

Testimony of  
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on

Impoundment of Funds

Prepared for delivery before the  
Senate Subcommittee on Separation  
of Powers of the Committee on the  
Judiciary.

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Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to discuss with this Subcommittee the action taken by the Federal Highway Administration pursuant to the past directives to reduce Federal spending in recognition of the need for curbing inflationary pressures. There have been four limitations imposed on the obligation of Federal-aid highway funds.

1. On November 23, 1966, an initial limitation of \$3.3 billion was established for the fiscal year 1967.

The \$3.3 billion limitation reflected a program reduction of \$700 million from the previously expected level of \$4 billion.

2. On January 23, 1968, a limitation of \$4.115 billion was established for the calendar year 1968.

No more than 45 percent of the calendar year limitation could be incurred through June 30, 1968. The new limitation represented a reduction of \$600 million in the approximately \$4.7 billion that was expected to be available during the calendar year 1968.

3. On September 6, 1968, the program was suspended for three months in order to reduce expenditures by \$200 million.

The suspension was one of the measures taken in response to the Revenue and Expenditure Control Act of 1968, which directed that Government expenditures be reduced by a total of \$6 billion during the fiscal year 1969. The reduction in Federal-aid highway expenditures during fiscal year 1969 was accomplished through the temporary deferral of new project approvals for a period of about 3 months.

4. On September 4, 1969, President Nixon directed a 75 percent reduction in new construction by the Federal Government. Also, the President urged the States and local governments to follow the example of the Federal Government by cutting back temporarily on their own construction plan.

Since the Federal-aid highway program provides grants-in-aid for the construction of highways by the States, curtailment of the program in line with the President's statement involved actions to be taken by the States.

No further steps were taken to prescribe a specific curtailment of the Federal-aid highway program, pending developments in connection with the voluntary action of the States in complying with the President's request. The State's deferral plans indicated a program level \$1,080 billion less than the \$5,044 billion originally proposed for the fiscal year ending June 30, 1970. The President withdrew his request for deferral in March 17, 1970.

For fiscal 1971, the obligation ceiling is \$4.6 billion.

In summary, the ceilings on Federal-aid highway funds available for obligation during a fiscal or calendar year, including the special limitations prescribed for the fiscal year 1967, the calendar year 1968, the fiscal year 1969, and the voluntary limitation requested by the President during the fiscal year 1970, did not affect the fiscal year apportionments authorized by Federal-aid highway legislation nor the availability of revenues in the Highway Trust Fund. The funds apportioned to the States but not obligated during a year were carried forward and remained available for obligation in later years. Revenues accruing to the Highway Trust Fund and not required for current expenditures were invested by the Treasury Department in public debt securities, and remained available to the credit of the Trust Fund for making payments to the States at a later date.

We recognize that the impact in individual States varies to some degree because there was no way to take into consideration what each State would have obligated during the fiscal year had there been no deferral. In other words, some States may plan proportionately higher programs than could be accomplished under the lower obligation amounts allowed whereas there would be little or no impact in other States because they have not planned large programs. The point that I would like to stress here is that each State received its proportionate share of the amount of funds available under the limitation.

As you know, the highway program is a fairly substantial part of the total public works program in all States. The immediate effect of a reduction in the availability of funds is to defer the approval of projects that permit them to move from the planning and engineering stage over to actual construction; to obligate the funds, in other words.

The control step that we take within FHWA is to defer the letter authorizing the State highway department to advertise for bids. We set maximum limits on the total amount of new obligations which the State would be permitted to enter into within a given period of time. Usually on a quarterly basis.

### Statutory Provisions

Now I would like to summarize the statutory authority which provides the basis for the administrative actions which I have just outlined.

Three issues with respect to Executive withholding or impoundment of funds arise in the context of title 23, United States Code: (1) the intent of Congress as expressed in title 23; (2) whether the States have vested rights in apportioned highway funds; and (3) whether the Executive Branch has a fiduciary duty to construct highways to the full extent permitted by the assets in the Highway Trust Fund.

In 23 U.S.C. 101(b), Congress declared that acceleration of construction of the Federal-aid highway systems, and prompt completion of the Interstate System are in the national interest. The language is not mandatory. The courts have held that such statements of policy do not add to or alter the specific operative provisions of a statute. These citations appear in the February 25, 1967, Opinion of the Attorney General (p. 14), which opinion we are submitting for the record.

In 1968, Congress enacted 23 U.S.C. 101(c), which states that it is the "sense of Congress" that no apportioned highway funds be impounded or withheld except such sums as necessary to assure sufficient amounts in the Highway Trust

Fund to defray expenditures. The House Public Works Committee reported a bill which contained mandatory language prohibiting such impoundment or withholding (H. R. 17134; see H. Rept. 1584, 90th Cong., 2d Sess., p. 11; however, the mandatory language was eliminated in conference. H. Rept. 1799, 90th Cong., 2d Sess., p. 31. In 1970, Congress reenacted 23 U.S.C. 101(c) almost verbatim, with little additional comment. H. Rept. 91-1551, 91st Cong., 2d Sess., p. 13; H. Rept. 91-1780, 91st Cong., 2d Sess., p. 41.

Two major legal opinions have been rendered on the legality of the limitations in the Federal-aid highway program which we will supply for the record.

The first was by the Comptroller General. Senator Randolph and Representative Fallon, former Chairman of the House Public Works Committee, asked the Comptroller General for his opinion of the legality of the 1967 limitation. The Comptroller General replied on February 24, 1967, in opinion B-160891. He emphasized that the opinion was advisory only and was binding on no one. The Comptroller General advised that he found the limitation to be legal as a proper exercise of executive authority so long as the executive did not reduce already outstanding

Federal obligations (which no limitation has done), it had no duty to spend all that Congress appropriates or authorizes to be obligated.

The other opinion on this matter was issued by the Attorney General on February 25, 1967, in answer to the Secretary of Transportation's request for a clarification of the legal issues involved. The Attorney General upheld the legality of the limitation as applied to the Federal-aid highway program, at least insofar as the limitation did not affect Federal obligations already outstanding.

I do not feel qualified to comment on the legal aspects of this issue or to discuss the validity of these two opinions.

I would like to point out that a case has been filed in the United States District Court for the Western District of Missouri on August 14, 1970, by the State Highway Commission of Missouri versus Secretary Volpe and George Shultz, Director of the Office of Management and Budget (Civil No. 1616).

This action is brought by the State Highway Commission of Missouri under sections 1361 and 1391 of title 23, United States Code, sections 101(c) and 104 of title 23, United States Code, sections 2 and 5 of the Federal-Aid Highway Act of 1968 (P. L. 90-495), and section 209 of the Federal-Aid Highway Act of 1956 (P. L. 627, 84th Cong.).

~~and~~ The complaint alleges, among other things, that the action of the Secretary in withholding the right to obligate funds is without authority in law.

I will not discuss this case further inasmuch as I have been advised by our counsel and the Department of Justice that such discussion would be inappropriate during pendency of this litigation.

Before concluding my statement, I would like to emphasize that no limitation has lasted long enough to affect any lapsing of funds as provided for in 23 U.S.C. 118.

I hope that I have given you a clear view of the history of the limitations in the Federal-aid highway program and the legal issues connected therewith.

I will be happy to answer any questions you may have.

Thank you.