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**Executive Spending  
Powers:**

**THE CAPACITY TO  
REPROGRAM, RESCIND,  
AND IMPOUND**

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## INTRODUCTORY NOTE

The capacity to impound, rescind, and reprogram is really a capacity that is shared by the executive *and* legislative branches. Impoundment, once largely controlled by the president, saw a complete overhaul with the 1974 Impoundment Control Act, which greatly attenuated the size of the club the executive branch could yield when opposing congressional budget appropriations. In this wake, a procedure for rescission (a part of the larger impoundment tool used by a president)<sup>1</sup> remained, but it required explicit approval by Congress. Similarly, the process for reprogramming funds is a process that highlights the interconnection of the Executive Branch and Congress when altering program funding. Although criticized as an unconstitutional congressional veto power, reprogramming remains a procedure that is “negotiated” to an outcome by both branches, whether according to often-complicated committee rules or, more frequently, traditional practice. This loosening or sharing of some of the powers once more autonomously executed by the president has caused at least one observer of the federal budget process to resurrect Woodrow Wilson’s protest that Congress “has entered more and more into the details of administration until it has virtually taken into its own all the substantial powers of government.”<sup>2</sup>

## I. A DESCRIPTION OF IMPOUNDMENT AND RESCISSION

Congress has traditionally recognized that the president must be given some flexibility when implementing funds that have been appropriated. Changing circumstances, such as a less turbulent hurricane season or the cessation of a war, may make the impetus behind allocated funds no longer relevant. And the president may, too, discover more efficient ways of accomplishing Congress’s intended goals and subsequently require fewer discretionary dollars. For either situation, Congress generally provides the executive branch such discretion by either including specific language in authorizing bills that permits the president to spend less than a full appropriation, or by forcing the president to navigate through a set of laws and procedures under which funds may be impounded. Today, this latter process is carved out of two federal statutes: the 1974 Impoundment Control Act<sup>3</sup> and the Anti-Deficiency Act.<sup>4</sup>

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<sup>1</sup> The 1974 Impoundment Control Act divides impoundment into two categories and sets out distinct procedures for each. A “deferral” delays the use of funds; a “rescission” cancels budget authority. Some commentators have distinguished between routine “efficiency” impoundments and “policy” impoundments. See Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. ON LEGIS. 413, 448-49 (1977).

<sup>2</sup> Woodrow Wilson, *Congressional Government* (New York: Meridian Books, 1956), p. 49, as quoted by Allen Schick in “Congress and the ‘Details’ of Administration,” *Public Administration Review* (1976), p. 516. Interestingly, and as Schick notes, Wilson’s comment was written in 1885, almost 30 years before he attained the presidency and two years before the publication of his influential essay, “The Study of Administration.”

<sup>3</sup> 2 U.S.C. §§ 681-88.

<sup>4</sup> 31 U.S.C. §§ 1341-42, 1349-51, 1511-57.

## A. PRE-ICA IMPOUNDMENT

Presidential impoundments have a long history and can be traced at least as far back as the Jefferson administration.<sup>5</sup> Until the turbulent impoundment-laden days of the Nixon Administration, Congress usually gave in to such presidential impoundments unless politics dictated otherwise. If the impoundment reflected real efficiency-garnering alterations to the budget, there was no reason for concern. Only when a true policy change ruffled legislative feathers would action go any further. But, even then, congressional responses took the non-statutory form of either vocal opposition to the president's policies or pressure from the potential recipients whose funds had been withheld. The result, if any, often took the form of backroom dealing and public negotiation until a suitable compromise had been met.<sup>6</sup>

These kinds of negotiations between the president and concerned parties took a blunt turn amid the impoundment battles that took place between Congress and the Nixon Administration. The Administration not only impounded funds at previously unprecedented levels by defining policy justifications quite broadly but also asserted a constitutional basis for the president's power to impound, in general.<sup>7</sup> Although Congress had traditionally been successful in pushing previous administrations toward some sort of political middle ground, that was not the case during these years. What subsequently followed was a series of pre-ICA lawsuits filed by beleaguered recipients to compel discharge of "their" appropriated funds. The courts largely sided with these plaintiffs, subsequently altering the impoundment debate with new judicial rules.<sup>8</sup>

Although the district courts have ruled several times in cases brought by potential funds recipients, the Supreme Court has entered into the fray only once. In *Train v. City of New York*, the Court held that the main source for deciding these outcomes was the authorization statute, itself.<sup>9</sup> Interpreting the legislative intent of an appropriation to the states authorized under the Federal Water Pollution Control Act Amendments of 1972<sup>10</sup>, the Court ruled that reductions in these allotments by the administrator of the Environmental Protection Agency were statutorily prohibited.<sup>11</sup> Interestingly, the government's case did not advance a separation of powers argument. Because the Court

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<sup>5</sup> Congress appropriated \$50,000 in 1803 for gunboats to patrol the Mississippi River in anticipation of a French attack. When Jefferson effected the Louisiana Purchase just months later, he wrote to Congress to inform them that he no longer required such funds. Congress had no objection. Fisher, *Presidential Spending Power* (1975), p. 150.

<sup>6</sup> Bradford Middlekauff, "Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure," *The Yale Law Journal* (1990), p. 212. Middlekauff's complete historical description is referred to frequently in this briefing paper. For examples of pressure exerted by local and state governments, see Mills & Munselle, "Unimpoundment: Politics and the Courts in the Release of Impounded Funds," *Emory Law Journal*, vol. 24 (1973), pp. 315-322.

<sup>7</sup> Nixon relied on the "executive power" clause of the U.S. Constitution. Art. II, § 1. For an analysis of this constitutional justification, see Note, "Impoundment of Funds," *Harvard Law Review*, 1505 (1973), 1513-16.

<sup>8</sup> See *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); *Guadalupe v. Ash*, 368 F.Supp. 1233 (D.C.D.C. 1973); *Oklahoma v. Weinberger*, 360 F.Supp. 724 (D.C.Okla. 1973); *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F.Supp. 689 (D.C.Va. 1973).

<sup>9</sup> 420 U.S. 35 (1975).

<sup>10</sup> Pub. L. No. 92-500, § 2, 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1252-68.

<sup>11</sup> *Id.* at 41-49.

did not reach a ruling on this ground, President Nixon's assertion that he had the constitutional authority to impound funds without congressional approval remained unclear.<sup>12</sup>

Along with the landmark decision in *Train*, several lower court opinions have bolstered the view that presidential impoundments are barred unless statutorily authorized by Congress. In *State Highway Commission of Missouri v. Volpe*, an impoundment case prior to the enactment of the ICA, the court explicitly held that "resolution of the issue before us does not involve analysis of the Executive's constitutional powers" since the government did not frame its argument on such grounds. Instead, as in *Train*, the court held that, as an issue of statutory construction, Congress had "intended" the disbursement of all appropriated funds.<sup>13</sup> The court went further to hold that the Anti-Deficiency Act, as well, did not allow the presidential impoundment of funds for policy reasons.<sup>14</sup> The *Volpe* court effectively recognized three possible sources for the president's authority to impound prior to the ICA: (1) a constitutional justification, (2) an interpretation of a particular authorizing statute, or (3) a justification based upon the Anti-Deficiency Act. The court determined that (2) and (3) could not apply in this case, and, although not ruling on (1), various district courts have found executive impoundment an unconstitutional violation of the requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>15</sup>

## B. POST-ICA IMPOUNDMENT

Congress's enactment of the ICA expanded upon these judicial decisions by statutorily weaning the president from his impoundment authority.<sup>16</sup> The Act delineates two categories of impoundment, deferral<sup>17</sup> and rescission<sup>18</sup>, and articulates the procedures by which a president can advance such policy options. The Act also gives the Comptroller General two new professional duties: first, he or she must submit a report in cases where the executive branch has (a) impounded funds without submitting a special

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<sup>12</sup> Of course, if the president does have such a constitutional power, then the question of legislative intent would be moot.

<sup>13</sup> 479 F.2d 1099 (8th Cir. 1973).

<sup>14</sup> 31 U.S.C. § 665(c) and currently 31 U.S.C. § 1511. The Anti-Deficiency Act enabled the president to establish reserves of funds to "provide for contingencies, or to effect savings whenever savings are made possible by...greater efficiency of operations."

<sup>15</sup> U.S. Constitution, Art. I, § 9, cl. 7. See, e.g., *Louisiana ex rel. Guste v. Brinegar*, 388 F.Supp. 1319 (D.C.D.C. 1975).

<sup>16</sup> The ICA was enacted as Title X of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974).

<sup>17</sup> Deferral is defined in the ICA as: (A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law. 2 U.S.C. § 682.

<sup>18</sup> Under a rescission type of impoundment, the president can cancel budget authority previously provided by Congress only with the approval of Congress. The president must first transmit a special message to Congress outlining the reasons for, and the impact of, the rescission. If Congress wishes, it may then respond to the special message by passing a rescission bill. If Congress does not act within forty-five days of continuous session, then the president must release the funds. 2 U.S.C. § 683.

message to the Congress or (b) incorrectly classified a proposed impoundment;<sup>19</sup> second, the Comptroller General is empowered to bring suits against the executive branch to compel release of impounded funds when such funds have been illegally impounded by evading the procedural restrictions mandated by the ICA.<sup>20</sup>

The Supreme Court has not ruled on a single impoundment case since *Train*; however, the District of Columbia Court of Appeals has ruled on the issue of deferrals within the ICA.<sup>21</sup> It found the deferral section to be unconstitutional, under *INS v. Chadha*, because it too much resembled a congressional veto.<sup>22</sup> The court held that the Anti-Deficiency Act would govern deferrals and that the ICA applied only to rescissions, or permanent impoundments.<sup>23</sup> Congress subsequently amended the ICA to codify this ruling within the year.

The executive branch has two primary obligations under the ICA. First, it must send a special message to Congress whenever it proposes to rescind funding; second, it may only subsequently execute any proposed rescission if all the procedural requirements of the ICA are met. According to regular congressional hearings involving the Comptroller General during the last thirty years, there have been very few instances since the enactment of the ICA where the executive branch has strayed past or obfuscated the reporting requirements of an impoundment.<sup>24</sup> A typical statement by the Special Assistant to the Comptroller General testifying before Congress noted that the Comptroller General’s “monitoring experience and a review of the record indicate no pattern or practice of refusal or failure to release deferred funds in a timely manner.”<sup>25</sup>

The number and size of proposed rescissions and the congressional disapproval rates for these proposed rescissions have varied widely from one administration to the next since the passage of the ICA. Intuitively, the rejection rate of proposed rescissions strongly correlates with whether or not the same political party controls both the presidency and Congress. But this is not always the case. “The president’s record on rescissions is a measure of his budgetary influence and of his standing with Congress.”<sup>26</sup> During the fiscal years of 1981 and 1982, when President Reagan proposed more than

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<sup>19</sup> 2 U.S.C. § 686.

<sup>20</sup> 2 U.S.C. § 687. Although the ICA does not explicitly require the Comptroller General to obtain the approval of Congress before bringing suit, it does imply that consultation with Congressional leadership is necessary: “[n]o civil action shall be brought by the Comptroller General under this [Act] until the expiration of 25 calendar days of continuous session of the Congress following the date on which an explanatory statement by the Comptroller General of the circumstances giving rise to the action contemplated has been filed with the Speaker of the House of Representatives and the President of the Senate.”

<sup>21</sup> *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).

<sup>22</sup> 462 U.S. 919 (1983).

<sup>23</sup> *City of New Haven*, 809 F.2d at 902.

<sup>24</sup> Realistically, a presidential administration could try to avoid the reporting requirement by either not reporting a rescission or misclassifying it as a deferral. During a typical congressional hearing involving the Comptroller General, he reported six unreported rescissions out of 798 proposed rescissions, or roughly 0.7% of the total deferrals for the period. See *The Deferral Process as Provided by the Congressional Budget and Impoundment Control Act of 1974: Hearings Before the House Committee on Rules*, 99th Congress, 2d Session 147 (1986), statement of Milton J. Socolar, Special Assistant to the Comptroller General.

<sup>25</sup> *Id.* at 138.

<sup>26</sup> Allen Schick, “Managing Federal Expenditures,” *The Federal Budget: Politics, Policy, Process* (The Brookings Institution: 2000), pp. 254-55.

\$23 billion in rescission impoundments, Congress upheld more than sixty-five percent of his requests.<sup>27</sup> In fact, Reagan's budgetary cancellations account for nearly two-thirds of the total rescinded since 1974. Overall, Congress has enacted only one-third of the rescissions proposed by presidents, but, when fiscal years 1981 and 1982 are excluded, this approval rate drops to nineteen percent.<sup>28</sup>

## **II. A DESCRIPTION OF REPROGRAMMING**

In contrast to impoundment and rescission, the procedures now governed in detail by statutory rules, reprogramming is a field of federal budget process where statutory rules are relatively underdeveloped. In practice, however, the significance of reprogramming cannot be overlooked.<sup>29</sup> In fact, Congress has been interested in regulating this field, it does so mainly not through statutory rules but through more informal procedures or "negotiations and agreements" between administrative agencies and pertinent congressional committees, and this informality constitutes one of the characteristics of this field.

### **A. BASICS**

Reprogramming is the agency's utilization of funds in an appropriation account for purposes other than those contemplated by Congress at the time of appropriation. In other words, it is the shifting of funds from one object to another *within* the same appropriations account.<sup>30</sup> Therefore reprogramming should be distinguished from a "transfer," which refers to the shifting of funds *between* appropriation accounts.

Reprogramming is distinguished from impoundment, since it does not involve the failure of spending the funds appropriated by Congress to a certain appropriation account. The line-item (appropriation account), seen as a whole, is spent as Congress designated; it is only within such a line-item that the diversion of funds happens. Professor Stith explains: "If an agency simply allocates its lump-sum appropriation differently than proposed in its budget justification or the appropriation committee reports, its action does not constitute 'impoundment.' Simply put, reprogrammings are

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<sup>27</sup> Presumably, this was due to the "Reagan mandate" and the Republican control of the Senate. MiddleKauff, *supra* note 6.

<sup>28</sup> U.S. General Accounting Office, *Impoundment Control Act: Use and Impact of Rescission Procedures*, GAO/T-OGC-99-56, July 30, 1999.

<sup>29</sup> As explained below, there are few sources that provide the updated, comprehensive data on reprogramming practiced by various agencies. Conceding that it is limited in scope and not the latest, one study provides some idea about the extent of reprogramming: It was reported that Department of Defense reprogrammed between \$3.1 billion and \$4.2 billion a year during the 5 fiscal years ending September 30, 1987, for an average about 1.3% of total obligational authority. (GAO, *Budget Reprogramming: Opportunities to Improve DOD's Reprogramming Process*, GAO/NSIAD-89-138 (July 1989) at 10)

<sup>30</sup> See, GAO, *Principles of Federal Appropriations Law (Third Edition) Volume I* (hereinafter *Principles*), at 2-30 (citing U.S. General Accounting Office, *A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Jan. 1993), at 74; B-164912-O.M., Dec. 21, 1977.)

not impoundments. Statutory line itemization, then, is necessary for Congress to bring executive reallocations within the Impoundment Control Act.”<sup>31</sup>

As opposed to “transfer,” which is prohibited unless a statutory authority is granted,<sup>32</sup> it is generally accepted that the authority to reprogram is implicit in an agency’s responsibility to manage its funds. It is said that “expenditure breakdowns in an agency’s budget justifications or in committee reports are not binding on the executive.”<sup>33</sup> A GAO report also states “an agency is free to reprogram unobligated funds as long as the expenditures are within the general purpose of the appropriation and are not in violation of any other specific limitation or otherwise prohibited.”<sup>34</sup> The U.S. Supreme Court also reaffirmed, in *Lincoln v. Vigil*, that no statutory authority is necessary for reprogramming.<sup>35</sup> Accordingly, reprogramming is “usually a nonstatutory arrangement … there is no general statutory provision either authorizing or prohibiting it, and it has evolved largely in the form of informal (i.e., nonstatutory) agreements between various agencies and their congressional oversight committees.”<sup>36</sup> The law says that these informal arrangements do not have the force and effect of law.<sup>37</sup>

Given its informal nature, then, it is not surprising that there is no universal reprogramming guideline applicable to all agencies; reprogramming policies, practices,

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<sup>31</sup> Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 645 (1988) (citing *Oversight on the Impoundment Control Process: Hearing Before the Task Force on Enforcement, Credit, and Multiyear Budgeting of the House Comm. On Budget*, 97th Cong., 2d Sess. 180 (1982) [statement of Professor Allen Schick]).

<sup>32</sup> 31 U.S.C. § 1532. See, GAO, *Principles*, at 2-24.

<sup>33</sup> See, e.g., 55 Comp. Gen. 812, 819-20 (1976); H.R. Rep. No. 662, 93d Cong., 1st Sess. 16 (1973) [“In a strict legally sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriations accounts, but the relationship with the Congress demands that the detailed justifications which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line-item appropriation bills.”].

<sup>34</sup> GAO, *Principles*, at 2-31 (citing B-279388, Jan. 4, 1999); GAO report continues to state that “This is true even though the agency may already have administratively allotted the funds to a particular object. 20 Comp. Gen. 631 (1941).”

<sup>35</sup> 508 U.S. 182 (1993); In the case where Indian Health Service’s reprogramming to cancel Indian children’s clinical program was challenged by eligible handicapped Indian children was questioned, the Supreme Court, reversing the lower court’s decision that was in favor of plaintiffs, held; “*After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.*” Id., at 192.

<sup>36</sup> GAO, *Principles* (supra note 30), at 2-30 -31

<sup>37</sup> In *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, U.S. Court of Claims rejects government’s argument that the reprogramming guideline, which made the Veterans Administration unable to honor its contractual obligation, does not excuse the Government from its liability, by stating as follows:

“*But of more importance to this case … is the fact that that procedure was adopted by the agency in service of its own needs; it was not created in response to any statutory directive. … This being the case, the reprogramming procedure cannot be passed off now as anything more than what it plainly was: an informal working arrangement between the agency and the congressional appropriations committees with whom the agency had to deal. Its requirements do not have the force and effect of law. It follows, therefore, that a failure on the part of the agency to observe the requirements of its reprogramming procedure could offer no legal basis for challenging the legality of the expenditure involved, 55 Comp. Gen. 307, 327 (1975)…*” (Id., at 547-8)

and procedures vary among agencies;<sup>38</sup> a few are statutory (i.e., legally binding), but most are nonstatutory, whose basis is located within instructions in committee reports, hearings, and other correspondence. These reprogramming procedures often involve some form of notification to the appropriations (and/or legislative, i.e., authorizing<sup>39</sup>) committees. (Details are covered further in C.)

Sometimes, in addition to notification, reprogramming arrangements also provide for committee approval. Despite the Supreme Court's decision in *INS v. Chadha*,<sup>40</sup> by which statutory committee approval or veto provisions were ruled unconstitutional,<sup>41</sup> an agency may continue to observe committee approval procedures. Such procedures would not be legally binding,<sup>42</sup> but agencies often comply with them simply as a matter of "comity" or "keeping faith" with the pertinent committees.<sup>43</sup> It is true that committee approval procedures are *de facto* binding, as agencies recognize the risk that noncompliance will be rewarded by punishment, i.e., the reduction of appropriation in subsequent years. Yet noncompliance with procedures would not, for example, nullify the actions made by unapproved reprogrammings, thus it is believed that committee approval procedures fall outside the scope of *INS v. Chadha*.

## B. HISTORICAL BACKGROUND<sup>44</sup>

According to Professor Fisher, who first called for the scholarly attention to reprogramming practice, "the word "reprogramming" does not appear in committee reports and hearings until the mid-1950s. Prior to that time, the same kind of practice was carried out under different names, such as "adjustments" or "interchangeability" or even "transfers." The particular context makes it clear whether funds were being shifted between accounts or within an account."<sup>45</sup>

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<sup>38</sup> The Defense Department has the most detailed and sophisticated procedures. See, Department of Defense Financial Management Regulation (DOD 7000.14-R), vol.3 ch.6, *Reprogramming of DoD Appropriated Funds* (Aug. 1, 2000); available at: <http://www.defenselink.mil/comptroller/fmr/03/index.html>

<sup>39</sup> See, Louis Fisher, "Reprogramming of Funds by the Defense Department," *The Journal of Politics*, Vol. 36 (1) (Feb., 1974), 77-102 [hereinafter *Reprogramming of Funds*], at 91.

<sup>40</sup> 462 U.S. 919 (1983)

<sup>41</sup> Accordingly, existing statutory provisions subject the agency's reprogramming authority to the *notification to the committee*, but *not to the committee approval*. For example, statutory restrictions on reprogramming by Department of State (22 U.S.C. § 2706) provides: "Funds appropriated for the Department of State *shall not be available* for obligation or expenditure *through any reprogramming* funds which ... [a list of various purposes/effects of shifting the funds]. ... *However, funds shall be available for obligation or expenditure if* the Committee on Foreign Affairs on the House of Representatives and the Committee on Foreign Relations of the Senate *are notified 15 days in advance of the proposed reprogramming.*" (*Emphasis added*): See, GAO, B-272080 (Jun. 7, 1996, GAO/AIMD-96-102R *Information on Reprogramming Authority and Trust Funds*).

<sup>42</sup> See, GAO, B-195269, Oct. 15, 1979; see also *Blackhawk Heating*.

<sup>43</sup> GAO, *Principles*, at 2-33.

<sup>44</sup> As for the historical development of the concept and practice of reprogramming, a series of work by Professor Louis Fisher are helpful: including; LOUIS FISHER, PRESIDENTIAL SPENDING POWER (PRINCETON U.P., 1975) [especially its chapter 4], Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 L. & CONTEMP. PROBS. 135, 150-55 (1972) [hereinafter *Spending Discretion*], and Fisher, *Reprogramming of Funds* (supra note 39).

<sup>45</sup> FISHER, PRESIDENTIAL SPENDING POWER, at 76-77. See also Arthur W. Macmahon, "Congressional Oversight of Administration: The Power of the Purse" (pt. 2), *Political Science Quarterly*, 58 (September 1943), 380, 404.

The development of reprogrammings is better understood in the context of the shift of congressional budgeting in the early twentieth century: *from line-item appropriations to lump-sum appropriations*. The choice between these two approaches to appropriations has been debated since the earliest days of the United States<sup>46</sup>; eventually the issue would be summarized into the two competing needs in the budget enforcement: *congressional control* and *administrative flexibility*. Though the former goal tends to favor more detailed line-itemization, too rigid congressional control and inflexible management would end up harming rather than protecting the fisc.<sup>47</sup> On the other hand, the latter goal (i.e., administrative flexibility) acquired broader support in the early and mid-twentieth century, when reprogrammings were justified by the emergency wartime needs and the extended role of the government under the New Deal. Accordingly, lump-sum appropriations became the norm of budgeting.<sup>48</sup> Although the appropriation process is still highly “line-itemized” (i.e., agency justification sheets and committee reports contain detailed items of programs and activities – “*subaccounts*”<sup>49</sup> – to be funded), most of such detailed information is omitted from the appropriation bill. The funds are grouped together to form lump-sum accounts.<sup>50</sup> Obviously, the broader appropriations items are defined, the more flexibility agencies enjoy.

Reprogramming practice became prominent against this background. And during the war, it was largely tolerated by Congress as a necessary emergency measure. When the practice persisted after the war, however, members of appropriations committees began reasserting controls, and congressional committee came to insist on regular reporting of reprogramming actions, and in some cases on prior committee approval.

On the one hand, appropriations committees did recognize that reprogrammings were necessary for many reasons. On the other hand, however, since the 1950s, there have been a number of committee reports and studies questioning abusive practices of reprogramming by agencies, most notably by the Department of Defense.<sup>51</sup> Responding to this concern, each set of appropriations committees and appropriated agencies has developed their own reprogramming procedures. As a result, there have not been any universal reprogramming guidelines so far.

## C. COMMONLY OBSERVED PRACTICES OF REPROGRAMMING PROCEDURES

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<sup>46</sup> FISHER, PRESIDENTIAL SPENDING POWER, at 60.

<sup>47</sup> Besides, line-item appropriations were exploited by the practice so-called “coercive deficiencies”; “*In response [to the detailed line-item appropriations], agencies would overspend their detailed line items, “coercing” Congress to appropriate more money to cover the “deficiency” in their funds, thereby engendering the passage of bills understandably known as “coercive deficiency appropriations.”*” (Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 PUB. CONT. L. J. 155, 160-62 (1979)). Partly as a countermeasure to this practice, the Anti-Deficiency Act of 1905 was enacted. See, Stith, *supra* note 31, at 609.

<sup>48</sup> For example, “During the years 1948-50 the number of appropriation accounts for the Department of Defense averaged about 100; within a few years that number was cut in half.” FISHER, PRESIDENTIAL SPENDING POWER, at 78.

<sup>49</sup> Fisher, *Spending Discretion*, at 150.

<sup>50</sup> FISHER, PRESIDENTIAL SPENDING POWER, at 75-6.

<sup>51</sup> See in general, FISHER, PRESIDENTIAL SPENDING POWER, Chapter 4. As for a particular focus on the fight between DoD and the House Appropriations Committee, see Fisher, *Spending Discretion*, at 151-3.

As mentioned above, reprogramming procedures are seldom provided in the public law; rather they are often based on the informal agreements between the appropriations committees and administrative agencies.<sup>52</sup> There are no universal guidelines applicable to all agencies, but one can see some common structure among them as outlined below:

(a) *Basics* – Regardless of the detailed items of programs and activities on the budget justification sheets and committee reports, as a matter of law, an agency has unlimited discretion to shift the funds among programs (“*sub-accounts*”) within the same account on the appropriations bill. Though agencies are expected to “keep faith” with the pertinent committees by adhering to the detailed budget justifications presented by agencies themselves, appropriations committees that naturally want to secure certain level of control over agency’s reprogramming usually establish guidelines for reprogramming, based on the agreement with agencies.<sup>53</sup>

(b) *Reprogramming Requests* – The reprogramming process begins with a reprogramming request filed by an agency to the pertinent committee. However, if a shift of funds does not amount to “reprogramming,” there is no need to file requests and follow the otherwise applicable procedures. This is the case when a shift of funds is made within a program element.<sup>54</sup>

(c) *Categories of Reprogramming* – Not all reprogrammings are subject to the procedures. In the case of Department of Defense, for example, there are four categories of reprogramming, each of which is subject to different level of congressional scrutiny; namely, (i) congressional prior approval reprogrammings; (ii) congressional notification reprogrammings; (iii) internal reprogrammings; and (iv) below-threshold reprogrammings.<sup>55</sup> Roughly speaking, committees require agencies to comply with procedures only in the case of major reprogrammings. For example, Professor Fisher points out that “[b]ecause of different interpretations between the Pentagon and the committees as to what constitutes an item of “special interest,” a reprogramming could be submitted in the form of notification rather than prior approval.<sup>56</sup>

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<sup>52</sup> As for the detailed history over the DOD reprogramming requests and House Appropriations Committee reactions thereto, see Fisher, *Reprogramming of Funds*, at 83-85.

<sup>53</sup> The most detailed one would be the DOD guidelines on reprogramming: see, DOD Financial Management Regulation (supra note 38). DOD was the first agency that developed such detailed reprogramming procedures. See, DOD Directive 7250.5 (“Reprogramming of Appropriate Funds,” Jan. 9, 1980) and DOD Instruction 7250.10 (“Implementation of Reprogramming of Appropriated Funds,” Jan. 10, 1980); These are described in detail in GAO, *Budget Reprogramming: Department of Defense Process for Reprogramming Funds* (July 1986) (GAO/NSIAD-86-164BR).

<sup>54</sup> “Under Defense’s arrangement as reflected in its written instructions, reprogramming procedures apply to funding shifts between program elements, but not to shifts within a program element. See, 65 Comp. Gen. 360 (1986).” GAO, *Principles*, at 2-32. As for the potential problem with this aspect, see infra note 69 and accompanying text.

<sup>55</sup> GAO, *Budget Reprogramming: Department of Defense Process for Reprogramming Funds*, GAO/NSIAD-86-164BR (July 1986), at 8.

<sup>56</sup> Fisher, *Reprogramming of Funds*, at 86.

(d) *Prior Approval Requirement* – Again there is no unified rule with regard to whose approval is required. It used to be so informal as to be satisfied by that of chairperson and a few ranking members of subcommittees.<sup>57</sup>

(e) *Notification Requirement* – Less substantial but still important reprogrammings tend to be subject to the notification requirements. As opposed to the prior committee approval requirement, there are some statutory provisions for notification requirement.<sup>58</sup>

(f) *Periodical Reporting Requirement* – As for many of reprogrammings that are minor and technical, procedures tend to exempt them from notification / approval requirement. However, these below threshold reprogrammings are also subject to the requirement that agencies should compile the data and file the report to the committee.

(g) *Implementation* – What happens if an agency fails to comply with these informal guidelines? As a matter of law, nothing happens; but such guidelines are believed to be “politically binding,” since appropriations committees can punish agency’s deviation by cutting or line-itemizing next year’s appropriations. This will be further discussed below.

Though it is difficult to have a comprehensive picture, examples from several agencies would provide a helpful sketch on the commonality and variety among the reprogramming guidelines applicable to agencies (See the Table 1).<sup>59</sup>

### **III. IMPOUNDMENT AND RESCISSION CONSIDERATIONS**

#### **A. CONGRESSIONAL-PRESIDENTIAL CONFLICTS**

Not surprisingly, rescissions create a good deal of turmoil between the president and Congress. When the executive branch requests cancellation of certain funds, it is akin to slapping Congress on the wrists for wasteful spending. Under the current statutory procedures of the ICA, Congress must actually introduce a rescission bill for open debate on the floor of the House or Senate, and the president has no authority to compel such a vote. In other words, in order to accomplish an impoundment of this kind, Congress must have first, already appropriated funds to a particular program; second, be told that such an appropriation is either inefficient or outright pork-barreling; and third, independently initiate a vote to rescind the previously-approved budgetary appropriations.<sup>60</sup> This is not usually an easy task. And, as the reports by the General Accounting Office show, presidents have been compelled to spend more than \$50 billion

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<sup>57</sup> For example, “[i]n the past, “committee approval” was not granted by the full committee – not even by the full subcommittee – but by a few of the ranking members.” Fisher, *Reprogramming of Funds*, at 90.

<sup>58</sup> For example, see, 22 U.S.C. § 2706 (supra note 41).

<sup>59</sup> Sources include: GAO, *Information on Reprogramming Authority and Trust Funds*, AIMD-96-102R (June 1996); *Budget Reprogramming: Opportunities to Improve DOD's Reprogramming Process*, GAO/NSIAD-89-138 (July 1989); *Budget Reprogramming: Department of Defense Process for Reprogramming Funds*, GAO/NSIAD-86-164BR (July 1986); and *Economic Assistance: Ways to Reduce the Reprogramming Notification Burden and Improve Congressional Oversight*, GAO/NSIAD-89-202 (Sep 1989) (foreign assistance reprogramming).

<sup>60</sup> 2 U.S.C. § 683.

of the \$76 billion they wanted rescinded.<sup>61</sup> Because the current rescission rules were enacted during the divisive era of Watergate and unprecedented use of impoundment by President Nixon, Congress's passage of the ICA reflected a strong desire to curb the executive's power. Another revealing reality of the current rules for rescission is that Congress has actually rescinded more funds on its own than when proposed by presidents since 1974. For every dollar that has been rescinded in response to presidential impoundment, four dollars have been rescinded out of self-initiated legislation by Congress.<sup>62</sup> Although this figure reflects Congress's increasing use of the rescission rules as a means to balance out augmented spending on other programs or reevaluation of emergency spending measures, it also reflects the political wrangling attached to the impoundment procedures. If Congress can act on an inefficient appropriation before the president might gain some political capital by drawing public attention to it, it may well be worth forestalling a fight that would be hard to justify as part of a national dialogue.<sup>63</sup> And then, too, sometimes Congress desires to send a message to a president overzealous with rescission mechanisms—by not only rescinding presidential impoundment requests but also attaching large appropriations that were part of the Administration's overall policy objectives.<sup>64</sup>

## B. STRENGTHENING CONGRESSIONAL CONTROL

While the ICA seems to have been effective in curbing presidential impoundments, some observers feel that it should be modified to strengthen the Comptroller General's power to sue the executive branch, as well as to provide other individuals standing in the courts. When Congress was forced to remove the "legislative veto" of the deferral procedure in 1987, it stipulated in section 206(c) that "Sections 1015 and 1016 of the Impoundment Control Act of 1974 are reaffirmed."<sup>65</sup> As noted above, section 1015 requires regular congressional reports to be submitted by the Comptroller General and section 1016 empowers him or her to sue the executive and compel the release of obligated funds. When President Reagan signed these amendments to the ICA into law, he averred:

[T]he Supreme Court's recent decision in *Bowsher v. Synar*<sup>66</sup>...makes clear that the Comptroller General cannot be assigned executive authority by the Congress. In light of this decision, section 206(c) of the joint resolution, which purports to "reaffirm" the power of the Comptroller

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<sup>61</sup> U.S. General Accounting Office, *Impoundment Control Act: Use and Impact of Rescission Procedures*, GAO/T-OGC-99-56, July 30, 1999.

<sup>62</sup> *Id.*; McMurtry, *Rescissions by the President Since 1974: Background and Proposals for Change*, Congressional Research Service Report No. 89-271GOV; and Schick, *supra* note 26, p. 254.

<sup>63</sup> For a broad description of the political positioning produced by the ICA, see generally, Christopher Wlezien, "The Politics of Impoundments," *Political Research Quarterly* (1994).

<sup>64</sup> In 1992, George Bush proposed nearly \$8 billion in rescissions, signaling more to come. Congress passed rescission bills that covered about \$2 billion, but then cut an additional \$22 billion from areas that were considered presidential priorities. As Schick notes, "Bush got the message and refrained from proposing additional rescissions." See *supra* note 26, p. 255.

<sup>65</sup> Pub. L. No. 100-119, § 206(c), 101 Stat. 785, 786 (1987).

<sup>66</sup> 478 U.S. 714 (1986).

General to sue the Executive branch under the Impoundment Control Act, is unconstitutional. It is only on the understanding that section 206(c) is clearly severable from the rest of the joint resolution,...that I am signing the joint resolution with this constitutional defect.<sup>67</sup>

Although still an issue for debate, President Reagan contended that Congress had no power to vest the Comptroller General with the power to sue the executive. When this position is placed amid the backdrop of several district court rulings that interpret the ICA to implicitly bar other public officials or private parties from bringing suits under the Act to force the release of impounded funds<sup>68</sup>, the statute loses most of its teeth in preventing the overuse of presidential rescissions. Still, the sheer fact that presidential administrations have, for the most part, complied with the statutory procedures for impounding funds would seem to suggest that the executive branch would rather avoid putting President Reagan's assertion to much of a judicial test.

### C. STRENGTHENING PRESIDENTIAL CONTROL

On the other side of this argument are the self-described deficit hawks who argue that fiscal discipline can only be achieved by returning at least some of the power of impoundment back to the president.<sup>69</sup> This effort has highlighted two possible revisions of the ICA: (a) enhanced rescission and (a) expedited rescission.

- (a) In its strongest articulation, enhanced rescission would treat the president's proposed impoundment as future law *unless* Congress specifically passed a bill that prevented the rescission *and* the president signed this new bill into law. Of course, if the president vetoed the returned bill, then a two-thirds majority vote by Congress would be required to finally obligate the appropriated funds. Bills that would create something close to enhanced rescission have been frequently introduced during the last twenty years,<sup>70</sup> but during any particular presidency, congressional members of the opposing party have stymied efforts toward successful change. Supporters of such change deem enhanced rescission as a sound policy that would give the president an essential tool for combating the federal budget deficit.<sup>71</sup> Opponents, however, see this as little more than a

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<sup>67</sup> Statement on Signing H.R.J.Res.324 into Law, 23 Weekly Comp. Pres. Doc. 1091 (October 5, 1987)

<sup>68</sup> *Public Citizen v. Stockman*, 528 F.Supp. 824 (D.C.D.C. 1981); *Rocky Ford Housing Authority v. United States Department of Agriculture*, 427 F.Supp. 118 (D.C.D.C. 1977).

<sup>69</sup> For a particularly strong account of this view, see Brian M. Riedl's recent article, "What's Wrong with the Federal Budget Process," at The Heritage Foundation's *Policy, Research & Analysis* archive, <http://www.heritage.org/Research/Budget/bg1816.cfm>.

<sup>70</sup> McMurtry, *supra* note 31, pp. 20-23.

<sup>71</sup> "Enhanced rescission authority could be enacted quickly, builds on existing law, and does not require the lengthy process for amending the Constitution. Rescission authority can be exercised at any time and for less than the total budget authority appropriated for a particular purpose. Most line item veto provisions require vetoing all budget authority for an item and must be exercised at the time the appropriations bill is presented for the Chief Executive's signature. In both these senses enhanced rescission authority is a highly flexible tool for spending control." U.S. Executive Office of the President, Memorandum for the President from the Cabinet Council on Economic Affairs Re: Enhanced Authority to Limit Spending (December 23, 1983).

statutory line-item veto.<sup>72</sup> Potentially, Congress might be forced to authorize an appropriation three times, including a final two-thirds majority vote, in order to successfully pursue policy objectives that deviate from those of the president's.

(b) Proposals for an expedited rescission amendment call for two changes: (1) a *requirement* that Congress actually vote on a proposed presidential impoundment, and (2) a much shorter time span for Congress to carry out this vote than the current requirement that the proposal be considered, if at all, within 45 days of continuous congressional session.<sup>73</sup> The argument for such an amendment rests mainly with the observation that Congress typically avoids presidential rescission proposals by simply doing nothing and forcing the president to obligate funds after the 45-day session has expired. If members of Congress were forced to actually defend "questionable" spending appropriations, it is argued, some of the wasteful pork barrel that reflects pressure solely from individual interest groups, rather than from genuine public needs, would disappear.

#### D. MAINTAINING THE STATUS QUO

In contrast to those who argue for greater or weaker presidential impoundment control, several observers from the Congressional Budget Office and the General Accounting Office have noted that recent trends seem to reflect a somewhat attenuated need for presidential rescissions than before budget deficit controls were enacted by Congress. From this standpoint, any amendments to the ICA would have little or no effect on curbing federal spending. In 1974, the rescission procedure was envisioned as a mechanism to accommodate a President's desire to impound funds by providing for congressional review and approval. Over time, however, the share of total rescissions enacted each year that were originally proposed by the president has fallen and the share originating in the Congress has increased.<sup>74</sup> One explanatory study of impoundment powers at the state level seems to support these observations.<sup>75</sup> Although only an exploratory study of this scarcely studied area of research, the authors conclude that gubernatorial impoundment authority is generally used to maintain balanced budgets

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<sup>72</sup> If, however, a line-item veto or general impoundment power is unconstitutional because it would strip Congress of its constitutionally-delegated spending power, enhance rescission would probably be unconstitutional, as well. See "Is a Presidential Item Veto Constitutional?" *Yale Law Journal* (96: 1987).

<sup>73</sup> 2 U.S.C. §§ 683, 688. Expedited rescission, in contrast to current law under ICA, would amount to a standard congressional "fast-track" procedure, as is used for some foreign affairs and trade bills.

<sup>74</sup> Prior to the enactment of the Balanced Budget and Emergency Deficit Control Act of 1985, Congress enacted approximately \$18.6 billion (or about \$1.7 billion/year) of the \$38 billion proposed for rescission by the president, while enacting approximately \$11.2 billion (or \$1 billion/year) in congressionally initiated rescissions. From 1985 through 1990, the years under the Balanced Budget Act, Congress enacted approximately \$355 million (or \$59 million/year) of the \$18.5 billion proposed for rescission by the president, while enacting approximately \$29.7 billion (or about \$5 billion/year) in congressionally initiated rescissions. Under the Budget Enforcement Act of 1990, Congress enacted approximately \$5.9 billion (or about \$737 million/year) of the \$19.3 billion proposed for rescission by the president, while enacting approximately \$63.9 billion (or about \$8 billion/year) in congressionally initiated rescissions. *Hearings of the Subcommittee on Legislative and Budget Process*, "The Rescissions Process After the Line Item Veto: Tools for Controlling Spending," Statement of Gary Kepplinger, Associate General Counsel, General Accounting Office.

<sup>75</sup> Douglas and Hoffman, "Impoundment at the State Level: Executive Power and Budget Impact," *The American Review of Public Administration*, vol. 34, No. 3 (2004), 252-258.

during times of revenue shortfall. Overall, “impoundments do not serve as a particularly effective policy mechanism for most governors.”<sup>76</sup>

Additionally, under the ICA, the President can propose rescissions only for funding provided by annual appropriations.<sup>77</sup> Today this represents about a third of the total budget; by 2009, discretionary spending will amount to less than thirty percent of overall spending. Revitalizing the president’s impoundment authority, it is argued, will do little in the face of escalating mandatory spending expenditures.<sup>78</sup>

Whether amendments to the ICA increasing the president’s impoundment authority would truly provide new incentives for budgetary restraint or not, some commentators find the question wholly unnecessary with regards to the current political climate. Jim Cooper, a Democrat of Tennessee and a member of the House Budget Committee, recently noted in an editorial that President Bush spends a lot of time arguing for increased impoundment powers, while never once sending rescission proposals to Congress. Presumably, Rep. Cooper continues, a Republican president should have little trouble convincing a Republican-controlled Congress to introduce a rescission bill for consideration if the curbing of spending authorizations is truly a presidential concern.<sup>79</sup>

## **IV. REPROGRAMMING CONSIDERATIONS**

### **A. PROBLEMS WITH REPROGRAMMING PRACTICE**

Reprogrammings in general are justifiable on several grounds. Professor Fisher describes it as “a remedy for the long period of time that exists between an agency’s justification of programs and its actual expenditure of funds.”<sup>80</sup> The House Appropriation Committee has explained that repogrammings are effectuated for such reasons as “unforeseen requirements, changes in operating conditions, incorrect price estimates, wage rate adjustments, legislation enacted subsequent to appropriation action, and the like.”<sup>81</sup> In this light, it would make sense for congressional appropriations committees to give some discretion to administrative agencies on the condition of notifications (and prior approval in some cases).

However, besides these legitimate uses, repogrammings can and often do accommodate “irregular uses” by agencies in attempts to circumvent congressional control. Such irregular uses include; (1) bypassing the Congress<sup>82</sup>; (2) using it as “*Ace in the Hole*,” [reprogramming effectively allows administration to postpone the

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<sup>76</sup> *Id.*, p. 252.

<sup>77</sup> The remaining portions of the budget fall under the title of mandatory spending and include the increasing costs of Social Security, Medicare, and interest on the federal debt.

<sup>78</sup> *Hearings of the Subcommittee on Legislative and Budget Process*, Committee on Rules, U.S. House of Representatives, Statement of Dan L. Crippen, Director, Congressional Budget Office.

<sup>79</sup> Jim Cooper, “Rescission Time in Congress,” *New York Times*, March 11, 2005.

<sup>80</sup> Fisher, *Spending Discretion*, at 150.

<sup>81</sup> H.R. Rep. No. 493, 84th Cong., 1st Sess. 8 (1955)

<sup>82</sup> “What is of concern is the tendency on the part of the Defense Department to use what is essentially an emergency tool on a more regular and frequent basis than the situations warrant.” (H. Rep. No. 1316, 89<sup>th</sup> Cong., 2d sess., 1966, 18; statement by Congressmen Lipscom, Laird, and Minshall) [Cited by Fisher, *Reprogramming of Funds*, at 91]

decisionmaking on the funds allocation despite the budget process];<sup>83</sup> (3) undoing the work of Congress [e.g., an agency accepts the reduction in the appropriation, but later requests reprogramming to make it up]<sup>84</sup>; (4) circumventing thresholds for the committee review.<sup>85</sup> As these anomalies frustrate the congressional control over agency spending, some countermeasures have already been taken. “For example, a provision in the fiscal year 2002 Defense Department appropriation act prohibits the use of funds to prepare or present a reprogramming request to the Appropriations Committees “where the item for which reprogramming is requested has been denied by the Congress.””<sup>86</sup>

At the same time, the history tells that simply making committee control more rigid does not always work and might even be harmful;<sup>87</sup> thus, deliberate measures should be pursued so as to achieve the best balance between congressional control and administrative flexibility. Generally speaking, current practices of reprogramming procedures would be reasonably set in terms of balancing these two competing needs. However, there is a room for administrative agencies to manipulate and circumvent these procedures. For example, an agency can alter “the base from which reprogrammings are made … if funds are to be shifted *between* program elements, committee interest is at its highest, leading either to notification or prior approval. But if funds are to be shifted *within* program elements, the basic control shifts toward the [agency].”<sup>88</sup> Simply, reprogramming procedures do not apply here. The classification among ‘program, project, and activity’ could be relevant.<sup>89</sup> If subjecting reprogramming practices to procedures is not always easy, irregular uses of reprogrammings above described would become more problematic.<sup>90</sup>

## B. POWER-BALANCE BETWEEN CONGRESS AND EXECUTIVE

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<sup>83</sup> Reprogramming, at times, becomes a convenient remedy for administrative indecisiveness. Committee study observed it as such: House, Subcommittee for Special Investigations of the Armed Services Committee, *Department of Defense Reprogramming of Appropriated Funds: A Case Study*, 89th Cong., 1<sup>st</sup> sess., 1965, 16. [Cited by Fisher, *Reprogramming of Funds*, at 93]

<sup>84</sup> Yet in the absence of a statutory provision, “a reprogramming that has the effect of restoring the funds deleted in the legislative process has been held not legally objectionable.” B-195269, Oct. 15, 1979. See, GAO, *Principles*, at 2-32.

<sup>85</sup> For example, DOD was seeking to initiate \$4M research project, but there was \$2M threshold (any project beyond that amount was subject to the committee review); thus at the outset it asked Congress for \$1M and started the project, then requested reprogramming for \$3M. Eventually this attempt was rejected by the appropriations committee. See, Fisher, *Reprogramming of Funds*, at 93-4.

<sup>86</sup> GAO, *Principles*, at 2-32. The Comptroller General has construed this provision as prohibiting a reprogramming request that would have the effect of restoring funds which had been specifically deleted in the legislative process; not limited to the denial of an entire project. See, GAO, *Legality of the Navy’s Expenditures for Project Sanguine During Fiscal Year 1974*, LCD-75-315 (Jan. 20, 1975).

<sup>87</sup> Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROBS. 135, 171 (1972): “It is not practicable for Congress to adjust to these new developments by passing large numbers of supplemental appropriation bills. Were Congress to control expenditures by confining administrators to narrow statutory details it would perhaps protect its power of the purse but it would not protect the purse itself. Discretion is needed for the sound management of public funds.”

<sup>88</sup> Fisher, *Reprogramming of Funds*, at 92.

<sup>89</sup> Professor Stith makes a similar point in the context of Gramm-Rudman-Hollings Act. See, Stith, *supra* note 31, at 645.

<sup>90</sup> However, see *infra* note 97.

As for Reprogramming, the constitutional question of the separation of powers between two branches is seldom raised. (1) It is repeatedly affirmed that agencies have a reprogramming power [i.e., discretion over how to allocate each lump-sum appropriations and deviate from the congressional intent] even in the absence of statutory authority<sup>91</sup>; while (2) it is commonly believed to be constitutional for congressional committees to require administrative agencies to comply with nonstatutory (non-binding) reprogramming guidelines (including notifications and prior committee approval), regardless of the Supreme Court decision in *INS v. Chadha*.<sup>92</sup>

In one sense, reprogramming procedures have served as a substitute for legislative vetoes denied by *Chadha*. Professor Fisher exemplifies how “informal and nonstatutory legislative vetoes” function in the post *Chadha* era.<sup>93</sup> After all, the straightforward rejection of legislative involvement (e.g., committee vetoes) might reduce, rather than increase, the flexibility allowed for the executive branch. It seems possible to understand that reprogramming procedures, avoiding *Chadha*’s rigidity by their informal legal status, achieve the balance between Congress and Executive.

There are competing views over these informal procedures. Professor Fisher once contended that “[t]here is repeated evidence in committee reports that “understandings [i.e., informal “gentlemen’s agreements” on reprogramming procedures] with agencies are not always honored,”<sup>94</sup> but Professor Stith argues that “[t]here is a general agency practice of adhering to reprogramming agreements – a practice so well established that in most cases the agreements are treated as ‘binding’ by all concerned.”<sup>95</sup> It is not easy to verify these views,<sup>96</sup> but at least one GAO report maintains that reprogramming guidelines are mostly followed.<sup>97</sup>

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<sup>91</sup> *UAW v. Donovan*, 746 F.2d 855, at 861 [“An agency is bound only by statutory allocations of lump-sum appropriations.”]; *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 548; *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). See also, Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 YALE J. ON REG. 501 (1996), at 521 and 531.

<sup>92</sup> See, *supra* notes 30-31, and accompanying text.

<sup>93</sup> See, Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288-90 (1993) (hereinafter *Legislative Veto*). For example, when President Reagan objected to the presence of committee veto provisions (requiring prior approval of the Appropriations Committees) and stated that his administration would regard these provisions as having no legal effect, the House Appropriations Committee immediately reiterated: At that time, NASA could exceed statutory spending caps by permission from the Appropriations Committees, and the House Appropriations Committee said that it would repeal both the committee veto and NASA’s authority to exceed the caps. This worked as a real threat to NASA, because it would have required NASA to obtain a new public law every time it needed to exceed spending caps. To avoid this rigidity, NASA suggested a compromise with the Appropriations Committees, under which NASA would not exceed any ceiling identified in the conference report without first obtaining the prior approval of the Appropriations Committees.

<sup>94</sup> FISHER, PRESIDENTIAL SPENDING POWER, at 79.

<sup>95</sup> Stith, *supra* note 31, at 613.

<sup>96</sup> One must note that there is a time lag between two articles. It could be the case that reprogramming practices used to be more problematic in early 1970s, when Professor Fisher wrote his article, but reprogrammings have been more or less brought under control by the development of procedures, when Professor Stith wrote her article.

<sup>97</sup> GAO, *Budget Reprogramming: Opportunities to Improve DOD’s Reprogramming Process*, GAO/NSIAD-89-138 (July 24, 1989), at 14.

Besides the Congressional-Presidential contrast, another issue seems to reside in the interactions *within* the Executive branch. In concluding his seminal article, Professor Fisher raised a question as follows:

*“To what extent does a president and the Office of Management and Budget retain control of reprogramming actions? It appears that they are largely excluded from what seems to be essentially an agency-committee operation.”<sup>98</sup>*

Professor Stith also mentions that “*Despite OMB’s power under the Anti-Deficiency Act to apportion an agency’s budget authority, OMB is often unaware of how apportionments are actually spent. Budget administration has been called the ‘dark continent’ of the federal budget process. There are indications that administrative reprogrammings and impoundments (failures to spend appropriations) routinely occur deep within agency bureaucracies as a result of management decisions that are not reported to Congress as required by reprogramming arrangements and the Impoundment Control Act – indeed, changes in the timing and allocation of expenditures may not even be known to OMB.*”<sup>99</sup>

In general, OMB is assigned a central role in the budget execution process<sup>100</sup>: it provides the guidance for budget preparation and submission of annual budgets and associated materials<sup>101</sup>; the Anti-Deficiency Act requires that an agency head prescribe, by regulation, a system of administrative control of funds that must be approved by OMB.<sup>102</sup> As for the reprogramming process, agencies are required to submit budget-related materials, including reprogramming requests, to OMB for clearance to transmittal to congressional committees or individual Members of Congress or their staff, or the media.<sup>103</sup> Accordingly, it is supposed that OMB staffs are notified of and clear reprogramming requests. However, some reports over the actual reprogramming processes describe the OMB’s involvement as less strict in nature.<sup>104</sup>

## C. REFORM PROPOSALS / OPTIONS

### *Making the Reprogramming Practice More Visible*

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<sup>98</sup> Fisher, *Reprogramming of Funds*, at 102.

<sup>99</sup> Stith, *supra* note 31, at 643.

<sup>100</sup> As for apportionment process by OMB, see ALLEN SCHICK, THE FEDERAL BUDGET (REV. ED.), at 242-44.

<sup>101</sup> See, OMB, Circular No. A-11(2002) (<http://www.whitehouse.gov/omb/circulars/a11/02toc.html>)

<sup>102</sup> 31 U.S.C. § 1514

<sup>103</sup> OMB, Circular No. A-11, Section 22.3: It explains the clearance is required to ensure “policy consistency between the President’s budget and the budget-related materials prepared for Congress and the media.”

<sup>104</sup> For example, one report says: “Officials at two of the civilian agencies stated that their relationship with OMB is an informal one. Clearance is normally by phone or memorandum. There is no set time limit regarding the reprogramming action. OMB is sent a copy of the reprogramming request. If there is a problem, the agency involved will hold the reprogramming until the problem is solved.” (GAO, *Budget Reprogramming: Department of Defense Process for Reprogramming Funds*, GAO/NSIAD-86-164BR (July 1986), at 28)

Another report says: “When asked whether the OMB Director was informed of the reprogramming implications for FAMS, an attorney from OMB General Counsel’s office told us that the OMB Director is informed of budget execution matters on an “as needed” basis and that it is not OMB’s policy to say whether the Director was notified of any specific reprogramming.” (GAO, *Budget Issues: Reprogramming of Federal Air Marshal Service Funds in Fiscal Year 2003*, GAO-04-577R (March 2004), at 6.)

Nonstatutory “agreements” on reprogramming procedures between agencies and appropriations committees are commonly said to be “not legally but politically” binding, mainly by virtue of committee’s power to “punish” agencies in the following appropriations. If a congressional committee remains unaware of an agency’s shifting funds, however, such implementation mechanism can by no means be effective. Therefore, assuming that the current reprogramming procedures make sense as a balance between congressional control and administrative flexibility, the visibility of reprogramming procedures becomes crucial.

Apparently, this issue has been properly recognized and GAO has published several studies.<sup>105</sup> GAO’s finding varies among reprogramming procedures applicable to different agencies. Besides, the countervailing factor should not be overlooked: that is, notifications could be burdensome to agencies, and appropriations committees would not be able to deal with too many reprogramming requests queued for their approval within a reasonable time; which might eventually undermine the merit of reprogrammings, i.e., administrative flexibility.<sup>106</sup>

#### *Changing the Relative Power Positions between the Legislative and Executive Branches*

Professor Fisher warns against a simplemindedness of seeing the repeal of congressional vetoes as the restoration of executive prerogative. Rather, he points that “the initiative for the legislative veto came from President Hoover … and executive officials tolerated the arrangement for decades because it was in their interest. By attaching the safeguard of a legislative veto, Congress was willing to delegate greater discretion and authority to the executive branch.”<sup>107</sup>

On the other hand, he also suggests, as a way to control reprogramming practice, to cut down on the amount of carry-over balance or to change the no-year (“available until expended”) appropriations to multi-year appropriations. However, it should be noted that Jones & Euske draws our attention to the risk of too rigid congressional control. They claim that reprogramming practice is already a reflection of agency’s reaction against the legislatively imposed budgetary rigidity. “Reprogramming operates as a distinct subcycle in the annual budget process. Considerable staff time and energy are consumed by agencies preparing and justifying reprogramming requests.”<sup>108</sup>

#### *Further Implications*

The reprogramming issue inherently involves the temporal gap within the budget process. It also touches the necessity of appropriate level of administrative flexibility. Therefore, any budget reform proposal could have relevance to this issue.

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<sup>105</sup> For example, GAO, *Defense Acquisitions: Better Information Could Improve Visibility over Adjustments to DOD’s Research and Development Funds*, GAO-04-944; *Budget Reprogramming: Opportunities to Improve DOD’s Reprogramming Process*, GAO/NSIAD-89-138; *Military Housing: Opportunities Exist to Better Explain Family Housing O&M Budget Requests and Increase Visibility over Reprogramming of Funds*, GAO-04-583

<sup>106</sup> See, e.g., GAO, *Economic Assistance: Ways to Reduce the Reprogramming Notification Burden and Improve Congressional Oversight*, GAO/NSIAD-89-202 (Sep 1989) [foreign assistance reprogramming]

<sup>107</sup> Fisher, *Legislative Veto*, at 273.

<sup>108</sup> L.R. Jones & K.J. Euske, “Strategic Misrepresentation in Budgeting,” *Journal of Public Administration Research and Theory: J-Part*, vol. 1(4), Oct. 1991, 437-460, p. 451.

For example, the longer period of budgeting (e.g. biennial budgeting) would likely require further flexibility to be granted to the agency's discretion. If it is the case, then the current reprogramming procedures might need to be reviewed as well.

Another proposal, such as "Performance Budgeting"<sup>109</sup> [in essence, restructuring budgeting from the appropriations account-based one into the program-oriented one], is concerned by agencies, because it is likely to reduce flexibility to respond to changing needs across program accounts, creating budget execution difficulties:

"For example, some VA [Veterans Administration] officials raised concerns that VA's proposed account structure might affect their ability to respond to changes in benefit claims. Currently, administrative costs are funded through one appropriations account so VBA can shift administrative funds among multiple programs throughout the year to address performance issues or respond to changes in benefit claims that might arise. Under the proposed appropriations account structures for fiscal years 2004 and 2005, each benefit program's administrative expenses would have been funded from separate appropriations accounts; as a result, shifting administrative funds among program appropriations accounts throughout the year would require transfer authority and VBA's ability to respond to changing needs would have been more limited."<sup>110</sup>

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<sup>109</sup> See, e.g., GAO, *Performing Budgeting: Efforts to Restructure Budgets to Better Align Resources with Performance*, GAO-05-117SP (Feb. 2005)

<sup>110</sup> Id., at 14.

**TABLE 1: EXAMPLES OF REPROGRAMMING PROCEDURES**

<b>Agency</b>	<b>Account</b>	<b>Reprogrammings Subject to Procedures</b>	<b>Required Action(s)</b>	<b>Authority</b>
Coast Guard <sup>i</sup>	Acquisition, Construction, and Improvement Account	(1) A significant change in the scope of a project as described in the budget justification (2) Creation/termination of a project (3) Change in project's funding by beyond threshold (\$1M or 15%)	Notification to the chairmen of House and Senate Transportation Appropriations Subcommittee at least 30 days in advance.	Committee Report (H.R. Rep. 104-177 and H.R. Conf. Rep. 104-286.)
	Alteration of Bridge Acct.	Change in project's funding by beyond threshold (\$500K or 25%)	<i>Same as above</i>	
Department of State <sup>ii</sup>	All appropriation accounts	(1) Creation of a program; (2) Elimination of a program, project, or activity; (3) Restoration of the funds eliminated by Congress; (4) A reprogramming in excess of \$250K or 10%, <i>and else (omitted)</i>	<i>Generally Prohibited unless</i> a notification is made 15 days in advance, to House Committee on Foreign Affairs and Senate Committee on Foreign Relations	Statute (22 U.S.C. § 2706)
Department of Defense <sup>iii</sup>	All appropriation accounts	(1) Increase in procurement or "matters of special interest to one or more committees (regardless of dollar amount); (2) exceeds threshold amount / creation of a program with significant follow-in costs; (3) accounting actions without changing purposes and amount justified in budget presentations; (4) below threshold reprogrammings	(1) Congressional committee's prior approval + approval by the Secretary (or Deputy) of Defense; (2) Notification to Congressional committee + approval by the Secretary (or Deputy) of Defense; (3) approval of the Assistant Secretary of Defense (Comptroller) + audit information to congressional committees; (4) nothing, but their cumulative list must be periodically reported to committees.	DOD Directive <sup>iv</sup>
Bureau of Indian Affairs	Operations of Indian Program Acct.	No restriction with regard to the tribal priority allocations activity	Report on all reprogrammings	Committee Report (H.R. Rep. 108-195)
Department of the Interior		(1) Initiate new programs or Change allocations specifically denied; (2) Above threshold (\$500K or 10%)	(1)+(2) proposal to be submitted to Appropriations Comm. for approval (3) Quarterly reports on all reprogrammings	Committee Report (H.R. Rep. 108-195) <sup>v</sup>

Indian Health Service <sup>vi</sup>		(1) Above threshold (\$500K or 10%); (2) All reprogrammings	(1) Request for approval, to be submitted by letters to chairmen and ranking minority members of Appropriations Comm. of both House and Senate; requests shall be considered approved after 30 days if no objection is posed. (2) Quarterly reports on all reprogrammings	Committee Report (S. Rep. 103-294)
Forest Service	General rule	(1) change the boundary of / abolish / move or close regional office for research (2) Reprogramming below \$3M/year (3) Above threshold (\$3M or 10%) (4) All reprogrammings	(1) Request for consent of both Appropriations Comm. (2) Approval by Chief (3) Approval by Appropriations Comm. (4) Reports to Washington Office	Committee Report (H.R. Rep. 108-195) + USDA Directive <sup>vii</sup>
	Land purchase & construction projects	(1) not exceed \$500K or 10% (2) above the threshold	(1) Directors have authority (2) Approval by Appropriations Comm.	

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- ii. Id., at 3
- iii. GAO, *Budget Reprogramming: Department of Defense Process for Reprogramming Funds*, GAO/NSIAD-86-164BR (July 16, 1986)
- iv. Department of Defense Financial Management Regulation (DOD 7000.14-R), vol.3 ch.6, *Reprogramming of DoD Appropriated Funds* (August 2000)
- v. Dept. of the Interior and Related Agencies Appropriation Bill, 2004
- vi. Technical Handbook for Environmental Health and Engineering, Vol. I. Pt. 3-5 “Reprogramming Procedures” (<http://www.oehe.ihs.gov/hb/index.cfm?go=toc>)
- vii. Document entitled as: “FSH 1909.13 – Program Development and Budgeting Handbook (WO Amendment 1909.13-94-1: effective 9/30/94):  
[http://www.fs.fed.us/im/directives/fsh/1909.13/1909.13\\_0\\_code.txt](http://www.fs.fed.us/im/directives/fsh/1909.13/1909.13_0_code.txt)

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12. GAO, *Performing Budgeting: Efforts to Restructure Budgets to Better Align Resources with Performance*, GAO-05-117SP (February 2005)

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