

# White House Expected to Cite Legal Backing for President's Refusal to

By WARREN WEAVER JR.  
 Special to The New York Times  
 WASHINGTON, Feb. 5—The Nixon Administration may provide Congress tomorrow with the first legal support for its assertion that the President has a constitutional right to refuse to spend money that the legislators have directed him to do.

Deputy Attorney General Joseph T. Sneed is scheduled to testify before the Senate Subcommittee on Separation of Powers, whose members are anxious to learn how the Justice Department plans to defend a spate of impoundment lawsuits that include largely uncharted legal territory.

President Nixon, a lawyer as well as a politician, told a news conference last week that "the constitutional right for the President of the United States to impound funds . . . when the spending of money would mean either increasing prices or increasing taxes . . . is absolutely clear."

But the Constitution does not contain such a statement, and no court has ever held this right existed, or anything remotely near it. Nor has any Attorney General of the Nixon Administration ever contended, up to now, that the President has the intrinsic power to disregard Congressional appropriations when he chooses.

To test this theory in the courts, more than a half-dozen lawsuits are already underway, challenging Mr. Nixon's right to refuse to spend money that Congress has provided. Some hinge on narrow questions of legislative intent, but others

go directly to the critical issue of the President's power or lack of it.

Senator Sam J. Ervin Jr., Democrat of North Carolina, has emerged as the chief spokesman for Congressional resistance to the President's assertions. He is chairman of the Senate Judiciary Subcommittee on Separation of Powers and is participating in one key case as a friend of the court.

Senator Ervin maintains that the President's refusal to spend funds explicitly ordered by Congress "patently violates the separation of powers doctrine," the constitutional blueprint under which the executive, legislative and judicial branches each have their own responsibility and authority.

Under the Constitution, Senator Ervin argues, the President has only the right to veto an entire bill. But if he can withhold spending money for one part of a bill but not others, he can "modify, reshape or nullify completely laws passed by the legislative branch, thereby making legislative policy, a power reserved exclusively to the Congress," he said.

**Suits Under Way**

Impoundment, the Senator told a hearing last week, "places Congress in the paradoxical and belittling position of having to lobby the executive to carry out the laws it has passed."

Denying President Nixon's argument that impoundment "cools down taxes, Senator Ervin said, "It merely provides a means whereby the White House can give effect to the social goals of its own choosing

by reallocating national resources in contravention of Congressional dictates."

Until now, the Administration has made no formal response to these charges of unconstitutional White House fiscal spokesmen have made some general comments, but the Justice Department has not yet been required to take a legal stand on the constitutional issue in any of the pending lawsuits.

The clearest Administration statement available was made in 1971 by Caspar W. Weinberger, then deputy director of the Office of Management and Budget, before the Ervin subcommittee. He relied basically, in defending impoundment, on the Constitution's requirement that the President "take care that the laws be faithfully executed."

Mr. Weinberger maintained that "the power to withhold appropriated funds is implicit in the constitutional requirement that the President enforce all the laws, including those that limit over-all spending or mandate setting up contingency funds."

Last week the new director of the Office of Management and Budget, Roy L. Ash, contended before the Ervin subcommittee that the President had no "explicit" impoundment authority in Federal law but maintained that his refusal to spend appropriations was consistent with his "constitutional duties."

A contrary Republican view was taken by William H. Rehnquist, then an Assistant Attorney General, in 1969 in a memorandum to the White House on the constitutionality of impoundment. He concluded then that the existence of "a constitutional power to decline to spend appropriated funds is supported by neither reason nor precedent."

Mr. Rehnquist was subsequently appointed to the Supreme Court by President Nixon, and it is possible he may disqualify himself when the impounding challenge cases reach the high court on the basis of his earlier statements. It may be some time, however,

ever, before the constitutional issue reaches the Supreme Court. The furthest advanced case, an action by the Missouri Highway Commission to force payment of impounded Federal highway funds, is awaiting a decision by the United States Court of Appeals for the Eighth Circuit.

In District Court, the judge held that the Nixon Administration's argument that the funds should be withheld to fight inflation was "impermissible." So far, however, this case involves interpretation of the highway trust fund statute rather than the President's constitutional powers.

Several of the other court challenges, including those brought to free funds for housing and water pollution control, also hinge on the relatively narrow issues of whether Congress intended to mandate spending or allow impoundment, rather than the relative authority of Congress and the President.

One of the most recent lawsuits, brought to reinstate two

**Found Power Implicit**

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## Spend Funds Congress Voted

Federal conservation and housing programs, plus squarely before the courts the Administration's constitutional right to cut off a civility that Congress has ordered continued.

The programs are the Rural Environmental Assistance Program, which pays half the cost of environmental improvements on small family farms, and Federally Assisted Code Enforcement, which provides grants and loans for rehabilitation of low-income and middle-income housing to bring it within local codes and thus preserve neighborhoods against urban renewal.

Last year, the Office of Management and Budget impounded \$85-million of the \$225-million that Congress had appropriated for the rural aid program, and in December Secretary of Agriculture Earl L. Butz announced that all uncommitted funds were being impounded and the program terminated. All of the current \$70-million appropriation for the housing code program loans has been impounded.

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