OVERSIGHT HEARING ON THE IMPOUNDMENT CONTROL ACT OF 1974

78603069

DEPOSITORY

HEARING

BEFORE THE

TASK FORCE ON BUDGET PROCESS

OF THE

COMMITTEE ON THE BUDGET
HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

JUNE 29, 1978

Printed for the use of the Committee on the Budget

SEP 27 1978

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CONTENTS

Page

Statement of—
- Dembling, Paul G., General Counsel, General Accounting Office; accompanied by Milton J. Socolar, Deputy General Counsel 2
- McOmber, Hon. Dale R., Assistant Director, Office of Management and Budget, Executive Office of the President 23
- Schick, Dr. Allen, senior specialist, Library of Congress 28

Additional information submitted for the record by—
- Dembling, Paul G.:
  - Prepared statement 9
    - Enclosures to statement:
      - Status of Recommendation to OMB To Improve Impoundment Reporting 11
      - Draft Bill 11
      - Program Curtailment Control Act of 1978 13
  - Tables submitted on the first 2 years of operation of the Impoundment Control Act:
    - A. Proposed Rescissions, Fiscal Year 1977 3
    - B. Proposed Deferrals, Fiscal Year 1977 4
    - C. Proposed Rescissions, Fiscal Year 1978 5
    - D. Proposed Deferrals, Fiscal Year 1978 6
- McOmber, Hon. Dale R., prepared statement 26
- Schick, Dr. Allen, prepared statement 37
- Staats, Hon. Elmer B., Comptroller General of the United States, correspondence re executive branch action on the Impoundment Control Act of 1974 and also the B-1 bomber:
  - June 29, 1978, to Hon. Robert N. Giaimo 20
  - August 1, 1978, to Hon. Strom Thurmond with enclosure dated August 5, 1977, to Hon. John J. LaFalce, re Minuteman III Intercontinental Ballistic Missile 53, 55
  - March 17, 1978, Hon. Abraham Ribicoff 56
  - May 10, 1978, Hon. Frank Horton 58
    - Enclosure to letter:
      - Draft Bill 59
      - Program Curtailment Control Act of 1978 60

OVERSIGHT HEARING ON THE IMPOUNDMENT CONTROL ACT OF 1974

THURSDAY, JUNE 29, 1978

HOUSE OF REPRESENTATIVES,
TASK FORCE ON BUDGET PROCESS,
COMMITTEE ON THE BUDGET,
Washington, D.C.

The task force met, pursuant to notice, at 9:30 a.m., in room 210, Cannon House Office Building, Hon. Butler Derrick, chairman of the task force, presiding.

Mr. DERRICK. We will get started. We expect to have another one or two Members here shortly.

It is a pleasure to have you here today at the Budget Process Task Force oversight hearing on title X of the Budget Act. This hearing is intended to focus on the operation of the impoundment title from several institutional viewpoints and over the timespan since it was enacted.

In the beginning, as with any new law, the going was rough; every issue was resolved for the first time after heated battles and a thorough search of the legislative history. Many of the key actors involved were discouraged and overloaded with detail.

I am hoping that we have sufficient experience to sort out those growing pains which we have experienced in the beginning stages of the act and to put them in perspective, which are the persistent problems which should be addressed and which are the necessary adjustments which beset the implementation of any new law.

The Impoundment Control Act was passed in 1974 as a reaction to the Nixon impoundments. In the 3 months following his reelection, Richard Nixon delayed, diminished, or terminated scores of Federal programs by impounding their funds; $21 billion in 1 year alone. Congress protested; legal scholars objected; suits were filed, newsmen discussed a constitutional crisis but no remedy existed for Congress to stop the impoundments.

After considerable effort, Congress passed the Impoundment Control Act of 1974, attaching it to the Congressional Budget Act, and the public outcry over impoundment died down. Now we tend to focus instead on individual impoundment issues such as the B-1 bomber or the Minuteman III actions; and in many ways, title X, the major impetus for reform at the time, has now taken a back seat to the implementation of the Budget Act itself.

I hope today to bring out some of the specific problem areas, either technical or philosophical, which have provided persistent and serious problems in implementing the act.

I am pleased to have here today some of the key people in this process who can provide insight into the operation of the act: Paul G. Dembling, General Counsel of GAO, who has formulated the legal base upon which the act has grown and taken shape; Dale R. McOmber, Assistant Director of OMB, who has played a key rôle in better budgeting in the executive branch through many administrations; and Dr. Allen Schick, Senior Specialist in the Library of Congress who lived through the formulation of the impoundment title word by word and has written some of the best interpretative material on the first few years of its operation. Would the lady from Maryland like to add anything?

Mrs. HOLT. No, thank you.

Mr. DERRICK. I would like to proceed with the first witness from the GAO and to follow each witness with questions and answers.

STATEMENT OF PAUL G. DEMBLING, GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY MILTON J. SOCOLAR, DEPUTY GENERAL COUNSEL

Mr. DEMBLING. Thank you very much, Mr. Chairman. Mr. Chairman, Mrs. Holt, we appreciate the opportunity to discuss with you our experience under the Impoundment Control Act of 1974.

Today's hearing focuses upon title X of the budget control legislation that was enacted in July 1974, known as the Impoundment Control Act of 1974. This act creates the procedural means by which the Congress considers and review executive branch withholdings of budget authority. The statute requires the President to report promptly to the Congress all withholdings of budget authority and to abide by the outcome of the congressional impoundment review process. By and large, the Impoundment Control Act has worked well.

The statute assigns several functions to the Comptroller General and GAO. We evaluate for the Congress impoundments reported by the executive branch. We also report to the Congress impoundments which the executive branch has failed to disclose and report. We identify undisclosed impoundments through our audit efforts and information provided to us by persons inside and outside the Government. Under certain circumstances GAO may sue an executive agency to compel the proper release of impounded funds.

Let me briefly summarize the key features of the Impoundment Control Act: There are two types of impoundments: Rescissions and deferrals. Deferrals are temporary withholdings of funds, while rescissions are requests to the Congress to cancel budget authority.

Either House of Congress can reject a deferral by passage of a simple resolution. Passage of such an impoundment resolution requires the executive branch to terminate the impoundment and to make the deferred funds available for obligation immediately.

Requests to rescind the budget authority involve the entire legislative process, since a bill or joint resolution passed by both houses and signed by the President is necessary to accomplish a rescission. Under the act, if a rescission bill is not passed within 45 days of continuous congressional session after the day on which the request is first received by the Congress, the funds withheld during the pendency of the request must be made available for obligation.

The Comptroller General is authorized to report to the Congress undisclosed rescissions and deferrals. Impoundments reported by the Comptroller General are treated as though coming from the President.

Complementary to this reporting process, the Comptroller General also is required to notify the Congress when an impoundment has been improperly classified by the President. Such a report triggers the appropriate congressional review mechanism and nullifies the process initiated by the prior Presidential message.

The Comptroller General is empowered to sue the appropriate representative in the executive branch to make funds available for obligation when he finds the executive branch has not complied with the statute's requirements that the funds be released.

While we believe the basic framework of the act is sound, we have suggested a number of possible refinements to the law and the way in which it is administered by the executive branch. In our view, implementation of these recommendations would streamline and clarify the operation of the statute. All of our administrative and legislative recommendations are discussed in detail in a report we submitted to the Congress on the first 2 years of operation of the Impoundment Control Act, and we wish to submit a copy of that for the record.

Mr. DERRICK. Without objection.

[The information referred to follows:]

LISTING OF IMPOUNDMENTS FOR FISCAL YEARS 1977 AND 1978— JUNE 20, 1978

A. Proposed Rescissions, Fiscal Year 1977

Proposal number and agency or program	Amount	Date proposed	Approved	45 days ended
R77-1—Legal Services Corporation	$45,000,000	July 29, 1976		Oct. 1, 1976
R77-2—Corps of Engineers, Army	6,600,000	Sept. 22, 1976		Mar. 1, 1977
R77-3—Interior—Bureau of Mines Helium Fund.	47,500,000		H.R. 3347, P.L. 95-10, $47,500,000, Mar. 10, 1977.	
R77-4—Federal Highway Administration, DOT [1]	35,000,000			
R77-5—International Security Assistance	41,500,000	Jan. 17, 1977	H.R. 3839, $41,500,000, Mar. 25, 1977.	
R77-6—Commerce—U.S. Travel Service	525,000			Mar. 14, 1977
R77-7—Commerce—NOAA	1,500,000			Do.
R77-8—DOD, Retired Pay	143,600,000		H.R. 3839, $143,600,000, Mar. 25, 1977.	
R77-9—DOD, Navy Shipbuilding	721,000,000		H.R. 3839, $452,600,000, Mar. 25, 1977.	
R77-10—DOD—Procurement, Air Force	14,350,000		H.R. 3839, $14,350,000, Mar. 25, 1977.	
R77-11—State—International Peacekeeping Activities.	12,000,000		H.R. 3839 $12,000,000 Mar. 25, 1977.	
R77-12—DOT—Coast Guard	6,803,000			Mar. 14, 1977
R77-13—SBA [2]	60,000,000			
R77-14—DOD—Navy Shipbuilding	126,212,000	May 18, 1977		July 22, 1977
R77-15—National Transportation Safety Board.	850,000	July 17, 1977		Sept. 25, 1977
R77-16—International Security Assistance.	21,090,000	July 19, 1977		Oct. 4, 1977
R77-17—GSA—Federal Building Fund	75,000,000			
R77-18—DOD, Aircraft Procurement, Air Force.	462,000,000			
R77-19—DOD—Missile Procurement, Air Force.	1,400,000			
R77-20—DOD—Missile Procurement, Air Force.	105,000,000	July 26, 1977		Oct. 15, 1977
Agriculture—Forest Service [3]	3,672,000	Aug. 2, 1977		

[1] Rescission (R77-4) withdrawn Nov. 5, 1976 (4th message).
[2] Rescission (R77-13) withdrawn Mar. 9, 1977 (8th message).
[3] Reported by Comptroller General.

B. Proposed Deferrals, Fiscal Year 1977

Proposal No.	Agency or program	Amount	Date proposed	Disapproved
D77-1	Emergency refugee and migration assistance fund.	$8,640,000	Oct. 1, 1976	
D77-2	Foreign Agricultural Service	[2] 1,742,928		
D77-3	Agricultural Stabilization and Conservation Services.	2,919,000		
D77-4	Forest Service—brush disposal	22,321,000		
D77-5	Forest Service—licensee programs	[3] 239,139		
D77-6	Commerce—NOAA	[4] 1,772,238		
D77-7	do	5,798,711		
D77-8	do	59,250		
D77-9	do	[5] 543,926		
D77-10	DOD—Military Construction	[6] 424,239,837		
D77-11	DOD—Panama Canal	146,000		
D77-12	DOD—Wildlife Conservation	[7] 515,343		
D77-13	HEW—special foreign currency program.	[8] 2,113,000		
D77-14	HEW—higher education	[9] 303,861,606		
D77-15	HEW—SSA	[10] 18,673,092		
D77-16	Interior—Bureau of Land Management	[11] 7,615,053		
D77-17	Interior—Bureau of Outdoor Recreation.	30,000,000		
D77-18 [1]	Interior—National Park Service	3,245,397		
D77-19	Interior—Geological Survey	30,300	Oct. 1, 1976	
D77-20	Interior—Bureau of Mines	3,525,248		
D77-21 [1]	Justice—Bureau of Prisons	1,900,000		
D77-22 [1]	State Department	14,225,000		
D77-23 [1]	DOT—Coast Guard	22,581,000		
D77-24	DOT—FAA	[12] 8,080,232		
D77-25	do	[13] 278,095,484		
D77-26	Treasury—Government and State assistance fund.	113,731,858		
D77-27	do	[14] 21,075,234		
D77-28	do	[15] 97,680,000		
D77-29	GSA—rare silver dollar program.	[16] 1,797,053		
D77-30	GSA—Foreign Claims Settlement Commission.	10,833,000		
D77-31	American Revolution—recent administration.	[17] 197,950		
D77-32	ICC	13,700,000		
D77-33	National Commission on Observance of International Women's Year.	680,500		
D77-34	DOD—Procurement, Navy	929,250,000	Nov. 5, 1976	
D77-35 [1]	HEW—Howard University	500,000		
D77-36	Treasury	51,002,500		
D77-37	International Security Assistance	[18] 79,000,000	Dec. 3, 1976	
D77-38	do	740,000,000		
D77-39	Labor—Employment and Training Administration.	2,919,000,000		
D77-40 [1]	Action Peace Corps/Domestic Program	550,000		
D77-41	USIA—salaries and expenses	2,437,000	Jan. 7, 1977	
D77-42	USIA	1,716,000		
D77-43	do	112,000		
D77-44	U.S. RR. Association	680,700,000		
D77-45	Commerce	654,000	Jan. 17, 1977	
D77-46 [1]	Commerce—NOAA	[19] 6,300,000		
D77-47	Commerce—Maritime Administration	200,900,000		
D77-48 [1]	DOT—FHWA	31,250,000		
D77-49	ERDA—energy extension source	7,500,000		
D77-50 [1]	ERDA—magnetic fusion energy	12,000,000		H. Res. 305, $12,000,000, Mar. 3, 1977.
D77-51 [1]	ERDA—program support community operation.	5,400,000		H. Res. 306, $5,400,000, Mar. 3, 1977.
D77-52	ERDA—biomedical and environmental research.	8,200,000	Jan. 17, 1977 (cont)	H. Res. 307, $8,200,000, Mar. 3, 1977.

B. Proposed Deferrals, Fiscal Year 1977—Continued

Proposal No.	Agency or program	Amount	Date proposed	Disapproved
D77-53	Corps of Engineers, Army	[20] $2,665,000	Mar. 24, 1977	
D77-54	Interior—Bureau of Reclamation	[21] 4,790,000	.....	
D77-55	ERDA—operating expenses	80,500,000	Apr. 4, 1977	
D77-56 [1]	ERDA—plant and capital equipment	46,660,000	.....	
D77-57	Treasury	[22] 8,453,000	Apr. 28, 1977	
D77-58 [1]	ERDA—CRBRP	[23] 37,400,000	May 18, 1977	
D77-59	State	18,000,000	.....	
D77-60 [1]	Treasury	150,000,000	.....	
D77-61	DOT—FAA	2,100,000	.....	
D77-62	DOD, military personnel	12,465,000	July 19, 1977	
D77-63	Commerce—EDA	11,000,000	.....	
D77-64	ERDA—plant and capital equipment	[24] 11,300,000	Aug. 16, 1977	
	Agriculture—Forest Service [25]	11,537,000	.....	
	Do	1,775,000	.....	
	Do	2,110,000	.....	

[1] Policy deferrals.
[2] D77-2A changed D77-2 ($1,609,608).
[3] D77-5A changed D77-5 ($145,665).
[4] D77-6A changed D77-6 ($1,770,716).
[5] D77-9A changed D77-9 ($355,550).
[6] D77-10C changed D77-10B ($387,651,837), D77-10A ($335,883,000), D77-10 ($76,483,201).
[7] D77-12A changed D77-12 ($362,600).
[8] D77-13A changed D77-13 ($1,113,000).
[9] D77-14A changed D77-14 ($31,701,606).
[10] D77-15A changed D77-15 ($17,271,878).
[11] D77-16A changed D77-16 ($5,426,000).
[12] D77-24A changed D77-24 ($463,585).
[13] D77-25B changed D77-25A ($287,095,484), D77-25 ($276,101,000).
[14] D77-27A changed D77-27 ($10,000,000).
[15] D77-28A changed D77-28 ($81,500,000).
[16] D77-29A changed D77-29 ($1,709,000).
[17] D77-31A changed D77-31 ($1,345,874).
[18] D77-37A changed D77-37 ($73,000,000).
[19] D77-46A changed D77-46 ($7,500,000).
[20] D77-53A changed D77-53 ($7,760,000).
[21] Temporary, Mar. 10, 1977 to Mar. 15, 1977, withholding.
[22] D77-57A changed D77-57 ($6,030,000).
[23] D77-58A changed D77-58 ($31,800,000).
[24] Comptroller General reported July 28, 1977.
[25] Reported by Comptroller General Aug. 2, 1978.

C. Proposed Rescissions, Fiscal Year 1978

Proposal number and agency or program	Amount	Date proposed	Approved	45 days ended
R78-1—Justice, LEAA [1]	$2,668,000	Sept. 23, 1977	.....	.....
R78-2—International Security Assistance	40,200,000	Jan. 27, 1978	H.R. 10982, P.L. 95-254, Apr. 4, 1978, $40,200,000.	.....
R78-3—State—international peacekeeping activities.	5,000,000	.....	H.R. 10982, P.L. 95-254, Apr. 4, 1978, $5,000,000.	.....
R78-4—Federal Home Loan Bank Board	10,055,000	.....	H.R. 10982, P.L. 95-254, Apr. 4, 1978, $10,055,000.	.....
R78-5—Agriculture Stabilization and Conservation Service.	30,000,000	May 12, 1978	.....	July 15, 1978
R78-6—International security assistance	48,000,000	June 5, 1978	.....	July 29, 1978

[1] Comptroller General reclassified R78-1 to a deferral Oct. 28, 1977.

31-188 O - 78 -- 2

D. Proposed Deferrals, Fiscal Year 1978

Proposal No.	Agency or program	Amount	Date proposed	Disapproved
D78-1	Foreign Agriculture Service	[2] $1,040,128	Oct. 23, 1978	
D78-2	Agricultural Stabilization and Conservation Service.	2,871,000		
D78-3	Forest Service—brush disposal	[3] 36,150,790		
D78-4	Forest Service	[4] 226,738		
D78-5	Commerce, EDA	4,000,000		
D78-6	do	[5] 4,599,543		
D78-7 [1]	Commerce—NOAA	3,750,000		
D78-8	do	[6] 6,067,967		
D78-9	do	6,177,030		
D78-10	do	[7] 950,343		
D78-11	DOD—military construction	438,438,904		
D78-12	DOD—Civil Wildlife Conservation	458,399		
D78-13	HEW—OE	3,740,098		
D78-14	HEW—SSA	13,865,200		
D78-15	Interior—Bureau of Land Management	[8] 33,180,327		
D78-16	Interior—Bureau of Outdoor Recreation.	30,000,000		
D78-17	Interior—Geological Survey	34,000		
D78-18	Interior—Bureau of Mines	3,490,967		
D78-19 [1]	Interior—Office of Territorial Affairs	12,000,000		
D78-20	Justice—Federal Prison System	42,245,000		
D78-21	DOD—Coast Guard	13,031,000		S. Res. 282, Nov. 1, 1977.
D78-22	DOT—FAA	1,010,000		
D78-23	do	[9] 148,123		
D78-24	do	320,650,484		
D78-25	do	74,880,000		
D78-26	Treasury	[10] 11,148,000		
D78-27	do	[11] 82,461,000		
D78-28	do	[12] 5,779,000		
D78-29 [1]	Treasury—Bureau of the Mint	5,729,883		
D78-30 [1]	ERDA—gas-cooled reactors	15,000,000		H. Res. 851, Nov. 2, 1977.
D78-31 [1]	ERDA—plenum fill experiment	[13] 2,300,000		
D78-32 [1]	ERDA—clean boiler fund from coal project.	46,660,000		
D78-33 [1]	ERDA—fusion material test facility.	7,500,000		H. Res. 852, Nov. 2, 1977.
D78-34 [1]	ERDA—intense neutron source facility	11,300,000		H. Res. 853, Nov. 2, 1977.
D78-35 [1]	ERDA—intersecting storage ring accelerator.	5,000,000		H. Res. 854, Nov. 2, 1977.
D78-36 [1]	ERDA—molton salt breeder reactor project.	1,500,000		
D78-37	GSA—rare silver dollar program	1,710,000		
D78-38 [1]	GSA—Federal Preparedness Agency	79,918		
D78-39	Foreign Claims Settlement Commission	10,738,000		
D78-40	ICC	13,700,000		
D78-41	USIA	[14] 1,653,000		
D78-42	U.S. Railway Association	260,000,000		
D78-43	Emergency Refugee and Migration Association Fund.	[15] 7,800,000	Nov. 10, 1977	
D78-44	DOD—shipbuilding, Navy	871,125,000		
D78-45 [1]	DOE—10 mW central receiver solar thermal powerplant.	31,000,000		
D78-46 [1]	NSF	4,500,000		
D78-47	International security assistance	131,200,000		
D78-48	do	2,000,000		
D78-49 [1]	do	673,250,000		
D78-50	Treasury	3,406,000		
D78-51 [1]	Commerce, EDA	123,646,769	Jan. 27, 1978	
D78-52	Panama Canal	309,000		
D78-53	HEW—scientific activities overseas	3,497,000		
D78-54 [1]	Justice—LEAA	2,668,000		
D78-55	Labor—Employment and Training Administration.	1,380,114,000		
D78-56 [1]	NSF	6,900,000		
D78-57	Commerce, Maritime Administration	122,000,000	Feb. 23, 1978	
D78-58	Treasury	388,000		
D78-59	Agriculture, Forest Service	4,500,000	Mar. 10, 1978	
D78-60	DOD—Corps of Engineers	5,450,000	May 12, 1978	

D. Proposed Deferrals, Fiscal Year 1978—Continued

Proposal No.	Agency or program	Amount	Date proposed	Disapproved
D78-61 [1]	DOE—fuel freezing option bomb production.	$23,497,000		
D78-62	DOE	12,300,000	May 12, 1978	
D78-63 [1]	Interior—Bureau of Reclamation	17,700,000		
D78-64	Commerce—Regional Planning Commission.	1,618,000	June 15, 1978	
D78-65	Commerce—NOAA	1,433,000		
D78-66	Treasury—antirecession financial assistance fund.	5,000,000		

[1] Policy deferrals.
[2] D78-1A changed D78-1 ($987,928).
[3] D78-3A changed D78-3 ($31,312,165).
[4] D78-4A changed D78-4 ($140,665).
[5] D78-6A changed D78-6 ($3,900,000).
[6] D78-8A changed D78-8 ($5,428,873).
[7] D78-10A changed D78-10 ($715,926).
[8] D78-15A changed D78-15 ($31,700,000).
[9] D78-23A changed D78-23 ($134,293).
[10] D78-26C changed D78-26B ($10,709,000), D78-26A ($10,609,000), D78-26 ($8,184,000).
[11] D78-27C changed D78-27B ($81,732,000), D78-27A ($59,351,000), D78-27 ($35,446,000).
[12] D78-28B changed D78-28A ($1,500,000), D78-28 ($35,446,000).
[13] D78-31A changed D78-31 ($1,500,000).
[14] D78-41A changed D78-41 ($1,153,000).
[15] D78-43A changed D78-43 ($2,000,000).

Mr. DEMBLING. A summary of the status of the recommendations for administrative improvements that we made to OMB in our June 1977, report is appended to my statement.

On the administrative side, we recommended that first, OMB specify the duration of proposed partial-year deferrals; second, identify all impoundments of congressional add-ons to executive branch budget requests; third, note whether there have been previous impoundments proposed for each program in which withholdings currently are proposed; and fourth, improve the timeliness of Presidential impoundment reports.

One of our legislative recommendations is the repeal of the requirement to report routine impoundments in the form of budgetary reserves pursuant to the Antideficiency Act or otherwise specifically authorized by law. Our experience suggests that the current requirement to report these impoundments produces little congressional reaction and greatly inceases paperwork and administrative burdens on the executive branch, the Congress, and the GAO.

Excluding routine impoundments would allow the Congress to focus on the policy issues that precipitated the act's passage, as indicated in your opening remarks, Mr. Chairman. It should also have the beneficial effect of reducing the expense and time required to process impoundment reports to the Congress.

Our other legislative recommendations include providing a means to reduce the 45-day period during which funds can be withheld pending rescission requests.

The current 45-day period of continuous session for consideration of rescissions often extends well beyond the calendar day equivalent, and the actual duration of the rescission period is uncertain at the time a proposal is submitted. In our report we indicate that the average has been about 80 calendar days, which translates from the 45 days required in the act.

We believe that the more certain time period of 60 calendar days would better serve the interests of all parties.

We also believe it would be helpful to amend the act so that the Congress can express its disapproval of proposed rescissions without having to wait for the statutory rescission period to expire. This could be done by providing a mechanism under which either House, by simple resolution, could express its disapproval of a proposed rescission. The waiting period would then stop and the funds being withheld pending rescission would have to be made available for obligation.

We also suggested amending the act to require a statement of the exact duration of proposed partial-year deferrals, eliminate the 25-day waiting period before the Comptroller General can initiate legal proceedings to compel the release of impounded budget authority, and specifically when impoundments may be proposed after prior impoundments for the same program have been rejected by the Congress.

Finally, since our June 1977 report on the Impoundment Control Act, certain events took place which demonstrate limitations on the applicability of the Impoundment Control Act as a congressional oversight tool. I refer to the President's curtailment of the B-1 bomber and the Minuteman III missile programs. In these programs the executive branch took steps to cancel certain aspects of B-1 bomber and Minuteman III production—such as termination of production contracts—before notifying the Congress.

In the case of the B-1 bomber, stop-work orders were issued on June 30, 1977, yet the Congress was not notified of the already implemented change in program plans until July 19, when the President proposed to rescind funds in excess of those needed to pay off liabilities created in part by the curtailment action.

Similarly, contract stop-work and termination orders were sent to the major Minuteman III contractors on July 11, 1977, but it was not until July 26, 1977, that the matter was formally presented to the Congress through a proposed rescission of budget authority.

Several Members of Congress expressed concern that curtailments of major programs were not more promptly brought to the attention of the Congress. The Impoundment Control Act does not apply to program curtailment or termination decisions as such but only deals with budgetary impacts; that is, so long as budget authority is to be used the Impoundment Control Act does not come into play. In light of this, several Members of Congress asked us to consider how the Congress could assure its review of proposed curtailments or terminations by the executive branch in the future prior to their implementation.

We responded to these concerns in letters to key legislative officials and representatives of the executive branch. Our letter suggested a possible legislative approach to permitting an expedited congressional review of proposed curtailments.

Later we drafted legislation that provides a review procedure under which Congress could disapprove proposed curtailments within 14 days after they are submitted. A copy of the draft is also appended to my statement.

Under this approach, the review procedure would not be self-executing; the Congress would specify in other statutes those pro-

grams to be made subject to the procedure. Our proposal was not designed as a definitive solution to the program curtailment problem but it may serve as a focus for consideration of the many issues which arise here.

Our contacts with the Members of Congress and their staffs indicate interest in the advantages and disadvantages of the idea as well as the desire to study closely how such a procedure might be implemented.

Mr. Chairman, we would also like to submit for the record copies of materials that we believe would be of interest to the task force in its deliberations concerning the effectiveness of the Impoundment Control Act of 1974. These materials include selected correspondence relating to the President's curtailment of the B-1 bomber and the Minuteman III missile programs, and the draft of a legislative mechanism requiring prior congressional consultation before program curtailments could be implemented.

This concludes my prepared statement, Mr. Chairman. We would be happy to reply to questions, if we can. Let me also introduce to you Milton Socolar, Deputy General Counsel of GAO, who is accompanying me here this morning.

[Testimony resumes on p. 14.]

[The prepared statement of Mr. Dembling along with enclosures referred to in colloquy follows:]

PREPARED STATEMENT OF PAUL G. DEMBLING

Mr. Chairman and members of the task force: We appreciate the opportunity to discuss with you our experience under the Impoundment Control Act of 1974.

Today's hearing focuses upon title X of the budget control legislation that was enacted in July 1974—known as the Impoundment Control Act of 1974. This act creates the procedural means by which the Congress considers and reviews executive branch withholdings of budget authority. The statute requires the President to report promptly to the Congress all withholdings of budget authority and to abide by the outcome of the congressional impoundment review process. By and large, the Impoundment Control Act has worked well.

The statute assigns several functions to the Comptroller General and GAO. We evaluate for the Congress impoundments reported by the executive branch. We also report to the Congress impoundments which the executive branch has failed to disclose and report. We identify undisclosed impoundments through our audit efforts and information provided to us by persons inside and outside the Government. Under certain circumstances GAO may sue an executive agency to compel the proper release of impounded funds.

Let me briefly summarize the key features of the Impoundment Control Act:

There are two types of impoundments: Rescissions and deferrals.

Deferrals are temporary withholdings of funds while rescissions are requests to the Congress to cancel budget authority.

Either House of Congress can reject a deferral by passage of a simple resolution. Passage of such an impoundment resolution requires the executive to terminate the impoundment and to make the deferred funds available for obligation immediately.

Requests to rescind the budget authority involve the entire legislative process since a bill or joint resolution passed by both Houses and signed by the President is necessary to accomplish a rescission. Under the act, if a rescission bill is not passed within 45 days of continuous congressional session after the day on which the request is first received by the Congress, the funds withheld during the pendency of the request must be made available for obligation.

The Comptroller General is authorized to report to the Congress undisclosed rescissions and deferrals. Impoundments reported by the Comptroller General are treated as though coming from the President.

Complementary to this reporting process, the Comptroller General also is required to notify the Congress when an impoundment has been improperly classified by the President. Such a report triggers the appropriate congressional review mechanism and nullifies the process initiated by the prior Presidential message.

The Comptroller General is empowered to sue the executive branch to make funds available for obligation when he finds the executive branch has not complied with the statute's requirements that the funds be released.

While we believe the basic framework of the act is sound, we have suggested a number of possible refinements to the law and the way in which it is administered by the executive branch. In our view, implementation of these recommendations would streamline and clarify the operation of the statute. All of our administrative and legislative recommendations are discussed in detail in our report to the Congress on the first 2 years of operation of the Impoundment Control Act. A summary of the status of the recommendations for administrative improvements that we made to OMB in our June 1977 report is appended to my statement.

On the administrative side, we recommended that OMB specify the duration of proposed partial-year deferrals; identify all impoundments of congressional "add-ons" to executive branch budget requests; note whether there have been previous impoundments proposed for each program in which withholdings currently are proposed; and improve the timeliness of presidential impoundment reports.

Foremost among our legislative recommendations is the repeal of the requirement to report routine impoundments in the form of budgetary reserves pursuant to the "Antideficiency Act" or otherwise specifically authorized by law. Our experience suggests that the current requirement to report these impoundments produces little congressional reaction and greatly increases paperwork and administrative burdens on the executive branch, the Congress, and the GAO. Excluding routine impoundments would allow the Congress to focus on the policy issues that precipitated the act's passage. It should also have the beneficial effect of reducing the expense and time required to process impoundment reports to the Congress.

Our other legislative recommendations include providing a means to reduce the 45-day period during which funds can be withheld pending rescission requests. The current 45-day period of continuous session for consideration of rescissions often extends well beyond the calendar day equivalent; and the actual duration of the rescission period is uncertain at the time a proposal is submitted. We believe that the more certain time period of 60 calendar-days would better serve the interests of all parties. We also believe it would be helpful to amend the act so that the Congress can express its disapproval of proposed rescissions without having to wait for the statutory rescission period to expire. This could be done by providing a mechanism under which either House, by simple resolution, could express its disapproval of a proposed rescission. The waiting period would then stop and the funds being withheld pending rescission would have to be made available for obligation.

We also suggested amending the act to: Require a statement of the exact duration of proposed partial-year deferrals; eliminate the 25-day waiting period before the Comptroller General can initiate legal proceedings to compel the release of impounded budget authority; and specify when impoundments may be proposed after prior impoundments for the same program have been rejected by the Congress.

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Several Members of Congress expressed concern that curtailments of major programs were not more promptly brought to the attention of the Congress. The Impoundment Control Act does not apply to program curtailment or termination decisions as such, but only deals with budgetary impacts. That is, so long as budget authority is to be used, the Impoundment Control Act does not come into play. In light of this, several Members of Congress asked us to consider how the Congress could assure its review of proposed curtailments or terminations by the executive branch in the future prior to their implementation.

We responded to these concerns in letters to key legislative officials and representatives of the executive branch. Our letter suggested a possible legislative approach to permitting an expedited congressional review of proposed curtailments. Later, we

drafted legislation that provides a review procedure under which Congress could disapprove proposed curtailments within 14 days after they are submitted. (A copy of the draft is also appended to my statement.) Under this approach, the review procedure would not be self-executing; the Congress would specify in other statutes those "programs" to be made subject to the procedure. Our proposal was not designed as a definitive solution to the program curtailment problem; but it may serve as a focus for consideration of the many issues which arise here.

Our contacts with Members of Congress and their staffs indicate interest in the advantages and disadvantages of the idea as well as the desire to study closely how such a procedure might be implemented.

Mr. Chairman, we would like to submit for the record copies of materials that we believe would be of interest to the task force in its deliberations concerning the effectiveness of the Impoundment Control Act of 1974. These materials include selected correspondence relating to the President's curtailment of the B-1 bomber and Minuteman III missile programs, and the draft of a legislative mechanism requiring prior congressional consultation before program curtailments could be implemented.

This concludes my prepared statement, Mr. Chairman.

Enclosures.

STATUS OF RECOMMENDATIONS TO OMB TO IMPROVE IMPOUNDMENT REPORTING

GAO recommendation

Expedite the reporting of impoundments.

OMB response/status

Still a problem from time to time. See our report on 8th special message for fiscal year 1978, dated June 6, 1978.

GAO recommendation

Specify deferral ending dates.

OMB response/status

OMB disagreed with recommendation. Not done.

GAO recommendation

Identify prior impoundment proposals in each meassage.

OMB response/status

OMB agreed. Has been done.

GAO recommendation

Identify congressional "add-on" budget authority when proposed for impoundment.

OMB response/status

OMB agreed when the "add-on" influences the decision to impound.

GAO recommendation

Identify cognizant executive branch official to contact on each message.

OMB response/status

OMB disagreed. Not done.

DRAFT BILL

SEC. ——. (a) For purposes of this section:

(1) "Program" means any project, activity, or weapons system expressly made subject to this section by law, in amounts specified in appropriation acts.

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

(3) "Curtail" means to discontinue, in whole or in part, the execution of a program, resulting in the application of less budget authority in furtherance of the program than provided by law.

(4) Continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain shall be excluded in the computation of the 14-day period referred to in subsection (b)(2) of this section. If a special proposal is transmitted under subsection (b) of this section during any Congress and the last session of such Congress adjourns sine die before the expiration of 14 calendar days of continuous session (or a special proposal is so

transmitted after the last session of the Congress adjourns sine die), the message shall be deemed to have been retransmitted on the first day of the succeeding Congress and the 14-day period referred to in subsection (b)(2) of this section (with respect to such special proposal) shall commence on the day after such first day.

(5) "Disapproval resolution" means a concurrent resolution which expresses disapproval of a special proposal transmitted under subsection (b) of this section.

(6) "Special proposal" means a proposal sent by the President to the Congress pursuant to subsection (b) of this section notifying the Congress of the executive branch's determination to curtail a program.

(b) Proposals to curtail programs:

(1) Whenever the executive branch has determined to curtail any program the President shall transmit to both Houses of Congress a special proposal specifying—

(A) the program proposed to be curtailed;

(B) the department or establishment of the Government which is responsible for implementing the program;

(C) the reasons why the program should be curtailed;

(D) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effects of the proposal; and

(E) all facts, circumstances, and considerations relating to or bearing upon the proposal, and to the maximum extent practicable, the estimated effect of the proposal upon the purposes which the program was to accomplish.

(2) No actions shall be taken to curtail any program for a period of 14 days of continuous session after the date on which a special proposal is received by the Congress. If, during this 14-day period, a disapproval resolution is passed, the curtailment shall not be implemented.

(3) Passage of a disapproval resolution shall have the same force and effect as an impoundment resolution passed pursuant to section 1013(b) of the Impoundment Control Act of 1974.

(4) Passage of a disapproval resolution shall terminate the 45-day period referred to in section 1012(b) of the Impoundment Control Act of 1974.

(c) Transmission of messages; publication:

(1) Each special proposal transmitted under subsection (b) of this section shall be transmitted to the House of Representatives and the Senate on the same day, and shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in session. Each special proposal shall be printed as a document of each House.

(2) A copy of each special proposal transmitted under subsection (b) shall be transmitted to the Comptroller General on the same day it is transmitted to the House of Representatives and the Senate. In order to assist the Congress in the exercise of its functions under subsection (b) of this section the Comptroller General shall review each special proposal and inform the House of Representatives and the Senate as promptly as practicable with respect to the facts surrounding the proposal.

(3) If any information contained in a special proposal transmitted under subsection (b) of this section is subsequently revised, the President shall transmit to both Houses of Congress and the Comptroller General a supplementary special proposal stating and explaining such revision. Any such supplementary special proposal shall be delivered and printed as provided in (1) of this subsection. The Comptroller General shall promptly notify the House of Representatives and the Senate of any changes in the information submitted by him under (2) of this subsection which may be necessitated by such revision.

(4) Any special proposal transmitted under subsection (b) of this section and any supplementary special proposals transmitted under (3) of this subsection, shall be printed in the first issue of the FEDERAL REGISTER published after such transmittal.

(d) Reports by Comptroller General:

If the Comptroller General finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any other officer or employee of the United States has determined to curtail a program with respect to which the President is required to transmit a special proposal under subsection (b) and that the President has failed to transmit a special proposal with respect to such determination, the Comptroller General shall make a report thereon. Such report of the Comptroller General shall have the same effect as if it were a special proposal transmitted by the President under subsection (b) of this section, and, for purposes of this section, such report shall be considered a special proposal transmitted under subsection (b) of this section.

(e) Suits by Comptroller General:

If under subsection (b)(2) of this section, a curtailment proposal is disapproved, the Comptroller General is hereby expressly empowered, through attorneys of his own selection, to bring a civil action in the United States District Court for the District of Columbia to enforce the requirements of subsection (b)(2) through (4) of this section, as applicable, and the court is hereby expressly empowered to enter in the civil action, against any department, agency, officer, or employee any order which is necessary or appropriate to compel compliance with such requirements.

(f) This section may be cited as the "Program Curtailment Control Act of 1978."

Program Curtailment Control Act of 1978

EXPLANATORY STATEMENT

The draft legislation would provide a mechanism for prior congressional review and potential disapproval of executive branch decisions to curtail programs. This mechanism would afford Congress a preliminary, expedited review at the decision stage. The purpose of the expedited review is to alleviate potential shortcomings in the operation of the Impoundment Control Act either where a curtailment decision does not involve an impoundment subject to that act or where unilateral implementation of a curtailment decision would lessen the effectiveness of later congressional review of any impoundment which is involved.

Program coverage.—The legislation enacts as permanent law a curtailment review procedure, but it does not identify the programs subject to the procedure. This is left for congressional action in other laws. Thus the only criteria in the definition of "program" (subsection (a)(1)) are that a project, activity or weapons system be expressly made subject to the curtailment procedure by another statute, and that the program amount be specified in an appropriation act.

It would be extremely difficult to define in general terms what types of programs should be subject to the curtailment procedure, or even to define "program" in the abstract. The identification of covered programs is really a matter of congressional preferences and priorities at any given time. The assumption underlying the legislation is that Congress, applying whatever criteria it sees fit, will list in other statutes the specific programs to be covered. This could probably be done most conveniently through the annual budget process. Likewise, requiring that the program amount be specified by law avoids problems in ascertaining the funding level desired by Congress where budget authority for a covered program is provided by means other than a discrete line-item appropriation.

Application of curtailment procedure.—The review procedure is triggered by an executive branch decision to "curtail" a program which has been made subject to the bill. The definition of "curtail" (subsection (a)(3)) requires that the executive branch decision result in a reduction of budget authority applied in furtherance of the program. As noted above, the level of budget authority for this purpose would be the amount so specified in an appropriation act. The reduction relates to the use of funds "in furtherance of the program." Thus, although the full amount of budget authority may be spent in some manner, e.g., to pay contract termination costs or other liabilities incident to the curtailment, such a use of funds still involves a reduction in funding for affirmative program purposes which triggers the review provisions.

Curtailment review procedure.—The review procedure would generally be similar to the procedure for reviewing deferrals of budget authority under the Impoundment Control Act, except that congressional disapproval would take the form of a concurrent resolution. The President would report a proposed curtailment decision to Congress, together with appropriate information (subsection (b)), and supplementary reports would be made for any revisions (subsection (c)(3)). The proposal, and any supplementary reports, would be printed in the Federal Register (subsection (c)(4)).

A copy of the proposal and any revision would also be transmitted to the Comptroller General, who would submit comments to the Congress (subsection (c)(2)). The Comptroller General would report to the Congress for review and action proposed curtailment decisions which the executive branch fails to report (subsection (d)). The Congress would have 14 days of continuous session in which to disapprove a proposed curtailment (subsections (b)(2), (a) (4)-(5)). After a proposal is disapproved, the Comptroller General could bring judicial enforcement actions if necessary to effect compliance with the disapproval and assure that any impounded funds are made available (subsection (e)).

Relationship to impoundments.—The curtailment review procedure would not diminish congressional review opportunities under the Impoundment Control Act; rather, the two procedures would be complementary. When the curtailment propos-

al involves a deferral or rescission of budget authority, the requirements of the Impoundment Control Act would also attach. If Congress disapproves the curtailment, this action would, in addition to precluding implementation of the curtailment as such, require that any impounded budget authority be made available (subsection (b) (3) and (4)). On the other hand, even if Congress fails to disapprove the curtailment within 14 days, the Impoundment Control Act review period would continue to run for the remainder of the statutory 45 days. Thus Congress would retain in full its present review authority over any impoundments involved in a curtailment proposal.

Mr. DERRICK. Thank you very much, Mr. Dembling, for an excellent statement. We do have several questions here that we would like to pursue with you.

My first question involves our 45-day period. Congress can, as you stated in your testimony, only disapprove a rescission request by allowing the 45-day period to expire. You have proposed that Congress also be able to end a rescission sooner by passage of a simple resolution of disapproval. Could you amplify on this maybe just a little bit for us?

Mr. DEMBLING. Yes, sir. The problem that faces the Congress at the present time is that if it plans to take no action on a rescission proposal of the President within 45 days, the executive branch feels that it must wait the 45-day period before it can make available for obligation the funds that are in the proposal; however, there have been times where the Congress feels that it knows that it is not going to pass a rescission bill and would like to speed up the process. We feel that there ought to be some mechanism for speeding up the 45-day wait which, as I have said translates itself into about 80 days many times. We propose that passage of a simple resolution by either House would indicate that a rescission bill will not be passed and consequently expresses the view of the Congress, and then the funds could be made available for obligation.

Mr. DERRICK. I believe that you have also suggested that we might go on a calendar-day basis to let that time run?

Mr. DEMBLING. Yes, sir.

Mr. DERRICK. And maybe a 60-day calendar day basis would be more reasonable?

Mr. DEMBLING. Yes, sir.

Mr. DERRICK. Do you think that a simple resolution of disapproval can overturn part of a rescission? In other words, can it be directed to a line-item?

Mr. DEMBLING. Since a rescission bill requires the passage by both houses of Congress and signature by the President in order to be effective, a simple resolution would indicate that one House was not going to pass the rescission bill. The rationale of the simple resolution is that the intent of the Congress not to pass the rescission bill is expressed.

Mr. DERRICK. Thank you. The gentlelady from Maryland.

Mrs. HOLT. Thank you, Mr. Chairman. Your recommendation that we repeal the requirement that OMB report routine impoundments disturbs me a little bit.

Wouldn't we be sacrificing some of the information that was intended under the act if we did that? Couldn't there be a better way worked out? In other words, what was the purpose of doing it that way? Wasn't it to give us all of the information?

Mr. DEMBLING. There was at the outset, if you recall, a feeling that perhaps the Impoundment Control Act didn't really mean to encompass Antideficiency Act reserves and actions, since those impoundments were made pursuant to law—in other words, that the President had authority to take actions under the Antideficiency Act. When the Impoundment Control Act was passed the Congress decided that all reserves should be reported to the Congress in order to be aware of all actions taken—made either pursuant to law or for policy reasons.

In review of our first 2 years' experience under the Impoundment Control Act, we found that there were about 157 actions that were reported by the President dealing with Antideficiency Act impoundments. The Congress felt that these were routine, and did not react to them. It was more concerned about the other actions that were taken—the impoundments that involved policy and fiscal considerations. Therefore, we felt that in order to lessen the burden on everyone this area could be curtailed; in other words, not to report the routine impoundments or reserves made under the Antideficiency Act. That is the reason for it.

Mr. SOCOLAR. If I might interject a comment here—the recommendation to eliminate the routine impoundments is really designed to deal with the paperwork burden but would not affect the Comptroller General's authority—as we view the recommendation—to continue to review those reserves that had been established, but were not being reported, and the Comptroller General would still have the authority to report any improper impoundments that were not being reported.

Mrs. HOLT. What is bothering me is that I feel this information, or directing our attention to it, is valuable to us. I know we don't have enough time to react to everything, but I am reluctant to think about not having it at least brought to our attention. On the other hand, are you saying that there was no action taken on these routine notifications?

Mr. DEMBLING. I believe there was action taken on 2 of them, 2 out of the 157 that were reported.

Mrs. HOLT. Thank you very much. Thank you, Mr. Chairman.

Mr. DERRICK. Mr. Mineta.

Mr. MINETA. Thank you, Mr. Chairman. First of all, Mr. Dembling, I appreciate your appearance here today. I was just wondering to whom did that June 1977, report to the Congress go?

Mr. DEMBLING. It should have gone to all Members of the Congress.

Mr. MINETA. And did the specific committee that might have responsibility for any oversight functions on this aspect of that June 1977, report or the Budget Impoundment Control Act of 1974 have hearings on this whole matter and get into it as a followup to your report?

Mr. DEMBLING. No; we have not had any hearings on the Impoundment Control Act, except for this one.

Mr. MINETA. I assume that it is the Rules Committee that would have jurisdiction on that matter?

Mr. DEMBLING. Yes, sir.

Mr. MINETA. And on the recommendations that you made to OMB, I notice that you have about four, I guess, where they have

actually responded to your recommendation. Except for that last one, where you identify cognizant executive branch officials to contact on each message where OMB disagreed—I don't know why they would disagree on that matter—but in any event on those other items would they require legislation?

Mr. DEMBLING. No, we don't believe so.

Mr. MINETA. But if you are not going to get them to respond in a positive manner to your recommendations and they say, "Well, stick it in your ear" or "Go fly a kite," how are you going to get that response, a positive response?

Mr. DEMBLING. These recommenations were to speed up our information or to make it a little easier for us to report to the Congress. Generally, I must say that the information that we need has been forthcoming from the Office of Management and Budget and we do have a good working relationship with them in connection with the substantive issues that face us and that we require in order to report to the Congress.

In addition, the General Accounting Office does have audit staffs that are located in most of the agencies in the Government. Our audit staffs do check and verify the information that has been submitted either by the agency to OMB or by OMB through the President to the Congress. We verify that information in the various agencies, and there, again, we have had no problem in getting that material from the agencies.

Mr. MINETA. To that extent, who initiates those requests for audits? Do you do any of that yourself, on your own initiative do you start some of those audit investigations?

Mr. DEMBLING. Well, in connection with a Presidential message that is submitted to the Congress on a list of impoundments, we verify each impoundment. Routinely we go through the process of asking our audit staffs to check each of the impoundments that are listed in the impoundment message that the President sends to the Congress. We do that as a routine matter; we will check and verify each of the impoundment actions.

Mr. MINETA. One of the big things around here right now seems to be the phrase "fraud, abuse and waste." It is a good cliche. It sort of covers the whole waterfront. Who looks into those kinds of things?

Mr. DEMBLING. The Antideficiency Act that Mrs. Holt was speaking about earlier provides for specific curtailments of funds or reserve of funds when cost savings would be required.

I have a copy of the act here and it says that in apportioning any appropriations—I am reading from 31 U.S.C. 665, which is the Antideficiency Act: "Reserves may be established solely to provide for contingencies or to affect savings whenever savings are made possible by or through changes in requirements for greater efficiency of operations." The Antideficiency Act gave the executive authority to curtail funding for various programs and the Office of Management and Budget does implement requirements of the Antideficiency Act.

Mr. MINETA. Where does GAO step into that? As I listened to it, it was really more the executive branch——

Mr. DEMBLING. We review those reserves when they are established and reported under the Impoundment Control Act.

In addition, actions taken by various agencies under the Antideficiency Act are reviewed by our audit teams in the agencies, apart from any impoundments that may be disclosed, to check any that have been undisclosed, for example.

Mr. DERRICK. We have a vote in progress. The committee will recess until about 10:15. We will be back. Thank you. If you will bear with us.

[After recess.]

Mr. DERRICK. We will get started. Grant projects and construction projects frequently suffer from slowdowns, either if program regulations take too long to write or if construction progress is slow. When a slowdown proceeds to the point that funds will probably lapse, GAO reports a de facto rescission to Congress. This has the same legal effect as a Presidential rescission request. This remedy for slowdowns is not adequate, for two reasons: First, by the time GAO reports a de facto rescission, it is probably too late to prevent funds from lapsing; and second, no-year funds will not lapse no matter what, so GAO doesn't have any reason to report a de facto rescission.

My question is: If a grant or construction project is proceeding slowly, you might report a de facto rescission; but by then funds will probably have lapsed anyway. On the other hand, if no-year funds are involved, then you don't have any reason to report a de facto rescission. How can these problems be minimized?

Mr. DEMBLING. The funds have been made available for obligation and if there is really a slowdown in the expenditure of the funds, you really don't have an impoundment under the Impoundment Control Act. There isn't very much that we can do under the Impoundment Control Act to speed up the expenditure of funds.

If you are talking about deferrals, of course, the mechanism of the Impoundment Control Act comes into play. We are dealing with funds that are available for obligations and whenever the OMB does make those funds available for obligation they have met the requirements of the Impoundment Control Act and there doesn't appear to be a deferral in those cases.

When you are talking about a slowdown, of the expenditure of funds, it really doesn't come within the purview, as we understand it, of the Impoundment Control Act.

Mr. DERRICK. But what steps might be taken? You recognize this is a problem. I assume you agree with me on that. I am not suggesting that you do something; what I am asking for are suggestions as to what we might do to minimize these problems. I understand maybe it does not come under the act.

Mr. SOCOLAR. We did make a legislative recommendation to deal with that problem. Where there is a slowdown to the point where we feel that there is not sufficient time before the funds lapse to effectively carry that particular program forward, we have recommended that the act be amended in that kind of a situation to preserve the funds involved, so that there will be sufficient time to proceed through the court action, if necessary, without having to be concerned that an intervening, lapsing period would cause those funds to be lost.

Mr. DERRICK. Give me a little more of the mechanics of your amendment.

Mr. SOCOLAR. Suppose, for example, the executive branch were to defer obligations under a particular program and the Comptroller General in his review were to conclude that the deferral is proceeding for such a length of time that effectively there will evolve a rescission of those funds because by the time the executive branch decides to stop the deferral there won't be enough time as a practical matter to carry the program out. That is the point in time at which we would report a de facto rescission.

If by the time that moment arrives there is not enough time as a practical matter to do anything about it before the funds lapse, we have recommended that in that kind of a situation those funds be frozen and in a sense be considered as obligated, so that they don't lapse, in order to force the ultimate carrying out of that program.

Mr. DERRICK. I thank you.

Mr. DEMBLING. Mr. Chairman, may I go back to a question that Mr. Mineta asked before, as to what is being done by GAO with regard to abuses with regard to spending programs?

This is outside the Impoundment Control Act and goes to the core of the authority and responsibility of the General Accounting Office generally.

The responsibility and duties of the General Accounting Office are to review programs and activities of the executive branch to see that they are carried out economically, effectively, and efficiently, and in accordance with the legislation which established those programs that was passed by the Congress; so that is something that the GAO has been doing since its creation in 1921; and it is the GAO's responsibility to see that the executive branch is carrying out the programs for which it has responsibility in an effective, efficient, and economical manner.

Mr. MINETA. The thing is, we had, for instance, a couple of weeks ago the HEW appropriations bill in which I think $1 billion was cut out for fraud, waste and abuse for fiscal year 1979.

I was wondering how do we know, let's say, on June 23, that in fiscal year 1979 we are going to have fraud, waste, and abuse of $1 billion worth? And next year, what we are going to put in the budget is a line item for $7 billion of waste, fraud and abuse, and then we will all vote for an amendment to take out $7 billion for fraud, waste, and abuse.

We will be way ahead of the game. Where does GAO fit into that? I understand you say it is outside the Impoundment Control Act; is it part of your basic task to identify those?

Mr. DEMBLING. Usually we respond to requests by the various committees—for example, the authorizing committees and the appropriations committees—to do surveys and audits on specific programs. That is in response to requests by the Congress.

Mr. MINETA. That has to come on a specific request?

Mr. DEMBLING. That comes on specific requests. Such requests amount to about 35 percent of the work that the GAO does. The other 65 percent is self-initiated—to try to anticipate the needs of the Congress for information on which to make its decisions. We submit reports to the Congress on various programs which are being carried out by the executive branch.

Mr. MINETA. To followup on that point then, what is the definition of a routine impoundment?

Mr. DEMBLING. Routine impoundments are impoundments under the Antideficiency Act—curtailments in connection with savings which the executive branch feels would be effected because of changed conditions or changed requirements or changed needs, and there the President has the authority to curtail obligating such funds for such programs.

Mr. MINETA. Under section 1015 of the Budget and Impoundment Control Act you have certain responsibilities in terms of identifying where those impoundments might be. What kind of a system do you have of checking up or catching those kinds of impoundments other than those where they are reported to you? Do you have some way of being able to identify these things, or is it happenstance? How do we really know, in fact, here in the Congress? I look at the 1977 report, just in terms of your introduction, and you have a bar chart on deferrals and rescissions on various kinds of programs, whether it is housing and community development, manpower, education, defense, science research and development, highways, roads, others, and we have impoundments of $11 billion in housing and community development in fiscal years 1975 and 1976, in highways and roads of, again, close to $11 billion in those 2 fiscal years. What kind of a system does GAO have to report to the Congress on those impoundments?

Mr. DEMBLING. Each impoundment message is considered and we comment on each impoundment referred to the Congress.

Mr. MINETA. That is fine for those that someone says: "OK, Congress, I am going to impound these funds," but what about some of these other things that are going on that are not visible, how do you catch those?

Mr. DEMBLING. We have audit staffs in practically all of the departments and agencies of the Government. They are stationed there and are familiar with the programs and the actions taken by the departments and agencies. The audit staffs report back to us any undisclosed impoundments or those that appear to be of such a character.

We also get information from the Congress and from interested parties who are affected by various programs. For example, grantees will inform us of actions which appear to be impoundments and in those cases those that are directly interested and affected usually make for the best reporters to us with regard to actions that are being taken by the executive branch.

Mr. MINETA. I haven't yet heard in your response where you find these things by a normal, routine procedure of checking on things. I mean, you identified where the executive branch sends up a message to the Congress. You have identified snitches, but you haven't identified where you have a regular system of being able to identify and report to the Congress.

Mr. DEMBLING. The only regular system we have is that the audit staffs that reside in the departments and agencies inform us of any actions that are taken by the departments and agencies.

Mr. SOCOLAR. We do make periodic reviews of the financial statements of the agencies and we concentrate our efforts in those areas where the impoundments are most likely to occur. We feel that it makes the most sense to concentrate our efforts, for example, in

connection with water projects, those areas where the impoundments are most likely to occur.

Mr. MINETA. I think I heard the figure that, for instance, in case of fraud, waste, and abuse, that in the HEW budget it may amount to 3 percent. If General Motors could do as well in that same area, they would be doing well. Do you have any kind of reaction to that kind of a general statement?

Mr. SOCOLAR. I am not sure that I follow the import.

Mr. MINETA. The Government is always accused of having waste, fraud, and abuse, but what about the private sector, are they devoid of waste, fraud, and abuse?

Mr. SOCOLAR. I suspect not.

Mr. MINETA. Is 3 percent an unreasonable figure in terms of that general classification?

Mr. SOCOLAR. I don't know whether it is really possible to establish what a reasonable figure would be. I think that the ultimate aim of all of us is to examine what is going on and to keep such fraud and abuse as does appear through those examinations at the very minimal level that we can.

Mr. MINETA. The other thing that we have been doing recently with appropriations bills is a 2-percent across-the-board cut and no one item to be cut by any greater than 5 percent. It seems to me what the Congress has done is delegated to the executive branch the determination as to where those cuts ought to be.

The Department of Energy may not cut anything as far as nuclear programs are concerned; 76 percent of their money goes into nuclear power, and all of us are interested in alternative sources of energy. They may take zero cuts of nuclear power and maximize those cuts in alternative energy programs and still keep within the 2-percent across the board.

How do we, the Congress, the GAO, really take a look at those to see whether or not our priorities or mandates are being carried out by the executive branch?

Mr. DERRICK. Would the gentleman yield?

Mr. MINETA. Surely.

Mr. DERRICK. I ask unanimous consent to enter in the record at this time a letter on the date of June 29, to the chairman of the Budget Committee from the Comptroller General.

[The letter referred to follows:]

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., June 29, 1978.

Hon. ROBERT N. GIAIMO,
Chairman, Committee on the Budget,
House of Representatives.

DEAR MR. CHAIRMAN: This replies to your letter of June 16, 1978, in which you asked whether the executive branch would have to report pursuant to the Impoundment Control Act, 31 U.S.C. §§ 1401 *et seq.*, withholdings of budget authority made in compliance with the so-called "Miller amendment" language.

Representative Miller, of Ohio, has offered amendments to a number of pending appropriation bills that would require the withholding of 2 percent of the total nonmandatory budget authority provided in the bill, but not more than 5 percent of the nonmandatory authority in each account, activity, and program. For example, his amendment to H.R. 12929, the Departments of Labor and Health, Education, and Welfare appropriations bill, 1979, adopted by the House on June 13, 1978 (see 124 Cong. Rec. H5381 (daily ed. June 13, 1978)), states:

Of the total budget authority provided in this Act, for payments not required by law, 2 per centum shall be withheld from obligation and expenditure: *Pro-*

vided, That of the amount provided in this Act for each appropriation account, activity, and project, for payments not required by law, the amount withheld shall not exceed 5 per centum.[1]

We interpret the Impoundment Control Act as applying only to those withholdings of budget authority that are essentially the product of an executive branch exercise of discretion not to utilize available budgetary resources. *Cf.,* 31 U.S.C. §§ 1401 (1)(B), 1402(a) and 1403(a). Thus we do not believe that the act covers withholdings mandated by law. As noted above, the language of the Miller amendment requires that 2 percent of the total nonmandatory portion of an appropriation act be withheld from obligation and expenditure. The effect is to make unavailable as a matter of law 2 percent of the aggregate nonmandatory budget authority. While some discretion probably exists in making the withholdings (subject to the 5-percent limitation), compliance with the ultimate 2-percent reduction is clearly a firm legal requirement under the terms of the amendment. Therefore, we believe it is reasonable to view such withholdings as representing essentially the implementation of a statutory mandate.

In addition, application of the Impoundment Control Act to Miller amendment withholdings would produce incongruous results. Presumably such withholdings, if subject to the act, would take the form of proposed rescissions of budget authority, rather than temporary deferrals, and would therefore require affirmative congressional action, *i.e.,* enactment of rescission bills. See 31 U.S.C. §§ 1401(3) and 1402. This approach would, in effect, require Congress to act twice and thereby make implementation of the Miller amendment a matter for Congress rather than the executive branch.

By virtue of the Miller amendment's 5-percent limitation, the mix of individual withholdings may become quite complex. Thus, attempting to implement the necessary withholding through the rescission process in a manner consistent with the aggregate 2-percent requirement and the individual 5-percent limitations would be likely to create a procedural morass for both Congress and the executive branch. Even more significantly, either House of Congress would effectively nullify the Miller amendment by failing to pass the necessary rescission legislation.

In sum, subjecting Miller amendment withholdings to the Impoundment Control Act would essentially reduce the amendment to a mandate for the submission of rescission proposals. Its stated requirements would be deprived of any finality and would, in fact, have no legal effect as such. We believe that application of the Impoundment Control Act in this context is untenable as a matter of law.

We also note that the legislative history concerning the Miller amendment developed thus far suggests an understanding that the Impoundment Control Act would not apply. During the House debate on H.R. 12936, the Department of Housing and Urban Development-Independent Agencies Appropriations Bill, 1979, Representative Miller introduced an amendment identical to that adopted by the House in connection with H.R. 12929. In the course of the debate on the Miller amendment to H.R. 12936, Representative Boland said:

> * * * What this amendment would do is give the executive branch considerable leeway in applying the reduction. That would take away authority and power from the Congress and fly in the face of the Congressional Budget and Impoundment Control Act of 1974. That is exactly what we are doing if we adopt the position of the gentleman from Ohio (Mr. Miller). 124 Cong. Rec. 5814 (daily ed. June 19, 1978).

The desirability of the Miller amendment in this regard was a specific point of contention during debate on the HUD-Independent Agencies bill, and the amendment was ultimately rejected here. However, both proponents and opponents of the amendment seemed to agree that the executive branch would retain discretion in making the required withholdings. See generally, 124 Cong. Rec., *supra,* at H5813–14. In fact, Representative Miller suggested that the absence of congressional involvement in effecting the budget cuts was a necessary feature of his amendment. *Id.* at H5813. The only other statement on this point which we have found during debate on the various Miller amendments likewise suggests that the required withholdings would not be subject to congressional review. See 124 Cong. Rec. H5381 (daily ed., June 13, 1978) (remarks of Representative Conte on the Labor-HEW bill).

For the reasons stated above, it is our opinion that if the Miller amendment language is enacted in its present form, the required withholdings of budget author-

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[1] This amendment is similar to other amendments introduced to H.R. 12928, the Public Works appropriations bill, 1979, 124 Cong. Rec. H5713—14 (daily ed. June 16, 1978) H.R. 12936, the HUD Independent Agencies appropriations bill, 1979, 124 Cong. Rec. H5813 (daily ed. June 19, 1978); H.R. 12934, the State Justice Commerce Judiciary appropriations bill, 1979, 124 Cong. Rec. H5550 (daily ed. June 14, 1978); and H.R. 12935, the legislative branch appropriations bill, 1979, 124 Cong. Rec. H5558 (daily ed. June 14, 1978) (5 percent–10 percent formula).

ity would not be subject to the reporting and review procedures of the Impoundment Control Act. Of course, the act would apply to any withholdings that go beyond the 2- and 5-percent thresholds of the Miller amendment. Accordingly, if the amendment becomes law, it will be essential that the executive branch fully and specifically identify those withholdings taken to implement Miller amendment requirements, as opposed to other withholdings of budget authority.

We hope the foregoing will be of assistance to you.

Sincerely yours,

ELMER B. STAATS,
Comptroller General of the United States.

Mr. MINETA. Great.

Mr. DERRICK. If you have that before you, they address that question specifically and they are in agreement with what you are suggesting, that the Congress has given to the executive branch that authority to do pretty much what they please within the 2- and the 5-percent limitations, and I do not mean to interrupt you.

I would be glad to hear them comment on that further. You have already asked the question, but I will reinforce what I perceive from the testimony; that this, in fact, is what Mr. Miller intended to do. Be that as it may, we have given the executive branch a great deal of flexibility there, to be kind to them, and it is something that the Congress, I believe, should retain. I would like to know what we might do about it.

Mr. DEMBLING. That is correct. The discretion is, as Mr. Mineta points out, that there can't be a cut beyond the 5 percent in any one program, and as long as it averages out to 2 percent across the board, then it is within the provisions of the so-called Miller amendment.

Mr. DERRICK. Let me interject something here: As I understand it, there is enough flexibility in the opening, in addition to this Miller amendment, in the latter, too, that we have given there, that it could be substantially more than 5 percent. You are going to have to track down or they are going to have to designate, as I understand it, what they are withholding under the Miller amendment.

Mr. DEMBLING. We recognize that, Mr. Chairman, and we recognize that we are going to have to track and monitor what the cuts are in order to make sure that there are no impoundments. In other words, if they exceed the 5 percent in any one program, of course, it is an impoundment, and if they exceed the 2-percent overall cut, that is an impoundment; so that we will have to track and make sure that they are adhering to the 2- and the 5-percent limitations.

Mr. MINETA. That goes back to my original question on section 1015 of the act, whether or not you have a procedure set up for catching those kinds of things.

Mr. DEMBLING. As I indicated, the procedure we have is that our audit staffs reside at the various departments and agencies; and, as Mr. Socolar pointed out, are atuned to those kinds of programs which lend themselves to curtailments.

Mr. MINETA. Thank you, Mr. Dembling. Thank you very much, Mr. Chairman.

Mr. DERRICK. Let me pursue this just a little further.

The fact of the matter is that the executive branch already had a substantial amount of flexibility in there without the Miller amendment, in that they could transfer in certain instances from

one program to another without having to answer to Congress and without that being considered an impoundment; is that correct?

Mr. DEMBLING. Yes, sir.

Mr. DERRICK. Would you amplify on that just a little?

Mr. DEMBLING. Yes, sir. The way appropriation acts are enacted, they are lump-sum appropriations. While the agencies come before the Congress and indicate how they propose to spend the money and justify the various programs, when the Congress appropriates its funds it usually does it on a lump-sum basis.

Mr. DERRICK. If I might interject, I guess probably the breeder reactor funds last year are an excellent example of that.

As I understand it, the Congress appropriated these funds for the continuation and the funds were actually used within the same program for the termination; is that correct?

Mr. DEMBLING. Yes, sir; but there, in addition to the appropriation act, you also had the breeder reactor act that provided for certain conditions and criteria under which the President could terminate the program. In that situation you had a condition where he could not terminate the program except under the criteria specified in the breeder reactor act.

Mr. DERRICK. Was this also true in the B-1 situation?

Mr. DEMBLING. No, not in the B-1 situation. The B-1 situation was a case in which there was a provision which made the funds available but did not specify termination costs were going to be included in the funds that had been appropriated.

Mr. DERRICK. Because it was not specified it was taken——

Mr. DEMBLING. That is correct. I presume what you are getting at, Mr. Chairman, is the situation that in some appropriation acts there are provisions for line-itemizing the program; it establishes a maximum or minimum amount to be appropriated for a specific program. In those situations, if that amount is not made available for obligation, you have an impoundment; but in the lump-sum appropriation for an agency, the agency, OMB, and the executive have discretion within the overall act as to how they are going to utilize the funds after the appropriation act is enacted.

Mr. DERRICK. I thank you very much. I thank you for your excellent testimony and for your statement.

If you would remain with us, we may have some more questions down the line. Thank you.

Mr. DEMBLING. Thank you, Mr. Chairman.

Mr. DERRICK. Mr. McOmber, we are delighted to have you before the committee this morning and thank you for taking the time, and we will hear from you at this time.

STATEMENT OF HON. DALE R. McOMBER, ASSISTANT DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT

Mr. McOMBER. Mr. Chairman and members of the committee, I am pleased to be here to discuss with you the administration of the Impoundment Control Act of 1974.

Almost 4 years have passed since the Impoundment Control Act became law. Following an initial period when the reporting mechanisms to carry out the law were being established, the administration of the act has become, mainly, routine. The actions of both the

legislative and the executive branches related to this law are now generally predictable.

The Office of Management and Budget has the lead responsibility for preparing the reports on the impoundment of funds that are transmitted by the President to the Congress. This responsibility is related to the Office's responsibility for apportioning funds as required by the Antideficiency Act. While the Impoundment Control Act requires reports on any action to withhold funds, whether covered by an apportionment action or not, most impoundments occur in connection with the apportionment of funds. Under directives issued by OMB, each agency is responsible for reports to OMB on any action taken that withholds or delays the use of funds.

We believe that the act is working in the way the Congress intended. Information is being reported to the Congress on the withholding of funds and the Congress has been able to overturn impoundments as it desires. We think that there is general agreement that the President is complying with the language and spirit of the act. We also have good working relationships with the Congress and the General Accounting Office in administering the act.

Since President Carter came into office he has either proposed or continued 23 rescissions totalling $1.7 billion in budget authority. Of the 21 proposals on which the Congress has completed action, most have been approved—79 percent of the dollar amount in 12 proposals. Similarly, of the $10 billion deferred by the President, $64.4 million, or less than 1 percent, has been disapproved.

Most of these impoundments have been made routinely under authority of the Antideficiency Act; that is, as Mr. Dembling noted earlier, funds have been reserved to provide for contingencies or to affect savings whenever possible because of changes in requirements or greater efficiency of operations.

Many deferrals are necessary because of the clear intention of the Congress that funds not be used until other specific actions occur. For example, the completion of a study is often required by the Congress. In other cases the Congress provides funds for use in later years.

As to OMB concerns, while we think the act is working routinely and well, we recognize some concerns with its operation. I will discuss the concerns of the Congress in a few minutes, but first I want to mention our own views.

It would not be surprising if we noted that the act is a burden on the President and the executive branch; however, we recognize that the Congress should be able to overturn Executive acts to withhold funds. We support that principle and continuation of the Impoundment Control Act.

The fact that most of the impoundments reported are routine and noncontroversial does raise a question about the act's requirement that every action be reported by the President. This requirement means that a number of voluminous reports must be developed each year and transmitted by the President. This is despite general agreement that only a small number of the actions reported will be of concern to the Congress.

Even though the reports have become quite routine, the necessity for the reports to travel through the executive branch network all the way to the President is demanding in time and effort and is

a paperwork burden for the executive branch, and we might add, a paperwork burden for the Congress as well.

We note that in his report in June 1977, on the Impoundment Control Act, the Comptroller General indicated that the legislative history of the act suggests that the Congress interest was on those impoundments that represent fiscal or program policy differences between the executive branch and the Congress and not those actions authorized by law.

In that report, the Comptroller General recommended that the act be amended to exclude reporting deferrals authorized by law, or deferrals for administrative or routine purposes.

The Congress might wish to consider this recommendation, or the Congress might wish to consider permitting the Director of the Office of Management and Budget to transmit such deferrals, but to require the President to continue to transmit rescissions and deferrals that represent policy actions.

As to congressional concerns, we are aware of at least two kinds of concerns of the Congress about operation of the act. One kind of concern is with the fact that the act permits funds to be withheld for 45 continuous days of the congressional session while a rescission proposal is being considered. Members of Congress have sometimes been concerned that the period can be too long, primarily because interruptions in the session often cause funds to be withheld for 90-calendar days or more. Also, there is sometimes uncertainty about the end of the 45-day period.

We would agree with the suggestion of the Comptroller General that the act be amended so that rescission proposals pend before the Congress for a definite number of calendar days, like the 60-day period he recommended.

We would not agree with suggestions from some Members of Congress that no impoundment take place while a rescission is pending before the Congress. It seems irrational and undesirable to propose rescission of a specific sum and then to continue to obligate some portion of that sum proposed for cancellation.

We also do not agree with the suggestion by the Comptroller General that the President notify the Congress at the time a decision is made to undertake a major termination or curtailment. This plan is the one outlined in Mr. Dembling's statement and in the draft bill that accompanies that statement.

Under that plan, the Congress would have a short period—like 14 days—to review the proposal. If the Congress had not disapproved the proposal within the time specified in the draft bill, the withholding could begin.

We do not believe that Congress should be asked to consider major questions in such a short time. In the past many weeks have been required for congressional discussion of such matters. For example, the Congress took 148 days of continuous session to review the proposed B-1 bomber termination. We do not believe that a hasty review of such serious matters is in the interests of either the Congress or the President.

A related concern about the 45-day period for pending rescissions sometimes develops when it seems apparent that the Congress will take no action on a rescission. The act does not specify a way to

require release of impounded funds before the end of the 45-day period.

The Congress might wish to provide for a concurrent resolution expressing its view that funds proposed for rescission should be released prior to the end of the period prescribed in law. Under those circumstances the executive branch would immediately release the impounded funds.

A second major concern of Members of Congress has been the timeliness of impoundment reports.

We do not believe that this is a significant problem. We have made a determined effort to report deferrals and rescission proposals on a timely basis. Since the President must be involved in each of the reports, we must balance the congressional need for speedy reporting with the need to make effective use of the President's time. This means that usually we should not submit impoundment reports singly to the President. It also means that an impoundment report and a presidential decision on a major policy rescission or deferral will not occur simultaneously.

It is not reasonable to expect that every option reviewed by the President be accompanied by potential impoundment reports that have received necessary legal and technical scrutiny within both the agency and the Executive Office of the President.

We believe that reports to the Congress have been submitted in a reasonable time, with rare exceptions. I assure you that we will continue to emphasize the need of the Congress for timely reporting.

Mr. Chairman, I would be glad to discuss these matters further.

[The prepared statement of Mr. McOmber follows:]

PREPARED STATEMENT OF HON. DALE R. MCOMBER

Mr. Chairman and members of the committee. I am pleased to be here today to discuss with you the administration of the Impoundment Control Act of 1974.

Almost 4 years have passed since the Impoundment Control Act became law. Following an initial period when the reporting mechanisms to carry out the law were being established, the administration of the act has become, mainly, routine. The actions of both the legislative and executive branches related to this law are now generally predictable.

The Office of Management and Budget has the lead responsibility for preparing the reports on the impoundment of funds that are transmitted by the President to the Congress. This responsibility is related to the Office's responsibility for apportioning funds as required by the Antideficiency Act. While the Impoundment Control Act requires reports on any action to withhold funds, whether covered by an apportionment action or not, most impoundments occur in connection with the apportionment of funds. Under directives issued by OMB, each agency is responsible for reports to OMB on any action taken that withholds or delays the use of funds.

We believe that the act is working in the way the Congress intended. Information is being reported to the Congress on the withholding of funds, and the Congress has been able to overturn impoundments as it desires. We think that there is general agreement that the President is complying with the language and the spirit of the act. We also have good working relationships with the Congress and the General Accounting Office in administering the act.

Since President Carter came into office, he has either proposed or continued 23 rescissions totalling $1.7 billion in budget authority. Of the 21 proposals on which the Congress has completed action, most have been approved (79 percent of the dollar amount in 12 proposals). Similarly, of the $10 billion deferred by the President, $64.4 million, or less than 1 percent, has been disapproved.

Most of these impoundments have been made routinely under authority of the Antideficiency Act. This is, funds have been reserved to provide for contingencies, or to effect savings whenever possible because of changes in requirements or greater efficiency of operations. Many deferrals are necessary because of the clear intention

of the Congress that funds not be used until other specific actions occur like the completion of a study. In other cases, the Congress provides funds for use in later years.

OMB CONCERNS

While we think the act is working routinely and well, we recognize some concerns with its operation. I will discuss the concerns of the Congress in a few moments. But first, I want to mention our own views.

It would not be surprising if we noted that the act is a burden on the President and the executive branch. However, we recognize that the Congress should be able to overturn executive acts to withhold funds. We support that principle and continuation of the Impoundment Control Act.

The fact that most of the impoundments reported are routine and noncontroversial does raise a question about the act's requirement that every action be reported by the President. This requirement means that a number of voluminous reports must be developed each year and transmitted by the President. This is despite general agreement that only a small number of the actions reported will be of concern to the Congress. Even though the reports have become quite routine, the necessity for the reports to travel through the executive branch network all the way to the President is demanding in time and effort—and is a paperwork burden for both the executive branch and the Congress.

We note that in his report in June 1977, on the Impoundment Control Act, the Comptroller General indicated that the legislative history of the act suggests that the Congress' interest was on those impoundments that represent fiscal or program policy differences between the executive branch and the Congress and not those authorized by law. In that report, the Comptroller General recommended that the act be amended to exclude reporting deferrals authorized by law, or deferrals for administrative or routine purposes. The Congress might wish to consider this recommendation. Or the Congress might wish to consider permitting the Director of the Office of Management and Budget to transmit such deferrals but to require the President to continue to transmit rescissions and deferrals that represent policy actions.

CONGRESSIONAL CONCERNS

We are aware of at least two kinds of concerns of the Congress about operation of the act. One kind of concern is with the fact that the act permits funds to be withheld for 45 continuous days of the congressional session while a rescission proposal is being considered. Members of Congress have sometimes been concerned that the period can be too long primarily because interruptions in the session often cause funds to be withheld for 90 calendar days or more. Also, there is sometimes uncertainty about the end of the 45-day period. We would agree with the suggestion of the Comptroller General that the act be amended so that rescission proposals pend before the Congress for a definite number of calendar days, like the 60-day period he recommended. We would not agree with suggestions from some Members of Congress that no impoundment take place while a rescission is pending before the Congress. It seems irrational and undesirable to propose rescission of a specific sum and then to continue to obligate some portion of that sum proposed for cancellation.

We also do not agree with the suggestion by the Comptroller General that the President notify the Congress at the time a decision is made to undertake a major termination or curtailment. Under that proposal, the Congress would have a short period, like 14 days, to review the proposal. If the Congress had not disapproved the proposal within the time specified, the withholding could begin. We do not believe that Congress should be asked to consider major questions in such a short time. In the past, many weeks have been required for congressional discussion of such matters. For example, the Congress took 148 days to review the proposed B-1 bomber termination. We do not believe that a hasty review of such serious matters is in the interests of either the Congress or the President.

A related concern about the 45-day period for pending rescissions sometimes develops when it seems apparent that the Congress will take no action on a rescission. The act does not specify a way to require release of impounded funds before the end of the 45-day period. The Congress might wish to provide for a concurrent resolution expressing its view that funds proposed for rescission should be released prior to the end of the period prescribed in law. Under those circumstances, the executive branch would immediately release the impounded funds.

A second major concern of Members of Congress has been the timeliness of impoundment reports. We do not believe that this is a significant problem. We have made a determined effort to report deferrals and rescission proposals on a timely basis. Since the President must be involved in each of the reports, we must balance

the congressional need for speedy reporting with the need to make effective use of the President's time. This means that usually we should not submit impoundment reports singly to the President. It also means that an impoundment report and a Presidential decision on major policy rescissions or deferrals will not occur simultaneously. It is not reasonable to expect that every option reviewed by the President be accompanied by potential impoundment reports that have received necessary legal and technical scrutiny within both the agency and the Executive Office of the President.

We believe that reports to the Congress have been submitted in a reasonable time with rare exceptions. I assure you that we will continue to emphasize the needs of the Congress for timely reporting. I will be glad to discuss these matter further.

Mr. DERRICK. Thank you, Mr. McOmber, for an excellent statement.

If you will bear with us, we have a vote on and I am going to recess the committee for about 10 minutes to allow us to vote, and then when I come back I am going to ask Dr. Schick if he will give his testimony, and then ask questions of both of you at the same time. I think it might facilitate matters. Since we are getting into the Housing Act, and we will probably have a good many votes, it might be a little better to do it that way. Thank you.

Mr. DERRICK. I didn't ask you, but would that suit your schedule to wait until Dr. Schick testifies and then answer questions?

Mr. MCOMBER. Oh, yes, indeed.

[After recess.]

Mr. DERRICK. Dr. Schick, I am delighted to have you before the committee this morning. I feel a real attachment to you and your shop over there. You have always been helpful to us over the last few years. You have written some tremendous material for us, and I would like to hear from you now.

STATEMENT OF DR. ALLEN SCHICK, SENIOR SPECIALIST, LIBRARY OF CONGRESS

Dr. SCHICK. Thank you, Mr. Chairman. I am pleased to testify. I am also pleased to have Dale McOmber right next to me to assist in answering questions.

Let me mention at the outset that this statement reflects my views only and not those of either the Congressional Research Service or the Urban Institute.

I am going to read excerpts from my statement and ask permission that the entire statement be placed in the record.

Mr. DERRICK. I feel kinder toward you now than I did before.

Dr. SCHICK. Thank you, sir. The Impoundment Control Act has been in effect for almost 4 years. It took effect during the historic transition from the Nixon to the Ford Presidency, and it has survived the transition from a Republican to a Democratic White House. During these years, more than $50 billion in proposed rescissions and deferrals have been submitted to Congress. The 1974 law definitely did not put an end to impoundments; no legislation short of an airtight bar on executive discretion in the use of public funds could do that. Nor did the act completely end all controversy over impoundments, though the passions and strife of the Nixon era impoundments have abated.

However, except for occasional spasms, impoundment control has settled into a three-stage process involving Presidential recommendations and reports, Comptroller General review, and congressional action or—in most cases—inaction. At each of these stages, Con-

gress has been confronted with a great amount of documentation and paperwork, much required by the law itself, and some growing out of the manner in which it has been implemented. More than 500 proposed rescissions and deferrals, packaged into dozens of Presidential messages, have been forwarded to Congress, along with numerous supplementary messages revising earlier submissions. Congress has received more than 100 communications and reports from the General Accounting Office and it has considered almost a dozen rescission bills. More than 100 impoundment resolutions have been introduced in Congress and 50 have passed.

An examination of the raw statistics on impoundment control leads to a number of conclusions: The volume of deferrals has been consistently higher than proposed rescissions. In dollar terms, at least three times as much has been deferred in each of the past 4 years than has been proposed for rescission. Over the full span, deferrals have totaled $45.5 billion compared to $8.8 billion for the rescissions. The executive branch can be expected to favor deferrals over rescissions; the former can continue in effect if Congress fails to act; the latter must cease unless Congress passes a rescission bill within the 45-day period. Nevertheless, the preponderance of deferrals is due to the fact that this type of action is more likely to deal with routine rather than policy issues.

As both Mr. Dembling and Dale McOmber indicated, the bulk of impoundments thus far have been for routine Executive actions and most of those have been in the deferral category.

Second, impoundment is a declining activity, with the total volume of both deferrals and rescissions much lower under President Carter than under President Ford. Each year's deferrals have been lower than the preceding year's level. Rescissions were slightly higher in fiscal year 1975, but with Carter in office, they dropped in half during fiscal year 1977. During the current fiscal year, the President appears to have virtually abandoned the rescission route, except for a few routine matters.

If we try to explain the dropoff in impoundments, I think again you can offer several explanations.

The executive branch has received the message by and large that the Impoundment Control Act cannot give it across the board a second time at bat, and so very often the executive branch found that rather than gaining through taking the second crack, by submitting a deferral or rescission, it found that Congress resisted it, and therefore it has tended, except in the case of military expenditures, except in that major category, to submit by and large routine rescissions and deferrals.

There is a marked difference in the disposition of the rescissions and deferrals. Almost every deferral is sustained by congressional inaction; most rescissions proposed by the President have been overturned by congressional inaction. Only 12 percent of the deferrals have been disapproved by Congress; 65 percent of the rescissions have been "disapproved" by congressional unwillingness to pass a rescission bill.

In dollar terms, the figures have to be adjusted to take into account an early disapproval of more than $9 billion withheld from highway programs. With the highway deferral excluded, Congress

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has disapproved less than 2 percent of the dollars deferred by the President; it has disapproved 80 percent of the proposed rescissions.

These overall statistics, however, mask important differences between the Ford and Carter years. President Carter has had a much higher success rate, particularly with regard to rescissions. Congress has vetoed less than $100 million of the more than $10 billion temporarily withheld by President Carter; it has gone along with approximately two-thirds of his rescissions. It shouldn't surprise one that a President of the same party as the majority of Congress should be able to be more persuasive and successful than his predecessor was.

Mr. DERRICK. We hope that is true.

APPRAISAL OF THE IMPOUNDMENT CONTROLS

My assessment of the Impoundment Control Act is much the same as it was 2 years ago when I first reviewed its implementation. In my judgment, the act has established a workable, though cumbersome, procedure for congressional review of Presidential impoundments. It does not resolve basic constitutional questions of legislative-executive relations and the reach of Presidential power, but it offers a method of settling impoundment disputes without raising these more portentious questions.

Congress has been able to prevent the President from unilaterally withholding funds, and the President has been able to manage the financial affairs of the Government without undue rigidity. The impoundment battles of the early 1970's have not been ended, but now they usually are fought through agreed upon means. Compared to the contests of the Nixon era, the Impoundment Control Act provides for limited warfare and, in most cases, for resolution of differences within a limited period of time.

The plain fact is that both Presidents Ford and Carter have generally conformed to the procedures of the 1974 act. There have been few unreported impoundments brought to the attention of Congress by GAO and few serious misclassifications of rescissions or deferrals. Both Presidents have expeditiously released funds after deferrals have been disallowed or after the 45-day period for rescissions has ended. The impoundment controls have proven to be workable when Congress and the President are of different parties as well as when they are of the same party. The controls have worked despite significant shifts in Presidential usage and priorities.

Only about 5 percent of President Ford's rescissions were defense-related; more than 90 percent were in domestic programs. By refusing to act on the bulk of the rescission proposals, Congress denied the President a "second chance" on appropriations for social programs. The pattern has been different during the Carter years. Almost 90 percent of Carter's rescissions have been in defense programs, and Congress has been willing to go along with most of them.

It could be that the Impoundment Control Act has worked because we have a President willing to operate within the boundaries and requirements of law.

It could be that a President bent on overridding the policies of Congress might disregard the impoundment controls as well. One can only speculate as to what might have happened if the impoundment law was in operation during the early 1970's when a willful President unilaterally cut off funds for programs established by Congress. My own hypothesis is that no President could act with the impoundment controls now on the books as he might, and in fact as a President did, in the absence of the 1974 legislation. Nixon exploited the absence of law—the fuzzy demarkation of powers between the two branches—to take power into his own hand. Congress has successfully denied that unacceptable option to future Presidents by establishing the Impoundment Control Act.

Yet the Impoundment Control Act has been far from perfect and Congress has expressed its dissatisfaction with the procedures from time to time. In a number of instances, it has effectively amended or bypassed the impoundment controls; on occasion, it has gone on record with the argument that the executive branch has not lived up to its part of the bargain. While I do not believe that wholesale change in the Impoundment Control Act is either necessary or desirable, it is appropriate to examine the main problem areas, to ascertain their causes and possible remedies.

Both of the previous witnesses have discussed the paperwork burden imposed by the Impoundment Control Act, and both have indicated that they would be inclined to favor a procedure which would limit impoundment reports to policy rather than routine impoundments.

The flow of messages and documents generated by the Impoundment Control Act has been extraordinary and has burdened the committees of jurisdiction as well as the House and Senate. The impoundment controls have been part of recent legislative efforts to more vigorously oversee and constrain executive actions. The load has diminished, however, as the volume of impoundments have decreased. Thus, the problems arising out of Ford's tens of billions of dollars of impoundments have been lessened by Carter's scaledown of impoundment actions.

The volume of impoundments is much more than a matter of paperwork, for it can skew the outcomes as well. The probable effects include:

First, giving the President an advantage in deferrals, for their large number undermines congressional ability to detect every policy outcome; and

Second, deterring the Congress from acting on some routine rescissions proposed by the President. In other words, the paperwork has encouraged congressional inaction, favoring the President in deferrals and penalizing him in rescissions.

Yet, it is also true that Congress has been able to act when it wants. The huge number of deferrals in fiscal years 1975 and 1976 did not prevent Congress from selectively disapproving those Presidential actions which it deemed to be serious departures from established policies. Congress has been able to sort through the hundreds of Presidential messages to actively determine the disposition of any Presidential impoundment. For this reason, I find no compelling need to modify the Impoundment Control Act to lessen the number of reports and messages.

Most of the proposals for change are predicated on a distinction between routine and policy impoundments. But this useful analytic distinction cannot be etched into law without creating a new host of problems and conflicts. A matter deemed to be routine by the President might be considered a policy issue by Congress. In this regard, it is worth noting that several deferrals classified by GAO as "routine" have been overturned by impoundment resolutions. If the President were given the option to decide whether a matter is routine or policy, he would be vulnerable to charges of misleading Congress; if GAO was given a role in screening Executive submissions and deciding which policy ones should be brought to the attention of Congress, it would have an effective veto over congressional action.

Congress in 1974 opted for a broad definition of impoundments. It decided that excessive paperwork is preferable to excessive strife. Let the executive branch report everything; let Congress decide what action to take. This is the underlying philosophy of impoundment control and it should not be altered.

After all, routine versus policy is more an analytic category than a legal one. It is easy for us to look at the reports submitted by the President, and to define them as either routine or policy matters. It is much more difficult to write that kind of ironclad distinction into law.

INFORMING CONGRESS OF EXECUTIVE ACTIONS

The Impoundment Control Act gives Congress an imperfect monitoring capability: the Comptroller General is to review all reported impoundments and also notify Congress of any unreported ones as well as of errors in classification. However, the Comptroller General cannot inspect every administrative action affecting the availability of funds. GAO cannot always distinguish between delays caused by prudent management and delays promoted by policy motives. Even when it is vigilant, GAO ordinarily becomes aware of an Executive action sometime after it has taken effect.

GAO has adopted a reactive posture toward executive branch impoundments. That is, rather than initiating investigations, it gets involved only after the President has filed an impoundment report or if a third party complains about Executive action. GAO explained its procedures in a 1976 letter to Senator Warren Magnuson:

> To fulfill our responsibilities to detect unreported withholdings, we monitor the handling of budget authority by the administration, in addition to receiving information from Members of Congress, committee staff, interest groups, and constituents on possible unreported withholdings. While we believe this has worked reasonably well in the past to enable us to detect unreported withholdings, we cannot monitor all budget authority simultaneously, even with the help of interested third parties. Furthermore, once a suspected withholding has been found, we believe it prudent to obtain OMB and agency documentation (apportionment and allotment schedules) evidencing the existence of budgetary reserves, and, when necessary, prepare analyses of relevant statutes to determine whether the failure to make the budget authority available legally constitutes an unreported withholding under the act. Consequently, unreported withholdings cannot always be reported immediately.

This procedure does not always adequately protect congressional interests. A case in point was the controversial B-1 bomber for which funds had been appropriated before the President decided not to proceed with the weapon. The Defense Department con-

cealed B-1 contracts 3 weeks before it notified Congress. Although Congress was not confronted with a fait accompli—disapproval of the rescission proposal would have compelled the Defense Department to resume work on the airplane—restarting the program would have entailed considerable costs.

GAO is constrained from more active vigilance by two limitations: Staff resources and conflicts with its other roles. In order for it to monitor all—or even a large portion—of relevant executive branch activities, GAO would have to multiply the staff devoted to impoundment work. In view of its other duties, GAO has been reluctant to expend limited resources on active surveillance, preferring instead to respond to reports and complaints brought to its attention.

The second reason is that GAO is charged by law to promote efficiency in Federal expenditure. Overzealous enforcement of the impoundment controls could force the executive branch to wastefully spend great sums of money. The B-1 case illustrates GAO's dilemma. After the President proposed a rescission, the 45-day clock started to run. But the period ended before Congress completed action on a rescission bill. According to the impoundment control procedures, GAO should have ordered the immediate obligation of some $460 million in budget authority, and the resumption of work on the canceled contracts. Instead, GAO gave fuzzy responses to congressional inquiries and the Defense Department was able to release the funds without actually spending them. In this manner, GAO was able to reconcile the conflicting demands of the Impoundment Control Act and its responsibilities for financial efficiency.

This morning, Mr. Dembling has submitted a proposed Program Curtailment Act as one possible way of coping with that situation. I have not been able to examine the proposed law, but it does seem to me that the executive branch can do a much better job of timely notification of Congress. In the B-1 bomber case, for example, there is nothing inherent in the Impoundment Control Act which called for that delay, and perhaps if the President were to act more expeditiously, we would not have to have a program curtailment procedure.

The next problem is the 45-day period, and I think all parties are agreed that the Impoundment Act is in need of revision.

In procedural terms, the 45-day period has evoked more controversy than any other provision of the Impoundment Control Act. In practice, the 45 days usually stretch to a much lengthier period of time. During the 1975 and 1976 fiscal years, the interval between the submission of a rescission proposal and the end of the 45-day period averaged 80 calendar days, to which, if we add the 30 days or more prior to the President's notification of Congress, we are talking about one-third or more of the fiscal year going by without release of the funds.

Since impoundments do not have to be reported until the 30 days allowed by law for the apportionment of funds, the actual time between appropriation and termination of an impoundment averages more than 100 days.

As a consequence of this delay, the President has been able to put unwanted programs into cold storage for much of the fiscal

year, thereby frustrating congressional intent and impairing program effectiveness. Delay sometimes has been sought for its own sake and, possibly, for political advantage as well. Whatever the motive or cause, Congress thus far has had no remedy when the President has manipulated the rescission rules to hold up programs.

The problem is compounded by the tendency of Congress to wait until the last moment to take up rescission bills. As a result, Congress bypasses an opportunity to give the executive branch an early indication of its intentions. There is reason to believe that earlier action by Congress would lead to earlier release of funds by the President.

The Comptroller General has offered two proposals to ameliorate congressional helplessness during the waiting period:

First, convert from 45 days of continuous session to 60 calendar days, thereby shortening the amount of time between submission of rescission and the expiration of the waiting period while still giving Congress ample opportunity to act on the rescission. This sensible approach also would have the advantage of fixing a definite date for the end of the waiting period.

Second, GAO also has proposed that the President be required to release the withheld funds if either the House or Senate passes a resolution indicating its disapproval of the rescission. In effect, Congress would have a legislative veto over rescissions comparable to the veto it now has over deferrals.

Congress has fashioned its own remedy—advance rejection of an expected impoundment. During fiscal year 1977, President Carter announced his opposition to certain water projects. To avert a possible impoundment, Congress inserted the following sections into the Public Works Employment Act of 1977—Public Law 92-28:

SEC 201. Congress hereby finds and declares that: * * * such projects should not be discontinued except by following the legislative process provided by * * * the Congressional Budget and Impoundment Control Act of 1974.

SEC 202. Notwithstanding the deferral and rescission provisions of Public Law 93-344, all appropriations provided in Public Laws 94-355 and 94-351—fiscal 1977 appropriations for public works and agriculture—for construction projects or for investigations, planning, or design related to construction projects shall be made available for obligation by the President and expended for the purposes for which the appropriations are made * * *

SEC 203.* * * section 202 of this act shall be equivalent to and have the legal effect of a resolution disapproving any deferral of budget authority previously provided for construction projects * * * section 202 is also equivalent to a congressional statement of intent not to uphold any rescission of budget authority * * *

This provision in effect nullified the expected impoundment of water resource projects in advance. I make two points with regard to that procedure. One is that the particular formula used by Congress was unclear, and some might say, contradictory. There were three sections of that provision, and one section seemed to give what another section took away.

But the second point I would like to make is much more important, and that is if Congress were to apply this approach across the board to all appropriations, it would effectively negate the Impoundment Control Act, that is, if Congress were to attach a rider to every appropriation saying that it has already disapproved of the rescission or the deferral, then the Impoundment Control Act would cease to have operational effect.

Revision of the 45-day period also must reckon with the tendency of Congress to defer action until the last moment or beyond. Many rescissions, perhaps even the bulk of rescissions which have been approved by Congress after the end of 45 days. Funds for the B-1 bomber, for example, were repealed more than 3 months after the 45 days were over. Congress might consider a revision in the discharge procedure for rescission bills along with a mechanism for timely or automatic introduction of such bills in the House.

As you know, Mr. Chairman, the House Budget Committee last year passed a resolution directing the chairman of the Budget Committee to take timely action to assure that this problem doesn't arise in the future.

The final, and I think most important issue which I would discuss, is the scope of the Impoundment Control Act.

During the course of each year, executive agencies take many thousands of actions affecting the rate and level of expenditure. Specifications are drawn and revised repeatedly for grants and contracts; administrative units are reorganized, slowing or speeding the processing of applications for funds; regulations are introduced or redrawn; funds are shifted from one use to another; efficiencies are introduced in administrative operations and the savings are applied to other activities.

It is possible to read the Impoundment Control Act to cover each and every one of these actions. In the Nixon era climate, Congress opted for the broadest definition of impoundments. These are the bare words of section 1011 of the act: Deferral of budget authority includes—

(A) withholding or delaying the obligation or expenditure of budget authority * * * provided for projects or activities; or

(B) any other type of Executive action or inaction which effectively precludes the expenditure of budget authority.

The Comptroller General has reasonably interpreted this provision to cover only willful actions which reduce the total amount of budget authority obligated or expended in a budget account. On June 11, 1975, he ruled that the "act does not support to invalidate the exercise or reasonable administrative discretion in the adoption of program provisions and regulations * * *"

On September 28, 1976, he advised Representative James J. Florio,"That a failure to obligate the full amount of an appropriation does not, per se, constitute a withholding of budget authority within the meaning of the Impoundment Control Act. There must be sufficient evidence of behavior on the part of responsible executive agency officials that demonstrates an intention to refrain from obligating available budget authority."

In other words, neither routine adminstrative actions nor shortfalls are deemed to be impoundments. These are reasonable and productive applications of the Impoundment Control Act. The interests of Congress in establishing particular programs and funding levels remain fully protected against Executive attempts to terminate or curtail programs.

Much more troubling than these adminstrative actions have been personnel limits mandated by the Office of Management and Budget and reprogramings of funds by executive agencies. Both types of actions have precipitated congressional efforts to strength-

en the impoundment controls. When OMB establishes yearend personnel ceilings for agencies, it affects the level of expenditure in two ways: First, the amount of money spent on salaries is likely to be less than the amount provided by Congress; second, personnel shortages can slow down administrative operations and reduce the level of expenditure below the amount appropriated for programs. For example, an agency might not be able to process all eligible loan applications because OMB ceilings prevent it from hiring needed personnel.

While Congress has a legitimate interest in assuring that programs are carried out at the levels provided in law, in my judgment, the Impoundment Control Act should not be used as an all-purpose remedy against every type of Executive action that affects the level of expenditure. If personnel ceilings were covered by the act, it would also seem logical to cover instances in which agencies hold down personnel—and other—costs in order to avert a supplemental appropriation. It is quite common for agencies—on their own volition or as ordered by OMB—to apply savings to some of the unbudgeted costs of pay increases and unexpected developments. A rigid application of impoundment controls to these situations would weaken executive branch incentives to be efficient and would surely lead to increased spending, not only in situations where personnel levels have been constrained in order to reduce program operations but also where the sole intent is to promote operational efficiencies.

Congressional concern over impoundment by means of personnel ceilings is reflected in the agriculture appropriation bill for fiscal year 1979—H.R. 13125. The House Appropriations Committee has protested:

> The tendency of the executive branch to establish arbitrary personnel ceilings to slow down or stop various programs * * * in violation of the spirit, if not the letter, of the Impoundment Control Act.
>
> On several occasions, funds have been appropriated for additional staff deemed essential by the Congress, and then used as additional funds for travel or equipment and supplies.

The Appropriations Committee restructured the 1979 budget accounts for several agriculture programs to prevent these practices:

> * * * to avoid such de facto impoundments in the future, the committee has recommended in many instances separate appropriations for "personnel compensation and benefits" and "for other expenses." As a result of this bill language, and attempt to withhold funds for salaries must be reported to Congress for its consideration under the law.

In effect, Congress has moved to "line itemize" certain appropriations, thereby bringing the particular items under the scope of the Impoundment Control Act. It has taken similar action to thwart reprogramings—the transfer of funds from one purpose to another within the same budget account. GAO has ruled that reprogramings do not violate the Impoundment Control Act as long as there is no net withholding of funds. The issue arose when President Carter sought to apply funds appropriate for development of the Clinch River Breeder Reactor to the termination of the project. In a June 23, 1977, letter to Senator Jackson, the Comptroller General held that this division of the funds did not violate the impoundment controls:

The act is concerned with the rescission or deferral of budget authority, not the rescission or deferral of programs. Thus, a lump-sum appropriation for programs A, B, and C used to carry out only program C would not necessarily indicate the existence of impoundments regarding programs A and B. So long as all budgetary resources were used for program C, no impoundment would occur even though activities A and B remain unfunded.

The congressional response to reprograming has been to extend impoundment controls to particular programs and projects. Thus, section 304 of the second suppplemental appropriation for fiscal year 1977, sponsored by Representative Cederberg, has the following prohibition:

None of the funds appropriated or otherwise made available in this act shall be obligated or expended for the termination or deferral of any project, activity, or weapons system approved by Congress, except specific projects, activities, or weapons systems for which, and to the extent, budget authority has been rescinded or deferred as provided by law.

Although Representative Cederberg insisted that this provision would not bar reprogramings, the effect would seem to be otherwise. If a similar provision were extended to all appropriations, the Federal budget would be effectively converted to a line item basis and most, if not all, reprogramings would be prescribed.

In my view, Congress should not apply the impoundment controls in a manner that robs the Executive branch of all administrative flexibility. Congress and the President can coexist without having every aspect of the expenditure of funds nailed down in law. Congress can tolerate gray areas in its relationship with the executive branch, even though these are the breeding ground for ambiguity and controversy.

If I might, Mr. Chairman, insert a metaphor at this point, the gray area between the executive and legislative branch can be regarded as a DMZ, a demilitarized zone, for through 200 years of constitutional skirmishing, Congress and the President have patrolled their boundaries, the borders of the DMZ, crossing the line a bit to take advantage.

What happened in the early 1970's, and what provoked the enactment of the Impoundment Control Act was a massive, full-scale invasion of the DMZ by the executive branch. In other words, I believe we can continue to tolerate some of these ambiguities, some of these gray areas. What we cannot tolerate, and what the Impoundment Control Act effectively puts an end to is the massive disregard of law which once occurred.

However, if Congress tries to nail down every dime and every item of expenditure, and if it therefore succeeds in fully curbing Executive discretion, in my judgment, the American taxpayer might have to pay a very high price for this victory. Thank you.

[Testimony resumes on p. 44.]

[The prepared statement of Dr. Schick follows:]

PREPARED STATEMENT OF DR. ALLEN SCHICK

Mr. Chairman, this statement expresses my views and does not represent the views of the Congressional Research Service or the Urban Institute. The Impoundment Control Act has been in effect for almost 4 years. It took effect during the historic transition from the Nixon to the Ford Presidency, and it has survived the transition from a Republican to a Democratic White House. During these years, more than $50 billion in proposed rescissions and deferrals have been submitted to Congress. The 1974 law definitely did not put an end to impoundments; no legisla-

tion short of an airtight bar on executive discretion in the use of public funds could do that. Nor did the act completely end all controversy over impoundments, though the passions and strife of the Nixon era impoundments have abated.

However, except for occasional spasms, impoundment control has settled into a three-stage process involving Presidential recommendations and reports, Comptroller General review, and congressional action or—in most cases—inaction. At each of these stages, Congress has been confronted with a great amount of documentation and paperwork, much required by the law itself, and some growing out of the manner in which it has been implemented. More that 500 proposed rescissions and deferrals, packaged into dozens of Presidential messages, have been forwarded to Congress, along with numerous supplementary messages revising earlier submissions. Congress has received more than 100 communications and reports from the General Accounting Office and it has considered almost a dozen rescission bills. More than 100 impoundment resolutions have been introduced in Congress and 50 have passed.

An examination of the raw statistics on impoundment control lead to a number of conclusions:

The volume of deferrals has been consistently higher than proposed rescissions. In dollar terms, at least three times as much has been deferred in each of the past 4 years than has been proposed for rescission. Over the full span, deferrals have totaled $45.5 billion compared to $8.8 billion for the rescissions. The executive branch can be expected to favor deferrals over rescissions; the former can continue in effect if Congress fails to act; the latter must cease unless Congress passes a rescission bill within the 45-day period. Nevertheless, the preponderance of deferrals is due to the fact that this type of action is more likely to deal with routine rather than policy issues.

Impoundment is a declining activity, with the total volume of both deferrals and rescissions much lower under President Carter than under President Ford. Each year's deferrals have been lower than the preceding year's level. Rescissions were slightly higher in fiscal year 1975, but with Carter in office, they dropped in half during fiscal year 1977. During the current fiscal year, the President appears to have virtually abandoned the rescission route, except for a few routine matters.

Well over half of the deferrals have been for routine purposes authorized by the Antideficiency Act. As noted, rescissions are more likely to be for policy reasons, though many of them also are routine matters.

There is a marked difference in the disposition of rescissions and deferrals. Almost every deferral is sustained by congressional inaction; most rescissions proposed by the President have been overturned by congressional inaction. Only 12 percent of the deferrals have been disapproved by Congress; 65 percent of the rescissions have been "disapproved" by congressional unwillingness to pass a rescission bill. In dollar terms, the figures have to be adjusted to take into account an early disapproval of more than $9 billion withheld from highway programs. With the highway deferral excluded, Congress has disapproved less than 2 percent of the dollars deferred by the President; it has disapproved 80 percent of the proposed rescissions.

RESCISSIONS AND DEFERRALS, FISCAL YEARS 1975-78—THROUGH MAY 1978

[In thousands of dollars]

RESCISSIONS

Year	Number [1]	Total proposed	Amount approved	Percent of dollars rescinded	Percent of proposals approved—in whole or part
1975	91 (4)	$3,328,500	$391,295	12	43
1976 [2]	50 (1)	3,608,363	138,331	4	14
1977	21 (1)	1,835,602	1,271,040	70	48
1978	5	85,255	55,255	65	60
Total	167	8,857,721	1,855,821	20	35

DEFERRALS

Year	Number [1]	Amount deferred	Amount disapproved	Number disapproved	Percent of dollars disapproved	Percent deferrals disapproved
1975	159	$24,574,236	$9,318,217	16	38	10
1976 [2]	119 (2)	9,209,780	393,081	[3] 24	4	20
1977	68 (4)	6,831,194	25,600	3	4	5
1978	63	4,902,064	51,831	5	1	8
Total	409	45,517,263	9,788,730	48	[4] 22	12

[1] Numbers in parentheses are GAO notifications of unreported impoundments.
[2] Fiscal year 1976 data includes the transition quarter. A proposal to rescind funds in both fiscal year 1976 and the transition quarter is counted as a single proposal.
[3] Two fiscal year 1976 deferrals were disapproved by both the House and Senate; they are counted only once here.
[4] Excluding the disapproval of $9.1 billion in highway funds, Congress has disapproved only 2 percent of the deferred dollars.

Source: House Appropriations Committee.

These overall statistics, however, mask important differences between the Ford and Carter years. President Carter has had a much higher success rate, particularly with regard to rescissions. Congress had vetoed less than $100 million of the more than $10 billion temporarily withheld by President Carter; it has gone along with approximately two-thirds of his rescissions.

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My assessment of the Impoundment Control Act is much the same as it was 2 years ago when I first reviewed its implementation. In my judgment, the act has established a workable, though cumbersome, procedure for congressional review of Presidential impoundments. It does not resolve basic constitutional questions of legislative-executive relations and the reach of Presidential power, but it offers a method of settling impoundment disputes without raising these more portentious questions. Congress has been able to prevent the President from unilaterally withholding funds, and the President has been able to manage the financial affairs of the Government without undue rigidity. The impoundment battles of the early 1970's have not been ended, but now they usually are fought through agreed upon means. Compared to the contests of the Nixon era, the Impoundment Control Act provides for limited warfare and, in most cases, for resolution of differences within a limited period of time.

The plain fact is that both President Ford and Carter have generally conformed to the procedures of the 1974 act. There have been few unreported impoundments brought to the attention of Congress by GAO and few serious misclassifications of rescissions or deferrals. Both Presidents have expeditiously released funds after deferrals have been disallowed or after the 45-day period for rescissions has ended. The impoundment controls have proven to be workable when Congress and the President are of different parties as well as when they are of the same party. The controls have worked despite significant shifts in presidential usage and priorities. Only about 5 percent of President Ford's rescissions were defense related; more than 90 percent were in domestic programs. By refusing to act on the bulk of the

rescission proposals, Congress denied the President a "second chance" on appropriations for social programs. The pattern has been different during the Carter years. Almost 90 percent of Carter's rescissions have been in defense programs, and Congress has been willing to go along with most of them.

It could be that a President bent on overriding the policies of Congress might disregard the impoundment controls as well. One can only speculate as to what might have happened if the impoundment law was in operation during early 1970's when a willful President unilaterally cut off funds for programs established by Congress. My own hypothesis is that no President could act with the impoundment controls on the books as he might in the absence of the 1974 legislation. Nixon exploited the absence of law—the fuzzy demarcation of powers between the two branches—to take power into his own hand. Congress has successfully denied that unacceptable option to future Presidents.

Yet the Impoundment Control Act has been far from perfect and Congress has expressed its dissatisfaction with the procedures from time to time. In a number of instances it has effectively amended or bypassed the impoundment controls; on occasion it has gone on record with the argument that the executive branch has not lived up to its part of the bargain. While I do not believe that wholesale change in the Impoundment Control Act is either necessary or desirable, it is appropriate to examine the main problem areas, to ascertain their causes and possible remedies.

Paperwork burden.—The flow of messages and documents generated by the Impoundment Control Act has been extraordinary and has burdened the committees of jurisdiction as well as the House and Senate. The impoundment controls have been part of recent legislative efforts to more vigorously oversee and constrain executive discretion. In recent years, Congress has multipled reporting requirements and legislative vetoes. By themselves, the impoundment controls might not be much of a load; in combination with requirements in other policy areas, they have made it difficult for Congress to keep track of executive actions. The load has diminished, however, as the volume of impoundments has decreased. Thus, the problems arising out of Ford's tens of billions of dollars of impoundments have been lessened by Carter's scaledown of impoundment actions.

The volume of impoundments is much more than a matter of paperwork, for it can skew the outcomes as well. The probable effects include: (1) giving the President an advantage in deferrals, for their large number undermines congressional ability to detect every policy outcome; and (2) deterring the Congress from acting on some routine rescissions proposed by the President. In other words, the paperwork has encouraged congressional inaction, favoring the President in deferrals and penalizing him in rescissions.

Yet, it is also true that Congress has been able to act when it wants. The huge number of deferrals in fiscal years 1975 and 1976 did not prevent Congress from selectively disapproving those Presidential actions which it deemed to be serious departures from established policies. Congress has been able to sort through the hundreds of Presidential messages to actively determine the disposition of any Presidential impoundment. For this reason, I find no compelling need to modify the Impoundment Control Act to lessen the number of reports and messages.

Most of the proposals for change are predicated on a distinction between routine and policy impoundments. But this useful analytic distinction cannot be etched into law without creating a new host of problems and conflicts. A matter deemed to be routine by the President might be considered a policy issue by Congress. In this regard, it is worth noting that several deferrals classified by GAO as "routine" have been overturned by impoundment resolutions. If the President were given the option to decide whether a matter is routine or policy, he would be vulnerable to charges of misleading Congress; if GAO was given a role in screening Executive submissions and deciding which policy ones should be brought to the attention of Congress, it would have an effective veto over congressional action.

Congress in 1974 opted for a broad definition of impoundments. It decided that excessive paperwork is preferable to excessive strife. Let the executive branch report everything; let Congress decide what action to take. This is the underlying philosophy of impoundment control and it should not be altered.

Informing Congress of Executive actions.—The Impoundment Control Act gives Congress an imperfect monitoring capability: the Comptroller General is to review all reported impoundments and also notify Congress of any unreported ones as well as of errors in classification. However, the Comptroller General cannot inspect every administrative action affecting the availability of funds. GAO cannot always distinguish between delays caused by prudent management and delays promoted by policy motives. Even when it is vigilant, GAO ordinarily becomes aware of an executive action sometime after it has taken effect.

GAO has adopted a reactive posture toward executive branch impoundments. That is, rather than initiating investigations, it gets involved only after the President has filed an impoundment report or if a third party complains about Executive action. GAO explained its procedures in a 1976 letter to Senator Warren Magnuson:

> To fulfill our responsibilities to detect unreported withholdings, we monitor the handling of budget authority by the administration, in addition to receiving information from Members of Congress, committee staff, interest groups, and constituents on possible unreported withholdings. While we believe this has worked reasonably well in the past to enable us to detect unreported withholdings, we cannot monitor all budget authority simultaneously, even with the help of interested third parties. Furthermore, once a suspected withholding has been found, we believe it prudent to obtain OMB and agency documentation (apportionment and allotment schedules) evidencing the existence of budgetary reserves, and, when necessary, prepare analyses of relevant statutes to determine whether the failure to make the budget authority available legally constitutes an unreported withholding under the act. Consequently, unreported withholdings cannot always be reported immediately.

This procedure does not always adequately protect congressional interests. A case in point was the controversial B-1 bomber for which funds had been appropriated before the President decided not to proceed with the weapon. The Defense Department canceled B-1 contracts 3 weeks before it notified Congress. Although Congress was not confronted with a fait accompli—disapproval of the rescission proposal would have compelled the Defense Department to resume work on the airplane—restarting the program would have entailed considerable costs.

GAO is constrained from more active vigilance by two limitations: staff resources and conflicts with its other roles. In order for it to monitor all (or even a large portion) of relevant executive branch activities, GAO would have to multiply the staff devoted to impoundment work. In view of its other duties, GAO has been reluctant to expend limited resources on active surveillance, preferring instead to respond to reports and complaints brought to its attention.

The second reason is that GAO is charged by law to promote efficiency in Federal expenditure. Overzealous enforcement of the impoundment controls could force the executive branch to wastefully spend great sums of money. The B-1 case illustrates GAO's dilemma. After the President proposed a rescission, the 45-day clock started to run. But the period ended before Congress completed action on a rescission bill. According to the impoundment control procedures, GAO should have ordered the immediate obligation of some $460 million in budget authority, and the resumption of work on the canceled contracts. Instead, GAO gave fuzzy responses to congressional inquiries and the Defense Department was able to release the funds without actually spending them. In this manner, GAO was able to reconcile the conflicting demands of the impoundment Control Act and its responsibilities for financial efficiency.

Forty-five-day period.—In procedural terms, the 45-day period has evoked more controversy than any other provision of the Impoundment Control Act. In practice, the 45 days usually stretch to a much lengthier period of time. During the 1975 and 1976 fiscal years, the interval between the submission of a rescission proposal and the end of the 45-day period averaged 80 calendar days. Since impoundments do not have to be reported until the 30 days allowed by law for the apportionment of funds, the actual time between appropriation and termination of an impoundment averages more than 100 days.

As a consequence of this delay, the President has been able to put unwanted programs into cold storage for much of the fiscal year, thereby frustrating congressional intent and impairing program effectiveness. Delay sometimes has been sought for its own sake and, possibly, for political advantage as well. Whatever the motive or cause, Congress thus far has had no remedy when the President has manipulated the rescission rules to hold up programs.

The problem is compounded by the tendency of Congress to wait until the last moment to take up rescission bills. As a result, Congress bypasses an opportunity to give the executive branch an early indication of its intentions. There is reason to believe that earlier action by Congress would lead to earlier release of funds by the President.

The Comptroller General has offered two proposals to ameliorate congressional helplessness during the waiting period: (1) Convert from 45 days of continuous session to 60 calendar days, thereby shortening the amount of time between submission of rescission and the expiration of the waiting period while still giving Congress ample opportunity to act on the rescission. This sensible approach also would have the advantage of fixing a definite date for the end of the waiting period. (2) GAO

also has proposed the President be required to release the withheld funds if either the House or Senate passes a resolution indicating its disapproval of the rescission. In effect, Congress would have a legislative veto over rescissions comparable to the veto it now has over deferrals.

Congress has fashioned its own remedy—advanced rejection of an expected impoundment. During fiscal year 1977, President Carter announced his opposition to certain water projects. To avert a possible impoundment, Congress inserted the following sections into the Public Works Employment Act of 1977 (Public Law 95-28):

> SEC. 201. Congress hereby finds and declares that: * * * such projects should not be discontinued except by following the legislative process provided by * * * the Congressional Budget and Impoundment Control Act of 1974.
>
> SEC. 202. Notwithstanding the deferral and rescission provisions of Public Law 93-344, all appropriations provided in Public Laws 94-355 and 94-451 [fiscal year 1977 appropriations for public works and agriculture] for construction projects or for investigations, planning, or design related to construction projects shall be made available for obligation by the President and expended for the purposes for which the appropriations are made * * *
>
> SEC. 203. * * * section 202 of this act shall be equivalent to and have the legal effect of a resolution disapproving any deferral of budget authority previously provided for construction projects * * * section 202 is also equivalent to a congressional statement of intent not to uphold any rescission of budget authority * * *

While the language of the three sections appears to be contradictory—section 201 seems to uphold impoundment control procedures while section 202 seems to bypass them—the intent is clear: To head off a possible rescission or deferral by announcing that Congress would disapprove the action. This appears to be a remedy only when Congress and the President have fought over specific spending items during the appropriations stage. If it was applied across the board to all appropriations, this procedure would effectively negate the Impoundment Control Act.

Revision of the 45-day period also must reckon with the tendency of Congress to defer action until the last moment or beyond. Many rescissions have been approved by Congress after the end of 45 days. Funds for the B-1 bomber, for example, were repealed more than 3 months after the 45 days were over. Congress might consider a revision on the discharge procedure for rescission bills along with a mechanism for timely or automatic introduction of such bills in the House.

THE SCOPE OF IMPOUNDMENT CONTROL

During the course of each year, executive agencies take many thousands of actions affecting the rate and level of expenditure. Specifications are drawn and revised repeatedly for grants and contracts; administrative units are reorganized, slowing or speeding the processing of applications for funds; regulations are introduced or redrawn; funds are shifted from one use to another; efficiencies are introduced in administrative operations and the savings are applied to other activities.

It is possible to read the Impoundment Control Act to cover each and every one of these actions. In the Nixon-era climate, Congress opted for the broadest definition of impoundments: These are the bare words of section 1011 of the act:

Deferral of budget authority includes—

> (A) withholding or delaying the obligation or expenditure of budget authority * * * provided for projects or activities; or
>
> (B) any other type of Executive action or inaction which effectively precludes the expenditure of budget authority.

The Comptroller General has sensibly interpreted this provision to cover only willful actions which reduce the total amount of budget authority obligated or expended in a budget account. On June 11, 1975, he ruled that the:

> Act does not support to invalidate the exercise or reasonable administrative discretion in the adoption of program provisions and regulations * * *

On September 28, 1976, he advised Representative James J. Florio:

> that a failure to obligate the full amount of an appropriation does not, per se, constitute a withholding of budget authority within the meaning of the Impoundment Control Act. There must be sufficient evidence of behavior on the part of responsible executive agency officials that demonstrates an intention to refrain from obligating available budget authority.

In other words, neither routine administrative actions nor shortfalls are deemed to be impoundments. These are reasonable and productive applications of the Impoundment Control Act. The interests of Congress in establishing particular pro-

grams and funding levels remain fully protected against executive attempts to terminate or curtail programs.

Much more troubling than these administrative actions have been personnel limits mandated by the Office of Management and Budget and reprogramings of funds by executive agencies. Both types of actions have precipitated congressional efforts to strengthen the impoundment controls. When OMB establishes yearend personnel ceilings for agencies, it affects the level of expenditure in two ways: First, the amount of money spent on salaries is likely to be less than the amount provided by Congress; second, personnel shortages can slow down administrative operations and reduce the level of expenditure below the amount appropriated for programs. For example, an agency might not be able to process all eligible loan applications because OMB ceilings prevent it from hiring needed personnel.

While Congress has a legitimate interest in assuring that programs are carried out at the levels provided in law, in my judgment, the Impoundment Control Act should not be used as an all-purpose remedy against every type of executive action that affects the level of expenditure. If personnel ceilings were covered by the act, it would also seem logical to cover instances in which agencies hold down personnel (and other) costs in order to avert a supplemental appropriation. It is quite common for agencies—on their own volition or as ordered by OMB—to apply savings to some of the unbudgeted costs of pay increases and unexpected developments. A rigid application of impoundment controls to these situations would weaken executive branch incentives to be efficient and would surely lead to increased spending, not only in situations where personnel levels have been constrained in order to reduce program operations but also where the sole intent is to promote operational efficiencies.

Congressional concern over impoundment by means of personnel ceilings is reflected in the agriculture appropriation bill for fiscal year 1979 (H.R. 13125). The House Appropriations Committee has protested:

> The tendency of the executive branch to establish arbitrary personnel ceilings to slow down or stop various programs * * * in violation of the spirit, if not the letter, of the Impoundment Control Act.
>
> On several occasions, funds have been appropriated for additional staff deemed essential by the Congress, and then used as additional funds for travel or equipment and supplies.

The Appropriations Committee restructured the 1979 budget accounts for several agriculture programs to prevent these practices:

> * * * to avoid such de facto impoundments in the future, the committee has recommended in many instances separate appropriations for "personnel compensation and benefits" and "for other expenses." As a result of this bill language, an attempt to withhold funds for salaries must be reported to Congress for its consideration under the law.

In effect, Congress has moved to "line itemize" certain appropriations, thereby bringing the particular items under the scope of the Impoundment Control Act. It has taken similar action to thwart reprogramings—the transfer of funds from one purpose to another within the same budget account. GAO has ruled that reprogramings do not violate the Impoundment Control Act as long as there is no *net* withholding of funds. The issue arose when President Carter sought to apply funds appropriate for development of the Clinch River Breeder Reactor to the termination of the project. In a June 23, 1977, letter to Senator Jackson, the Comptroller General held that this division of the funds did not violate the impoundment controls:

> The act is concerned with the rescission or deferral or budget authority, not the rescission or deferral of programs. Thus, a lump-sum appropriation for programs A, B, and C used to carry out only program C would not necessarily indicate the existence of impoundments regarding programs A and B. So long as all budgetary resources were used for program C, no impoundment would occur even though activities A and B remain unfunded.

The congressional response to reprograming has been to extend impoundment controls to particular programs and projects. Thus, section 304 of the second supplemental appropriation for fiscal year 1977, sponsored by Representative Cederberg, has the following prohibition:

> None of the funds appropriated or otherwise made available in this act shall be obligated or expended for the termination or deferral of any project, activity, or weapons system approved by Congress, except specific projects, activities, or weapons systems for which, and to the extent, budget authority has been rescinded or deferred as provided by law.

Although Representative Cederberg insisted that this provision would not bar reprogramings, the effect would seem to be otherwise. If a similar provision were extended to all appropriations, the Federal budget would be effectively converted to a line item basis and most, if not all, reprogramings would be prescribed

In my view, Congress should not apply the impoundment controls in a manner that robs the executive branch of all administrative flexibility. Congress and the President can coexist without having every aspect of the expenditure of funds nailed down in law. Congress can tolerate gray areas in its relationship with the executive branch, even though these are the breeding ground for ambiguity and controversy. If Congress succeeds in curbing executive discretion, the American taxpayer might have to pay a very high price for its victory.

Mr. DERRICK. Thank you, Dr. Schick, for an excellent testimony.

Mr. Dembling, why don't you come up here and take this end chair.

[Discussion off the record.]

Mr. DERRICK. I thank you all for your very excellent testimony.

As I proceed, not to simplify the matter, the problem we have here as the testimony from OMB indicated, is that of the $10 billion in deferrals. Since Congress did not agree with, about $64 million, if we assume that Congress is aware of what is going on, this means the majority were not of any particular consequence and were routine, as opposed to policy. I would agree with Dr. Schick's statement, that we don't want to sacrifice the prerogatives of Congress just over a little more paperwork. We could eliminate a great deal of the problem we are having here, doing something about the 45-day period—maybe 60 calendar days, would be an answer to it. In addition, we could eliminate or require the executive branch in some way not to eliminate the lag time of 2 or 3 weeks that they sometimes have and allow the Congress, as has been suggested, a disapproval resolution with immediate release of funds. We must also decide the matter of how do we determine what is policy and what is routine, who makes that decision.

I think the others have some reasonable alternatives, but that is the one area that I have not resolved, and I would be glad to have all of you address yourselves to that. Mr. McOmber, why don't you start?

Mr. MCOMBER. Mr. Chairman, the point that you have made has been one that has long concerned us. As a matter of fact, it is fair to say that we have argued in past years that it would be difficult indeed to make the distinction between policy and routine items, and that the arguments that would occur might make such distinctions not worth trying.

However, in thinking about the matter in connection with the hearings you called, we concluded that we should recognize that all of these matters are often the subject of judgment, and that if the Congress chose to make such a distinction, and to incorporate it into law, that we would recognize that it is a very gray area indeed, and we would lean over backwards to try to send to the Congress all of the things that we believed might possibly be controversial, or about which there is any doubt.

We would undoubtedly, even under those circumstances, sometimes make mistakes in judgment. But if the Congress should choose to move in this direction, all we can do is to promise that we would do our best to avoid the sort of controversy and differences of opinion that might occur.

Mr. DERRICK. That is a tremendous responsibility. Dr. Schick.

Dr. SCHICK. Several hundred deferrals have been submitted to Congress during the past 4 years which are routine and involve no controversy or policy issue. GAO has done an effective screening job for these, telling Congress in a boiler plate sentence that these are authorized under the Antideficiency Act, and the facts as presented by OMB appear to be accurate. This is certified by GAO.

I don't see any great burden to Congress in continuing to deal with that arrangement. I would call to your attention that several so-called routine impoundments have been overturned by Congress, and I would hate to deny Congress the option of taking whatever action it deems to be appropriate in regard to any rescission or deferral of funds.

Mr. DERRICK. Mr. Dembling, would you care to comment?

Mr. DEMBLING. Yes. I agree that this is a gray area. Any impoundment under the Antideficiency Act we have considered "routine" such an impoundment is made for cost savings perhaps by curtailing of a program. Those that are made on an economic basis or fiscal basis are more of the policy category—not made under the Antideficiency Act.

Recognizing that if this is carried too far there might be abuse, but up to this time, we have recognized none of the abuse that some people are concerned about. Therefore we felt that those that were made under the Antideficiency Act could be considered routine, recognizing that there were only two that the Congress did overturn out of 157 that we identified in the first 2 years of operation.

We feel that it is working properly. We don't have a problem with it, and as we pointed out earlier, we could always monitor those kinds of reserves and notify the Congress if we felt that there were some major policy impoundments that Congress should be aware of.

Mr. DERRICK. Thank you. Mr. McOmber, who makes this decision as to what is policy and what is routine? Is it made at OMB? Do you make it? Is it made by the agency? Is there some procedure that you would have set up, or what?

Mr. MCOMBER. I can answer that question in terms of a little bit of experience we have had. You may remember that prior to the Impoundment Control Act itself, there was, for a brief time, a law, the Federal Impoundment and Information Act that required OMB to report impoundments. The Congress expected us to make the distinction in those reports.

We set up some criteria which distinguished between routine and policy impoundments, which I believe were generally acceptable. They included the distinction that Mr. Dembling has made, that is, we identified Antideficiency Act impoundments as being routine in nature. However, we did, as I remember it, classify or permit the classification of certain kinds of antideficiency actions which seemed to be controversial on their face as being policy-based withholdings.

Mr. DERRICK. Another concern that we have is the impoundment in many instances starts substantially before the 45 days begin to run.

Would you support an amendment that would start the 45 days at the instance of the impoundment? I am asking you, Mr. McOmber.

Mr. McOMBER. We have indicated that we would support a change in the law tied to a calendar day period.

Now to answer your question, I think I should respond by noting that we do not believe it unreasonable to have as much time as 3 weeks elapse between a decision to withhold funds and the reporting of that decision to Congress. For example, if such a withholding occurs deep within the Department of Defense, it may well take 3 weeks for the proposal to be developed and for the President to sign the document and transmit the special message informing the Congress.

Mr. DERRICK. Why not do it simultaneously though? If I might interject, I don't have all the legislative history before me on that. I would perceive that Congress intended originally, when they said 45 days, that they meant 45 days, and, of course, if you take these 3 weeks and put it on top of the 80-day average, with the other matters of termination dates and that sort of thing, you are really talking about much more than 45 days. And this adds to it, to the problem that we are addressing, rather substantially.

Mr. McOMBER. Yes. We recognize that in certain controversial areas where there were definitive actions like those that occurred in connection with the B–1 rescission proposal and a few others where so-called stop orders were issued, that the circumstances were well defined and an argument can be made about the need for more rapid reporting. The problem, however, is one of identification of when that point begins; that is, if indeed the President is to make the determination, as he is required to do with all rescission proposals, some sort of action document must travel to the President and must travel back down.

As I noted in my statement, it would be impractical, if not inconceivable, for every option laid before the President to be accompanied by a rescission report, so that the President could make the decision and sign the report simultaneously.

Mr. DERRICK. Do you think that this would become practical if we were able to eliminate much of the routine?

Mr. McOMBER. I doubt that it would be. That is, it is going to be necessary, under most of the circumstances that we can conceive, once the President has made a decision, for that decision to be translated into documents of explanation. It requires a reasonable amount of time to develop the technical reports. It is hard for me to imagine that we could have a situation in which, on the same day that the President makes a decision, we could transmit all of the congressionally required information concerning that decision.

Mr. DERRICK. I gather that the answer to the question is that you would not support it?

Mr. McOMBER. We would not.

Mr. DERRICK. That is as I suspect.

Dr. SCHICK. Mr. Chairman, can I make one comment?

Mr. DERRICK. Yes.

Dr. SCHICK. I think there is a reasonable remedy to the problem which Mr. McOmber has just brought to the table, and that is to require instant notification with a deadline for submitting the

backup material. In other words, you can require the President to notify Congress at the time the action occurs and within no later than a fixed number of days to provide Congress the information required by the Impoundment Control Act.

Mr. DERRICK. How about this as an alternative? Why not put your 60 calendar days in there, and say either/or, but under no circumstances shall it be over 60 days from the date of impoundment?

Dr. SCHICK. That would be all right, but the other thing that has to be done is if you hold the executive branch to the fire, you sort of have to hold Congress to the fire as well, that is, you would have to adjust the number of days in the discharge procedure. If a sizable portion of the 45 or 60 days had been consumed by late reporting of the action, then in effect Congress is depriving itself of the opportunity to act.

Mr. DERRICK. I understand, but I was assuming that Congress would get immediate notification and that would be a requirement as you suggest.

Dr. SCHICK Very good, fine.

Mr. DERRICK. Sixty days after Congress receives the immediate notification.

Dr. SCHICK. Yes, fine.

Mr. MCOMBER. Mr. Chairman, I would like to make one other point concerning the matter that you raise. We refer to the President's actions as if those were the sole matter that concerns us, but after all, proposals have to be made to the President. That is, if an agency, for one reason or another, determines that it is appropriate to recommend to the President that he withhold funds and curtail a program, then development of that recommendation also requires time. I would suggest that it is inappropriate for an agency to send such a recommendation forward and not begin to withhold simultaneously. That is, if an agency is proposing that the funds be withheld, then a dilemma exists. It could hardly propose the withholding of $100 million in funds and then continue to use those funds while the President and his advisers consider the matter, reducing the funds to $90 million or $80 million. So there is a need for a reasonable amount of time to make these determinations.

Mr. DERRICK. I understand, and your thoughts are well taken. However, I think it is a matter of judgment about what is a reasonable amount of time, and I think that Congress probably thought that 45 days was a reasonable amount of time. But it has become, at least in the view of many, an unreasonable amount of time because of the 3-week lag and the various other things that run to 120 or 130 days. Of course, what we are really getting to is this—you don't think that the administration should have a right to switch funds in programs, obviously thwarting the original purpose of what Congress had in mind, such as the breeder reactor. Surely you wouldn't think that?

Mr. MCOMBER. Mr. Derrick, with emphasis on your word "obviously," I certainly would agree.

Mr. DERRICK. You caught me cold on that one. I would agree with you. I think that we certainly are going to have to address that situation.

Mr. Dembling, do you have any comments on the matters that we have discussed?

Mr. DEMBLING. No.

Mr. DERRICK. Mr. Mineta.

Mr. MINETA. Thank you, Mr. Chairman. It seems to me, to characterize Dr. Schick's DMZ thing, we have this problem of again what is routine or what is policy.

Second, this question of this notification, and when the impoundment of funds comes along.

Just following up on what you are saying, Mr. McOmber, about the impoundment of funds, if the impoundment of funds doesn't occur, or the time doesn't start on it until the President makes his decision, then the 45 days start running, would that make a difference, other than the fact that you say it doesn't make sense for the agency to have made a recommendation to the President and it is going through whatever mechanics or process it has to go through, and then in the meantime funds are being used if you don't impound the funds immediately? But suppose the impoundment of funds doesn't begin until the President makes the decision, and then the notification to the Congress?

Mr. MCOMBER. Certainly, everything is a matter of degree. It would be more reasonable to do that than to require it at the time when someone deep within an agency issues a stop order. Again, I would have to note, however, that it is important to recognize that the President often makes decisions on the basis of general papers that are brought before him. If those 45 days begin at the point of his decision—at the time he puts a checkmark on an approval box on a piece of paper—then we have the problem of preparing the information that is necessary for the Congress to evaluate the proposal.

Sometimes preparing the justification and technical materials takes an amount of time because the President makes general policy determinations. Translating them into specific effects, including the precise dollar amount affected, does often take time. I would simply reiterate that we do need a reasonable amount of time in order to prepare reports. It might very well be that we would not be able to prepare those papers until several weeks have elapsed, and the Congress would in the meantime not have the opportunity to review the information.

Mr. MINETA. Under present practices, after an appropriations bill is signed into law, I take it there is some time period for the apportionment of funds to be made.

Mr. MCOMBER. Yes, the law and our regulations say "30 days."

Mr. MINETA. Under that situation, you say that you have to make that apportionment of funds within 30 days?

Mr. MCOMBER. Yes.

Mr. MINETA. Are there any decisions made at that point relative to what ought not to be—is that where the Antideficiency Act then picks up?

Mr. MCOMBER. Yes. That is, most deferrals that are reported to the Congress are decided upon during that apportionment period.

Mr. MINETA. Who makes that? OMB makes those?

Mr. McOMBER. OMB makes recommendations to the President with respect to the impoundment of funds. OMB makes the determination on the apportionment.

Mr. MINETA. And that is notified to the department and then what do they do?

Mr. McOMBER. There are two circumstances. First of all, the Department very often recommends routine deferral or even rescission actions. If we initiate those proposals, we then advise the Department, work with them on preparing an impoundment report, and make the recommendation, including the report on the impoundment proposal to the President.

Mr. MINETA. That is under the Antideficiency Act?

Mr. McOMBER. Most of the withholdings made at that time will be under the Antideficiency Act but not all of the recommendations made to the President will be under that authority.

Mr. MINETA. Do I understand that GAO's recommendation is that those that are under the Antideficiency Act are to be summarily concerned as routine and not have to go through all this paperwork to the President?

Mr. DEMBLING. What we have proposed was that those impoundments or reserves that are created under the authority of the Antideficiency Act would not have to be reported to the Congress. That was our suggestion. The apportionment process and the provisions for apportioning the funds to the agencies that the OMB goes through would remain. Those reserves that are authorized by the Antideficiency Act would not have to be reported to the Congress.

Mr. MINETA. Mr. McOmber, you mention on page 6 the need to balance the congressional need for speedy reporting and the effective use of the President's time.

Suppose you were to do this on a quarterly basis rather than on each individual action, the time running on each individual action but sort of bundling these things up on a quarterly basis in the report to the Congress. It necessarily lengthens the time. But is there a way of balancing again the two?

Mr. McOMBER. Quarterly reports would certainly reduce the problem of use of the President's time. I think, because of the way impoundment questions arise, it would be unfair to the Congress to wait that long in many cases. That would be too long because decisions are hardly made on a quarterly basis.

Mr. DEMBLING. If I might interject, you might also have the problem where, if you waited too long a period of time during the fiscal year, and you were dealing with 1-year funds, that deferrals might really be rescissions if they were referred to the Congress too late in the year.

Mr. MINETA. Just a general question. How does this relate to where agencies haven't spent their full amount of moneys, and then you see all of a sudden the expenditure of funds, because they are afraid if they don't use it up, next year's appropriations might be cut back? Is there some way of dealing with that issue?

Mr. McOMBER. We have interpreted the law and opinions issued by the Comptroller General to mean that if in situations where there has been no deliberate action to prevent the obligation of funds and the funds lapse because the agency has not, under

reasonable circumstances, been able to obligate them, and an impoundment report is not necessary.

Now that line of thought sometimes is judgmental, as you will recognize. Our instructions try to recognize that fact, and we hope that they lean in the direction of the doubt going to the side of the Congress. That is, where there is not a clear indication that the cause of unobligated funds has been the result of deliberate action, then we have insisted upon reporting.

We have tried to lean in the direction of reporting. However, we may not have been completely successful in every instance.

Mr. MINETA. Mr. Chairman, I don't believe I have any more questions. Thank you very much.

Mr. DERRICK. I have one more question of Dr. Schick. As to the Miller amendments, the 2-percent amendments that were addressed in the letter to the chairman from GAO. Do you agree with GAO's opinion that they do not feel that the Executive is under obligation and that there is a tremendous latitude, only with the exception of exceeding the 5 percent?

Dr. SCHICK. I suppose quick decisions generate instant analysis. I think that the decision in this case is not in compliance with the Impoundment Control Act. Let me explain why.

Miller gave the President two numbers, 2 percent or 5 percent.

Mr. DERRICK. Two percent, not to exceed 5 percent.

Dr. SCHICK. Two percent off total HEW, not to exceed 5 percent off any appropriation within that bill.

What this meant was that the President and executive officers have a great deal of discretion, running into hundreds of millions of dollars in big appropriation accounts, whenever the budget authority is withheld from any one of the appropriation accounts in the Labor-HEW bill, it is an act of executive discretion. Every single impoundment of funds in the Labor-HEW bill without exception represents a discretionary action by the executive branch. Why? Because the executive branch could uphold and carry out Miller's requirement of 2 percent by not withholding a single dollar from any particular appropriation, but withholding them from others. In other words, as regards any particular appropriation, the executive branch has a range of discretion going from zero to 5 percent.

With regard to the totality of appropriations, it doesn't have discretion. It has to be 2 percent, but after all, in past rulings, GAO has held that the Impoundment Control Act lies against the budget authority in each appropriation account. The Labor-HEW bill contains several dozens of appropriation accounts. We have to look at each of those appropriation accounts, and with regard to each, if there has been a withholding of funds under Miller, in my judgment, it constitutes an impoundment which should be reported to Congress.

Mr. DERRICK. I thank you. Would you care to respond to that Mr. Dembling?

Mr. DEMBLING. We felt that here the Congress had acted to continue the discretion. It is like the lump-sum appropriation enactment in reverse. In other words, when the Congress appropriates "lump sums" to an agency, it says to the executive:

Though you came up and justified this appropriation with specificity on a variety of programs, but in enacting the Appropriation Act we are going to give you discretion as to how you are going to really expend that money.

This is in the reverse. They have said:

Now we have cut 2 percent of that Appropriation Act, and we are going to give you discretion as to how you are going to arrive at that decrease of the 2 percent. However, we are going to limit that discretion by saying that no one program can be cut more than 5 percent.

So we have looked at it from the standpoint of the Congress enacting this discretionary authority for the Executive and have taken a look at it from the standpoint of saying it is 2 percent overall, 5 percent in any one program. If it exceeds those limits then it is an impoundment. Otherwise we felt it would be very cumbersome to even try to determine each appropriation action that was being taken.

Mr. McOMBER. Mr. Chairman, there is a related point here that perhaps is being overlooked. Under the regulations that we have issued, we would treat the choice as to the 2- to 5-percent reduction in any one account differently from impoundments. To be specific, on the apportionment form, which Mr. Dembling's auditors have under their scrutiny, we will identify the amount of the reduction from the basic appropriation and show that amount separately from other budgetary sources so a clear distinction can be made between any reduction resulting from the general provision and any impoundment that might occur in the same appropriation. That distinction will be so clear that there should not be any doubt in anybody's mind as to the amount of the general reduction that applies to a particular appropriation.

Mr. DERRICK. I thank you, Mr. McOmber. I have one other question that I just can't let you go without asking. Surely you don't agree with the recent administration stance on legislative veto, do you?

Mr. McOMBER. I am not very familiar with the precise statement.

Mr. DERRICK. Let me refresh your memory. The President, of course, recently stated that the administration would not feel legally bound by most legislative vetoes. Of course, we might construe this to mean that you wouldn't pay any attention to us on these rescissions and deferrals. Surely you don't believe that.

Mr. McOMBER. I would not disagree with the administration on the point, you understand, but this question is directly related to some of the matters that have arisen here this morning concerning suggestions that Congress might end the 45-day period by passing a single resolution by one House. I would note that the administration would not agree with such a proposal. After all, there have been occasions on which the Houses have disagreed with each other. There have even been occasions when one House has persuaded the other House to change its mind.

Mr. DERRICK. You know, if I might interject, I would find that absolutely inconsistent with your testimony, most of it, so far today. If you were to carry that to its finite conclusion, then the Congress has spoken when it appropriates these funds, and you have no business to impound them, rescind, or have anything to do with it if you follow that conclusion on the other end.

Mr. McOMBER. No. We would simply argue that under the Impoundment Control Act we are required to report. Under that Impoundment Act the Congress can refuse to rescind.

Mr. DERRICK. You can't have it both ways.

Mr. McOMBER. I believe it is not a matter of both ways in the manner that you have described.

Mr. DERRICK. Surely you don't believe that.

Mr. McOMBER. Surely I do, but we do think that it would be most appropriate for the Congress as a whole to express its opinion. We have always been concerned with this matter of the 45-day period, that while individual Members of Congress may say that the Congress is not going to rescind, and that, therefore you should release the funds before the end of the 45 days, we have always taken the position that, if the Congress as a whole said that, which could be done——

Mr. DERRICK. But the Congress as a whole said in the beginning that they wanted you to spend this money.

Mr. McOMBER. But they also said——

Mr. DERRICK. Now you are telling us this. It takes two Houses to pass, as you well know.

Mr. McOMBER. Oh, yes.

Mr. DERRICK. So why should it be one way on one end and another way on the other?

Mr. McOMBER. The Congress passed the Impoundment Control Act.

Mr. DERRICK. That has nothing to do with the Impoundment Control Act, what I am talking about. That is a judgment you made. We didn't state two Houses in there at all, did we?

Mr. McOMBER. You did not, with respect to overturning deferral actions, that is correct.

Mr. DERRICK. Surely you wouldn't suppose that OMB would make such a judgment as that, would they?

Mr. McOMBER. My point is simply this: The full Congress has passed an appropriation. The President is permitted under the Impoundment Control Act to propose that the Congress cancel some of that action. It would seem wise, since the Congress as a whole proposed doing so, that the Congress as a whole express its will about whether or not it refuses to cancel that action.

Mr. DERRICK. Of course, this colloquy has no answer to it, other than I would just say, of course, if both Houses had not agreed to begin with, so why not take it from the other end? If one House disagrees, you wouldn't have it anyway? So if one House disagrees on the other end, why shouldn't that be superior? I thank you all.

Mr. MINETA. Could I just ask one quick question? Roughly how many employees do you have all together at OMB?

Mr. McOMBER. We have a little more than 550.

Mr. MINETA. And of that a little more than 550, how many are Civil Service as compared to schedule C or any other kind of political appointments?

Mr. McOMBER. I don't know the precise figures. There are something like 14, 15 perhaps, who are schedule C or are appointed by the President, and all of the rest are Civil Service employees.

My colleague points out that the number is probably a little higher when we count the schedule C secretaries, the confidential secretaries to some of these individuals.

Mr. MINETA. In terms of professional staff, so to speak, you say the number is about 15 or so?

Mr. MCOMBER. Yes, approximately that.

Mr. MINETA. Thank you very much.

Mr. DERRICK. Once again, I thank all three of you and your associates for being here this morning. I think the hearing has been very worthwhile, certainly for me, and I thank you for taking the time. I enjoyed it.

[The following material was submitted for the record:]

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C. August 1, 1977.

Hon. STROM THURMOND,
U.S. Senate.

DEAR SENATOR THURMOND: This replies to your letter of July 22, 1977, in which you requested our analysis of the authority of the executive branch to issue stop-work orders for work on the B-1 bomber. Your letter states your concern that such instructions were given prior to the completion of congressional action on the President's request pursuant to the Impoundment Control Act of 1974 to rescind $462 million of fiscal year 1977 procurement funds that were provided to the Department of Defense (DOD) for this purpose. Thus, you question whether the President violated controlling law by issuing the stop-work orders.

We conclude that the executive branch can legally terminate B-1 bomber production without the need for additional specific legislative authority other than the action taken pursuant to the Impoundment Control Act. We do, however, have serious policy reservations about the practice of beginning to dismantle a program before the Congress has had an opportunity to express itself pursuant to the Impoundment Control Act. We intend to express our views to the executive branch on this matter shortly. There follows a discussion of our findings and conclusions.

I. DOD FISCAL YEAR 1977 AUTHORIZATION AND APPROPRIATION ACTS

A. THE FISCAL YEAR 1977 AUTHORIZATION ACT

The B-1 bomber was not specifically authorized by DOD's fiscal year 1977 authorization act, Public Law 94-361, approved July 14, 1976. Rather, procurement of these aircraft was authorized by the general language of title I of the statute, "Procurement":

> For aircraft: for the Army, $554,100,000; for the Navy and the Marine Corps, $2,995,800,000, of which not more than $104,100,000 shall be available only for the procurement of the A-6E aircraft; *for the Air Force, $6,143,800,000.* (Italics added.)

The Committee reports on H.R. 12438, the bill that ultimately was enacted as Public Law 94-361, clearly indicate that B-1 bomber production was authorized by and included within the above-quoted language. See S. Rep. No. 94-1004 (Committee of Conference), 94th Cong., 2d Sess. 20 (1976); S. Rep. No. 94-878, 94th Cong., 2d Sess. 15 (1976); and H.R. Rep. No. 94-967, 94th Cong., 2d Sess. 39 (1976).

B. THE FISCAL YEAR 1977 APPROPRIATION ACT

Similarly, except for a limitation on the use of funds for the B-1 prior to February 1, 1977, the fiscal year 1977 DOD appropriation act. Public Law 94-419, approved September 22, 1976, did not provide funds specifically for the bomber procurement. Instead, funding for the aircraft was included in the lump-sum appropriation in title IV of the appropriation under the heading "Aircraft Procurement, Air Force":

> For construction, procurement, and modification of aircraft and equipment, including armor and armament, specialized ground handling equipment, and training devices, spare parts, and accessories therefor; specialized equipment; expansion of public and private plants, Government-owned equipment and installation thereof in such plants, erection of structures, and acquisition of land without regard to section 9774 of title 10, United States Code, for the foregoing purposes, and such lands and interests therein, may be acquired, and construc-

tion prosecuted thereon prior to the approval of title as required by section 355, revised statutes, as amended; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes including rents and transportation in of things; $6, 067,700,000, and in addition, $21,500,000, of which $8,600,000 shall be derived by transfer from "Aircraft Procurement, Air Force, 1976/1978", and $12,900,000 which shall be derived by transfer from "Aircraft Procurement, Air Force, July 1, 1976/1978", to remain available for obligation until September 30, 1976. Until February 1, 1977, the obligation of funds appropriated in this Act for the procurement of the B-1 bomber shall be limited to a cumulative rate of not to exceed $87,000,000 per month.

The Committee reports on H.R. 14262, the bill that was enacted as the DOD fiscal year 1977 appropriation act, indicate that, of the $6,067,700,000 appropriated, $948 million (in addition to prior-year advance procurement funds) was intended for use for B-1 bomber procurement. See S. Rep. No. 94-1046, 94th Cong., 2d Sess. 216 (1976); and H.R. Rep. No. 94-1231, 94th Cong., 2d Sess. 150 (1976).

II. The President's Decision To Curtail B-1 Bomber Production and the Impoundment Control Act of 1974

On July 19, 1977, as a consequence of his decision not to proceed with the original B-1 bomber production plans, the President proposed the rescission under the Impoundment Control Act of 1974, title X of Public Law 93-344, approved July 12, 1974, of $462 million. This amount was a part of the funds that had been appropriated to DOD in Public Law 94-419, above, for aircraft procurement of the Department of the Air Force during fiscal year 1977. The amount sought for rescission was determined to be in excess of the Government's estimated termination liabilities resulting from the President's decision to halt B-1 bomber production. See Rescission Proposal No. R77-18, July 19, 1977. We have determined that, prior to the date of the rescission request, stop-work orders on B-1 bomber production activities were issued on June 30, 1977, and were followed by termination orders on July 6, 1977.

III. Analysis

The question of whether the stop-work orders properly were issued to halt work on the B-1 bomber prior to completion of congressional action on the request to rescind the $462 million focuses upon the basic authority of the executive branch to both initiate and terminate B-1 bomber procurement efforts.

In a recent opinion we considered the authority of the executive branch to change the Clinch River Breeder Reactor Project (CRBRP) from a program for the construction and operation of a demonstration liquid metal fast breeder reactor to one only for the design of such a reactor. In our letter to Senators Jackson and Baker of June 23, 1977, copy enclosed, we analyzed the legislative basis of the CRBRP. We found that the CRBR project and funding therefor were specifically authorized by law. Because the President indicated his intention not to proceed in accordance with the legislation establishing and describing the CRBRP, we concluded that executive branch actions and expenditures to implement the revised plans would be legally improper.

The legislative basis for the B-1 bomber is not similar to that of the CRBRP. Unlike the breeder reactor where we found specific legislative authority for and a description of the program, there is no specific legislative authority for procurement of the B-1 aircraft. Similarly, where we found constraints in the CRBRP authorizing statute describing the purposes for which funds could be appropriated (construction and operation of the demonstration plant) there are no limitations in either the DOD authorization or appropriation acts for fiscal year 1977 limiting, at this time, the executive branch's authority regarding B-1 bomber production.

While it might be argued that the committee reports on the DOD authorization and appropriation acts constrain the executive branch insofar as the bomber is concerned, we must point out that, unless such constraints appear in the enacted statutes, they have no legal effect and do not affect the executive branch's authority. See *Matter of LTV Aerospace Corp.* B-183851, October 1, 1975, copy enclosed.

Accordingly, and in light of the facts that: the B-1 bomber was not specifically authorized or described in law; funds were not specifically appropriated for production of the bomber; and that both the DOD authorization and appropriation acts for fiscal year 1977 do not at this time constrain the executive branch's activities in the B-1 bomber program, we must conclude that issuance of stop-orders prior to completion of congressional action pursuant to the Impoundment Control Act of 1974 on R77-18 was not in violation of law.

While we conclude that, as a matter of law, the executive branch has not violated the statutes governing the B-1 bomber program, we believe the practice of initiating major program terminations prior to the time Congress has been either informed of such decisions or allowed to complete action under the Impoundment Control Act of 1974 to consider the rescission proposals on the program, creates a situation that jeopardizes the possibility of restarting the program should the Congress disapprove the rescission proposal and specifically direct continuation of the program. At a minimum, terminating and then restarting the program could greatly increase program costs. We intend to notify the executive branch of our views on this practice and will keep you informed of the status of our discussions with them.

Sincerely yours.

ELMER B. STAATS,
Comptroller General of the United States.

Enclosures.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., August 5, 1977.

Hon. JOHN J. LAFALCE,
House of Representatives.

DEAR MR. LAFALCE: This replies to your letter of July 27, 1977, with enclosures, in which you requested our analysis of whether the executive branch has violated the Impoundment Control Act of 1974, title X of Pub. L. No. 93-344, approved July 12, 1974. Specifically, you are concerned that a violation of the act occurred when the executive branch terminated the Minuteman III Intercontinental Ballistic Missile (ICBM) program prior to the date on which Congress was requested to rescind $105 million in budget authority that was determined to be in excess of program needs as a consequence of the decision to terminate further production efforts. As pointed out by your letter, the executive branch announced its plans regarding the missile by a press release dated July 6, 1977.

We have determined that stop-work and termination orders were sent to the appropriate contractors on July 11, 1977. However, it was not until July 26, 1977, that the President formally requested the rescission of the excess procurement budget authority resulting from the decision to curtail production. Rescission Proposal No. R77-20, July 26, 1977.

In the light of these facts, you raised two questions concerning the propriety of the executive branch's actions. Your questions and our answers thereto follow:

> In a situation of this kind, when the precise date of the administration's decision to seek a rescission can be clearly ascertained (i.e., the date of the Defense Department's press release), will GAO consider this to be "constructive notice" to the Congress for purposes of the 45-day period specified in the Budget Act and, accordingly, start that period running on the first calendar day of session thereafter?

We have previously considered whether the effective date, for the purposes of the Impoundment Control Act, of a rescission proposal is the date on which the executive makes its decision not to use budget authority as opposed to the time at which the Congress is formally requested to rescind such authority.

In our letter of September 24, 1976, copy enclosed, to Senator Magnuson, we concluded that the language and history of the Impoundment Control Act do not allow us to set a date prior to the date a message is transmitted to the Congress. Accordingly, we must answer your first question in the negative.

Your second question is:

> As noted above, the administration's actions in this case have had the cumulative effect of destroying, or at least lessening significantly, the ability of those involved to restart this program in the event the rescission proposal is disapproved by Congress. I liken this to the nursery rhyme about Humpty Dumpty, where the administration has knocked him from the wall and, in effect, challenged Congress to put him back together again. In a "midstream" rescission situation, not fully contemplated in the Budget Act, will GAO consider seeking injunctive or other judicial relief to prevent this kind of *fait accompli* pending congressional review as contemplated in the Act?

We share your concern and agree that the Congress should be promptly notified of decisions to terminate programs. We do not believe that actions should be taken to dismantle or curtail programs without the Congress having an opportunity to fully consider the matter. In this regard, we think one of the major objectives of the Impoundment Control Act—namely, that both the executive branch *and* the Congress should jointly make decisions to delay or terminate programs—is thwarted when situations such as the instant one occur. In such cases, as you point out in your letter, the Congress may well be presented with what amounts to a *fait*

accompli; the program is already curtailed and it could be very difficult, if not impossible, to resume the program within the original time and cost plans.

Unfortunately, the practice followed by the executive branch concerning the Minuteman III ICBM is not unique. We recently discovered a similar situation in connection with the President's decision to curtail the B–1 bomber production; termination orders were issued before the Congress was allowed to complete action on the rescission proposal for that program.

Senator Thurmond asked us to review the propriety of the executive branch's actions in the case of the B–1 bomber, in light of his concern that a violation of the Impoundment Control Act there occurred. Enclosed is a copy of our letter of August 1, 1977, responding to the Senator.

Because we agree with you and Senator Thurmond that the handling of the terminations of the B–1 bomber and the Minuteman III missile are not in keeping with the spirit of the Impoundment Control Act, we have written to the Director of the Office of Management and Budget, copy enclosed, communicating our concern with the present policy. We will keep you informed of the status of our discussions.

In the meantime, we must conclude that the act does not empower this Office to seek injunctive or other judicial relief to alleviate the difficulties raised by the present circumstances. The law only authorizes this Office to seek to have budget authority made available for obligation—*i.e.,* released from its impounded status—when the President has failed to comply under the act with the mandate to do so. Thus, until such time as the Congress fails to pass a rescission bill concerning the Minuteman III ICBM and the President does not release the $105 million currently sought for rescission, this Office is without power to seek judicial redress.

We hope the foregoing will be helpful to you.

Sincerely yours,

ELMER B. STAATS,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., March 17, 1978.

Hon. ABRAHAM RIBICOFF,
Chairman, Committee on Governmental Affairs,
U.S. Senate.

DEAR MR. CHAIRMAN: The purpose of this letter is to address certain problems that arise in connection with decisions by the executive branch to terminate or curtail Federal programs or activities and to suggest the possibility of remedial legislation in this area for consideration by the Congress.

The termination or curtailment by the executive branch of Federal programs and activities is a frequent occurrence. For the most part, such actions are routine matters of program administration which do not involve broad policy considerations. However, some are of major importance and may represent significant shifts in Government policy. The B–1 bomber and Minutemen III programs are recent examples of contract terminations that have prompted considerable concern by Members of Congress.

The principle purpose of the Impoundment Control Act of 1974 is to subject to congressional review executive branch actions limiting the obligation and expenditure of budget authority. Nevertheless, the act in its current form does not ensure that all significant decisions involving the termination or curtailment of Government programs are subjected to congressional review or that congressional review, to the extent required, is available on a fully effective basis.

If the entire amount of budget authority for a particular program is to be expended in the termination process, a rescission proposal does not appear to be required by the terms of the act since all available budget authority will in fact be expended. Under this approach, the act provides no mechanism for congressional review. The same result would follow where all budget authority affected by a program curtailment will be expended to meet liabilities flowing from the curtailment.

Problems concerning congressional review of termination or curtailment decisions also arise where the decision involves an impoundment subject to the act, but the impoundment affects only a portion of the available budget authority. In such cases the opportunity for congressional review under the act may arise on a limited or piecemeal basis, thereby precluding Congress from addressing the full impact and consequences of the decision. Likewise, the remedy of requiring that the impounded portion of budget authority be made available may be incomplete and largely ineffective.

The problem of congressional review under the act is particularly acute where actions to terminate or curtail a program are taken prior to the submission of a rescission proposal or during the 45-day period provided for congressional action on a rescission bill. The ability to resume program plans within the initial time and cost estimates may be impaired in the event the rescission proposal is not approved.

Experience with the B-1 bomber and Minutemen III programs serves to illustrate each of thes problems.

In the case of the B-1 bomber, funding for the aircraft was included in the lump-sum appropriation in title IV of the 1977 Department of Defense Appropriation Act under the heading "Aircraft Procurement, Air Force." The administration submitted a rescission proposal because $462 million of the budget authority would remain unused after the payment of contract termination liabilities. Thus only a portion of the budget authority originally programed for the B-1 was presented for congressional scrutiny under the Impoundment Control Act. If all such budget authority had been required for termination liabilities, presumably there would have been no rescission proposal and, therefore, no opportunity for congressional review of B-1 program decisions under the act.

The timing of the B-1 and Minuteman III rescission proposals, in relation to program decisions and actions, is also a matter of concern. We understand that stop-work orders on production activities on the B-1 bomber were issued on June 30, 1977, and production termination orders were sent to the appropriate contractors on July 6, 1977. As noted above, the decision to terminate this work on the B-1 resulted in an amount of funds becoming excess to the Department of the Air Force's aircraft procurement needs during fiscal year 1977. Although the contracting parties were informed of the executive branch decision to terminate the B-1 contracts on July 6, 1977, the Congress was not formally requested, pursuant to the Impoundment Control Act, to rescind excess procurement funds until July 19, 1977, several weeks after the decision and contract terminations were made. Rescission proposal R77-18.

With regard to the Minuteman III ICBM, the Department of Defense announced the decision to terminate contracts on July 6, 1977. Stop-work and termination orders were sent to the major contractors on July 11, 1977. However, the President's request to rescind unneeded procurement funds was not sent to the Congress until July 26, 1977, almost 3 weeks later. Rescission proposal R77-26.

Thus, in the cases of the B-1 bomber and Minutemen III ICBM, by the time the Congress was requested to rescind excess budget authority, steps had already been taken to implement the decisions on which the proposed rescissions were based.

In effect, the practice of initiating program terminations or curtailments prior to the time the Congress has had an opportunity to complete action under the Impoundment Control Act on the rescission requests can operate to deny to the Congress meaningful review of the actions proposed—as one Member of Congress indicated, presenting for congressional approval what may amount to a *fait accompli.*

We have recommended that proposed rescissions involving major programs be submitted to the Congress contemporaneous with instructions to suspend further program work, rather than to terminate the program, if such suspension is feasible. We believe that such an approach is in keeping with the spirit of the Impoundment Control Act and would be preferable to the approach taken with respect to the B-1 bomber and Minuteman III.

In many cases a choice must be made between terminating contracts and other arrangements or continuing the program during pendency of the rescission proposal. Neither choice is without attendant pitfalls. As discussed above, termination actions prior to the expiration of the 45-day period may present the Congress with a *fait accompli* or result in increased costs in the event the Congress rejects the proposed rescission. On the other hand, it may be very costly to continue a program in its original form, even at the minimum sustaining rate, during the period of congressional consideration of a rescission proposal, i.e., 45 days of continuous session. Such costs could increase significantly during the review period, particularly, in the event of an adjournment of the Congress. If the Congress approved the rescission, the funds spent to sustain the program would have been wasted.

One possible means of alleviating these problems would by the enactment of legislation providing for congressional review of major program terminations or curtailments at the decision stage. The legislation could require the President to notify the Congress at the time a decision is made to undertake such a termination or curtailment, and before taking any action to implement the decision. A fixed period of time, such as 14 days of continuous session, could be provided for expedited congressional review of the proposed termination or curtailment actions. Unless

the proposal was disapproved within the stated period, the executive could begin implementing the decision.

The new expeditied review mechanism would afford Congress the opportunity to take action at the decision stage. It would also provide a mechanism to review certain major termination or curtailment decisions which may not involve impoundments cognizable under the present act. Obviously, the specific provisions of the legislation, such as the time period for expedited reviews and the form of congressional action, could be framed in different ways.

Perhaps the primary specific issue would be the identification of those program termination or curtailment decisions to which the expedited review mechanism should apply. One approach, among many conceivable alternatives, would be to apply the expedited mechanism to terminations or curtailments involving "major system acquisitions" as that concept is developed in Office of Management and Budget Circular No. A-109 (April 1976). The Circular sets forth general criteria for identifying major system acquisitions, and gives agencies discretion to establish dollar thresholds. In this regard, the current Defense Department thresholds are $75 million for research and development and $300 million for production. While many civil agencies have not established dollar thresholds, such amounts could be specified by legislation for purposes of the expedited review procedure. Another approach might be to leave for identification in appropriation or authorization acts, or through other means involving the cognizant congressional committees, the particular programs and types of termination or curtailment actions to which the expedited review mechanism would apply.

We would be happy to discuss the problems outlined herein, and possible remedial legislation, with you or members of your staff.

Sincerely yours,

ELMER B. STAATS,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., May 10, 1978.

Hon. FRANK HORTON,
House of Representatives.

DEAR FRANK: Thank you for your letter of April 19, 1978, responding to our recent suggestion (March 17, 1978) that legislation be enacted to provide for prior congressional review and disapproval of executive branch decisions to curtail certain Federal programs.

Mr. Dick Thompson of the House Committee on Government Operations minority staff requested that we provide you with draft legislative language that accomplishes the purposes outlined in our March 17, 1978, letter. Our respective staffs could then further consider the issues raised by the suggestion and proposed remedial legislation.

To this end, we have drafted legislation under which the executive branch would be required to submit to the Congress its decisions to curtail those programs that have been made expressly subject to the congressional review procedure of the draft bill. These decisions could not be implemented for a period of, for example, 14 legislative days during which time the Congress would have an opportunity to review them. If, within the 14-day period, a concurrent resolution of disapproval were passed opposing a curtailment decision, the decision could not be implemented. Provisions are made in the draft bill to allow the Comptroller General to bring a civil action to compel the implementation of a program as required by the bill, as well as for the Comptroller General to report to Congress executive branch decisions to curtail programs that should have been, but were not, submitted by the President. The draft legislation and an explanatory statement are enclosed.

You will note that the draft bill does not include the detailed parliamentary procedure by which the Congress would review curtailment plans. We believe this is an area that should be decided by the Congress. We point out, however, that such a procedure could be patterned after section 1017 of the Impoundment Control Act of 1974, 31 U.S.C. 1407.

Should you have any questions or wish to discuss the matter further, please do not hesitate to call upon us.

Sincerely yours,

ELMER B. STAATS,
Comptroller General of the United States.

Enclosures.

DRAFT BILL

Sec. ———. (a) For purposes of this section—

(1) "program" means any project, activity, or weapons system expressly made subject to this section by law, in amounts specified in appropriation acts.

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

(3) "curtail" means to discontinue, in whole or in part, the execution of a program, resulting in the application of less budget authority in furtherance of the program than provided by law.

(4) continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain shall be excluded in the computation of the 14-day period referred to in subsection (b)(2) of this section. If a special proposal is transmitted under subsection (b) of this section during any Congress and the last session of such Congress adjourns sine die before the expiration of 14 calendar days of continuous session (or a special proposal is so transmitted after the last session of the Congress adjourns sine die), the message shall be deemed to have been retransmitted on the first day of the succeeding Congress and the 14-day period referred to in subsection (b)(2) of this section (with respect to such special proposal) shall commence on the day after such first day.

(5) "disapproval resolution" means a concurrent resolution which expresses disapproval of a special proposal transmitted under subsection (b) of this section.

(6) "special proposal" means a proposal sent by the President to the Congress pursuant to subsection (b) of this section notifying the Congress of the Executive branch's determination to curtail a program.

(b) Proposals to curtail programs.

(1) Whenever the Executive branch has determined to curtail any program the President shall transmit to both Houses of Congress a special proposal specifying—

(A) the program proposed to be curtailed;

(B) the department or establishment of the Government which is responsible for implementing the program;

(C) the reasons why the program should be curtailed;

(D) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effects of the proposal; and

(E) all facts, circumstances, and considerations relating to or bearing upon the proposal, and to the maximum extent practicable, the estimated effect of the proposal upon the purposes which the program was to accomplish.

(2) No actions shall be taken to curtail any program for a period of 14 days of continuous session after the date on which a special proposal is received by the Congress. If, during this 14-day period, a disapproval resolution is passed, the curtailment shall not be implemented.

(3) Passage of a disapproval resolution shall have the same force and effect as an impoundment resolution passed pursuant to section 1013(b) of the Impoundment Control Act of 1974.

(4) Passage of a disapproval resolution shall terminate the 45-day period referred to in section 1012(b) of the Impoundment Control Act of 1974.

(c) Transmission of messages; publication.

(1) Each special proposal transmitted under subsection (b) of this section shall be transmitted to the House of Representatives and the Senate on the same day, and shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in session. Each special proposal shall be printed as a document of each House.

(2) A copy of each special proposal transmitted under subsection (b) shall be transmitted to the Comptroller General on the same day it is transmitted to the House of Representatives and the Senate. In order to assist the Congress in the exercise of its functions under subsection (b) of this section the Comptroller General shall review each special proposal and inform the House of Representatives and the Senate as promptly as practicable with respect to the facts surrounding the proposal.

(3) If any information contained in a special proposal transmitted under subsection (b) of this section is subsequently revised, the President shall transmit to both Houses of Congress and the Comptroller General a supplementary special proposal stating and explaining such revision. Any such supplementary special proposal shall be delivered and printed as provided in (1) of this subsection. The Comptroller General shall promptly notify the House of Representatives and the Senate of any changes in the information submitted by him under (2) of this subsection which may be necessitated by such revision.

(4) Any special proposal transmitted under subsection (b) of this section and any supplementary special proposals transmitted under (3) of this subsection, shall be printed in the first issue of the Federal Register published after such transmittal.

(d) Reports by Comptroller General.

If the Comptroller General finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any other officer or employee of the United States has determined to curtail a program with respect to which the President is required to transmit a special proposal under subsection (b) and that the President has failed to transmit a special proposal with respect to such determination, the Comptroller General shall make a report thereon. Such report of the Comptroller General shall have the same effect as if it were a special proposal transmitted by the President under subsection (b) of this section, and, for the purposes of this section, such report shall be considered a special proposal transmitted under subsection (b) of this section.

(e) Suits by Comptroller General.

If under subsection (b)(2) of this section, a curtailment proposal is disapproved, the Comptroller General is hereby expressly empowered, through attorneys of his own selection, to bring a civil action in the United States District Court for the District of Columbia to enforce the requirements of subsection (b) (2) through (4) of this section, as applicable, and the court is hereby expressly empowered to enter in the civil action, against any department, agency, officer, or employee any order which is necessary or appropriate to compel compliance with such requirements.

(f) This section may be cited as the "Program Curtailment Control Act of 1978."

PROGRAM CURTAILMENT CONTROL ACT OF 1978

EXPLANATORY STATEMENT

The draft legislation would provide a mechanism for prior congressional review and potential disapproval of executive branch decisions to curtail programs. This mechanism would afford Congress a preliminary, expedited review at the decision stage. The purpose of the expedited review is to alleviate potential shortcomings in the operation of the Impoundment Control Act either where a curtailment decision does not involve an impoundment subject to that act or where unilateral implementation of a curtailment decision would lessen the effectiveness of later congressional review of any impoundment which is involved.

Program coverage.—The legislation enacts as permanent law a curtailment review procedure, but it does not identify the programs subject to the procedure. This is left for congressional action in other laws. Thus the only criteria in the definition of "program" (subsection (a)(1)) are that a project, activity or weapons system be expressly made subject to the curtailment procedure by another statute, and that the program amount be specified in an appropriate act.

It would be extremely difficult to define in general terms what types of programs should be subject to the curtailment procedure, or even to define "program" in the abstract. The identification of covered programs is really a matter of congressional preferences and priorities at any given time. The assumption underlying the legislation is that Congress, applying whatever criteria it sees fit, will list in other statutes the specific programs to be covered. This could probably be done most conveniently through the annual budget process. Likewise, requiring that the program amount be specified by law avoids problems in ascertaining the funding level desired by Congress where budget authority for a covered program is provided by means other than a discrete line-item appropriation.

Application of curtailment procedure.—The review procedure is triggered by an executive branch decision to "curtail" a program which has been made subject to the bill. The definition of "curtail" (subsection (a)(3)) requires that the executive branch decision result in a reduction of budget authority applied in furtherance of the program. As noted above, the level of budget authority for this purpose would be the amount so specified in an appropriation act. The reduction relates to the use of funds "in furtherance of the program." Thus, although the full amount of budget authority may be spent in some manner, e.g., to pay contract termination costs or other liabilities incident to the curtailment, such a use of funds still involves a reduction in funding for affirmative program purposes which triggers the review provisions.

Curtailment review procedure.—The review procedure would generally be similar to the procedure for reviewing deferrals of budget authority under the Impoundment Control Act, except that congressional disapproval would take the form of a concurrent resolution. The President would report a proposed curtailment decision to Congress, together with appropriate information (subsection (b)), and supplemen-

tary reports would be made for any revisions (subsection (c)(3)). The proposal, and any supplementary reports, would be printed in the Federal Register (subsection (c)(4)).

A copy of the proposal and any revision would also be transmitted to the Comptroller General, who would submit comments to the Congress (subsection (c)(2)). The Comptroller General would report to the Congress for review and action proposed curtailment decisions which the executive branch fails to report (subsection (d)). The Congress would have 14 days of continuous session in which to disapprove a proposed curtailment (subsections (b)(2), (a) (4)-(5)). After a proposal is disapproved, the Comptroller General could bring judicial enforcement actions if necessary to effect compliance with the disapproval and assure that any impounded funds are made available (subsection (e)).

Relationship to impoundments.—The curtailment review procedure would not diminish congressional review opportunities under the Impoundment Control Act; rather, the two procedures would be complementary. When the curtailment proposal involves a deferral or rescission of budget authority, the requirements of the Impoundment Control Act would also attach. If Congress disapproves the curtailment, this action would, in addition to precluding implementation of the curtailment as such, require that any impounded budget authority be made available (subsection (b) (3) and (4)). On the other hand, even if Congress fails to disapprove the curtailment within 14 days, the Impoundment Control Act review period would continue to run for the remainder of the statutory 45 days. Thus Congress would retain in full its present review authority over any impoundments involved in a curtailment proposal.

[The publication entitled: "Review of the Impoundment Control Act of 1974 After 2 Years," submitted by the Comptroller General, is located in committee files.]

[Whereupon, at 12:05 p.m., the Budget Process Task Force was adjourned.]

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