. REV. 32 (1962); Kolodziej, *Congresional Responsibility for the Common Defense: The Money Problem*, 16 WEST POL. Q.

(a) By President Franklin D. Roosevelt: In 1942 the President requested that the Secretary of War "in cooperation with the Director of the Bureau of the Budget, establish reserves in the amount that can be set aside at this time by the deferment of construction projects not essential to the war effort."⁴² Such sums ranged from 174 million dollars to 405 million dollars in the years 1940 to 1943.

(b) By President Truman: In 1949 President Truman, who was opposed to the policy of a seventy-group Air Force desired by Congress, impounded funds appropriated for that purpose and refused to spend them.

(c) In 1956 the Department of Defense shelved an appropriation by Congress "earmarked for the construction of twenty super-fort bombers."⁴³

(d) In 1962 the Kennedy Administration stated that it would not spend funds appropriated to build the B-70 aircraft if Congress appropriated them. The dispute was settled by political negotiation, but the power so to impound funds was asserted by President Kennedy.

Thus what apparently began as a wartime practice, and was justified by the exigencies of the war effort, has been taken over and used by succeeding Presidents in times of peace (and that quasi-war period termed the Cold War). That itself is an instance of how certain activities deemed desirable and necessary for the successful prosecution of a war have a way of becoming solidified and added to the totality of powers exercised by government at other times. The history of the Constitution has been one of the aggrandizement of governmental powers, and within government, of executive powers. Control over appropriations furnishes an example of the latter. Perhaps it is important to note, furthermore, that the foregoing instances of impounding appropriated funds all concern national defense activities, where the constitutional powers of the President would be maximized by including those of Commander-in-Chief of the armed forces.

The lawfulness of presidential conditioning and impounding

149 (1963); Kranz, *A 20th Century Emancipation Proclamation*, 11 AM. U.L. REV. 48 (1962).

⁴² WALLACE, *op. cit. supra* note 40, at 146.

⁴³ CORWIN, *op. cit. supra* note 38, at 137.

congressionally authorized expenditures, as with all controversial constitutional questions, cannot be decided by a formula. There is no ready-made rule which might be applied in the time-honored mechanistic manner: $R(ule) \times F(acts) = D(ecision)$.⁴⁴ Were the issues ever to be presented in an appropriate case to the Supreme Court for decision—a conceivable eventuality—that Court necessarily would have to create law to fit the situation. The judicial choice could only be made after an evaluation of the pertinent facts and of the conflicting principles relevant to the problem, plus an assessment of the operative impact of the decision upon the practices of government. That, of course, would perforce involve an exercise in what is sometimes castigated as “judicial legislation” by those who should know better but for some reason do not. The adjudicative process, in such circumstances, would be interpretative in that the justices would seek to give meaning to constitutional terms and constitutional silences, but it would also be law-making—and, accordingly, not dissimilar from what the Court has done since at least as far back as 1803.⁴⁵ What, then, are the relevant considerations that must be tossed into the crucible?

B. A Digression on Judicial Method

A word, first, about method. Since this paper seeks to set out some of the complexities inherent in a constitutional question, some attention to method is desirable. One approach would call for the judge to go through an exercise rather like the following: he first would ask, what are the facts?, and then after determining them and selecting the crucial questions upon which the result would turn, would search the corpus of doctrine known as “the law” to locate the rule or principle which decides the issue. This is the $R \times F = D$ formula. Its statement is its own refutation, as Cardozo noted long ago for private-law problems⁴⁶ and as Holmes had postulated even earlier.⁴⁷ In 1881 Holmes pointed out that “logic” was not the *sine qua non* of the judicial process, even that bastardized sort of reasoning that often passes for logic in the legal world. In 1921 Cardozo, then on the New York Court of Appeals, noted that four methods were open to the judge: the method of history, of philos-

⁴⁴ See FRANK, *COURTS ON TRIAL* (1949).

⁴⁵ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁴⁶ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

⁴⁷ HOLMES, *THE COMMON LAW* (1881).

ophy, of sociology, and of tradition.⁴⁸ Cardozo was talking about the cases that had come before his court—mainly those of the legal problems of individuals, the private-law categories of contracts and torts, property and domestic relations, and the like. He had not yet been appointed to the United States Supreme Court; and although he did not later give any indication that he found problems there significantly different from those he met on the New York court, there is the testimony of Mr. Justice Frankfurter that he at least did not find Cardozo's analyses and explications of the adjudicative process helpful in his task on the Court.⁴⁹

Nevertheless, Holmes and Cardozo and the others who made up a group of judges and legal commentators loosely known as "legal realists"—which was less a school than a movement—did perform at least one great task.⁵⁰ They smashed the facade of classical jurisprudence and made it intellectually untenable. In so doing, however, they left nothing in its place. The legal realists crumpled the edifice of mechanical jurisprudence, which at least was a theory however faulty it may be, but did not provide a substitute. Since that onslaught—perhaps Jerome Frank's *Law and the Modern Mind*⁵¹ might provide some sort of high-water mark—there has been a considerable intellectual chaos. If rules alone are not determinative of given cases and if judges are human (often only too human), what, then, is relevant and what, then, is a correct description of the judicial decision-making process?⁵² The legal realists did not provide any sort of answer; and in fact, that movement has tended to die away, leaving behind it an important residue: that the $R \times F = D$ statement of the process is not adequate.

Some stirrings have been noted in recent years that reveal a tendency toward filling the void left by the legal realists. As might have been expected, to some extent this is in the nature of a counter-revolution, although one of considerably more sophistica-

⁴⁸ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921). See also CARDOZO, *THE GROWTH OF THE LAW* (1924).

⁴⁹ FRANKFURTER, *SOME OBSERVATIONS ON SUPREME COURT LITIGATION AND LEGAL EDUCATION* (1954).

⁵⁰ See GARLAN, *LEGAL REALISM AND JUSTICE* (1941). Cf. Gilmore, *Legal Realism: Its Cause and Cure*, 70 *YALE L.J.* 1037 (1961).

⁵¹ FRANK, *LAW AND THE MODERN MIND* (1930). See LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949).

⁵² Compare WASSERSTROM, *THE JUDICIAL DECISION* (1961) with Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 *GEO. WASH. L. REV.* 318 (1964).

tion than a bald attempt to resurrect and reinstate mechanical jurisprudence. (I am not referring here to those lawyers and other commentators, including newspaper columnists, who at this late date espouse the old orthodoxy. Their numbers are considerable, but their position is untenable.) These observers tend to be critics of the Supreme Court and much of the product that has come forth from that bench in recent years.⁵³ They tend to advance two propositions: first, that the Supreme Court should recognize its limitations and the justices should restrain themselves from getting into a number of controversies better left (in their judgment) to other courts or other governmental decision-makers (this is the school of thought that has the late Mr. Justice Frankfurter as its major prophet and that includes among its votaries Mr. Justice Harlan and a clutch of law and political science professors); and second, that the justices, in their opinions, do not justify and explain their decisions in a manner consistent with adherence to what is variously called "reason" or "principle" or "neutral principle" or "the law as it has been received and understood." These gentlemen, legal scholars all, decry what they consider to be the "cynic's snicker" (unidentified), the "nihilists" (to them, Thurman Arnold falls into this category), the "result-oriented" commentators (also unidentified), the libertarians, the judicial "activists," and assorted other categories of the intellectually unwashed.⁵⁴ If Mr. Justice Frankfurter is their prophet, Mr. Justice Black tends to be their "devil," and the lines are drawn as between the "activists" and the "self-restrainers"—as if a choice had to be made on an abstract plane between them. Such a choice cast in such stark terms is obviously over-simplified, and the controversy that has been stirred up by such commentators tends to be more pseudo than meaningful. The counter-revolution thus far has not been entirely a dud, but at least the shells that have been fired haven't done much to provide enlightenment. However,

⁵³ See SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* (1964). This volume collects, cites, and discusses the principal exponents of the on-going academic debate over the jurisprudence and role of the Supreme Court. See also Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964), one of the latest and most impassioned of the academic critics of the Court.

⁵⁴ For an exposition of this point of view, see BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). See also Gunther, *The Subtle Vices of the Passive Virtues*, 64 COLUM. L. REV. 1 (1964); Miller, Book Review, 9 HOW. L.J. 188 (1963) (reviewing BICKEL, *op. cit. supra*).

one thing they have done is important: it is to emphasize that attention must be paid to the *way* that constitutional decisions are made. The method is important in and of itself.

To put the question in present context, how, one might ask, can the questions of presidential power to condition federal contracts and to impound appropriated funds be answered by reference to the method preferred by these counter-revolutionaries? Should, first of all, the Supreme Court concern itself with the question? It is difficult to see why it should not, in a proper case involving the issue of whether a given contractor, otherwise qualified, should get a contract if he refuses to agree to the non-discrimination clause, or the issue of whether the people of, say, the state of Mississippi are to be denied appropriated funds because of failure to integrate the public schools. Of course the problem is "political" in that it involves difficult questions of public policy—what constitutional question doesn't?—but the issues are clear-cut, the deprivation substantial and personal, so that the question of "standing" should occasion no difficulty. Would this be a case calling for judicial self-restraint? Hardly, for it is a conflict among those very political branches of government that would answer the question otherwise. To say that self-restraint should be exercised is to uphold the power—which may be quite all right as a result, but surely it should come after a fuller deliberative process. One does not have to believe that the Court should get into every controversy that might develop in the American polity to maintain that the question of executive power in our constitutional system is a proper issue for judicial cognizance.

If, then, a proper case got to the Supreme Court, what would the counter-revolutionaries have to suggest by way of method? The answer is not readily apparent, once one delves below the level of exhortation. As a whole, this group of critics tends to become somewhat mystical when they attempt to prescribe proper judicial method. They are far better at description and at picking holes in judicial logic.⁵⁵ What of their prescription? It is that the justices should resort to "reason" *qua* reason and produce thereby "impersonal principles" of constitutional law. What those principles might be and just how "reason" is to assist in determining them is not said.

This, quite obviously, will not do. One need not be a cynic, or

⁵⁵ See, *e.g.*, many of the essays in the several volumes of *THE SUPREME COURT REVIEW*, published by the University of Chicago.

labelled as one, or to be thought of as unthinkingly and unheedingly approving a given Court decision because, say, a Negro was the plaintiff or some other civil-rights issue was before the Court, to assert that the counter-revolutionaries have helped only little in their criticism, however constructively intended it may have been. One need not be a votary in either the Frankfurter or the Black group. It is possible to maintain that neither the mechanical jurisprudents *nor* the legal realists *nor* those whom I have termed the counter-revolutionaries have produced a useful and adequate conception of the adjudicative process. In this respect, legal thinking in America has not moved much beyond Oliver Wendell Holmes when he published *The Common Law* in 1881.

If that be so, then it is important to ask if anyone has gone beyond Holmes, if anyone else has built upon the intellectual shambles left by the legal realists so as to produce a jurisprudence useful and meaningful in A.D. 1965 and the future. The short answer to that is "no." One or two have tried, some others have recognized the need, but no one yet has made the breakthrough to new insights and a new synthesis.⁵⁶ And that is the core of the problem. To summarize: the legal realists exploded the notion of an automatic jurisprudence; the counter-revolutionaries have now demonstrated that the legal realists went too far, that rules *are* important, even if not conclusively so, that law is an ordering device, and that judicial method is important. Justice should be done, say the counter-revolutionaries, but it also must be shown to be done. Judges are human, and some of them doubtless only too human, but the process by which they reach their results is an important element in and of itself. The need is evident for a new synthesis.

In such a synthesis, the libertarians—those who uphold the Court in its civil liberties and civil rights decisions of recent years and who applaud its activism—also have a contribution to make. These "ritualistic liberals," to use Professor Sidney Hook's label, or "knee-jerk liberals," to use the more opprobrious term of columnist William S. White, these "wooden liberals" who tend to count "one up" or "one down" for their causes, depending on

⁵⁶ Perhaps the person who has done most toward creating new jurisprudence is Professor Myres S. McDougal of the Yale Law School. See, e.g., MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960) (collection of previously-published essays dealing with the application of "policy science" to the law).

the result in a given case, require that attention be paid to the results, to what happens in an instance of constitutional adjudication. For after all, such cases have important consequences for actual people, people beyond the immediate litigants, and the results thus *are* important. Important, yes, but not the whole of the matter. Accordingly, the synthesis that is necessary must come from a fusion of the teachings of three disparate groups: the legal realists, who revealed the complexity and the uncertainty of the decision-making process; the counter-revolutionaries, who have pointed out that rules and the process itself are important; and the libertarians (the activists), who show that the results of the process are important in that a significant impact is made upon the value position of the American citizenry.

This brings the discussion back to the question posed before the digression on method began: what are the considerations relevant to the determination of a constitutional problem? I know of no one who has provided a satisfactory answer to that question. If it is reduced to its present context, however, it may be a bit more manageable: what are the considerations relevant to determination of the issue of presidential power over appropriations? The following may be suggested, not as a definitive listing but as an indication of the complexity of the problem.

C. The Relevant Factors

1. *The Need for Contextual Analysis.*—Presidential power over expenditure of appropriated funds must be seen, first of all, in the context in which it arises. A requirement exists for contextual analysis of any constitutional question. Without such an approach, commentary on constitutional problems tends to turn into relatively sterile exegeses of doctrinal texts of an order not significantly different from those medieval scholastics who allegedly worried about such pseudo-questions as how many angels may dance on the point of a needle. The context surrounding the problem of shared power over appropriations contains at least two subsidiary questions: (a) are there other examples of power being exercised by the Executive in situations where Congress has express constitutional power? and (b) what is the social milieu in which the problem arises? Both merit brief attention.

As the late Professor Edward S. Corwin noted in his leading

text⁵⁷ on the presidency, the history since 1787 has been one of the aggrandizement of the powers of the Executive. What the President has done in impounding funds fits into a pattern of other action which collectively makes up a marked trend toward greater executive and administrative power. The following may be suggested as illustrative instances, although far from an exhaustive listing, of executive activities within the area of congressional constitutional power:

(a). *Control over public lands.* Repeated assertions by the President that he had the right to withdraw public lands from private acquisition was upheld by the United States Supreme Court in 1915, Congress never having repudiated the practice.⁵⁸ The Constitution, it will be recalled, states in article IV that Congress is the organ with power over public property.

(b). *Control over other public property.* Despite article IV and despite the absence of any specific authorizing statute, President F. D. Roosevelt in 1938 transferred fifty "over-age" destroyers to Great Britain in exchange for ninety-nine-year leases on certain military bases.⁵⁹ The action was justified by an opinion from the then Attorney General, a document in itself a remarkable instance of the manner in which government lawyers can find a legal basis for an action deemed desirable and necessary by the President.

(c). *Control over federal contracts.* The contracting power, while not mentioned in the Constitution, is an inherent power of the national government.⁶⁰ As such, it would seem that ultimate power in this area lies in Congress. There are a number of ways in which the Executive exercises control over contractual matters in the absence of prior congressional approval. Noted above was the practice of placing certain conditions upon award of contracts and the practice of withholding certain funds that Congress wanted to spend contractually. Others include the "blacklist," that is, a list of business firms that are barred for various reasons from obtaining contracts; Defense Manpower Policy No. 4, under which contracts are funnelled into "labor-surplus" areas; the procurement process itself, whereby by far the greatest amount of procurement dollars are spent under "negotiated" rather than "advertised bid" contracts

⁵⁷ CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (4th ed. 1957).

⁵⁸ *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

⁵⁹ See 34 (Supp.) *AM. J. INT'L L.* 183 (1940).

⁶⁰ See *United States v. Tingey*, 30 U.S. (5 Peters) 115 (1831).

despite the clear statement by Congress of preference for the latter; the administration of certain other statutes, such as, for example, the Contract Adjustment Act of 1958;⁶¹ that statute calls for publicity being given to decisions of Contract Adjustment Boards, but the Pentagon interprets this to mean that they merely have to make the decisions available; this is done by filing them and producing them when asked for, but not announcing them; and, finally, "weapon system" procurement, not authorized by statute, but nonetheless often used.⁶²

(d). *Administration by contract.* This is a system of calling upon profit and non-profit corporations and organizations to perform a considerable amount of the public administration of the government, administration which Congress had thought was to be accomplished by public officials but which in fact is done by contractor employees. Among other things, this has the result of circumventing certain civil service laws.⁶³

(e). *The stockpiling program.* A program started by Congress for the purpose of helping national defense was apparently turned by the administrators into a system whereby the prices of the goods being stockpiled were stabilized and kept high.⁶⁴

(f). *The "executive privilege" doctrine,* which had its inception in a "temporary" emergency-type measure but which now has so proliferated as to keep from Congress many documents and other information about activities in the Executive Branch.⁶⁵

(g). *By far the most evident and the most extreme measures*

⁶¹ 72 Stat. 972, 50 U.S.C. §§ 1431-35 (1958).

⁶² For discussion, see Miller & Pierson, *Observations on the Consistency of Federal Procurement Policies With Other Governmental Policies*, 29 LAW & CONTEMP. PROB. 277 (1964); Miller, *Administrative Discretion in the Award of Federal Contracts*, 53 MICH. L. REV. 781 (1955).

⁶³ See Dupré & Gustafson, *Contracting for Defense: Private Firms and the Public Interest*, 77 POL. SCI. Q. 161 (1962); Miller, *Administration by Contract: A New Concern for the Administrative Lawyer*, 36 N.Y.U.L. REV. 957 (1961); Washington Star, March 5, 1965, p. 1, cols. 3-4 (discussion of House Civil Service Commission report on "contracting-out").

⁶⁴ See SUBCOMM. ON NATIONAL STOCKPILE AND NAVAL PETROLEUM RESERVES, SENATE COMM. ON ARMED SERVICES, 88TH CONG., 1ST SESS., INQUIRY INTO THE STRATEGIC AND CRITICAL MATERIAL STOCKPILES OF THE UNITED STATES 36-45 (Comm. Print 1963). This draft report met subcommittee opposition, with three senators opposing it. However, the point made in the textual discussion does not seem to be disputed by any of the three dissenters.

⁶⁵ For discussion, see Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 29 GEO. WASH. L. REV. 623 (1961).

have been those taken by Presidents during time of war. A listing of some of those by President F. D. Roosevelt should suffice to show what was involved:

In April 1942 the writer [Corwin] requested the Executive Office of the President to furnish a list of all the war agencies and to specify the supposed legal warrant by which they had been brought into existence. A detailed answer was returned that listed forty-three executive agencies, of which thirty-five were admitted to be of purely executive provenience. Six of these raised no question, for all they amounted to was an assignment by the President of additional duties to already existing officers and to officers most of whose appointments had been ratified by the Senate. Thus our participation in the Combined Chiefs of Staff became an additional duty of certain military and naval commanders, and the combined Raw Materials Board was a similar creation. Nobody was assigned to such duties who was not already in an office to which the duties were properly referable. But the Board of Economic Warfare, the National Housing Agency, the National War Labor Board, the Office of Censorship, the Office of Civilian Defense, the Office of Defense Transportation, the Office of Facts and Figures and the Office of War Information, the War Production Board (which superseded the earlier Office of Production Management), the War Manpower Commission, and later on the Economic Stabilization Board—all of these were created by the President by virtue of the "aggregate of powers" vested in him "by the Constitution and the statutes"—a quite baffling formula, . . . the invention of Mr. Jackson.⁶⁶

To some extent, of course, such examples of executive power reveal only that when Congress delegates authority to an administrative agency it tends to lose control and that the administrator has considerable discretion to interpret his mission. De Tocqueville noted this in a somewhat different context, when he said:

When the central government which represents [the] majority has issued a decree, it must entrust the execution of its will to agents over whom it frequently has no control and whom it cannot perpetually direct. The townships, municipal bodies, and counties form so many concealed backwaters, which check or part the tide of popular determination.⁶⁷

⁶⁶ CORWIN & KOENIG, *THE PRESIDENCY TODAY* 36 (1956). See generally CORWIN, *THE PRESIDENCY: OFFICE AND POWERS* (4th ed. 1957).

⁶⁷ DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 271 (Bradley ed. 1945). "[I]t is untrue that the decisions of the bureaucrats (public or private) are exclusively routine decisions. Many, indeed, are creative ones, not derived

But over and above that is the fact that the growing number of such examples evidences the rise of what Roscoe Pound once called "executive hegemony" in government, of the desuetude of representative government. More and more, the President is asserting an independence from Congress, even in some instances where Congress has clear constitutional authority to act and has acted. The Constitution sets up a system of shared power and even of apparent legislative dominance but the flow of events is turning that system into something different in fact. The positive law bespeaks one thing, the "living law" of American constitutionalism quite another.⁶⁸ The point advanced here is merely that presidential conditioning and impounding of funds is not unique. I do not suggest further that this exhibits even a limited type of cavalier disregard of the constitutional proprieties. The problem is much more complex and difficult.

The other aspect of the context in which the problem at hand may be viewed is that of the world situation—the total social milieu—against which the legal question is projected. This may be briefly set out for the point need not be labored that this is an age of revolution, of rapid social change, of even cataclysmic conflict. Turbulence is in the air, both domestically and planet-wide. That point is fast becoming a truism, and need not be expanded at this time.

But the implications are of fundamental significance—in process of change is the very role of Congress in American government. That body stands as the last legislative institution of any real importance in the entire world; in no other nation, not even Great Britain, does the legislature have such a significant position as in the United States. But even so, what seems to be in process of being created—by slow accretion—is executive government. A major contributing cause of this trend is the advent of new problems that government must grapple with and the acceptance of new responsibilities that government must fulfill. At the present time, it may be said, the trend toward executive dominance is still in its formative stages, but it is gathering speed and, if one may be pardoned a look into a cloudy crystal ball, will continue to do so. (It

from precedent or standing rules, but highly discretionary and thus essentially law-making in character." NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 15 (1957).

⁶⁸ Cf. Miller, *Notes on the Concept of the "Living" Constitution*, 31 *GEO. WASH. L. REV.* 881 (1963).

is one of the fascinating aspects of American constitutionalism that such a marked change can—likely, will—take place within the confines of the fundamental law as written in 1787. The Constitution, with its built-in, planned-for ambiguity and flexibility, presents no substantial barrier to such a development. What it does do, however, is to institutionalize a political process, particularly with respect to the conduct of foreign relations, in which it is becoming more difficult to get government to govern adequately.)⁶⁹

“Contextual” analysis, however, presupposes certain standards by which data may be evaluated as to its relevance. The development of such standards and the selection of data to be employed in the resolution of constitutional questions presents most difficult questions. Few scholars have addressed themselves to them.⁷⁰ The relevant context for the resolution of any constitutional problem requires, if it is to be adequately analyzed and projected, consideration of a wide-ranging amount of social, economic, and political data. Attempts by the Supreme Court to use this sort of information, while common enough, has not always been successful. The process of judgment is greatly complicated when “non-legal” data are used. It also poses critical questions about the competence of judges (or other decision-makers) to know, assimilate, and wisely use such information. The initial problem is: when are such data relevant—how are choices to be made from the mass of information that is available on any one question? The criteria of choice are not readily evident—just as the criteria of choice among (conflicting) relevant principles are not evident.⁷¹

2. *Applicable “principle”*.—The question is one of presidential power. Is there any law to be applied? As noted above, a number

⁶⁹ See Fulbright, *American Foreign Policy in the 20th Century Under an 18th Century Constitution*, 47 CORNELL L.Q. 1 (1961).

⁷⁰ Among the few: McDUGAL & ASSOCIATES, *op. cit. supra* note 56, and other works by Professor McDougal; Mayo & Jones, *supra* note 52.

⁷¹ In this, lawyers seem to resemble scientists.

Deductive science (in contradistinction to descriptive sciences like geography and botany) begins with fundamental, *unproved* propositions which are verified only in their several consequences. The scientist does not seek to prove these axioms; rather, he accepts them provisionally, judiciously but without proof, hoping that their *consequences* agree with the facts. Nor is his attitude toward them one of avoidance or tolerance. He cannot get doing without them in spite of the circumstance that they represent precisely the opposite of what the popular view takes to be a fact.

MARGENAU, *ETHICS AND SCIENCE* 7 (1964).

of contemporary students of the Constitution maintain that the task of the Supreme Court (and presumably any other authoritative decision-maker) is to apply to the resolution of such a problem either the law as it has been received and understood or neutral principles; this is to be done by the mental process called "reason." These observers have been called the "counter-revolutionaries" among present-day legal theorists. The "interests" are to be "balanced," the result reached with little or no reference to the consequences that might flow from the result. The emphasis is upon the method, and those decisions are approved that are made through the operation of "due procedure" of the adjudicative process. What, then, does this approach offer to the problem at hand? Which principles may be identified and applied?

The cases are sparse, and of those remotely relevant none are directly on point. The reasoning process must be one by analogy and the initial search is for the apposite decision. A pertinent first question is this: when is an analogy sufficiently apposite to be employed?⁷² The general question aside as beyond the scope of the present article, a group of judicial decisions may be identified, which, when analyzed, appear to produce at least two principles which are inconsistent. On the one hand, a clutch of recent cases collectively may be said to illustrate the proposition that the Executive must find a statutory basis for the exercise of power; or at least, in accordance with Mr. Justice Jackson's concurring opinion in the *Steel Seizure Case*,⁷³ presidential power varies with the degree to which he acts in cooperation with Congress.

When he acts, said Jackson, pursuant to an express or implied authorization of Congress, his authority is at its maximum. When he acts in absence of a congressional grant of authority, he can rely only on his own independent powers,

but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.⁷⁴

⁷² Cf. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

⁷³ 343 U.S. at 634.

⁷⁴ *Id.* at 637.

Mr. Justice Jackson went on to maintain that when the President takes measures incompatible with the expressed or implied will of Congress, "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."⁷⁵

Decisions in the same vein are *Kent v. Dulles*,⁷⁶ *Cole v. Young*,⁷⁷ and *Peters v. Hobby*,⁷⁸ which together with the majority in the *Steel Seizure Case* indicate that the Supreme Court feels that limits exist to executive or administrative power and that, to an undetermined extent, the Executive must in some instances receive authority from Congress to act.

That is one line of cases. Another suggests a contrary proposition: that the President can act without prior congressional authorization. Illustrative here are the following cases: *Midwest Oil Co. v. United States*,⁷⁹ *United States v. Pewee Coal Co.*,⁸⁰ *Greene v. McElroy*,⁸¹ and the *Japanese Exclusion Cases*.⁸² In each of these the Court indicated, either by holding or otherwise, that some sort of presidential power existed independent of Congress. Quite obviously, then, what is revealed is a situation reflecting the existence of the Principle of Doctrinal Polarity, that is, inconsistent principles travelling, as Professor M. S. McDougal has said, in "pairs of opposites."⁸³

What the Supreme Court has said in the past cannot determine the nature and extent of the President's powers. The law as it has been received and understood is inconsistent and the "specter of conflicting neutral principles"⁸⁴ can be raised. Is there a way rationally to resolve the question? The problem is more than application of "the law." In fact, it appears to have at least two, perhaps three, other dimensions. In addition to applicable principle

⁷⁵ *Ibid.*

⁷⁶ 357 U.S. 116 (1958).

⁷⁷ 351 U.S. 536 (1956).

⁷⁸ 349 U.S. 331 (1955).

⁷⁹ 236 U.S. 459 (1915).

⁸⁰ 341 U.S. 114 (1951).

⁸¹ 360 U.S. 474 (1959).

⁸² *E.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944).

⁸³ *E.g.*, McDougal, *The Ethics of Applying Systems of Authority: The Balances Opposites of a Legal System*, in *THE ETHICS OF POWER: THE INTERPLAY OF RELIGION, PHILOSOPHY, AND POLITICS* 221 (Lasswell & Cleveland eds. 1962).

⁸⁴ Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 663 (1960).

or the law in the sense of a pre-existing body of doctrine made up of both permissive and prohibitory rules, attention must be paid to: (a) the initial premises from which the decision-maker proceeds; this might be called the point of departure where the decision-maker begins in deciding or justifying a given decision;⁸⁵ (b) an appraisal of the logic—the process of reasoning—used; and (c) an evaluation of the probable effects of alternative decisions. Few, if any, analyses of the constitutional decisional process develop all facets of that process. Nevertheless, attention must be accorded to all if an adequate job is to be done, either by way of description (that is, what has the decision-maker done?) or prescription (that is, what should be done?). What, then, do these dimensions offer to the resolution of the problem of presidential impounding of appropriated funds?

3. *The Ingredients of a Constitutional Decision.*—First, as to the initial premises from which the decision-maker proceeds (to make or to justify his decision), the cases discussed above produce, as has been seen, inconsistent principles or rules. A person deciding a given case may, of course, choose either one of these. But at least so far as the judiciary is concerned, the reasons for this choice are normally not set out with any degree of particularity in the published opinions. The point may be seen in the recently decided case of *Kennedy v. Mendoza-Martinez*.⁸⁶ Mr. Justice Stewart begins his dissenting opinion by stating:

The Court's opinion is lengthy, but its thesis is simple: (1) The withdrawal of citizenship which these statutes provide is "punishment." (2) Punishment cannot constitutionally be imposed except after a criminal trial and conviction. (3) The statutes are therefore unconstitutional. As with all syllogisms, the conclusion is inescapable if the premises are correct. But I cannot agree with the Court's major premise—that the divestiture of citizenship which these statutes prescribe is punishment in the constitutional sense of the term.⁸⁷

However, neither Mr. Justice Stewart,⁸⁸ in dissent, nor Mr. Justice Goldberg, speaking for the Court, provided any satisfactory ex-

⁸⁵ See CARDOZO, *THE GROWTH OF THE LAW* 62 (1924). Cf. MARGENAU, *op. cit. supra* note 71.

⁸⁶ 372 U.S. 144 (1963).

⁸⁷ *Id.* at 201-02.

⁸⁸ *Id.* at 201.

planation of why the major premise was chosen. In this respect, the justices bring to mind Holmes's observation in 1899: "I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results."⁸⁹ If for "law schools" is substituted "judges," then that statement seems to describe what courts often, if not always, do. Once having chosen a basic premise, the judge may then proceed by logic to his conclusion.⁹⁰

Turning to the problem under discussion, the question becomes that of determining which basic premises might be employed in the resolution of the power of the President to impound appropriated funds. In constitutional terms, where within the rubric of "separation of powers" (and, possibly, of federalism) may such premises be located? Two may be suggested. One may begin as did Mr. Justice Black in the *Steel Seizure Case* with the assumption or premise that only Congress has the law- or policy-making power. Not so, said Mr. Chief Justice Vinson in dissent;⁹¹ the President has an independent power. Again, neither explained why he chose his point of departure. The reasons for the decisions both reached became essentially a matter of logical deduction. Black proceeded in this manner: (a) only Congress can make a law; (b) Congress has not made a law respecting seizure of industrial plants in times of labor disputes; therefore (c) the seizure of the steel mills by the President is invalid. So, too, with Vinson: (a) the President has independent powers—as Commander-in-Chief, as the official responsible for the conduct of foreign affairs, etc.; (b) a need exists for the continuing operation of the steel mills, and a labor strike threatens that; therefore (c) the President may seize.

The question of impounding by the President must begin with a choice being made between two such conflicting premises. Which premise is chosen is not itself a matter of "logic"; rather it is the recognition and selection of one of these "ultimate entities of

⁸⁹ HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 238 (1920).

⁹⁰ Not always by logic. Sometimes the judge assumes the conclusion, or his reasoning is circular. In this respect, compare *Wilson v. Girard*, 354 U.S. 524 (1957), with *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

⁹¹ 343 U.S. at 667.

the law"⁹² with little or no attention paid to the reasons for that choice. What that choice might be seems, in the first instance, to involve the environment in which it is made. Thus if the person who must decide is, say, a legal adviser to a congressional committee, he might very well—likely, would—select the premise that Congress is the ultimate policy-maker. But if he is an adviser to the Executive, then it is likely that the contrary premise would be thought most appropriate.⁹³ In similar fashion, lawyers appearing as advocates before tribunals make such choices; each advocate begins with a ready-made conclusion (in favor of his client) which becomes the major premise; he then proceeds to develop an argument based on logic (and, as we will see, "policy" or "effects") in which he seeks to persuade the decision-maker. The environment colors the choice of premises by the advocate, just as it does for the adviser to Congress or the Executive. The law, in other words, is a tool to manipulate as much as it is—perhaps, more than it is—a body of interdictory rules.

That refers to the advocate, but what about the judiciary? How do judges choose premises? As we have seen, this is not explained in constitutional cases. Reference may here be made to the other main ingredient of the process: the effects or consequences of possible alternative decision. For we have seen enough to indicate the validity of the insight of Morris R. Cohen with respect to questions of federalism: "in a changing society the relations between the states and the nation are essentially political, *i.e.*, determined on the grounds of social policy, and . . . it is only by an intellectually indefensible fiction that they can be deduced from a written document such as our federal Constitution."⁹⁴ In like manner, the relations between Congress and the President are determined on political grounds, on the basis of what is good social policy. Those relationships are not to be deduced from the Constitution unless we are willing to employ a transparent fiction. The Supreme Court has done so in the past, in

⁹² Professor L. L. Fuller calls the basic premises of judges the "ultimate entities" of the law. FULLER, *BASIC CONTRACT LAW* 521 (1947).

⁹³ In this connection, Mr. Justice Jackson's statement in the *Steel Seizure Case* seems apt; he maintained that he could not be bound as a judge to what he had said as Attorney General, when he took a partisan position on a presidential seizure of a war plant. 343 U.S. at 649 n.17 (concurring opinion).

⁹⁴ COHEN, *AMERICAN THOUGHT: A CRITICAL SKETCH* 169 (1954).

the relative handful of cases dealing with separation-of-powers issues.⁹⁵

It is submitted, accordingly, that the choice of basic premise depends to some (unmeasurable) extent upon the view a person, including a judge, has of what is good social policy in the circumstances. This seems to be clear enough for the legislator and also for the administrator, including the lawyer who advises both. But what about courts? The same would seem to be valid: a recognition of what Holmes called "the secret root from which the law draws all the juices of life," by which he meant "considerations of what is expedient for the community concerned,"⁹⁶ seems to characterize much, perhaps all, constitutional adjudication. We may, with Holmes, broaden that to include all adjudication, but it seems clear beyond question when the issue is one involving the great ambiguities of the Constitution. Unavoidably involved in "politics"—all constitutional questions, in this sense, are "political questions" even though they may not have been put into that category of self-restraint by the Supreme Court—the judiciary is faced with the question of evaluating the effects or consequences of its decisions. This evaluation, which usually is accomplished by purely intuitive and not empirical means, quite possibly is the determining factor in the choice among premises, which choice is then developed logically to the conclusion in the case.

The trouble here is that the judicial process, as now constituted, has no way by which such an evaluation may be made. As Cohen put it,

general principles alone [cannot] . . . determine individual decisions. Modern logic and modern science alike demonstrate the untenability of this conception. Established legal principles may supply guiding analogies, but the decision of any individual case depends on an understanding of the actual social conditions, and of the consequences of the decision, as well as on the judge's view as to which of these consequences are best or most important. Elevation to the bench does not make a man omniscient, and the obvious fiction that courts decide only points of law prevents us from giving them adequate facilities for investigation into the relevant facts of the case, and into the larger

⁹⁵ *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Note particularly the obviously faulty opinion by Mr. Justice Black for the Court.

⁹⁶ HOLMES, *THE COMMON LAW* 35 (1881).

social consequences of their decision. In our anxiety to make judges independent of the popular will we are making them independent of the knowledge necessary to make their work satisfactory.⁹⁷

The need exists for a means by which judges may evaluate the consequences of their decisions, as well as be provided with a flow of all the information relevant to a decision in a given case. "We lack a sociology of judicial decision-making, and do not really know, save in an impressionistic, helter-skelter manner, just what the impact on the value position of Americans is of a decision of the United States Supreme Court."⁹⁸ Nor are judges able to forecast, save on the highest level of abstraction, and then only on an a priori basis, what the consequences of their decisions might be. Compare, in this regard, the statement by Mr. Justice McReynolds dissenting in the *Gold Clause Cases*⁹⁹ with that of Mr. Justice Harlan dissenting in *Wesberry v. Sanders*.¹⁰⁰ Said McReynolds: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling"¹⁰¹—indeed a clouded crystal ball! Said Harlan:

What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process is itself weakened.¹⁰²

Nonetheless, it does seem to be valid to maintain that an appreciation of the consequences of decisions, however intuitive that appreciation may be, does help to determine the choice of premises from which to proceed to decide—or to justify—decisions of the Supreme Court.¹⁰³ (The two have to be separated; whatever goes into the process of deciding, it apparently differs from what may be said in the opinion.) In other words, what is sometimes called the "policy" aspect of a case is determinative of its resolution. (The problem then becomes one of ascertaining which policy should be

⁹⁷ COHEN, *op. cit.* *supra* note 94, at 166.

⁹⁸ Miller & Howell, *supra* note 84, at 690.

⁹⁹ Norman v. Baltimore & O.R.R., 294 U.S. 240, 361 (1935).

¹⁰⁰ 376 U.S. 1, 20 (1964).

¹⁰¹ 361 U.S. at 381.

¹⁰² 376 U.S. at 48.

¹⁰³ Cf. Miller, *On the Need for "Impact Analysis" of Supreme Court Decisions*, 33 GEO. L.J. 365 (1965).

followed.) The well-known *Lukens Steel* case provides illustration in that we may infer that what were included in the opinion as policy considerations may well have had a large influence in the choice of the premise. Consider these statements by Mr. Justice Black, made in a case involving whether a federal contractor must pay its employees minimum wages in accordance with the Walsh-Healey Act: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."¹⁰⁴ The plaintiff, accordingly, was said to lack standing to challenge the governmental action, "no legal rights" having been "invaded or threatened."¹⁰⁵ If Mr. Justice Black had stopped there, it would have been a pure case of circular reasoning, not dissimilar from many other opinions. However, he went on to point out the adverse consequences of permitting an action to be brought in such circumstances: purchasing should be free from "vexatious and dilatory restraints"; delays would take place, which would be an "intolerable . . . handicap"; "essential to the even and expeditious functioning of Government" is the unhampered administration of the purchasing machinery; "confusion and disorder" would result from judicial supervision" of contracting. An empirical basis for the learned Justice's statements is completely lacking; but that is not to denounce the opinion, it is merely to point out that it fits with many others by the Supreme Court. As Mr. Justice Frankfurter said in an off-Court statement, the justices in anti-trust cases are unable to "find light on what the practical consequences of [their] decisions have been";¹⁰⁶ this led him to conclude that these consequences, to the extent that they are relevant in the decisional process, "ought not to be left to the blind guessing of myself and others only a little less uninformed than I am."¹⁰⁷

D. By Way of Conclusion

The conclusion which emerges from this rather free-wheeling discussion of the factors going into the constitutional question of presidential impounding of appropriated funds may be simply

¹⁰⁴ *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

¹⁰⁵ *Id.* at 125.

¹⁰⁶ FRANKFURTER, SOME OBSERVATIONS ON SUPREME COURT LITIGATION AND LEGAL EDUCATION 17 (1954).

¹⁰⁷ *Ibid.*

stated. It is this: The answer is not to be deduced from the Constitution itself but is to be decided on the grounds of policy. This, in turn, means that the President can and may withhold expenditure of funds to the extent that the political milieu in which he operates permits him to do so. Even if a person does bring an action in court to challenge either presidential conditioning or withholding of expenditures, it is possible that the Supreme Court would find that he lacked standing to get a decision on the merits. But if the Court did accord standing to the litigant and went ahead to decide on the merits, then the Court would *ipso facto* have to make a determination as to what good social policy should be in the circumstances. In making this determination—in “legislating,” be it said—there are no accepted criteria or standards of evaluation. The Court would have to make a choice between conflicting strands of opinion as to the nature of the federal government and its relationship to the states. Such a choice inevitably would have aspects of “fiat” involved.

However, an appropriate case outside of the purview of the Civil Rights Act of 1964 may never get to the Supreme Court on the power to withhold expenditure of funds. In that event, decisions as made by the President would establish a practice and provide a basis in custom. These, too, may be called constitutional decisions and to be creative of constitutional law. A number of Presidents, as we have seen, have acted in this manner. Most of these instances have come in the area of national defense where the President has constitutional powers as Commander-in-Chief of the armed forces. In other situations, such as racial discrimination, the President may also be able to draw upon specific constitutional powers (and duties). Let us take a hypothetical case. Assume that the Civil Rights Act of 1964 had not been enacted. Would presidential impounding of funds and not disbursing them to institutions discriminating on the basis of race, color, creed, or national origin be constitutionally valid? Such a proposal was made by the Civil Rights Commission in 1963,¹⁰⁸ but President Kennedy quickly quashed it, saying he had no authority to do so.¹⁰⁹ Was that

¹⁰⁸ See U.S. COMM'N OF CIVIL RIGHTS, INTERIM REPORT (April 16, 1963).

¹⁰⁹ President Kennedy said on April 19, 1963: “I don’t have the power to cut off the aid in a general way, as was proposed by the Civil Rights Commission, and I think it would probably be unwise to give the President of the

valid? How decide? One may argue that the President's duty under article II, section 3 to "take care that the laws be faithfully executed" includes the duty to execute the fundamental law of the Constitution as well as the statutes. This may well involve a choice the Executive will have to make between a statute and the command of the Constitution as interpreted by the Supreme Court. With respect to impounding funds, that argument would run as follows: (a) even without the Civil Rights Act of 1964, the Constitution now requires that government, both state or federal, not discriminate on the basis of race in any of its facilities; (b) the President must faithfully execute this "law of the land"; so (c) the President is under a constitutional duty not to disburse funds to segregating institutions nor to permit any subordinate executive officer to do so. Such a duty, while doubtless not judicially enforceable against the President himself, may well become the basis for a justiciable action against a lesser official.

A recent decision in the Court of Appeals for the Fourth Circuit is instructive on the point. In *Simkins v. Moses H. Cone Memorial Hosp.*,¹¹⁰ decided in 1963, private hospitals receiving federal funds under the Hill-Burton Act¹¹¹ were held to be within the ambit of "state action" because they participated in a state (North Carolina) plan for hospital construction; accordingly, racial discrimination by the hospital is constitutionally invalid. The Hill-Burton Act had provided that "separate but equal" facilities could receive federal aid. The decision turned on the "state action" question, but it seems to have larger portents. A fair conclusion would seem to be that the command of the Constitution is that executive officers have a duty in the disbursement of funds to take action to insure that the recipient does not discriminate on the basis of race, color, creed, or national origin. That would seem to be clear after the Supreme Court's decision in *Bolling v. Sharpe*,¹¹² and the court of appeals decision in *Simkins*, without regard to the Civil Rights Act of 1964.¹¹³

United States that kind of power" N.Y. Times, April 20, 1963, p. 11, col. 5.

¹¹⁰ 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), 32 GEO. WASH. L. REV. 640 (1964).

¹¹¹ Hospital Survey Construction Act, 60 Stat. 1041 (1944), 42 U.S.C. § 291e(f) (1958).

¹¹² 347 U.S. 497 (1954).

¹¹³ This does not go to the point of whether or not it would be possible to

E. Congressional Power to Require Expenditure

The other side of the medal concerning the power of the Executive not to spend appropriated funds is the question of the remedies, if any, which Congress may have for a failure or a refusal to spend. Is there any way in which the legal process may be used to force presidential action? The question was sharply posed in 1962 in connection with appropriations for the Department of Defense. More specifically, should an airplane once called the B-70 and later named the RS-70 be procured in quantity? The President and the Secretary of Defense thought not, but Chairman Carl Vinson of the House Committee on Armed Services thought otherwise. Mr. Vinson was determined to place language in the appropriations act under which "the Secretary of the Air Force, as an official of the executive branch, is directed, ordered, mandated, and required to utilize the full amount of the \$491 million authority granted 'to proceed with production planning and long leadtime procurement for an RS-70 weapon system.'"¹¹⁴ Mr. Vinson wanted this language, not only to insure as best Congress could that the RS-70 would be procured, but also to learn whether "Congress has the power to so mandate." As stated in the Committee report:

To any student of government, it is eminently clear that the role of the Congress in determining national policy, defense or otherwise, has deteriorated over the years. More and more the role of the Congress has come to be that of a sometimes querulous but essentially kindly uncle who complains while furiously puffing on his pipe but who finally, as everyone expects, gives in and hands over the allowance, grants the permission, or raises his hand in blessing, and then returns to his rocking chair for another year of somnolence broken only by an occasional anxious glance down the avenue and a muttered doubt as to whether he had done the right thing.

Perhaps this is the time, and the RS-70 the occasion, to reverse this trend. Perhaps this is the time to re-examine the

compel executive action in the fulfillment of such a duty. The remedy a victim of discrimination may have in such circumstances may well be "extrajudicial"—i.e., political or through the use of such other non-judicial sanctions as may be available. Cf. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

¹¹⁴ House Committee on Armed Services, *Authorizing Appropriations for Aircraft, Missiles, and Naval Vessels*, H.R. REP. No. 1406, 87th Cong., 2d Sess. 9 (1962).

role and function of Congress and discover whether it is playing the part that the Founding Fathers ordained that it should.¹¹⁵

Had the language desired by Mr. Vinson remained in the appropriations act, a clear challenge to the Executive would have been mounted. But it did not. After a conversation with President Kennedy, Mr. Vinson agreed to withdraw the express mandate. The conclusion to be drawn is that, looking at the question from the point of view of Congress, again it is the *political*, and not the legal, remedy which is available. There is no way short of impeachment by which the President (or, as in this case, a subordinate official, the Secretary of the Air Force) could be forced to spend moneys that in his judgment the national interest dictated should not be spent. As another congressional committee found when it tried to force the production of documents for its hearings, and ran squarely into the executive privilege doctrine, no way exists by which a congressional committee can force its will on the Executive.¹¹⁶

The conclusions seem obvious. In the first place, the Executive is becoming—has already become—at least co-equal in power and dignity to the Congress. In any court test which might eventuate between the two branches as to which has the upper hand—the ultimate power—it is only when the executive action takes *affirmative* action contrary to the express (or implied) will of Congress in an area peculiarly within the province of Congress that Congress will prevail (and then only if a justiciable controversy can be presented in federal court). This much the *Steel Seizure Case* seems to teach.¹¹⁷ Secondly, the relationships between the Congress and the Executive, when Congress seeks to impose its will upon the Executive, are as stated above: political rather than legal. Those relationships are to be determined on the basis of the operation of the political process and not by resort to time-honored notions of justiciability and the operation of the judicial process. (In saying

¹¹⁵ 115 *Id.* at 7. See also Davis, *Congressional Power to Require Defense Expenditures*, 33 *FORDHAM L. REV.* 39 (1964).

¹¹⁶ Compare Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 *YALE L.J.* 477 (1957), with Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 29 *GEO. WASH. L. REV.* 623 (1961).

¹¹⁷ That the *Steel Seizure Case* presents no insuperable barrier to presidential action seems obvious. An instructive comparison may be found in the actions taken by President Kennedy in 1962 when the steel industry raised their prices and then rescinded the increase. For an account, see Auerbach, *Administered Prices and the Concentration of Economic Power*, 47 *MINN. L. REV.* 139 (1962).

this, it should be emphasized, I am not suggesting that any sharp line can be drawn in constitutional matters between a "political" decision and a "legal" decision. Necessarily, the decisions taken by government involve both, whether those decisions be made by the judicial, executive, or legislative branch. In other words, the "policy" aspects of any constitutional question can be eliminated in even a judicial decision only by an indefensible fiction.)

One other matter deserves mention: The conclusions about presidential power in the field of appropriations would seem to hold true even though we may note an increasing use by Congress of devices by which it is sought to enable Congress to retain some control over specific expenditures. Ever increasingly, as Congress sees what it considers to be its constitutional prerogatives slipping away and executive hegemony rising, an effort is made to require certain decisions of administrators to be held in abeyance until approval is given by a congressional committee. In brief, this is the area of the so-called "come into agreement" provisions of statutes, many of which relate to expenditures by way of contract or grant. Can Congress so limit the executive power?

The short answer to that question is that Congress has done so in numerous instances, as a recent study by Professor Joseph P. Harris documents.¹¹⁸ However, the question of whether Congress can require the Executive to obtain approval from a congressional committee before the expenditure of funds by way of contract or grant has been and is considered by the Department of Justice to involve serious constitutional problems.¹¹⁹

II. THE STATUTE: TITLE VI AND ITS IMPLEMENTATION

The constitutional context provides background for a brief look at some of the questions raised by title VI of the Civil Rights Act of 1964. Since enactment of the statute, federal agencies have drafted regulations implementing its provisions. While it is yet too

¹¹⁸ HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964).

¹¹⁹ In recent years, four Attorney Generals of the United States have held that legislative provisions vesting in Congressional Committees the power to approve or disapprove actions of the Executive Branch are unconstitutional. The Acting Attorney General now advises me that a provision vesting such power in a committee made up in part of Members of Congress stands on no better footing. Both such provisions represent a clear violation of the constitutional principle of separation of powers. This is the position taken in similar cases by President Eisenhower, President Kennedy, and by myself [President Johnson].

White House Press Release, Oct. 8, 1964.

early to be able to do more than pose some of the problems involved, some generalizations may be ventured even now. These include the following.

(1) Title VI was translated into regulations issued by executive agencies and departments beginning in December 1964—probably as speedily as a ponderous bureaucracy could be expected to move, particularly in light of the controversial nature of the subject matter. These regulations tend to follow a model developed by the Department of Health, Education, and Welfare.¹²⁰ Of particular interest is the provision for obtaining “assurances” from recipients of federal financial assistance that the moneys will be expended “in compliance with all requirements” of non-discrimination on the basis of race, color, or national origin.¹²¹ These “assurances” (*i.e.*, promises) are not expressly called for by the statute, but seem to be consistent with its provisions. That they are important may be seen in the announcement in late February 1965 that the Board of Education of the State of Mississippi had agreed to sign a compliance agreement. This will enable that state to continue to receive federal funds (at present on the order of 23 million dollars annually) for educational purposes and to be eligible for future grants. The Governor of Mississippi, in approving such action, acknowledged that “in the 28 years that the state has been accepting Federal funds it has ‘come to depend upon’ Federal aid.”¹²² The economic leverage exerted by the federal government is indeed an awesome power, in its effects sufficient to have definite constitutional impact.

(2) During the past several decades it has become clear that the nature of the American system of federalism depends, insofar as governmental decisions are concerned, upon what Congress decides. Prior to the constitutional revolution of the 1930's the Supreme Court operated as the ultimate arbiter of federalism. But the flow of decisions which began with the *Jones & Laughlin* case,¹²³ upholding the validity of the National Labor Relations Act,¹²⁴ has resulted in what may accurately be termed an unannounced abdica-

¹²⁰ 29 Fed. Reg. 16298-16305 (1964).

¹²¹ 29 Fed. Reg. 16299 (1964).

¹²² N.Y. Times, Feb. 26, 1965, p. 14, col. 1. Compare *Schools in South Integrate to Bar Loss of U. S. Aid*, N.Y. Times, March 7, 1965, p. 1, col. 6.

¹²³ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹²⁴ National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. §§ 151-66 (1958).

tion of power in economic matters by the high bench in favor of the political branches, principally Congress, of the national government. The familiar history of that basic transformation need not be recounted here, except to note the shift in the judicial task in economic policies from interpreter of the Constitution to that of interpreter of statutes; while this does not mean that the Court has now given up its creative role, it does mean that it no longer operates as the "authoritative faculty of political economy"¹²⁵ in this country.

The Civil Rights Act generally, and title VI in particular, also has enormous consequences for the nature of American federalism. It is for that reason that the statute may realistically be termed a fundamental constitutional decision; it makes constitutional law, just as does the Supreme Court in its decisions which update the Constitution of 1787 (and its amendments). No longer may it be said, as some are wont to do, that constitutional law is strictly a matter of judicial provenience. The Congress also makes constitutional law, as in 1890 when the Sherman Antitrust Act¹²⁶ was enacted, in 1946 with the promulgation of the Employment Act,¹²⁷ and in 1964 in the Civil Rights Act.¹²⁸ This is not to say that every congressional statute takes on the overtones of a constitutional amendment, but surely some do. Judicial acceptance of the new legislative posture perforce means that the remedy of those who disapprove is no longer in the Supreme Court, which no longer operates as an aristocratic censor of legislative programs (save as they touch in such areas as civil rights and civil liberties). We are back, thus, to *Munn v. Illinois*.¹²⁹ the political branches are dominant in a government which increasingly accepts affirmative responsibilities in socio-economic matters.¹³⁰

¹²⁵ COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 7 (1924).

¹²⁶ 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958).

¹²⁷ Employment Act of 1946, 60 Stat. 23, 15 U.S.C. §§ 1021-24 (1958).

¹²⁸ See McCLOSKEY, *ESSAYS IN CONSTITUTIONAL LAW* 183 (1957): "[T]he meaning of the Constitution is profoundly influenced by the actual course of legislative and executive action, . . . [and] constitutional interpretation is not a judicial monopoly."

¹²⁹ 94 U.S. (4 Otto) 113 (1877), in which the Court told a company complaining about price-setting that its remedy was legislative, not judicial.

¹³⁰ I have called this the rise of the "Positive State" in previous papers. Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399 (1962); Miller, *Technology, Social Change, and the Constitution*, 33 GEO. WASH. L. REV. 17 (1964); Miller, *The Public Interest Undefined*, 10 J. PUB. L. 184 (1961).

(3) Another constitutional aspect of the Civil Rights Act, as seen both in title VI and generally, is the other side of the separation-of-powers rubric: *cooperation* rather than *conflict* among the three branches of the national government. This is the little noted feature of shared governmental powers—that the officials of the three branches must cooperate. Their “warfare,” as Woodrow Wilson put it, “is fatal.”¹³¹ This is particularly important in an age of proliferating government. With respect to the judiciary and the President, it has been a long and rough road from the perhaps apocryphal sneer of President Jackson (“Chief Justice Marshall has made his decision, now let him enforce it”) to the employment by three modern Chief Executives of armed forces to enforce court orders.¹³² So, too, with Congress: after remaining quiescent from the immediate post-Civil War period to 1957, the national legislature finally has stirred itself sufficiently to enact into statutory law what the Supreme Court had (in part) interpreted into the Constitution. Cooperation, rather than conflict, seems to be the norm of action within the three branches. This may be seen specifically in one requirement of title VI.

(4) Section 602 of the Civil Rights Act provides in part:

In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.¹³³

What this means is that Congress intends to keep a watchful eye upon the administration of title VI. The requirement is similar to other statutes which require “laying before the legislature” certain administrative actions before they become valid.¹³⁴ The consequences are at least two-fold. First, by so intervening into the

¹³¹ WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1908).

¹³² On presidential power in this area, see Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C.L. REV. 117 (1958). See also Pollitt, *The President's Powers in Areas of Race Relations: An Exploration*, 39 N.C.L. REV. 238 (1961).

¹³³ 78 Stat. 252 (1964), 42 U.S.C.A. § 2000d-1 (1964).

¹³⁴ See Harris, *op. cit. supra* note 118.

administrative process Congress is helping to break down some of the boundaries between legislation and administration, and thus is chipping away at the underpinning of the historical separation of powers. Second, the requirement means that the recipient, actual or would-be, of federal financial assistance is in effect given another avenue of review of administrative action. For if Congress does not like a proposed action terminating or refusing to grant money, it can exercise an "item veto in fact" by passing a statute.¹³⁵ In addition, and perhaps of even more importance, it permits congressional committees to bring pressure to bear upon administrative officials, directly (as by requiring them to testify on the action) or indirectly (through ex parte communications to the administrator). The question, accordingly, may seriously be asked whether title VI does not accord too much "due process" to those receiving or asking for federal aid.

(5) At what point does due process become "undue"? The procedural safeguards in title VI run the gamut from attempted voluntary persuasion through administrative hearings and review to judicial review and finally to legislative review. All of these favor the *recipient* of or person seeking financial aid from the federal government. The *victim* of discrimination is given no such elaborate protection; in fact, the victim is not mentioned at all, in the statute or regulations, other than in the most general terms. Section 601 of the act provides that no person shall be excluded "from participation in" or "denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" because of his "race, color, or national origin." But he is not given a cause of action by the statute to force compliance. However, the regulations do permit complaints to be filed with "the responsible Department official or his designee."¹³⁶ An investigation is then to be made, hearings held if necessary, and administrative review within the department or agency effected. If an administrative finding is made that title VI has been violated, the order cutting off financial assistance cannot go into effect until the proposed order has been laid before the appropriate congressional committees for thirty days. Before the order can go into effect, finally, the recipient may seek judicial review.

¹³⁵ See Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962).

¹³⁶ 29 Fed. Reg. 16301 (1964).

What this means may be summed up as follows: First, the victim of discrimination must depend upon the officials of the Executive to protect him. To what extent this dependence will result in affirmative actions designed to effectuate the intent and purpose of title VI is problematical. The history of official discriminations visited upon Negroes does not give cause for optimism on that score. For example, the non-discrimination in employment clause mandatory in all federal contracts was for years ignored by federal procurement officers,¹³⁷ even in recent years, it has been honored more in the breach than in the observance. While there is evidence of a change in attitude in official circles, as seen in statutes and regulations, nevertheless compliance with title VI will depend in large part upon the zeal of lesser federal officials. By no means is it a self-evident proposition that the regulations implementing title VI will be assiduously administered. Whatever the regulations say, their effectiveness could be greatly reduced by a lackadaisical attitude by those charged with the responsibility of administration.

Second, even if the regulations are administered with zeal, the well-known snail-like pace of the public administration, compounded with legislative and judicial review, would seem to insure that the likelihood of actual termination of federal funds could be delayed for years, if not indefinitely.¹³⁸ This may be too pessimistic a view to take at this juncture, but surely the opportunity is there. Moreover, when the possibilities for delay are added to the additional fact that termination can apply to only the particular recipient found to be in violation of title VI and to only the particular program or activity in which noncompliance is found, it may readily be seen that the actual operative impact of title VI may be quite small. In other words, there can be no blanket—i.e., statewide—termination

¹³⁷ See Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955).

¹³⁸ However, it was reported in the *New York Times* that there has been a "collapse of a widely held view among Southern politicians and educators that the fund-withdrawal procedures under Title VI were too cumbersome to be effective." A way out of the too cumbersome procedure seems to be denial by the federal agency of "new annual grants" when there had been a failure "to make satisfactory efforts to desegregate." Accordingly, the text point of "undue process" in title VI may be unduly pessimistic, even though it should be noted that such annual reviews will call for aggressive investigation by the federal agency of all complaints. *N.Y. Times*, March 7, 1965, p. 30, col. 3.

of funds because of discrimination in, say, one school district, unless it is found that the state agency was responsible for local non-compliance.¹³⁹ What could develop, accordingly, in a case-by-case approach, in which the victims of discrimination would have to press in each locality receiving federal financing and, more, in each program or recipient within that locality.

When, then, is due process "undue"? The answer for title VI lies in the future. Of course, aggressive action by federal officials on a wide front could alter the picture substantially. But whether such action will be taken is not yet known. Nor, for that matter, is it known how many additional employees would be needed to insure full and effective compliance with title VI. The fears of some members of Congress—for example, Senator Richard Russell who called it the "genocide" provision¹⁴⁰—that title VI would work a tremendous change may not be borne out. The effectiveness, in short, of title VI depends on imponderables. In the meantime, recipients of federal financial assistance need have no fear about not being accorded due process. Whether the same thing can be said about the objects of discriminatory practices is another matter.

The victim of discrimination must rely upon the zeal of subordinate federal officials. He does not have an opportunity to get judicial review in the same manner as the recipient of federal aid. While mandamus probably would be available to force officials to act, in the event that they refused, say, to undertake an investigation,

¹³⁹ As pointed out in the *New York Times*, every state has signed an "assurance" of non-discrimination in education programs, although apparently there is some hope by state officials that "local option" will permit segregation in fact to take place. *Id.* at col. 2. Since the textual statement was written, it has become apparent that the U.S. Office of Education is pursuing an aggressive policy of enforcement of title VI. Thus, in a letter to Alabama's Superintendent of Schools, the U.S. Commissioner of Education, Francis Keppel, stated that Alabama's assurances of school desegregation are "not sufficient." *N.Y. Times*, April 11, 1965, p. 50, col. 1. See *N.Y. Times*, April 15, 1965, p. 18, col. 1, discussing a regional conference called to explain title VI to state officials of the South, in which an Assistant Secretary of Health, Education, and Welfare stated that a school district that did not submit an acceptable plan of desegregation by September 1965 would have its funds cut off. But see *Wall Street Journal*, Mar. 12, 1965, p. 1, col. 6, in which slow enforcement of title VI is seen, with some federal agencies being reluctant to do anything at all (*e.g.*, the Department of Agriculture and the Housing and Home Finance Agency).

¹⁴⁰ *Newsweek*, Aug. 19, 1963, p. 18.

this would entail a long and tortuous path.¹⁴¹ Furthermore, are the administrative remedies of the victim to be exhausted prior to any resort to court? Inevitably, accordingly, it would seem that the victim of discrimination, if it does take place, would have to resort to extrajudicial sanctions: publicity and political pressure.

(6) When the Civil Rights Commission recommended in 1963 that all federal expenditures be terminated in Mississippi, President Kennedy stated that he did not have the power to do so; he further stated that he thought it would be "probably unwise" for the President to have such a power.¹⁴² (As discussed above, the President does seem to have that power, even with President Kennedy's disclaimer, particularly in national defense areas.) But it was only a few months later that the first draft of the Civil Rights Act was sent to Congress by the Administration. In it was provision for permissive, not mandatory, employment of withholding of funds. As enacted, this was changed to a mandatory directive. The question that now presents itself is: if withholding expenditure is within the constitutional power of the President (and may even be his constitutional duty in instances of racial discrimination), what is the effect of the congressional mandate? Does it merely shore up an already existing power? Does it create new power? Does it mean that in areas other than those covered by the Civil Rights Act—*e.g.*, national defense—the President has now made the tacit admission and will be held to the position that he cannot impound funds? Such questions cannot be answered, save in broad generalities: In briefest terms, it may be suggested that the act leaves the President and Congress in the same basic position as they were before the act was promulgated; the relationships between President and Congress are essentially political and are to be solved by the operation of the political process, not by resort to legalistic arguments.¹⁴³

¹⁴¹ See DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 24.03 (1958).

¹⁴² See note 109 *supra*.

¹⁴³ A relevant question is this: where does the Civil Rights Act leave President Kennedy's Executive Order on housing? Senator John Sparkman called that order unconstitutional in the debate on the Civil Rights Act. Does the act supersede presidential power, leave it in exactly the same position as before, or buttress it? There are no ready answers, but the Civil Rights Commission has asserted the continuing constitutional validity of the order. See text accompanying note 149 *infra*.

(7) The constitutional power of Congress to enact title VI seems to be unassailable.¹⁴⁴

(8) Finally, there are uncertainties in title VI which make its full application difficult to forecast. Of particular relevance here is Point No. 6, above. Title VI expressly excepts contracts of "insurance or guaranty" from its provisions. The meaning of this is not at all clear, particularly since section 605 reads: "Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty."¹⁴⁵

From the debate on the floor of the Senate, this apparently means that such activities as FHA home mortgage insurance program, Federal Deposit Insurance Corporation programs, and the like, are excluded.¹⁴⁶ The Civil Rights Commission has so interpreted the statute.¹⁴⁷ However, President Kennedy's Executive Order No. 11063,¹⁴⁸ which prohibits discrimination in all federal housing programs, is still on the books. It provides in part that action will be taken to prevent discrimination in housing facilities the loans upon which are "insured, guaranteed, or otherwise secured by the credit of the federal government"; this action, it should be noted, is not to terminate the federal program. Agencies are to use "their good offices and to take other appropriate action permitted by law, including the institution of appropriate litigation, if required, to promote the abandonment of discriminatory practices."

¹⁴⁴ The power to spend includes the power to condition expenditures. See *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127 (1947). *Quaere*: is there a constitutional requirement of non-discrimination in appropriations and expenditures? See *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

¹⁴⁵ 78 Stat. 253 (1964), 42 U.S.C.A. § 2000d-4 (1964).

¹⁴⁶ For reproduction of some of the Senate debate, see CCH, *CIVIL RIGHTS ACT OF 1964, WITH EXPLANATION* 53-66 (1964). This is not to say, it should be noted, that statements on the floor of the Senate are necessarily controlling in the interpretation courts give to statutes. The process of statutory interpretation is much more complex than that, and the judges have a creative role in that process. They are not necessarily bound by what often are self-serving statements made by individual congressmen during floor debate. On statutory interpretation, see *NEWMAN & SURREY, LEGISLATION: CASES AND MATERIALS* 642-712 (1955).

¹⁴⁷ See U.S. COMM'N OF CIVIL RIGHTS, *CIVIL RIGHTS UNDER FEDERAL PROGRAMS: AN ANALYSIS OF TITLE VI*, at 13 (Special Publication No. 1, Jan. 1965).

¹⁴⁸ 27 Fed. Reg. 11527 (1962). See Sloane & Freedman, *The Executive Order on Housing: The Constitutional Basis for What It Fails To Do*, 9 How. L.J. 1 (1963).

The meaning of the statute and the executive order, when juxtaposed, is unclear. What apparently can be said is this: to the extent that the statute conflicts (if it does) with the order, then the statute prevails.¹⁴⁹ But if there is no conflict, then it is at least arguable and probably tenable that the order continues in full force and effect. It complements the statute, in other words. (This does not mean that the order has had any important impact; a recent survey by the *Wall Street Journal* concluded that it had not.)¹⁵⁰

The "contract of insurance or guaranty" exception may, finally, be a "hidden joker" in title VI, which tends further to reduce its effectiveness. According to Senator John Sparkman, it means that title VI cannot apply to banks insured by the Federal Deposit Insurance Corporation, savings and loan associations insured under the Federal Savings and Loan Corporation, the Federal Housing Administration, the Veterans Administration, and other insurance and guarantee programs in agriculture and elsewhere.¹⁵¹ If this be valid, then most of the private housing in the nation does not come under title VI, even though there may be a federal loan or guaranty present.

May, however, the "contract of insurance or guaranty" proviso be constitutionally challenged? Could it not persuasively be argued that it is now the command of the Constitution, for state governments and the federal government alike, that no official action can be taken or funds disbursed which actively permits or condones discrimination on the basis of race, color, creed, or national origin? The series of Supreme Court cases beginning with *Brown v. Board of Educ.*¹⁵² and *Bolling v. Sharpe*¹⁵³ in 1954 and culminating in the "sit-in" cases of 1964,¹⁵⁴ plus the *Simkins* case discussed above, would seem to make such a principle clear beyond peradventure.¹⁵⁵

¹⁴⁹ See HOUSE COMM. ON GOV'T OPERATIONS, 85TH CONG., 1ST SESS., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF THE USE OF PRESIDENTIAL POWERS 9 n.19 (Comm. Print 1957), stating that it is well settled that "an Executive Order, or any other Executive action, whether by formal order or by regulation, cannot contravene an Act of Congress that is constitutional." While this is the "black-letter" statement, surely the actuality is far more complex, as the text of the present article seeks to illustrate.

¹⁵⁰ *Wall Street Journal*, July 16, 1964, p. 1.

¹⁵¹ See CCH, CIVIL RIGHTS ACT OF 1964, WITH EXPLANATION 53-66 (1964).

¹⁵² 347 U.S. 483 (1954).

¹⁵³ 347 U.S. 497 (1954).

¹⁵⁴ E.g., *Bell v. Maryland*, 378 U.S. 226 (1964).

¹⁵⁵ The textual statement suggests that a constitutional duty devolves

This is not to say that private individuals cannot discriminate, but it is to say that neither the federal government nor the states can engage in programs that have that effect. Accordingly, it may well be that the "hidden joker" is itself unconstitutional.¹⁵⁶

III. CONCLUSION

I have sought to set forth some of the complexities inherent in the determination of any constitutional question, with emphasis upon the issue of whether the President may impound appropriated funds. Some attention has been accorded title VI of the Civil Rights Act of 1964, even though extensive discussion would be premature. One main conclusion which emerges from what has been said above is that by slow accretion the Presidency (and the public administration generally) is becoming the dominant branch of the national government. Many reasons exist for this development within the framework of the Constitution of 1787.¹⁵⁷ The "nationalization" of racial questions, which began in 1954 with the Supreme Court's decision in *Brown* and which culminated in 1964 in the Civil Rights Act, had an even earlier precursor in executive action. While the focus has been mainly on the Court and Congress, it should not be forgotten that President F. D. Roosevelt's executive order¹⁵⁸ in 1942 on non-discrimination in employment under war contracts was the first important federal governmental action since Reconstruction days to attempt to redress the position of disadvantaged American citizens.¹⁵⁹ This is just another illustration of the growing importance of the Executive in the American constitutional order.

upon the Executive to "take care" that the commands of the Constitution are carried out. While the concept doubtless cannot be pressed very far at this time, it can nevertheless be said that an emerging concept of duty seems to be visible in recent events, particularly in the matter of racial segregation. Cf. Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399 (1962). See the statement in a paid advertisement in the *New York Times* by several dozen members of faculties of New England universities, implying that the President is under a duty to protect the exercise of constitutional rights in advance of their denial; the context of the statement was the racial crisis at Selma, Alabama. N.Y. Times, March 15, 1965, p. 34, cols. 5-8.

¹⁵⁶ Further discussion is beyond the scope of this article. *Quaere*: is there a presidential duty *not* to obey the statutory mandate excepting contracts of insurance and guaranty?

¹⁵⁷ See Miller, *Technology, Social Change, and the Constitution*, 33 GEO. WASH. L. REV. 17 (1964).

¹⁵⁸ Exec. Order No. 8802, 6 Fed. Reg. 3109 (1942).

¹⁵⁹ For discussion, see RUCHAMES, RACE, JOBS, AND POLITICS (1953).