

## H. Canceling Budget Authority

### § 26. Introduction and Sequestration Generally

#### *The Impoundment Control Act of 1974*

Impoundment refers to a decision by the executive not to spend money that has been appropriated by Congress. Although this authority was unquestioned for many years, perceived abuses of this practice led to the enactment of title X of the Congressional Budget and Impoundment Control Act of 1974. Title X of the Congressional Budget and Impoundment Control Act of 1974 relates to impoundment control of budget authority.<sup>(1)</sup> The Act gives the President the ability to propose an impoundment of appropriated funds subject to congressional approval.<sup>(2)</sup>

Sections 1012 and 1013 of the Impoundment Control Act specify two types of impoundments: rescissions and deferrals.<sup>(3)</sup> A rescission is the permanent cancellation of budget authority. A deferral temporarily delays the spending. These proposals must be approved by Congress before they can take effect. Absent such approval, the proposed cancellation of budget authority does not occur and the money must be spent as originally prescribed.

#### *Rescissions Generally*

Congress may propose rescissions (permanent cancellation) of previously-enacted budget authority as part of the regular legislative process, often reported in annual appropriation bills. Such rescissions may reflect a change in budget priorities or a desire to offset spending in one area by canceling budget authority in another. Striking a rescission from a measure (thus allowing the money to be spent) causes the net total budget authority to increase.<sup>(1)</sup> Rescissions of appropriations contained in appropriation acts are

1. 2 USC §§ 681–688; *House Rules and Manual* § 1130(6A) (2011). Because the Impoundment Control Act addressed both executive and legislative actions, an amendment adding a sense of Congress regarding the repeal of such Act is not germane to a concurrent resolution on the budget. Deschler-Brown Precedents Ch. 28 § 4.89, *supra*. For a further discussion of germaneness issues under the Impoundment Control Act, see Deschler-Brown Precedents Ch. 28 § 15.41, *supra*.
  2. The executive branch has no inherent power to impound appropriated funds, unless authorized by Congress. In lieu of congressional authorization, the President must spend all appropriated funds. See *Kennedy v. Matthews*, 413 F. Supp. 1240 (D.D.C. 1976); see also *Train v. City of New York*, 420 U.S. 35 (1975).
  3. 2 USC § 682; *House Rules and Manual* § 1130(6A) (2011).
1. See §§ 10.3, 11.11, *supra*.

exempted from the Rule XXI clause 2<sup>(2)</sup> prohibition against provisions “changing existing law” (*i.e.*, legislating in an appropriation bill).<sup>(3)</sup> However, this exception does not extend to amendments or to rescissions of contract authority provided by law other than an appropriation act.<sup>(4)</sup>

When proposing a rescission under the Impoundment Control Act, the President must transmit to Congress a special message. According to the Act, that message must specify the proposed amount of budget authority to be rescinded or reserved and the reasons why the budget authority should be rescinded or canceled. Under the Act, Congress has 45 calendar days of continuous session<sup>(5)</sup> after which Congress receives the President’s message to complete action on a rescission bill containing in whole or in part the budget authority contained in the President’s message.<sup>(6)</sup> If Congress does not approve of the rescission bill, the President must release the funds.

### ***Deferrals Generally***

To defer budget authority, the President must submit a special message to Congress setting forth the amount, the affected government account, the period of time for the deferral, and the reasons for the deferral.<sup>(1)</sup> Previously, Congress could reject the proposal by one-House veto,<sup>(2)</sup> but this provision of the Impoundment Act was declared unconstitutional in *City of New Haven, Conn. v. United States*, 809 F.2d 900 (D.C. Cir. 1987). Today Congress may disapprove a deferral only through the enactment of a law.

In one instance a President has taken a predecessor’s request for rescissions and converted the rescissions into deferrals.<sup>(3)</sup>

### ***Sequestration Procedures***

Sequestration is an automatic spending reduction process usually achieved by across-the-board cuts of budget authority. This post-enactment

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2. See Deschler’s Precedents Ch. 26, *supra*.
  3. *House Rules and Manual* §§ 1038, 1043, 1052 (2011). See also Pub. L. No. 99–177, sec. 228(a) (Gramm-Rudman-Hollings). See § 27.1, *infra*.
  4. *House Rules and Manual* § 1052 (2011).
  5. Continuity of a session of Congress (defined at 2 USC § 682(5)) is broken only by adjournments *sine die*. Days in which either House is not in session because of an adjournment of more than three days are not counted towards the 45-day period.
  6. While section 1017 of the Impoundment Control Act (2 USC § 688) affords privileged status to bills approving such rescissions within the 45-day period, nothing in the Act precludes consideration in the House of such bills after the expiration of that 45-day period. Such bills would merely lack privileged status for consideration and would have to be considered pursuant to the regular rules of the House. For an example of a bill considered in this manner, see 121 CONG. REC. 8484, 8485, 94th Cong. 1st Sess., Mar. 25, 1975, and Deschler-Brown Precedents Ch. 33 § 22.3, *supra*.
1. 2 USC § 684(a); *House Rules and Manual* § 1130(6A) (2011).
  2. For consideration of such resolutions in the House, see § 28.1, *infra*.
  3. See § 27.3, *infra*.

procedure occurs outside of the legislative process. A presidential order is issued that permanently cancels budgetary authority. This order's purpose is to achieve a required amount of outlay savings. There have been several procedures (some no longer applicable) that have given the President this cancellation authority.

### —*Under Gramm-Rudman-Hollings*

Section 251 of Gramm-Rudman-Hollings established certain discretionary spending limits.<sup>(1)</sup> These limits applied to new budget authority and outlays provided in annual appropriation acts. Any breach would trigger an automatic sequestration.<sup>(2)</sup>

Section 254 of Gramm-Rudman-Hollings<sup>(3)</sup> required the Office of Management and Budget to issue a final sequestration report 15 days after Congress adjourns a session, if the session's enacted discretionary appropriations exceeded the discretionary spending limits. Although this section initially expired in 2002, it was reinstated by the enactment of the Budget Control Act of 2011.<sup>(4)</sup>

Sections 255 and 256 of Gramm-Rudman-Hollings<sup>(5)</sup> list exemptions from the across-the-board cuts of budget authority, including Social Security benefits, net interest, and veterans' affairs programs.

### —*Bowsher v. Synar*

The U.S. Supreme Court held in *Bowsher v. Synar*, 478 U.S. 714 (1986), that the automatic sequestration process contemplated in Gramm-Rudman-Hollings was unconstitutional. The Court's holding was rooted in the constitutional principle of separation-of-powers. The sequestration process of section 251 established a mechanism whereby the Comptroller General, an official removable by Congress, would determine necessary budget cuts for a given fiscal year and the President would issue a sequestration order to implement such cuts. The Court held that the power vested in the Comptroller General was an executive power. Therefore, section 251 of Gramm-Rudman-Hollings was found unconstitutional because it reserved for Congress, via the Comptroller General, the power to execute laws.

Following the Court's decision, Congress relied on the fallback procedures contained in section 274 of Gramm-Rudman-Hollings.<sup>(1)</sup> That section provided for the creation of a Temporary Joint Committee on Deficit Reduction,

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1. 2 USC § 901.

2. 2 USC § 902. For the referral of sequestration messages under Gramm-Rudman-Hollings, see Deschler-Brown-Johnson Precedents Ch. 35 §§ 3.1, 3.8, *supra*.

3. 2 USC § 904.

4. Pub. L. No. 112–25.

5. 2 USC §§ 905, 906.

1. The *Bowsher* decision gave Congress 60 days to enact corrective legislation in response to the decision. Such corrective legislation was entitled to expedited procedures under

composed of all members of the House and Senate Budget Committees. Such joint committee, pursuant to the statute, was tasked with receiving the same budgetary reports from the Congressional Budget Office and the Office of Management and Budget as would have been provided to the Comptroller General, and propounding a joint resolution embodying those reports. The joint resolution implemented the cuts declared null and void by the Court.

***—Under the Budget Enforcement Act of 1990 and the Budget Enforcement Act of 1997***

Under the Budget Enforcement Act of 1990,<sup>(1)</sup> adjustable limits were established on discretionary spending for fiscal years 1991–1995. These limits were revised by the Budget Enforcement Act of 1997<sup>(2)</sup> which extended the pay-as-you-go process (enforced by sequestration) through fiscal year 2002.<sup>(3)</sup> Section 253 of Gramm-Rudman-Hollings had reinforced certain deficit targets, but the Budget Enforcement Act of 1990 eliminated deficit targets as a factor in budget enforcement. At the end of the fiscal year, the Office of Management and Budget was required to issue a final sequestration report for that fiscal year, and the majority leader of either House was authorized (within a specified time period) to introduce a joint resolution directing the President to modify his most recent sequestration order or to provide an alternative to reduce the deficit for such a fiscal year.<sup>(4)</sup> As noted, this pay-as-you-go procedure, and its enforcement by sequestration, expired in 2002.

***—Under Stat-Paygo***

Under the Statutory Pay-As-You-Go Act of 2010,<sup>(1)</sup> any reduction in revenues must be offset by cuts to direct spending programs or revenue increases. Similarly, any increase in direct spending must be fully offset by cuts to other programs or by increases in revenues. The budgetary effects of direct spending and revenue legislation are carried on PAYGO scorecards covering 5- and 10-year periods. At the end of a congressional session, if Congress has enacted bills that result in a net debit, the President must

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section 258 of Gramm-Rudman-Hollings. For the announcement by the Speaker of the creation of the joint committee on deficit reduction, see 132 CONG. REC. 16316, 99th Cong. 2d Sess., July 14, 1986. For House passage of the joint resolution enacting fiscal year 1986 cuts, see 132 CONG. REC. 16881, 16882, 16887, 16888, 99th Cong. 2d Sess., July 17, 1986 (H. J. Res. 672).

1. Pub. L. No. 101–508.

2. Pub. L. No. 105–33.

3. See § 22, *supra*.

4. 2 USC § 907b.

1. Pub. L. No. 111–139; 2 USC §§ 931–939.

issue a sequestration order.<sup>(2)</sup> Certain mandatory programs are exempt from such orders.

**—Under the Budget Control Act of 2011**

The Budget Control Act of 2011<sup>(1)</sup> created a process to reduce spending by \$1.2 trillion over fiscal years 2013–2021, by amending section 251 of Gramm-Rudman-Hollings.<sup>(2)</sup> The Budget Control Act of 2011 enforces discretionary spending caps through a sequestration process<sup>(3)</sup> occurring 15 days after Congress adjourns at the end of the session (exempting any military personnel accounts from sequestration provided that the savings are achieved through across-the-board reductions in the remainder of the Department of Defense budget).

The Act also provides for adjustments to discretionary spending limits for emergency appropriations, appropriations for combating terrorism, and for major disasters. The Act also established a point of order under section 314(f) of the Congressional Budget Act<sup>(4)</sup> against any bill, joint resolution, amendment, motion, or conference report that would cause discretionary spending caps to be exceeded.

Title IV of the Budget Control Act of 2011 established a bipartisan Joint Select Committee on Deficit Reduction. The committee was charged with proposing legislation that would result in at least \$1.5 trillion in savings over a 10-year period, such legislation qualifying for expedited procedures in the House and the Senate. However, the committee failed to report an agreement by the required deadline, triggering alternative automatic spending reductions of at least \$1.2 trillion over the fiscal year 2013–2021 period starting 15 days after adjournment *sine die* of the 112th Congress. Spending reductions would be achieved by sequestration orders and would be divided equally between security and nonsecurity spending.

A unique directive contained in the House-adopted budget resolution for fiscal year 2013 instructed the Committee on the Budget to report legislation to replace the mandated sequester with an alternate method of achieving those budgetary savings.<sup>(5)</sup> Although Congress did not complete action

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2. 2 USC § 934.

1. Pub. L. No. 112–25.

2. 2 USC § 901.

3. For parliamentary inquiries in the Senate regarding the inapplicability of Gramm-Rudman-Hollings congressional sequestration procedures ostensibly “revived” by the BCA of 2011, see 158 CONG. REC. S5923–24 [Daily Ed.], 112th Cong. 2d Sess., Aug. 2, 2012.

4. 2 USC § 645(f).

5. 158 CONG. REC. H1768 [Daily Ed.], 112th Cong. 2d Sess., Mar. 29, 2012 (H. Con. Res. 112, sec. 202).

on a concurrent resolution for fiscal year 2013, the Committee on the Budget nevertheless reported a bill to replace the sequester, which the House considered under a special order reported by the Committee on Rules.<sup>(6)</sup> While the bill did pass the House, it was not acted upon by the Senate.

### ***Line Item Vetoes***

The Line Item Veto Act was enacted by Congress in 1996 to provide the President with increased flexibility in canceling certain kinds of spending authority. The Act added a new part C to title X of the Congressional Budget Act<sup>(1)</sup> and established enhanced presidential rescission authority over certain categories of spending and revenue legislation.

Cancellation of budget authority was initiated by transmittal to Congress of a presidential message within five days of the enactment of the law providing such budget authority. The Act provided for congressional review of the cancellation within a period of 30 calendar days with expedited House consideration of bills disapproving the cancellation. Cancellations were effective unless disapproved by law.<sup>(2)</sup>

In *Clinton v. New York*, 524 U.S. 417 (1998),<sup>(3)</sup> the U.S. Supreme Court held that the cancellation procedures of the Line Item Veto Act violated the presentment clause of article I, section 7 of the U.S. Constitution.<sup>(4)</sup> Consequently, the procedures contained in that Act are no longer operative. Although proposals for modified line item veto procedures have been passed by the House, Congress has not enacted any new line item veto authorities.

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6. See § 21.6, *supra*.

1. *House Rules and Manual* § 1130(6B) (2011); 2 USC §§ 691–91f.

2. An instance of Presidential use of the line item veto (and Congress's reaction thereto) can be found in the following citations: on Nov. 7, 1997, a form of notice was given to discharge a bill disapproving cancellations of discretionary budget authority transmitted by the President (143 CONG. REC. 25156, 105th Cong. 1st Sess.). The disapproval bill was considered under suspension of the rules on Nov. 8, 1997 (143 CONG. REC. 25259, 25268, 105th Cong. 1st Sess.). The bill was presented to the President on Nov. 10, 1997, and the President issued a veto on Nov. 13, 1997. The House then voted to override the veto (the Senate joining later in the month) on Feb. 5, 1998 (143 CONG. REC. 899, 902, 903, 105th Cong. 2d Sess.). The override was successful and the bill became law on Feb. 25, 1998.

3. According to the Court, by giving the president the ability to cancel discrete items of budget authority (even if subject to congressional disapproval), the Act effectively gave the president unilateral authority to amend or repeal existing laws. Such authority violates the presentment clause of the U.S. Constitution, which lays out the specific procedures that must be followed by the legislative and executive branches in enacting legislation. Key to the court's decision was the constitutional prescription that bills must be either approved or rejected by the president *in toto*; the president cannot approve of only part of a bill.

4. *House Rules and Manual* § 104 (2011).