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

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March 10, 1982

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To the President of the Senate and the
Speaker of the House of Representatives

On February 5, 1982, the President's eighth special message for fiscal year 1982 was transmitted to the Congress pursuant to the Impoundment Control Act of 1974. The special message proposes 22 rescissions of budget authority totalling $10,655 million, 14 new deferrals totalling $2,334 million, and revisions to seven previously reported deferrals which increase the amounts deferred by $768 million.

At the request of Congressman Peter A. Peyser, we examined an impoundment of Library Services and Construction Act funds which was later submitted by the President in his eighth special message as rescission proposal R82-17. In an opinion dated February 5, 1982, we concluded that the Impoundment Control Act does not provide authority for the impoundment of funds under titles I and III of the Libraries Act.

Our conclusion was based on application to the Libraries Act of the so-called "fourth disclaimer" of the Impoundment Control Act, 31 U.S.C. §1400(4), which provides that:

> "Nothing contained in this Act or in any amendments made by this Act, shall be construed as--
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> * * * *
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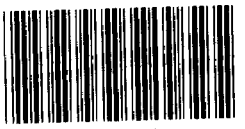
> "(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."



Our opinion involving the Libraries Act is consistent with other opinions issued by our Office between February 19, 1981, and December 31, 1981. These opinions interpret the fourth disclaimer's reference to laws requiring the obligation of budget authority as including those laws that evidence a statutory scheme to require use of budget authority though not expressly prohibiting impoundment. Following issuance of our February 5 Libraries Act opinion, we met with Office of Management and Budget staff who informed us that they believed the fourth disclaimer applies only to statutory provisions that expressly prohibit impoundment.

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The scope of the fourth disclaimer on this point is not addressed explicitly in its language nor in the legislative history of the Impoundment Control Act. In fact, we ourselves initially characterized the fourth disclaimer as a "transitional" provision, and like OMB, might have confined its application to very limited circumstances. We anticipated applying the fourth disclaimer only with respect to laws enacted prior to the Impoundment Control Act in response to previous impoundments.

A number of recent court decisions have addressed the meaning of the fourth disclaimer. Their rejection of the notion that the disclaimer was merely "transitional" caused us to reconsider our initial position. OMB argues that none of these decisions, save one which OMB believes supports their position, squarely addresses the issue confronting us--does the Impoundment Control Act provide authority to the President to impound funds that are subject to another statute which (1) does not expressly prohibit the President from invoking that authority, but (2) by its terms requires their obligation or expenditure. Our analysis of the Impoundment Control Act's fourth disclaimer, its legislative history, and the legal rationale advanced in the recent court cases, persuaded us that OMB's and our initial position regarding the scope and importance of the fourth disclaimer are incorrect. We concluded that the fourth disclaimer limits whatever authority would otherwise inure to the President under the Impoundment Control Act to impound funds made available by mandatory statutes. The reach of the disclaimer extends to all mandatory spending statutes, regardless of when they were passed or whether they contain an express prohibition against impoundment.

The Office of Management and Budget disagrees with our current interpretation of the fourth disclaimer as expressed in our most recent opinion--our letter to Representative Peter A. Peyser, B-205053(2), February 5, 1982, concerning the impoundment of funds under the Library Services and Construction Act. In view of OMB's disagreement, and since the meaning of the fourth disclaimer has yet to be fully articulated, we find it appropriate to address the matter in detail. The issues involved are complex and may well require legislative action to avoid extensive litigation.

A detailed analysis of the fourth disclaimer (Enclosure I), and a listing of prior opinions by our Office reflecting our current interpretation of the fourth disclaimer (Enclosure II) are enclosed.

We will cover in a separate report an examination of the individual impoundments reported in the President's eighth special message.

for Milton J. Socolar
Comptroller General
of the United States

Enclosures

ANALYSIS OF THE FOURTH DISCLAIMER

I. BACKGROUND AND SUMMARY OF CONCLUSIONS

The Impoundment Control Act of 1974, 31 U.S.C. §1400 et seq., was enacted against a background of intense controversy between the executive branch and the Congress over the impoundment practices of the Nixon Administration. Presidents had long asserted authority to impound funds and had exercised such authority from time to time. However, the practice of impoundment took a quantum leap under President Nixon. 1/

While many impoundments proceeded without judicial challenge, a number of others were contested in the courts. The resulting judicial decisions did not definitively resolve the scope of executive authority to impound. Rather, these decisions approached impoundment issues in terms of whether the particular statutory scheme under review mandated full spending, thereby precluding impoundment, or whether it permitted the executive sufficient spending discretion to accommodate impoundments. See, e.g., the Annotation, "Executive Impoundment of Funds," 27 ALR Fed. 214, 225 (1976):

> "* * * the judicial response [to impoundment cases] has been to treat each case on its own merits. As the authors noted in the article entitled 'Presidential Impoundment Part II: Judicial and Legislative Responses,' 63 Georgetown LJ 149 at p 150, '[T]he Congress must prove, by evidence beyond the simple enactment and funding of a program, that it meant to require the expenditure of a particular appropriation. Each case is sui generis; the compulsion upon the President to implement the objectives and full scope of a program depends upon the presence of a mandate in each statute

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1/ For a general discussion of impoundments during the Nixon Administration, see Fisher, Presidential Spending Power (Princeton University Press, 1975), at chapter 7.

> involved, or in its legislative history. Opponents of impoundment cannot compel the Executive to act unless they can demonstrate that in the particular statute before the court, the Congress sought to deny the Executive a right to reduce spending. Only such a showing overcomes the implicit presumption that the Executive acts within the law whenever it impounds.'"

The great majority of these decisions ruled against the executive branch claims of impoundment authority on the basis that the statutes under consideration provided for mandatory use of budget authority. Thus, while the pre-Act judicial decisions did not resolve the scope of the President's authority to impound discretionary funds, they did hold consistently that the President could not impound in a manner that would violate statutory requirements to use budget authority.

The Impoundment Control Act was enacted in response to the proliferating impoundments, and to provide an orderly mechanism for the legislative branch to respond to executive branch impoundments. The Act requires that all impounded funds be reported to the Congress and be released on the basis of prescribed congressional direction. Funds impounded for permanent withdrawal must be released if Congress fails to complete action on the requisite legislation within 45 legislative days. Funds impounded temporarily must be released if either House of Congress disapproves. However, the so-called "fourth disclaimer" of the Impoundment Control Act, 31 U.S.C. §1400(4), provides that:

> "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as--
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> * * * *
>
> "(4)superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."

Our Office has not heretofore satisfactorily resolved the precise effect of the fourth disclaimer. We have referred to it as a "transitional" provision, one that we surmised applied only to laws enacted prior to the Impoundment Control Act in response

to previous impoundments. We recommended repeal of the disclaimer section on this basis. 2/

In April of 1980 President Carter deferred budget authority made available under provisions of the Federal-Aid Highway Act. The deferral gave rise to a host of lawsuits. A number of Federal district courts rejected the notion that the fourth disclaimer was merely transitional. Instead, they held that it precluded the President's impounding the Highway Act budget authority because the statutory scheme of the Highway Act constituted the very type of spending mandate covered by the fourth disclaimer. These courts relied heaviliy on a pre-Impoundment Control Act court of appeals decision that likewise had construed the Highway Act as a mandate to spend. None of the decisions provide any support for the view that the fourth disclaimer is merely a transitional provision. (See parts II and III of this enclosure.)

The court rulings in the highway cases prompted us to review the entire matter. We concluded that the fourth disclaimer has continuing vitality and precludes the President's using the Impoundment Control Act in a manner inconsistent with mandatory spending statutes. 3/ Essentially, our interpretation of the fourth disclaimer preserves the distinction recognized in the pre-Act judicial decisions between mandatory and permissive spending statutes. Beginning in February 1981, we have applied this interpretation of the fourth disclaimer to eight impoundments proposed by the executive branch. See Enclosure II.

The Office of Management and Budget has questioned the legal basis for our current interpretation of the fourth disclaimer in the context of our most recent opinion--our letter to Representative Peter A. Peyser, B-205053(2), February 5, 1982, concerning the impoundment of funds under the Library Services and Construction Act. In view of OMB's disagreement, and since the meaning of the fourth disclaimer has yet to be fully articulated, we find it appropriate to address the matter in detail.

2/ See our report to Congress captioned "Review of the Impoundment Control Act of 1974 After Two Years," B-115398, June 3, 1977, at page 10.

3/ For purposes of this discussion, we use the term "mandatory spending statutes" to describe statutes that require the expenditure or obligation of budget authority. For example, the Federal-Aid Highway Act program discussed hereafter operates on the basis of contract authority.

Our basic conclusions and the reasons therefor, in summary form, are as follows:

--The weight of judicial authority to date (consisting of the Highway Act cases and one case under the Comprehensive Employment and Training Act) supports our current interpretation of the fourth disclaimer. The Highway Act decisions appear to us to be apposite, although they are construed by OMB as applicable only with respect to acts expressly prohibiting impoundment. All but one of the decisions clearly treat the overall statutory scheme of the Highway Act, rather than a "sense of Congress" statement in that Act that then existing law prohibited impoundment, as the mandate for purposes of the fourth disclaimer. A district court decision concerning the Comprehensive Employment and Training Act addresses a statute that neither requires the obligation of funds nor prohibits impoundments. It contains dictum that suggests agreement with OMB's interpretation of the fourth disclaimer, i.e., the disclaimer applies only to those statutes that expressly prohibit impoundment. However, this language is notably absent from the court of appeals opinion. On the contrary, dictum in the court of appeals opinion suggests the interpretation we have adopted. (See part III of this Enclosure.)

--While the legislative history of the fourth disclaimer is inconclusive, careful analysis of the language of the fourth disclaimer, in conjunction with the disclaimer section as a whole, supports our current interpretation. (See part IV.)

--Our current interpretation of the fourth disclaimer invokes the mandatory versus permissive test applied by the courts, and also previously recognized by the executive branch, in considering the legality of impoundments prior to enactment of the Impoundment Control Act. (See part V.)

--Our current interpretation of the fourth disclaimer does not carve out wholesale exemptions to the categories of funds that may be impounded under the Impoundment Control Act. To the extent it does create exemptions, the only limit on executive branch flexibility is that the executive branch may not violate specific statutory requirements while it seeks to have Congress change those requirements.

--Even if the fourth disclaimer did not exist--the practical consequence of OMB's position--there would be no legal basis for automatically giving the Impoundment Control Act precedence over every statutory spending program. A number of mandatory programs might still be held, by resort to rules of

statutory construction, to take precedence over the Impoundment Control Act. In the final analysis, the fourth disclaimer is nothing more than a rule of statutory construction, providing that no authority in the Impoundment Control Act can be used to overcome limitations upon that authority found in other statutes. (See part VI.)

A detailed discussion of each of these conclusions follows.

II. FEDERAL-AID HIGHWAY ACT LITIGATION

On April 16, 1980, President Carter proposed to defer (D80-61) $1.15 billion in fiscal year 1980 obligational authority for grants-in-aid to the States under the Federal-Aid Highway Act. Several States sought to enjoin the Secretary of Transportation from refusing to make available the full amount of the Federal-aid highway funds legally apportioned to them for fiscal year 1980, pursuant to the Highway Act.

The Highway Act established a system of grants-in-aid to assist the States in constructing interstate highways in the Federal-aid highway system. The Act directs the Secretary to apportion the amount authorized by Congress among the States according to the formula set forth at 23 U.S.C. 104(b).

Plans, specifications, and estimates are submitted to the Federal Highway Administration for approval. Approval of an individual project creates a contractual obligation of the United States to pay the Federal share of the cost of constructing the project. The State is reimbursed for expenditures from liquidating appropriations provided in annual appropriations acts.

Additionally, Congress has set an "obligational ceiling" in the annual Department of Transportation Appropriation Act for each fiscal year since 1976 on the total amount of apportioned budget authority which may be spent by the States in each fiscal year. This "obligational ceiling" limits the rate of obligation of authorized funds nationwide, and this ceiling, rather than the total of the States' unused apportionments, becomes a constraint on the national program.

The new authorization for fiscal year 1980, together with "carryovers" from prior years, established a total available authorization level of $13.6 billion. The fiscal year 1980

obligation ceiling imposed by Congress in section 311 of the 1980 Department of Transportation Appropriation Act, Pub. L. 96-311 (November 30, 1979), was $8.75 billion.

On April 16, 1980, President Carter submitted his seventh special message pursuant to the Impoundment Control Act, proposing to defer $1.15 billion of the FY 1980 obligational authority (D80-61). The Secretary announced that only $7.6 billion (instead of an obligational ceiling of $8.75 billion previously set by Congress) would be available for allocation to all the States in fiscal year 1980.

Twelve lawsuits were filed against the Secretary of Transportation. Five district courts issued decisions on the legality of the President's deferral proposal. Four of the district courts, in suits brought by Maine, New Mexico, Arkansas, and Nebraska, held in varying degrees that the impoundment was illegal. 4/ Three of these cases are discussed below.

State of Maine v. Goldschmidt, 494 F. Supp. 93 (D.Me. 1980).

In addressing the interplay between the Highway Act and the Impoundment Control Act, the court, citing State Highway Commission v. Volpe, 479 F.2d 1099 (8th Cir. 1973), stated that:

> "* * * There is no dispute that the Highway Act itself does not provide the President with [the authority to defer obligational authority made available to the States by Congress]. * * * Volpe unequivocally established that, in the absence of other statutory authority, the President may not defer authority to obligate highway funds previously apportioned to the States under

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4/ The District Court in State of Alaska v. Goldschmidt, No. A80-140 Civil, May 21, 1980, summarily concluded that the Impoundment Control Act authorized the deferral. In granting summary judgment for the defendant, the court did not address the effect of the fourth disclaimer. The district court decisions became academic when Congress subsequently disapproved the deferral in the Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96-304, 94 Stat. 857, 903 (July 8, 1980).

> the Highway Act for reasons related to the status of the economy and the need to control inflationary pressures." 494 F. Supp. at 97.

The Secretary of Transportation argued that the Impoundment Control Act provided an independent statutory basis for the President's action. Maine responded that the disclaimer section of the Act precluded its application to the Highway Act. The court agreed with Maine. 494 F. Supp. at 97, 98. The court stated that the plain and unambiguous statutory language makes clear the congressional intent that the Impoundment Control Act does not override any other act which mandates the obligation or expenditure of funds. Since the Highway Act is such a law, the court concluded, citing Volpe, that the Impoundment Control Act did not authorize the deferral of Highway Act funds. 494 F. Supp. at 98-99.

The court's analysis of four issues presented by the Secretary is particularly instructive.

The Secretary first argued that the Highway Act does not fall within the fourth disclaimer because while the Act requires the apportionment of obligational authority, it does not mandate the obligation of budget authority through the approval of highway projects. The court, again citing Volpe, rejected the Secretary's argument. Before enactment of the Impoundment Control Act, the court in Volpe at 479 F.2d 1016 held that the Highway Act required that apportioned funds not be withheld from obligation for purposes unrelated to the highway program. After passage of the Impoundment Control Act, the court in the Maine case applied the fourth disclaimer on the basis that mandatory apportionment was tantamount to mandatory obligation or expenditure.

A second argument made by the Secretary, which was rejected by the Maine court, was that the fourth disclaimer applies only to so-called entitlement authority, not to other forms of budget authority. Entitlement authority is authority derived from law under which persons have a statutory right to receive Government payments. The category of spending authority referred to by the Secretary is described in 31 U.S.C. §1351(c)(2) as the authority to

> "* * * make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriation Acts, to any person or government if * * * the United States is obligated to make such payments to persons or governments who meet the requirements established by such law."

The court held that the Secretary's argument was undercut by the substantial difference between the language of the fourth disclaimer and section 1351. 494 F. Supp. at 99.

The Secretary's third argument was that the disclaimer was a temporary measure. As support, the Secretary cited our 1977 report in which we described the disclaimer section as a "transitional provision whose objectives have been realized" and recommended its repeal. The court noted that Congress did not act on our recommendation, and that our recommendation was based, in part, on our observation that "the President generally is complying with those laws requiring the expenditure of funds." It concluded by stating that the President's compliance with laws requiring the expenditure of funds was precisely the question before it. 494 F. Supp. at 99, 100, and footnote 10.

The Secretary's final argument was based on our decision, 54 Comp. Gen. 453 (1974), that the Impoundment Control Act provides independent statutory authority to impound. The court pointed out that, assuming arguendo that our interpretation was correct, it did not address the fourth disclaimer or offer any interpretation or explanation of its effect on laws which prohibit executive impoundments. Furthermore, the court stated that there has been no indication that Congress has even been called upon to consider the implications of the fourth disclaimer. 494 F. Supp. at 100.

State of Arkansas v. Goldschmidt, 492 F. Supp. 621 (E.D.Ark. 1980).

The Arkansas court disagreed with our 1974 opinion, discussed above, that the Impoundment Control Act provides an independent statutory basis to impound. The court's disagreement was based, in large measure, on the language of the disclaimer section. 492 F. Supp. at 626. Furthermore, it stated, at 492 F. Supp. 628, that:

> "[E]ven if the [Impoundment Control Act] independently authorizes presidential impoundment, the language of the [Highway Act] * * * makes it clear that [Highway Act] budget authority is subject to the disclaimer of 31 U.S.C. §1400(4). The Court therefore concludes that any authority which the [Impoundment Control Act] may be construed to have given the President to defer budget authority was not intended to, and may not, reach [Highway Act] budget authority."

State of New Mexico v. Goldschmidt, Civ. No. 80-247-HB (May 22, 1980).

The Secretary argued that the Impoundment Control Act gave the President impoundment authority. The State argued that the fourth disclaimer is an exception to that authority which precludes its application to the Highway Act. The Court stated that:

> "* * * a literal interpretation of the [fourth disclaimer] would seem to be that the Impoundment Control Act does not change any other act which now provides for the mandatory obligation of expenditure of funds."

The Court then proceeded with an analysis of the Highway Act. It cited section 101(c) of the Act which states that:

> "It is the sense of Congress that under existing law no part of any sums authorized to be appropriated for expenditure upon any Federal-aid system which has been apportioned pursuant to the provisions of this title shall be impounded or withheld from obligation * * * by any officer or employee in the executive branch of the Federal Government * * *."

The Court then cited with approval the interpretation of section 101(c) contained in State Highway Commission of Missouri v. Volpe, 479 F.2d 1099, 1116 (8th Cir. 1973), that "Section 101(c) merely corroborates what, as pointed out earlier, the statute already provides - that apportioned funds are not to be withheld from obligation for purposes totally unrelated to the highway program." (Emphasis in original.)

The Secretary, in asserting that the Impoundment Control Act provided authority to withhold highway funds, argued that Volpe held only that the Highway Act did not authorize impoundments, and not that the Secretary was mandated to spend the funds appropriated. Therefore, argued the Secretary, since the Highway Act does not contain the words "required to obligate" and Volpe did not hold that it impliedly contains such a provision, the fourth disclaimer does not apply to the Highway Act.

The court characterized the Secretary's argument as "essentially a semantic one which ignores the reasoning of the Eighth

Circuit and the practical effects of its holding." The court went on to say that Volpe explicitly accepts the proposition that appropriation acts are not generally mandatory and that the Secretary would have the authority to spend the funds in his own discretion unless Congress had legislated to the contrary. It concluded that the Congress had so legislated in the Highway Act.

The court then addressed the Secretary's argument that even if the Highway Act requires the expenditure of funds, the fourth disclaimer was not meant to apply to the type of budget authority created by the Highway Act. The court rejected the notion that the fourth disclaimer applied only to entitlement authority; it also concluded that the disclaimer section was not transitional. The court stated that the disclaimer section was intended to apply to all acts mandating the expenditure of funds, and that Congress' failure to repeal the disclaimer section indicated its continuing vitality.

III. ANALYSIS OF THE HIGHWAY ACT DECISIONS AND OTHER DECISIONS CONSTRUING THE FOURTH DISCLAIMER

The decisions most relevant to the scope of the fourth disclaimer are those discussed in detail above. All addressed impoundments under the Federal-Aid Highway Act, and all but one held that the fourth disclaimer precluded the Highway Act deferral.

The Office of Management and Budget dismisses the precedential value of the Highway Act cases since it believes that section 101(c) of the Highway Act contains an express prohibition against impoundment, and that the courts relied upon this prohibition to conclude that the President could not invoke his authority under the Impoundment Control Act.

Section 101(c) is a "sense of Congress" statement "that under existing law" Highway Act funds shall not be impounded. It does not by its terms constitute an affirmative prohibition against impoundment, nor have the courts treated it as such. In contrast to the position taken by OMB, the executive branch argued in the Highway Act impoundment cases that this language was merely "precatory" and, therefore, was not covered by the fourth disclaimer of the Impoundment Control Act. Indeed, the courts did not rely on section 101(c) as the basis for concluding that the Highway Act is a mandatory spending statute.

As noted previously, the 1980 district court decisions essentially followed the pre-Impoundment Control Act decision in State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973), in construing the Highway Act. The Volpe decision clearly did not place primary reliance on the "sense of Congress" language in section 101(c) of the Highway Act. Rather, the court clearly relied upon the statutory scheme of the Highway Act as a whole in arriving at its conclusion that the Act constituted a mandate to spend. It viewed section 101(c) as merely providing further evidence of the mandatory effect of the statutory scheme as a whole:

> "Thus, we find Section 101(c) merely corroborates what, as was pointed out earlier, the statute as a whole already provides--that apportioned funds are not to be withheld from obligation for purposes totally unrelated to the highway program." 479 F.2d at 1116 (emphasis in original.)

In this regard, the Volpe court referred to the following statement from a House report (H.R. Rep. No. 91-1554) on 1970 amendments to the Highway Act:

> "The withholding of highway trust funds as an anti-inflationary measure is a clear violation of the intent of the Congress as expressed in section 15 of the Federal-Aid Highway Act of 1968 * * *." 479 F.2d at 1116 (emphasis supplied).

The decision in the 1980 Highway Act case of State of New Mexico v. Goldschmidt, Civ. No. 80-247 (May 22, 1980), reflects the same approach in construing the "sense of Congress" language of section 101(c) of the Highway Act. Memorandum op. at pp. 7-8. The court relies on the legislative history of section 101(c), also discussed in Volpe, to the effect that the "sense of Congress" language was not intended as a new prohibition against impoundment, but reflected the congressional understanding that impoundment was precluded by operation of the substantive provisions of the Highway Act already in effect when section 101(c) was enacted. The New Mexico court also noted that in 1973, following the court of appeals decision in Volpe, Congress rejected an amendment to the Highway Act which would have provided an affirmative prohibition against impoundment on the basis that such a prohibition was unnecessary.

OMB asserts that the only case that addresses the application of the fourth disclaimer to a statute that does not contain an express prohibition against impoundment is Fontaine v. Donovan, Civ. No. 81-0789 (D.D.C., May 21, 1981), aff'd sub nom. West Central Missouri Development Corp. v. Donovan, 659 F.2d 199 (D.C. Cir. 1981). This case held that executive branch deferrals of funds for programs authorized by the Comprehensive Employment and Training Act (CETA) were proper under the Impoundment Control Act. In rejecting plaintiffs' contention that the fourth disclaimer precluded the deferrals--one of many arguments against the deferral raised in the case--the court observed:

> "* * * Not only does the legislative history show that the disclaimer applied only to statutes such as the Federal-Aid Highway Act, 23 U.S.C. §101(c) (1976 ed.), which affirmatively prohibit impoundment, see 120 Cong. Rec. 20465 (1974) (remarks of Senator Ervin), but in the absence of such prohibition in the appropriation or authorization statutes, the Comptroller General, Congress and the President have treated the ICA [Impoundment Control Act] as adequate and independent authority for deferrals in almost 500 cases since the ICA was enacted in 1974. * * *" Memorandum op. at p. 14.

This statement, standing alone, suggests the court believed that the Impoundment Control Act provides authority to impound unless the relevant spending statute contains an express impoundment prohibition. But the portions of the district court opinion immediately preceeding the above-quoted statement first undertake to analyze the CETA statute as a whole, and then conclude on the basis of this analysis that the CETA statute does not constitute a mandate to spend. Thus it is by no means clear that the district court treated its interpretation of the fourth disclaimer (as opposed to its construction of the CETA statute as a whole) as dispositive on the applicablity of the Impoundment Control Act.

In any event, the court of appeals decision in this case, while affirming "the result of the district court, generally for the reasons stated in its May 21 opinion," 659 F.2d at 201, gives no indication of adopting the limited interpretation of the fourth disclaimer. This opinion states, 659 F.2d at 201-202:

> "* * * We reject appellants' claim that the 1978 Comprehensive Employment and Training Act, which was enacted after the Impoundment Control Act, constitutes a mandatory spending statute of the sort envisioned in 31 U.S.C. §1400(4) of the ICA. There is no provision in CETA specifically barring deferral of budget authority or requiring a particular level of spending, much less referring to the previously enacted ICA. Nor does the structure of CETA imply an inflexible command to spend. * * *" (Emphasis supplied.)

In sum, the clear majority of judicial statements to date on the fourth disclaimer tend to support our current interpretation. Any implication of a contrary view in the district court opinion in Fontaine would appear to be dictum and, in any event, apparently was not adopted by the court of appeals.

IV. LEGISLATIVE HISTORY

The only specific discussion of the fourth disclaimer in the legislative history of the Impoundment Control Act is the following statement by Senator Ervin during Senate consideration of the conference report on the Act:

> "A disclaimer section directs that nothing in the impoundment title should be construed as ratifying or approving any past or present impoundment, affecting the claims or defenses of any party to litigation concerning any impoundment, or asserting or conceding constitutional powers or limitations of either the Congress or the President. The disclaimer also disavows any intention by Congress to supersede any law which requires the mandatory obligation of budget authority, since several such statutes have been enacted in response to the wholesale impoundment of funds appropriated for specific programs. 120 Cong. Rec. 20465 (1974) (emphasis supplied).

We initially regarded the underscored sentence as support for the view that the fourth disclaimer was intended to cover only anti-impoundment statutes enacted in response to pre-Act impoundments. However, Senator Ervin's statement is ambiguous. While the "several such statutes" to which he refers are specific anti-impoundment provisions, it is not clear that Senator Ervin viewed the fourth disclaimer as applying exclusively to these statutes. In the same sentence, Senator Ervin also described the fourth disclaimer as covering "any law which requires the mandatory obligation of budget authority * * *" (emphasis supplied). Thus Senator Ervin's statement is inconclusive.

There are other indicia of congressional intent with regard to the fourth disclaimer which suggest a broader effect. First, the language of the fourth disclaimer does not limit its application to pre-Act statutes or other statutes which were enacted specifically to prohibit impoundments. The fourth disclaimer applies by its terms to "any provision of law which requires the obligation of budget authority or the making of outlays thereunder." Second, the other disclaimer provisions are relevant in interpreting the fourth disclaimer. The other disclaimers provide that nothing contained in the Impoundment Control Act or any amendments made by it shall be construed as--

> "(1) asserting or conceding the constitutional powers or limitations of either the Congress or the President;
>
> "(2) ratifying or approving any impoundment heretofore or hereafter executed or approved by the President or any other Federal officer or employee, except insofar as pursuant to statutory authorization then in effect; [or]
>
> "(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment * * *."

The second and third disclaimers, quoted above, are particularly instructive. Each clearly contemplates that issues could arise after enactment of the Impoundment Control Act concerning

the President's authority to impound under particular programs. 5/ If the limited interpretation of the fourth disclaimer applies only to pre-Act statutes that expressly prohibit impoundment, it is difficult to understand what purpose the second and third disclaimers would serve. The second and third disclaimers have more meaning if the fourth disclaimer is interpreted as preserving the distinction between permissive and mandatory spending statutes developed in pre-Act judicial decisions. In other words, the Impoundment Control Act is not to be construed as sanctioning impoundments which would be inconsistent with mandatory spending statutes such as those covered by the pre-Act decisions. By virtue of the second and third disclaimers, issues concerning whether particular statutory programs constitute such mandates to spend are not to be preempted by the Act.

V. APPLYING THE MANDATORY VERSUS PERMISSIVE TEST

The weight of judicial authority to date on the scope of the fourth disclaimer supports our interpretation that the disclaimer applies to mandatory spending statutes without regard to express prohibitions against impoundments. This raises the question as to where the line is to be drawn in distinguishing between "permissive" and "mandatory" statutes. OMB is concerned that our February 5, 1982, opinion to Representative Peyser on the Library Services and Construction Act (LSCA) suggests that any statute using the word "shall" will be viewed as mandating full spending and precluding impoundment.

This misconstrues our prior opinions applying the mandatory versus permissive distinction. As is clear from our February 5 opinion on the LSCA and our other opinions which have construed statutes as mandatory, the relevant statute must be reviewed as

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5/ The second disclaimer specifically extends to impoundments "hereafter executed or approved * * *." The third disclaimer does not indicate by its terms whether it applies to past, pending, and/or future litigation. However, Senator Ervin indicated that future litigation was contemplated since he noted during Senate consideration of the conference report that the Comptroller General's authority to sue to enforce the provisions of the Act "is not intended to infringe upon the right of any other party to initiate litigation." 120 Cong. Rec. 20465 (1974).

a whole to ascertain congressional intent. This is precisely the approach taken in the pre-Impoundment Control Act court decisions and in the post-Act highway decisions which consistently eschewed reliance on the word "shall," standing alone.

It is significant to note that prior to enactment of the Impoundment Control Act, key officials in the executive branch applied the very same mandatory versus permissive spending test in considering the legality of impoundments. In a memorandum dated December 1, 1969, on the subject of the President's authority to impound Federal impact-aid funds, the Honorable William H. Rehnquist, then Assistant Attorney General for the Office of Legal Counsel, observed:

> "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent. There is, of course, no question that an appropriation act permits but does not require the executive branch to spend funds. See 42 Ops. A. G. No. 32, p. 4 (1967). But this is basically a rule of construction, and does not meet the question whether the President has authority to refuse to spend where the appropriation act or the substantive legislation, fairly construed, require such action."

The December 1 memorandum concluded that, in view of the mandatory nature of the statutory scheme, the President lacked authority to impound impact-aid funds. A subsequent memorandum by Assistant Attorney General Rehnquist, dated December 19, 1969, considered the scope of the President's authority to impound in the context of several education programs. Again, the crucial consideration was whether the relevant statutory scheme constituted a mandate to spend the full amounts available or conferred spending discretion. While recognizing that some of the statutes conferred broad spending discretion, the December 19 memorandum also described the essential elements of certain statutory programs which appeared mandatory:

> "On the other hand, substantially all sizeable Office of Education programs do not involve such broad grants of

> discretion to the agency. They are formula grant programs, in which the statute provides for the allotment or apportionment of the funds appropriated for the program among the States on the basis of population or some other mathematical criteria. Typically, the substantive legislation provides for submission by State authorities of a plan for the use of the funds. If the Commissioner of Education determines that the plan meets the statutory criteria, he must approve it, and the State becomes entitled to its share of the appropriation. There is usually also provision for judicial review of a disapproval of the plan or of action to withhold or terminate assistance on grounds of noncompliance with the plan." 6/

The distinction between mandatory and permissive spending schemes is further illustrated in our recent opinion to Representative Peyser on the LSCA. We pointed out that the LSCA, 20 U.S.C. §§351 et seq., establishes a program of formula grants to States under which the amounts appropriated are allotted to the eligible States by application of specific criteria set forth in the Act. See §5(a) of the LSCA, 20 U.S.C. §351c(a). States desiring to receive their allotments are required to have plans approved in accordance with the criteria and procedures set out in the Act. See §6 of the LSCA, 20 U.S.C. §351d. A State is entitled to reasonable notice and opportunity for a hearing before its plan can be finally disapproved or before grant payments can be discontinued on the basis of non-compliance with the Act. The State is entitled to judicial review of any final agency action disapproving or suspending a plan. Finally, the Act specifically provides that from the allotments of appropriations made pursuant to the Act, the Commissioner of Education--

> "* * * shall pay to each State which has a basic State plan approved under section (6)(a)(1), an annual program and a long-range program as defined in sections 3(12) and (13) an amount equal

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6/ The two Office of Legal Counsel opinions discussed above are printed in Hearings before the Subcommittee on Separation of Powers, Senate Judicial Committee, 92d Cong., 1st Sess., captioned "Executive Impoundment of Appropriated Funds" (1971), at pages 279 et seq.

> to the Federal share of the total sums expended by the State and its political subdivisions in carrying out such plans * * *." §7(a) of the LSCA, 20 U.S.C. §351e(a) (emphasis supplied).

Our opinion to Representative Peyser noted that two pre-Impoundment Control Act district court decisions had held that the statutory scheme of the LSCA constituted a mandate to spend. State of Louisiana v. Weinberger, 369 F. Supp. 856 (E.D.La. 1973); State of Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D.Okla. 1973). These courts' analysis is equally valid today and brings the LSCA squarely within the application of the Impoundment Control Act's fourth disclaimer. The LSCA's spending scheme appears to be at least as "mandatory" as the provisions of the Federal-Aid Highway Act considered in the court cases previously discussed. Moreover, the LSCA meets all of the elements for a mandatory spending statute outlined in the Office of Legal Counsel memorandum of December 19, 1969. 7/

7/ Finally, it appears that the LSCA program is subject (see 20 U.S.C. §1221(b)) to section 413 of the General Education Provisions Act, 20 U.S.C. §1226, which provides (quoting from the Code):

> "Notwithstanding any other provision of law, unless expressly in limitation of the provisions of this chapter, funds appropriated for any fiscal year to carry out any of the programs to which this chapter is applicable shall remain available for obligation and expenditure until the end of such fisal year."

This language was first enacted during the period of controversy between Congress and the executive branch that preceded enactment of the Impoundment Control Act. It was designed to exempt education programs from impoundment (see e.g., S. Rep. No. 91-639, 1970 U.S. Code Cong. & Adm. News at 2768, 2821-22, 2895), and has been construed by the courts as an anti-impoundment directive. See e.g., Commonwealth of Pennsylvania v. Weinberger, 367 F. Supp. 1378 (D.D.C. 1973). The language now contained in section 413 was also recognized by the December 19 Office of Legal Counsel memorandum as in effect reinforcing the substantive statutory language which precluded impoundments of education [CONTINUED]

V. OTHER CONSIDERATIONS

OMB is concerned that our interpretation of the fourth disclaimer will have a highly negative and far-reaching impact on current practices under the Impoundment Control Act. In this regard, OMB suggests that our interpretation creates wholesale exceptions to the Act and will seriously reduce the flexibility now available to Congress in responding to executive branch proposals to revise Government funding priorities. This was not the case last year, during which we expressed the view that only eight out of well over 400 impoundments reported to the Congress involved mandatory spending statutes. 8/

It is true that our interpretation of the fourth disclaimer necessarily covers more programs than otherwise would be covered. The crucial limitation is that the executive branch may not take impoundment actions that are inconsistent with an existing statutory mandate in the process of requesting Congress to reconsider its priorities. This is less than a flat exemption of mandatory programs from the Impoundment Control Act. For example, one of the mandatory spending schemes considered in a prior opinion was the Public Broadcasting Act. While the Administration proposed a rescission of funds under this Act in 1981 pursuant to the Impoundment Control Act (R81-105), we expressed no objection to this proposal in view of the fact that no funds were being withheld since the program was "forward funded." 9/ As this example

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7/ CONTINUATION

formula grant programs. Thus while the basic statutory scheme of the LSCA is sufficient in itself to trigger the fourth disclaimer of the Impoundment Control Act, section 413 would appear to be an additional statute bringing the LSCA program within the fourth disclaimer, even under OMB's narrow interpretation of the disclaimer.

8/ It could well be that some, most, or all formula grant education programs are subject to the fourth disclaimer even under OMB's interpretation of the fourth disclaimer, in view of section 413 of the General Education Provisions Act. See footnote 7, supra. We are reviewing the status of some formula grant education programs for purposes of the fourth disclaimer in the context of rescission proposals recently submitted by the Administration and now pending before the Congress.

9/ See our report to the Congress dated May 13, 1981, B-200685, on the President's seventh special message for fiscal year 1981, at page 2 and Enclosure III of that report.

shows, there may be ways for the President to seek congressional reconsideration of its priorities with regard to mandatory spend ing statutes depending on the mechanics of the program. The only thing that the President may not do is use the Impoundment Control Act procedures in a manner that would violate the spending mandate while the proposal is awaiting congressional reconsideration. Essentially this means only that the President must comply with a statutory mandate unless and until he can persuade Congress to change it.

There is one final point to be made with regard to interpretation of the fourth disclaimer. Even under OMB's interpretation, or even if the Impoundment Control Act contained no fourth disclaimer at all, there would be no legal basis for OMB's view that the Act automatically takes precedence over mandatory spending statutes unless they expressly state the contrary. Clearly the fourth disclaimer is nothing more than a rule of statutory construction provided by Congress to assure that certain spending mandates take precedence over the authority provided by the Impoundment Control Act.

But where does OMB's interpretation leave statutes such as the Highway Act and LSCA? Since they are not covered by the fourth disclaimer under OMB's interpretation, they would not automatically supersede the Impoundment Control Act. By the same token, they would not necessarily be superseded by that Act because neither the fourth disclaimer, nor any other provision of the Impoundment Control Act, specifically gives the Act precedence over those statutes. 10/ The most to be said for OMB's interpretation in this context is that it leaves the priority between the Impoundment Control Act and seemingly mandatory statutes to be determined by some other means. Presumably this would require application of those conventional rules of construction that come into play when a conflict between two statutes appears to exist.

While it might be difficult to predict specific outcomes under this approach, there is no reason to assume that the Impoundment Control Act usually would take precedence. Although

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10/ The Congress, of course, can and occasionally has enacted language which makes clear that one statute takes precedence over other statutes. See the language of section 413 of the General Education Provisions Act quoted in footnote 7.

we have held that the Impoundment Control Act constitutes an independent authorization to impound (54 Comp. Gen. 453), our holding applies only in relation to discretionary spending programs. In this context the Act essentially served to fill a void by providing a regime for impoundments that were neither authorized nor prohibited by the statutory law then in effect. There is certainly nothing in the language or legislative history of the Impoundment Control Act to suggest that it was designed to supersede all (or any) seemingly mandatory spending statutes then in effect or thereafter enacted. Indeed, in our view the only pertinent language in the Act--the fourth disclaimer--provides exactly the contrary, i.e., that the Act does not supersede mandatory spending statutes.

PREVIOUS GAO OPINIONS APPLYING THE FOURTH DISCLAIMER

(1) B-198103--February 19, 1981

Letter to Chairman, Senate Committee on Veterans' Affairs, concluding that the Impoundment Control Act is not available to OMB to reduce the funded personnel ceilings established for the Veterans' Administration by Congress under 38 U.S.C. 5010(a)(4). Letter restated in impoundment report, B-200685, April 13, 1981, in response to deferral proposals D82-95, D81-96 and D81-97.

(2) B-202472--March 25, 1981

Letter to Chairman, Subcommittee on Telecommunications, Consumer Protection, and Finance, House Committee on Energy and Commerce, concluding that funds appropriated for the Corporation for Public Broadcasting may not be withheld from availability, pursuant to rescission proposal R81-105, during the 45-day withholding period normally applicable to rescission proposals. Letter restated in impoundment report, B-200685, May 13, 1980, in response to rescission proposal R81-105.

(3) B-200685--April 13, 1981

Impoundment report concluding that funds appropriated to the Department of Treasury for purchase of stock of the National Consumer Cooperative Bank may not be withheld from availability, pursuant to rescission proposal R81-36, during the 45-day withholding period normally applicable to rescission proposals.

(4) B-200685--April 12, 1981

Impoundment report concluding that funds from the Highway Trust Fund for the Great River Road project may not be withheld under deferral D81-89.

(5) B-200685--July 30, 1981

Impoundment report concluding that funds appropriated for the direct student loan program may not be withheld from availability, pursuant to rescission proposal R81-161, during the 45-day withholding period normally applicable to rescission proposals.

(6) B-200685--July 30, 1981

Impoundment report concluding that funds appropriated for grants to States for Social and Child Welfare services under title XX of the Social Security Act may not be withheld from availability under rescission proposal R81-162.

(7) B-205053--December 31, 1981

Impoundment report concluding that all the funds appropriated for the Solar Energy and Energy Conservation Bank may not be deferred under deferral D82-184 because 12 U.S.C. 3614, 3615, require that a specified percentage of the funds appropriated be provided for financial assistance.

(8) B-205053--February 5, 1982

Letter to Congressman Peter A. Peyser concluding that funds appropriated for titles I and III of the Library Services and Construction Act may not be withheld from availability during the 45-day withholding period normally applicable to rescission proposals.