

'Implied' power at issue in Nixon-Congress fight

In the political and constitutional struggle now developing between Congress and President Nixon on the question of his right to refuse to spend appropriated funds, the danger is that the President is largely right on the issue and may therefore seem to be right on the principle.

The issue is not to be downgraded. Holding down prices and taxes is one of Nixon's aims in reducing the rise in federal spending; there may be other ways to achieve that aim but few will dispute its importance. Ridding the federal budget of outmoded, unnecessary and ineffective programs is useful in itself—although there is ample room for argument over Nixon's specific decisions.

Nixon is right, moreover, in contending that Congress has no functioning machinery, and has never displayed the will power or political courage, to set and keep an economically sensible spending ceiling—much less to balance spending priorities within such an over-all limit. Presidents have been doing the budgetary job mostly from necessity, not in an egregious usurpation of congressional power.

Congress often the offender

Congress, moreover, has often been the offender rather than the offended. If, for example, a president were impounding money appropriated to double the size of the Air Force or build a full-scale ABM system, some now criticizing Nixon would be backing him to the hilt. In fact, congressional excess on military spending in past years was a major reason why presidential impoundments came to be more frequent.

It is one thing, however, for a president to act essentially defensively against a specific congressional policy he thinks unwise, particularly in the case of an item appropriation he could not veto without vetoing an entire appropriations bill—and even in that limited case his constitutional authority seems never to have been fully tested. It is quite another thing for a president to use the impoundment of appropriated funds offensively or aggressively—as Nixon now is doing—to change the whole direction of government and to nullify legally legislated policies without resort to accepted constitutional practice.

Right of executive fiat?

Agriculture Secretary Butz, for example, has announced that all appropriated funds for the Rural Environmental Assistance Program have been impounded and the program terminated. He and Nixon no doubt have what they consider good reasons to kill this program; but accepted practice heretofore would have been for Nixon to ask Congress to repeal it, or to appropriate no more funds. Has he the right, not before claimed, to end by executive fiat a legislative policy, either because it would be more efficient to do it that way or because Congress might refuse to do as he recommended?

Well it may be asked why the Constitution's framers gave the president the veto power, and required a two-thirds vote in each house to override it (giving the execu-

Tom Wicker

tive a substantial and definable share of the legislative power), if they also intended, without saying, that he have the power to nullify acts of Congress for his own reasons, whether or not he had previously vetoed them, whether or not the veto was overridden.

The administration's argument

The administration seems to be arguing that the impoundment power is implied in the president's duty to "take care that the laws be faithfully executed"—a strange claim from a "strict constructionist" President. In political fact, however, Nixon is resting his case on public necessity, which is no doubt considerable, but which is also a dangerous doctrine to invoke in constitutional matters.

At a recent news conference, for example, Nixon said he had an "absolutely clear" constitutional right to impound appropriated funds when their expenditure would cause a rise in prices or taxes. Whether the right is all that clear is questioned by many; but if it exists it can't be ascribed to a nonexistent constitutional duty falling on the president to hold down either prices or taxes. This is a momentary public necessity which is being adduced to justify an expansion of the president's constitutional limits.

Beyond impoundment

Again, in the case of the Water Pollution Control Act, Nixon refused to allocate to the states \$6 billion authorized by Congress. Ronald Ziegler and the Budget Bureau have pointed out that funds to meet the authorization have not been appropriated, hence have not technically been impounded. But what has happened goes beyond impounding because, having vetoed the original bill and lost, Nixon still had the chance to fight in Congress against the actual appropriation of funds this year.

Fearing he would lose again, Nixon refused even to allocate the authorization among the states, although doing so would not have involved spending a dime, and he would later have had the opportunity to reduce or refuse state requests for any funds that might ultimately be appropriated. That is how an "implied" power to impound funds can become the "implied" power to set aside legislative enactment, in effect overriding Congress' overriding of the veto. It is the same insidious process by which implied powers produced the imperial Presidency in foreign affairs, and now work toward the monarchical president at home.