No. 6 3 Orig.

IN THE

Supreme Court of the United States

October Term, 1972

No. , Original

THE STATE OF GEORGIA,

Plaintiff,

-vs-

RICHARD M. NIXON, President of the United States, CLAUDE S. BRINEGAR, Secretary of Transportation, JOHN R. OTTINA, Acting Commissioner of Education, ROBERT W. FRI, Acting Administrator of the United States Environmental Protection Agency, and ROY L. ASH, Director of the Office of Management and Budget of the United States,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF MOTION

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Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The STATE OF GEORGIA respectfully asks leave of the Court to file the attached Complaint against RICHARD M. NIXON, President of the United States, CLAUDE S. BRINEGAR, Secretary of Transportation, JOHN R. OTTINA, Acting Commissioner of Education,

ROBERT W. FRI, Acting Administrator of the United States Environmental Protection Agency, and ROY L. ASH, Director of the Office of Management and Budget of the United States.

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Defendants.

COMPLAINT

The State of Georgia brings this action to obtain equitable and declaratory relief against defendants' unlawful withholding or impoundment of federal financial assistance to which it is entitled under various laws of the United States, complaining and alleging as follows:

I

JURISDICTION

1. The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of

the United States, and Title 28, United States Code, Section 1251(b)(3).

II

PARTIES

A. *Plaintiff*

2. The State of Georgia is a State of the United States. Its capital and principal offices are located in Atlanta, Fulton County, Georgia. It brings this action both in its own behalf and as *parens patriae* for its general citizenry in order to avoid the irreparable injury which will otherwise be incurred by it and its citizens through defendants' unlawful withholding or impounding of federal financial assistance to which the plaintiff is entitled under various laws of the United States.

B. *Defendants*

3. The Honorable Richard M. Nixon is President of the United States. He is sued individually and in his official capacity. As President of the United States, he is responsible for the fiscal policies and actions of his subordinate officers in the Executive Branch of Government and, as is hereinafter set forth, has directed many of the actions complained of. Under the Constitution of the United States, it is the duty of the President to see that the laws enacted by the Congress are faithfully executed. The principal office and place of business of the President is located in Washington, D. C.

4. The Honorable Claude S. Brinegar is Secretary of Transportation of the United States. He is sued individually and in his official capacity. As Secretary of Trans-

portation, he is the chief officer of the United States Department of Transportation and is responsible for its policies and practices, including the administration of programs of federally assisted highway construction under Title 23 of the United States Code. His principal office and place of business is located in Washington, D. C.

5. The Honorable John R. Ottina is the Acting Commissioner of Education of the United States. He is sued individually and in his official capacity. As Commissioner of Education, he is the chief officer of the United States Office of Education and is responsible for its policies and practices, including the administration of programs of federal aid to education under the National Defense Education Act, 20 U.S.C.A. §§ 401-602. His principal office and place of business is located in Washington, D. C.

6. The Honorable Robert W. Fri is the Acting Administrator of the United States Environmental Protection Agency. He is sued individually and in his official capacity. As Administrator of the United States Environmental Protection Agency, he is the chief officer of such agency and is responsible for its policies and practices, including the administration of water pollution control projects under the Federal Water Pollution Control Act of 1972, Pub. L. 92-500 (October 18, 1972) 86 Stat. 816. His principal office and place of business is located in Washington, D. C.

7. The Honorable Roy L. Ash is Director of the Office of Management and Budget of the United States. He is sued individually and in his official capacity. As Director of such Office, he acts under the direction of the

President, performing such functions as the President may from time to time delegate or assign to him. As Director and acting for the President, he has taken and directed many of the actions complained of. His principal office and place of business is located in Washington, D. C.

8. The official residence of all of the named defendants is Washington, D.C. and none is a citizen of the State of Georgia.

III

FIRST CAUSE OF ACTION

9. Having determined it to be in the national interest to provide for the needs of local and interstate commerce, and also for the national defense, through accelerated programs of federally assisted highway construction, the Congress of the United States enacted the Federal-Aid Highway Act of 1956, 70 Stat. 374, as amended, Title 23, United States Code. The Act provides for four Federal-aid systems: the primary system, the secondary system, the urban system, and the "Interstate system," the last-mentioned being declared by the Congress to be "essential to the national interest" and "one of the most important objectives of this Act." The federal share payable for Federal-aid highway construction projects ranges from basically 50% of construction costs for projects financed with primary, secondary and urban funds, to basically 90% for "Interstate" projects. Interstate projects currently receive over 75% of all federal financial assistance available under the Act.

10. To obtain federal assistance a State must first have its program for a proposed project, and then its de-

tailed plans, surveys, specifications and cost estimates for the same, approved by the Secretary of Transportation as being consistent with the objectives of the Act and meeting various safety, environmental, and anticipated use standards provided for therein. Construction is then undertaken by and in the normal course of events wholly paid for by the State, which upon proof of completion is reimbursed for the federal share. In the ordinary course of events several years may pass between approval of a project proposed by a State and its receipt of the federal portion after the completion of construction.

11. In light of the time lag between the planning and the completion of construction of Federal-aid highway projects, and to permit orderly programming based upon knowledge of the amount of federal fiscal assistance which will be forthcoming, the Congress has provided for a rather unique funding scheme. Federal funding procedures commence with a yearly apportionment to the various States, including the State of Georgia, of the sums authorized by the Congress to be appropriated for expenditure. 23 U.S.C.A. § 104. This apportionment, based upon specific formulae contained in the Act, must be made on or before January 1 next preceding the commencement of fiscal year to which the apportionment relates, and the Secretary is further directed to make the apportionment "as far in advance of the fiscal year for which authorized as practicable, but in no case more than eighteen months prior to the beginning of the fiscal year for which authorized."

12. Under 23 U.S.C.A. § 118, the sums apportioned to Georgia and the other States are required to be made available for expenditure (in the form of authority to obligate funds) immediately upon the Secretary's cer-

tification of the apportionment for each of the Federal-aid highway systems. In addition to this availability of the sums apportioned prior to the start of the fiscal year for which they are authorized, 23 U.S.C.A. § 118 provides that the apportioned sums shall continue to be available for expenditure for a period of two years after the close of the fiscal year for which such sums are authorized—at which time any apportioned sums remaining unexpended lapse.

13. Subject only to the Secretary's approval of the State's proposed projects as being consistent with the objectives of the Act and in compliance with its guidelines and standards (with his approval of any such project being deemed to be a contractual obligation of the Federal Government for the payment of its proportionate share of the project), the Act authorizes construction to commence "as soon as funds are available for expenditure pursuant to [the Secretary's certification of the apportionment of funds authorized]".

14. Notwithstanding the clarity of the congressional intent that work on the Federal-aid highway systems should be accelerated and not delayed, defendants (excluding for the purpose of this first cause of action the defendants John R. Ottina, Acting Commissioner of Education and Robert W. Fri, Acting Administrator of the United States Environmental Protection Agency) and their predecessors in office have made it a policy or practice to withhold or impound a portion of apportioned sums which would otherwise be available for expenditure by Georgia and the other States. The defendants have withheld or impounded $24,088,134 of the sums which the Secretary of Transportation certified as Georgia's apportionment for fiscal 1973, which sum would otherwise

have been available to the State of Georgia for contractual commitments for highway construction commencing October 20, 1971 (the date of such certification).

15. Defendants' withholding or impoundment of the State of Georgia's authority to contractually obligate its entire apportionment, avowedly for the need to control inflationary pressures, is not based upon any provision, express or implied, of the Federal-Aid Highway Act of 1956, as amended, and is to the contrary based upon reasons which are wholly foreign to that or any other Act of the Congress.

16. Defendants are not only without lawful authority or discretion to withhold or impound Georgia's apportioned funds for the reasons advanced, but are acting contrary to the clear mandate of the Congress in doing so. In addition to the mandatory nature of the Act with respect to the availability of apportioned funds for construction in general, the Congress has expressly stated that its view of the Act was such as to preclude any part of the sums apportioned for expenditure upon any Federal-aid system from being "impounded or withheld from obligation . . . by any officer or employee in the Executive Branch of the Federal Government", the sole exception provided by the Congress being where the Secretary of the Treasury determines that a withholding is required in order to assure that the Highway Trust Fund will have sufficient funds to defray expenditures required to be made from that fund. 23 U.S.C.A. § 101(c). The Secretary of the Treasury has made no such determination.

17. As a result of defendants' unlawful actions, the State of Georgia and its citizens are suffering, and unless this Court grants relief will continue to suffer, irreparable

injury in (but not limited to) the following particulars:

(a) Fully planned highway construction projects have been and are being delayed, with the ultimate result, even if the defendants subsequently do release obligational authority for the construction of Federal-aid projects in conformity with the Act, being far greater expense to the State due to increased construction costs.

(b) Orderly programming is interfered with by the speedup and delay caused by the grant, withholding, and sometimes withdrawal, of the State's obligational authority in an unpredictable manner and contrary to the Act's provisions.

(c) Lives are lost and the real and personal property of the State's citizens is damaged through the failure to expedite construction of and bring to a prompt completion the Georgia portion of the "Interstate System".

IV

SECOND CAUSE OF ACTION

18. Having determined it to be in the national interest to strengthen instruction in science, mathematics, modern foreign languages and other subject areas important to the development of the mental resources, technical skills and talent of the general citizenry, to the ultimate benefit of the Nation's security and the national defense, the Congress of the United States enacted the National Defense Education Act, 72 Stat. 1580, as amended, 20 U.S.C.A. §§ 401-602. Title III, Part A, of the Act provides for grants to States for the acquisition of laboratory

and other special equipment, including audiovisual materials, for use in providing academic education in public elementary and secondary schools. Minor remodeling of laboratories or other space used for such materials or equipment is also provided for. 20 U.S.C.A. § 443. Congress has authorized appropriations of $130,500,000 for fiscal years 1971 through 1975 to attain these objectives.

19. A State desiring to receive federal fiscal assistance under Title III, Part A, of the Act must submit to the United States Commissioner of Education, through the State's educational agency, a "State Plan" which meets various statutory criteria. 20 U.S.C.A. § 443. The same provision of the Act requires the Commissioner of Education to approve any State plan or modification thereof which complies with these statutory provisions. The State of Georgia has submitted a State plan in accordance with 20 U.S.C.A. § 443 and the plan has been and continues to be "approved" by the Commissioner of Education.

20. From the sums appropriated by the Congress to fund Title III, Part A, of the Act, the Commissioner, after making certain deductions authorized by statute, is required to allot the balance of the appropriation (which will be at least 84% thereof) to the various States having approved plans. The allotment is itself based upon a mathematical formula set forth in detail by 20 U.S.C.A. § 442 and the Commissioner's computations under the same are purely ministerial.

21. 20 U.S.C.A. § 444 provides that from a State's allotment for a fiscal year the Commissioner *shall,* from time to time during the period the allotment is available for payment, pay to that State an amount equal to one-half of its expenditures for projects for the acquisition of

equipment or the remodeling mentioned in the initial paragraph of this Second Cause of Action (i.e., paragraph 18). The total payment to a State is not permitted to exceed its full allotment for the year.

22. For fiscal year 1972, the Congress appropriated the sum of $50,000,000 for the carrying out of the purposes of Title III, Part A, of the National Defense Education Act, 85 Stat. 103. In accordance with the above-mentioned provisions of the Act, the State of Georgia received approximately $1,300,000 as its share of the appropriation for fiscal year 1972.

23. For fiscal year 1973, the Congress provided by joint resolution for the continuation of Title III, Part A, programs "at a rate not in excess of the current rate". Pub. L. 92-334 (July 1, 1972), 86 Stat. 402, 404. This Joint Resolution has the full force and effect of an appropriation act.

24. Notwithstanding the mandate of the Congress in Title III, Part A, of the National Defense Education Act that the sums appropriated by the Congress to fund Title III, Part A, *shall* (after certain specified deductions are made) be allotted and paid to the various States, including the State of Georgia, and notwithstanding the additional mandate in the Joint Resolution, 86 Stat. 402, 404, that Title III, Part A, be continued (albeit not at a level greater than the 1972 level of $50,000,000), defendants (excluding for the purposes of this second cause of action the defendants Claude S. Brinegar, Secretary of Transportation and Robert W. Fri, Acting Administrator of the United States Environmental Protection Agency) have withheld or impounded all of the funds which the Congress has made available for the acquisition of equipment

and remodeling, allotting to the States only those minor funds needed to continue the administrative expenses of the State educational agency during fiscal year 1973. In place of the $1,300,000 which the State of Georgia received from the $50,000,000 appropriated by the Congress for fiscal 1972, it has received only $33,307 from the $50,000,000 appropriated by the Congress for fiscal year 1973.

25. The withholding or impoundment by defendants of the funds appropriated by the Congress for acquisition of equipment and remodeling under Title III, Part A, of the National Defense Education Act is not only unauthorized by law but is contrary to the express provisions of Title III, Part A, of the National Defense Education Act.

26. As a result of defendants' unlawful actions the State of Georgia and the pupils in its public schools are permanently injured through the loss of educational opportunities which would be afforded to them if the funds appropriated by the Congress to fund Title III, Part A, of the National Defense Education Act were allotted to the State as prescribed by the Congress.

V

THIRD CAUSE OF ACTION

27. Having determined it to be in the national interest to eliminate water pollution and restore and maintain the chemical, physical, and biological integrity of the Nation's waters, the Congress of the United States enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500 (October 18, 1972), 86 Stat. 816. Title II of this amendatory Act (hereinafter referred to as the Act) provides for grants to the States to assist them

in their construction of waste or sewage treatment facilities.

28. To obtain a grant a State must submit its plans, specifications and estimates to the Administrator of the Environmental Protection Agency for approval (as being consistent with the objectives of the Act and in compliance with the various standards and guidelines provided for therein). Sections 203 and 204. Construction is then to be undertaken by the State, which in the normal course of events will pay for the full construction costs and receive reimbursement for the federal share upon proof of completion. Under Section 202 of the Act "[t]he amount of any grant for treatment works made under this Act from funds authorized for any fiscal year beginning after June 30, 1971, shall be 75 per centum of the cost of construction thereof (as approved by the Administrator)."

29. In light of the time lag between planning, approval and the completion of construction of waste and sewage treatment facilities, and to permit orderly planning of construction based upon knowledge of the amount of federal fiscal assistance which will be forthcoming, the Congress has adopted a funding scheme similar to that which it has provided for Federal-aid highway construction. Federal funding procedures commence with the Administrator's yearly allotment to the various States of the sums authorized by the Congress to be appropriated for expenditure for each fiscal year. Section 205. This allotment, based upon a specific formula set forth by the Act (i.e., a ratio based upon needs for treatment facilities in each State as compared to the needs of all of the States), must be made by the Administrator on or before the Jan-

uary 1st immediately preceding the beginning of the fiscal year for which the allotment relates, except that for fiscal year 1973 the allotment is required to be made within 30 days after the date of enactment (in other words, no later than November 17, 1972). Section 205. Congress has authorized the sum of $5,000,000,000 to be appropriated for expenditure during fiscal 1973, $6,000,000,000 to be appropriated for expenditure during fiscal 1974, and $7,000,000,000 to be appropriated for expenditure during fiscal 1975. Section 207.

30. Under Section 205(b)(1) of the Act, the sums allotted to Georgia and the other States are required to be made available for obligation as of the date of the Administrator's allotment. Moreover, in addition to this availability of the sums allotted for obligation at least six months prior to the start of the fiscal year to which the allotment relates, these sums are to continue to be available for obligation by the States for a period of one year following the close of the fiscal year to which they relate. Portions of allotments not obligated by the end of this one year period are required to be immediately reallotted by the Administrator to the States. The Administrator is further directed to act upon plans, specifications and estimates as soon as practicable after they are submitted by a State, and his approval of the same is deemed to be a contractual obligation of the United States for the payment of its proportional share of the approved project.

31. Notwithstanding the above-described mandate of the Congress that the sum of $5,000,000,000 be both allotted to the States and made available for obligation by the States on or before November 17, 1972, defendants (excluding for the purpose of this third cause of action the

defendants Claude S. Brinegar, Secretary of Transportation, and John R. Ottina, Acting Commissioner of Education) failed to allot any sums at all by the November 17, 1972, deadline, and, when allotments subsequently were made (on or about December 8, 1972) they were in the total amounts of $2,000,000,000 for 1973 and $3,000,000,000 for 1974 (rather than the $5 billion and $6 billion which the Act calls for). The reason given by the then Administrator of the United States Environmental Protection Agency for this withholding or impoundment of over half of the allotment provided for by the Congress was his compliance with a letter from the President of the United States dated November 22, 1972, which stated in part:

> "I stated (in my veto message) that even if the Congress were to default its obligation to the taxpayers through enactment of this legislation, I would not default mine. Under these circumstances, I direct that you not allot among the States the maximum amounts provided by Section 207 of the Federal Water Pollution Control Act Amendments of 1972. No more than $2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974 should be allotted."

32. As a consequence of defendants' reduction of the total allotment provided for by the Congress, the State of Georgia's proportionate share of this total allotment for fiscal year 1973 has been reduced to $19,460,000 in place of that sum in excess of $40,000,000 to which it is entitled under the Act and which it would have received if defendants had allotted the full $5,000,000,000 as required by Sections 205 and 207 of the Act.

33. Defendants' withholding or impoundment of the State of Georgia's authority to contractually obligate its full proportionate share of the full allotment of $5,000,000,000 provided by the Congress, a withholding or impoundment predicated on defendants' avowed desire to control inflationary pressures, is not authorized by any provision, express or implied, of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, or any other Act of the Congress. It is to the contrary based upon reasons wholly foreign to that Act. The withholding and impoundment of Georgia's contractual authority in the matter is beyond any discretionary authority vested by law in the defendants, is in derogation of valid enactments of the Congress, and hence is unlawful.

34. In addition to this initial unlawful act of impounding the major portion of the allotment provided for by the Congress by reducing it from $5 billion for all States to $2 billion for all States (with the resultant diminution of Georgia's proportionate share of the total allotment), defendants have also failed to comply with the congressional imperative that those sums which are allotted to the States by the Administrator shall be made available for expenditure immediately (i.e., at the time the allotment is made). Defendants have failed and refused, and continue to fail and refuse, to permit the State of Georgia to contractually obligate any portion of that already reduced sum (i.e., the $19,460,000) which they have allotted to it. This second withholding or impoundment is similarly not authorized by any provision, express or implied, of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, and is also beyond any discretionary authority vested by law in the defendants, is in derogation

of valid enactments of the Congress, and hence is unlawful.

35. As a result of defendants' unlawful actions, the State of Georgia and its citizens are suffering, and unless this Court grants relief will continue to suffer, irreparable injury in (but not limited to) the following particulars:

(a) Construction projects which are fully planned and ready for construction have been delayed and are in jeopardy of being either lost completely or delayed for an additional year or more due to the loss of necessary State matching funds which by virtue of State law will lapse on July 1, 1973.

(b) The unlawful withholding or impoundment of the major portion of the allotment provided for by the Congress (i.e., $3 billion of the $5 billion authorized for fiscal year 1973), with its resultant diminution of Georgia's proportional share of the allotment, diminishes the ability of the State of Georgia to expedite the elimination of water pollution in accordance with the intent of the Congress and the national policy enunciated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816. Needed waste and sewage treatment facilities are being denied the State and its citizens.

(c) The injury set forth in subparagraph (b) of this paragraph is further aggravated by the withholding or impoundment of even those limited sums which defendants have permitted to be allotted to Georgia.

(d) The national policy determined by the Congress of the United States is being frustrated, and at

the present time is wholly negated by defendants' unlawful encroachment upon the constitutional prerogatives of the Congress under Article I, Sections 1 and 8, to the great injury of the State of Georgia and its citizens who as the direct consequence of such unlawful encroachment are being deprived of the opportunity to restore and maintain the chemical, physical and biological integrity of their waters (with all attendant economic, social and environmental benefits to the State and its citizens) in accordance with the timetable and sense of urgency which the Congress has determined to be in the national interest.

VI

RELIEF

36. The State of Georgia has no plain, speedy or adequate remedy at law with respect to defendants' unlawful withholding or impoundment of funds authorized by the Congress of the United States for assistance to and the use of the States as described in the causes of action set forth by this complaint. In light of the urgency of the problem and the serious constitutional considerations involved (e.g., separation of powers), an equally speedy and effective remedy is unavailable in any other court.

WHEREFORE, the State of Georgia prays that the defendants be required to answer this complaint, and that a decree be entered declaring the rights of the State of Georgia to the federal financial assistance provided by the Congress of the United States under the programs and enactments referred to herein, and enjoining defendants from impounding or withholding from the State of Geor-

gia any sums of money, obligational authority or other fiscal assistance or grants to which it is entitled under the above-described programs and enactments of the Congress, and for such other and further relief as may be proper in the premises.

ARTHUR K. BOLTON
Attorney General

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Deputy Assistant Attorney General

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Defendants.

BRIEF IN SUPPORT OF MOTION

JURISDICTION

This controversy is between the State of Georgia and five individual defendants, all of whom are citizens of the United States and of States other than the State of Georgia. The case is within the original jurisdiction of this Court under Article III, Section 2, Clause 2, of the Constitution of the United States, and Title 28, United States Code, Section 1251(b)(3). See, *South Carolina v. Katzenbach, Attorney General,* 383 U.S. 301, 307 (1966).

STATEMENT

Although the complaint in this case contains three separate causes of action, the principal question presented is but one. This question is:

> When the Congress of the United States has enacted a law providing for a program of federal financial assistance to the States in order to meet certain objectives which the Congress deems to be in the national interest, is it within the lawful discretion or power of the President of the United States (or any other member of the Executive Branch of Government) to thwart implementation of the program by withholding or impounding the funds (or obligational authority) which Congress has provided for its implementation?

Each of the three federal-aid programs with which Georgia's complaint is concerned has been either halted altogether or drastically curtailed, not through any decision of the Congress, but by decisions, policies and actions of the defendant members of the Executive Branch of Government. The well-publicized reason which defendants have advanced to justify their withholding or impoundment of the funds (or obligational authority) which the Congress has made available is their belief that this "executive" determination and policy is necessary to protect the Nation's economy against the dangers of inflation. We of course recognize and respect the fact that in their concern for the national economy the President and the other defendants in this action have been acting with the highest of motives. But, with the utmost of respect for the Office of the Presidency, it is the State of Georgia's position that the decision and policy is simply not one which

the President of the United States (or any other member of the Executive Branch of Government) is entitled to make. As we will in a moment more fully show, the Constitution of the United States is neither silent nor ambiguous as to where lies the power to enact the Nation's laws —including those laws creating and providing funds for federal-aid programs. Under our Constitution, it is in the Congress of the United States and not in the Executive Branch of Government that this power is lodged.

Quite obviously, the State of Georgia has taken actions and expended its own moneys to meet the various eligibility requirements and standards which the Congress has required as conditions precedent to a State's participation in the federal-aid programs halted or curtailed by defendants. Yet, through no fault at all of its own, the State and its citizens are being denied educational opportunities and the great number of other benefits which the Congress has determined to be in the national interest for them to have, and for which it (i.e., the Congress) has provided funds. The injuries which Georgia and its citizens have suffered, are suffering, and unless this Court grants relief will continue to suffer, involve both lives and property and are shown by the complaint to be real and substantial.

ARGUMENT

1. The complaint states facts entitling the State of Georgia to relief.

Over 100 years ago this Court commented upon the fact that the structure of our government is defined by law, saying:

> "We have no offices in this government, from the President down to the most subordinate agent, who

> does not hold office under the law, with prescribed duties and limited authority." *The Floyd Acceptances,* 7 Wall. (74 U.S.) 666, 676-677 (1868).

Looking at the powers of the three coordinate branches of our Federal Government, can there really be any doubt as to where responsibility lies for the enactment of the Nation's laws or as to whose duty it is to enforce these laws? Art. I, Sec. 1, of our Constitution states:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8 of the same Article (after enumerating various specific powers of the Congress, such as the power to collect taxes, pay debts, regulate interstate commerce and provide for national defense and the general welfare) declares that the Congress shall have the power:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."

The role of the Presidency in the law-making process, on the other hand, is narrowly circumscribed. He is authorized by Art. II, Sec. 3, to recommend legislation for congressional consideration, and possesses a limited power to veto acts passed by the Congress. U. S. Const. Art. I, Sec. 7. All of this, of course, deals with *proposed* legislation *prior to the time it becomes law.* Once a bill does become law, whether by virtue of the President's approval or by the overriding of his veto by the Congress,

the President's duty under the Constitution is clear. It is that:

> "[H]e shall take Care that the Laws be faithfully executed. . . ." U. S. Const. Art. II, Sec. 3.

In *Kendall v. United States,* 12 Pet. (37 U.S.) 524, 612 (1838), this Court stated what should be obvious when it said:

> "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."

And more recently, in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952), the Court more fully explained:

> "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says 'All legislative Powers herein granted shall be vested in a Congress of the United States. . . .' "

We are unaware of any authority or logical reason which would suggest that this division or separation of powers is rendered inapplicable simply because the enactment in question happens to provide for an expenditure of federal funds. That this is not what the framers of our Constitu-

tion had in mind regarding power over the purse is further evidenced by the fact that they also provided that the way, and indeed the only way, in which federal funds can be drawn from the Treasury for expenditure is by "Appropriations made by Law" (i.e., an enactment by the Congress). See, U.S. Const. Art. I, Sec. 9, Cl. 7; cf. *United States v. Realty Company,* 163 U.S. 427, 440 (1896).

We do not contend, of course, that the Congress could not, if it so desired and if it made clear its intent to do so, provide for a federal-aid program in which the President or some other administrator in the Executive Branch of Government did possess discretion as to whether the program should be carried out and the funds required and provided for its implementation expended. Yet we do find it hard to see how anyone can contend that the Congress has given anyone in the Executive Branch of Government any power or discretion to prevent full implementation of the three federal-aid programs involved in the present case.

The question is one of the Congress' intent. As a starting point on "intent", it might be observed that the very fact that the Congress has seen fit to enact a particular program and provide funding for its implementation would of itself seem to be a rather strong indication that it wanted and intended for its program to be carried out. It would consequently appear reasonable to suggest that an administrator asserting a power to halt, hold-up or curtail the program (whether by means of withholding or impounding funds or otherwise) should be required to bear the burden of pointing to a clear and unambiguous grant from the Congress of the claimed power.

What the Congress intended, of course, is to be derived

from a consideration of its entire legislative treatment of the particular program involved. As the United States Court of Appeals for the Eighth Circuit recently pointed out in rejecting the Secretary of Transportation's claim of "discretion" respecting the withholding or impoundment of obligational authority under the Federal-Aid Highway Act of 1956 (the very impoundment upon which the first cause of action in the complaint in the present case is based):

> "In construing the statute, we adhere to the basic canon of construction observed in *Richards v. United States:*
>
> > 'We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "We must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." ' 369 U. S. 1, 11 (1962).
>
> And as stated in 2 Sutherland, Statutory Construction § 2802, at 215 (3d ed. 1943), ' [t]he statute should be construed according to its subject matter and the purpose for which it was enacted. ' Over a century ago, Lord Campbell noted, '[i]t is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the *whole scope* of the statute to be construed. ' (Emphasis ours.) *Liverpool Borough Bank v. Turner,* 45 Eng.-Repr. 715, 718 (1860), aff'd, 70 Eng.Repr. 703. See generally *Thompson v. Clifford,* 408 F.2d 154, 158 (D. C. Cir. 1968); *United States v. St. Regis Paper Co.,* 355 F.2d 688, 692 (2 Cir. 1966); *Joanna*

> *Western Mills Co. v. United States,* 311 F.Supp. 1328, 1335 (Cust.Ct. 1970)." *State Highway Commission of Missouri v. Volpe, Secretary of Transportation, et al.,* —— F.2d —— (8th Cir., No. 72-1512, decided April 2, 1973) [Slip Opinion, p. 18].

Looking at the three federal-aid programs with which we are concerned in the present case, we think that in each instance the legislative scheme is not only wholly devoid of the sort of clear grant of discretion which defendants would have to show to justify their termination or curtailment of such programs (whether by withholding or impounding funds or otherwise), but that it affirmatively shows that it is the clear intent of the Congress that each of the programs be *fully* implemented and executed by the defendants.

(a) Federal-Aid Highway Act of 1956, 70 Stat. 374, as amended, Title 23, United States Code [First Cause of Action].

The basic funding procedures of this Act are set forth in the complaint. In short, the Congress, recognizing that highways cannot ordinarily be planned, approved for federal aid, constructed and paid for within a single fiscal year, has provided for a long-range funding program under which the sums which it *authorizes* to be appropriated (in the future) for expenditure, are apportioned to the States (in the present) in the form of an authority to contractually obligate the Federal Government for future payment of its share of the highway construction costs.

We have no quarrel with defendants concerning the initial apportionment to the various States, including the State of Georgia, of the sums which the Congress autho-

rized to be appropriated for expenditure for fiscal year 1973. This apportionment, made in accordance with the specific statutory formulae set forth by the Act (see 23 U.S.C.A. § 104), resulted in a total apportionment to the State of Georgia for fiscal year 1973 of $104,620,134. It is at this point, however, that defendants have departed from compliance with the law.

Under 23 U.S.C.A. §§ 114 and 118, the total apportionment (i.e., $104,620,134) should have been available to the State of Georgia for expenditure (in the form of obligational authority) immediately upon the Secretary of Transportation's October 1, 1971, certification of the allotment to the State (subject only to approval of Georgia's specific highway construction projects as meeting the Act's technical requirements). Georgia was informed, however, that its obligational authority was being limited to $80,532,000 for fiscal 1973. In his brief to the United States Court of Appeals for the Eighth Circuit in *State Highway Commission of Missouri v. Volpe, Secretary of Transportation, et al.*, ____ F.2d ____ (8th Cir., No. 72-1512, decided April 2, 1973), the then Secretary of Transportation John A. Volpe conceded that the total apportionment had not been made available to the States, speaking of the impoundment as a decision "made by the President through the responsible Executive Branch officials." See Brief for the Appellants in *State Highway Commission of Missouri v. Volpe, Secretary of Transportation, et al., supra,* at p. 2.

How this impoundment of $24,088,134 of Georgia's obligational authority can be said to square with the intent of the Congress as reflected in the Federal-Aid Highway Act of 1956, we find hard to imagine. The relevant portion of 23 U.S.C.A. § 114 provides that:

> "Construction may be begun as soon as funds are available for expenditure pursuant to subsection (a) of section 118 of this Title."

And 23 U.S.C.A. § 118(a) declares:

> "On and after the date the Secretary has certified to each State highway department the sums apportioned to each Federal-aid system or part thereof pursuant to an authorization under this Title, or under prior Acts, *such sums shall be available for expenditure under the provisions of this Title.*" (Italics added.)

As we see it, these provisions by themselves amply refute any contention that the Congress has clearly given anyone in the Executive Branch of Government the power or discretion to impound or withhold $24,088,134 of Georgia's obligational authority.

While the above-cited provisions would seem to be quite enough, it may be noted that in 1970 the Congress, perhaps alarmed over the increasing frequency of executive "impoundments" of its appropriations, added the following language to the Act:

> "It is the sense of Congress that under existing law no part of any sums authorized to be appropriated for expenditure upon any Federal-aid system which has been apportioned pursuant to the provisions of this title shall be impounded or withheld from obligation, for purposes and projects as provided in this title, by any officer or employee in the executive branch of the Federal Government, except such specific sums as may be determined by the Secretary of the Treasury, after consultation with the Secretary of Transportation, are necessary to be withheld from obligation for specific periods of time to assure that

> sufficient amounts will be available in the Highway Trust Fund to defray the expenditures which will be required to be made from such fund." 23 U.S.C.A. § 101(c).

It has never been suggested by anyone that there is a shortage of available funds in the Highway Trust Fund so as to bring the statute's single "exception" into play. What can legitimately be left to be said about the intent of the Congress? We think the Court of Appeals for the Eighth Circuit was plainly right when it concluded that the Secretary of the Treasury and Director of the Office of Management and Budget of the United States are not possessed of lawful power to halt or curtail the funding which the Congress has said *shall* be made available. See *State Highway Commission of Missouri v. Volpe, Secretary of Transportation, et al.*, ____ F.2d ____ (8th Cir., No. 72-1512, decided April 2, 1973).

In leaving the subject of highway construction, it might finally be mentioned that Georgia was informed in April, 1973, that any portion of its obligational authority for 1973 not obligated on or before May 15, 1973, will be withdrawn. This too is contrary to law since 23 U.S.C.A. § 118(b) provides that the sums apportioned shall continue to be available for expenditure (i.e., obligational authority) for a period of two years following the close of the fiscal year for which the sums are authorized (i.e., June 30, 1975).

(b) National Defense Education Act, 72 Stat. 1580, as amended, 20 U.S.C.A. §§ 401-602 [Second Cause of Action].

Title III, Part A, of this Act is a formula grant program under which a State, upon submitting a "State Plan"

which meets specified eligibility requirements (see 20 U.S.C.A. § 443), is entitled to receive an allotment from the appropriation made by the Congress to carry out the Act's purposes. This allotment is calculated by the Commissioner of Education in accordance with a specified statutory formula. See 20 U.S.C.A. § 442.

The Commissioner's functions under Title III, Part A, of the Act, with respect to all matters with which the State of Georgia's complaint is concerned, are strictly ministerial. As to his approval of State plans, 20 U.S.C.A. § 443(b) provides:

> "The Commissioner *shall* approve any State plan and any modification thereof which complies with the provisions of subsection (a) of this section." (Italics added.)

In connection with the Commissioner's allotment to the States of the sums appropriated by the Congress, 20 U.S.C.A. § 442 similarly declares that:

> ". . . the Commissioner *shall* allot to each State an amount which . . . [setting forth the statutory formula]." (Italics added.)

And finally, 20 U.S.C.A. § 444(a) sets forth his duties to make payments as follows:

> "From a State's allotment for a fiscal year under section 442(a) of this Title, the Commissioner *shall*, from time to time during the period such allotment is available for payment . . . pay to such State an amount equal to one-half of the expenditures for projects for acquisition of equipment and minor remodeling . . . carried out under its State plan . . . except that no State shall receive payments under

this subsection for any period in excess of its allotments for such period. . . . " (Italics added.)

To fund Title III, Part A, of the Act for fiscal year 1972, the Congress appropriated the sum of $50,000,000, see 85 Stat. 103, with the State of Georgia having received the sum of $1,300,000 as its allotment under this portion of the Act.

To fund Title III, Part A, of the Act for fiscal year 1973, the Congress provided by joint resolution for an appropriation of:

"[s]uch amounts as may be necessary for continuing the following activities, but at a rate for operations not in excess of the curent rate—

* * *

(4) . . . equipment and minor remodeling, . . ." 86 Stat. 402, Sec. 101(d).[1]

While the decision and intent of the Congress of the United States that Title III, Part A, of the National Defense Education Act should be continued during fiscal 1973 at the level at which it was maintained during 1972 is clear, once again the congressional direction has been thwarted by actions of the defendant members of the Executive Branch of Government. The federal-aid pro-

[1]The Comptroller General of the United States, in a letter dated December 13, 1972, to Senator Warren G. Magnuson, Chairman, Subcommittee on Labor, and Health, Education and Welfare, and Related Agencies, Committee on Appropriations, United States Senate, has stated that in his opinion there can be no doubt that the language "equipment and minor remodeling" in the joint resolution refers to the authorization of appropriations for this purpose in Title III, Part A, of the National Defense Education Act.

gram which the Congress has said should be continued has not merely been curtailed, it has been stopped altogether. As then Secretary of Health, Education and Welfare, Elliot L. Richardson, candidly admitted to Senator Warren G. Magnuson, Chairman, Subcommittee on Labor, and Health, Education and Welfare, and Related Agencies, Committee on Appropriations, United States Senate, by letter dated November 27, 1972:

> ". . . we are only providing States with funds to continue administrative expenses of the State education agency. . . ."

A more recent letter to Senator Magnuson (April 19, 1973) from the present Secretary of Health, Education and Welfare, the Honorable Casper W. Weinberger, ascribes this executive decision to withhold (or impound) the funds provided by the Congress to "the President's commitment to control Federal spending." See also 119 Cong. Rec. S. 3351 (Feb. 26, 1973). As a result of defendants' actions, the State of Georgia has received only $33,307 in place of the approximately $1,300,000 which it received during fiscal year 1972 and which it reasonably could have anticipated during 1973 had defendants complied with the law.

Not only are we unaware of any enactment of Congress which clearly vests defendants with the power to halt the operation of Title III, Part A, of the National Defense Education Act (whether by withholding or impounding funds provided by the Congress or otherwise), but we think that the statutes we have referred to make it abundantly clear that the intent of the Congress is for the programs under this Title and Part to continue.

(c) Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 [Third Cause of Action].

The funding procedures provided by the Congress under Title II of this Act to assist States in their construction of waste or sewage treatment facilities are quite similar to those which we have already discussed in connection with federal-aid highway construction. Recognizing that construction of the facilities contemplated might not always be capable of completion during the fiscal year within which the project is approved by the Administrator of the Environmental Protection Agency, the Congress has once again enacted into law a long-range funding program under which the sums which it *authorizes* to be appropriated (in the future) for expenditure, are allotted to the various States (in the present) in the form of authority to contractually obligate the Federal Government for its share of the construction costs.

Unlike the situation respecting federal-aid highway construction (where the initial apportionment of the congressional authorization is made in accordance with the Law and where it is at a subsequent point at which defendants unlawfully reduce the obligational authority to which the States are entitled), however, the defendants here have refused to follow even the initial allotment procedure required by the law. The relevant portion of Section 205(a) of the Act requires that:

> "Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, *shall* be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized,

> except that the allotment for fiscal year 1973 *shall* be made not later than 30 days after the date of enactment of [the Act]." (Italics added.)[2]

Surely there is no uncertainty as to what the "[s]ums authorized to be appropriated pursuant to section 207" are. Section 207 states:

> "There is authorized to be appropriated to carry out this Title . . . for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000."

Certainly there is nothing in this Act which clearly and unambiguously gives the defendant members of the Executive Branch of Government a discretionary power to allot to the States less than the sums which the Congress has authorized (i.e., $5,000,000,000 for fiscal 1973 and $6,000,000,000 for fiscal 1974). To the contrary, the wording seems to us to clearly show that the defendants have no such authority. Yet this is precisely what the defendants have done. The then Administrator allotted only $2 billion for 1973 and $3 billion for 1974, saying that this withholding or impoundment of over half of the sums authorized by the Congress (i.e., six of the eleven billion authorized) was by virtue of a Presidential directive, in a

[2]As in the case of federal-aid highway construction, the sums allotted to each State (in accordance with the statutory formula also provided in the Act) are required to be made available for obligation (subject only to the Administrator's approval of a project as meeting the technical requirements of the Act) immediately upon the date of the allotment, although here such availability continues for only one year after the close of the fiscal year for which the sums are authorized.

letter dated November 22, 1972, which said:

> "I stated (in my veto message) that even if the Congress were to default its obligation to the taxpayers through enactment of this legislation, I would not default mine. Under these circumstances, I direct that you not allot among the States the maximum amounts provided by Section 207 of the Federal Water Pollution Control Act Amendments of 1972. No more than $2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974 should be allotted."

Once again, whatever the merits may be as to the President's reasoning, and no matter how high his motives may be, the State of Georgia respectfully submits that the decision is one which under our Constitution the President is simply not entitled to make. The President exercised his valid constitutional authority when he vetoed the Act on October 17, 1972, but the Congress also exercised its valid constitutional authority when it overrode his veto on October 18, 1972. At this point, the bill became law and it became the constitutional *duty* of the President to ". . . take Care that the Laws be faithfully executed." We think that it is plainly inconsistent with this constitutional duty for the President, where the Law directs the allotment of an authorized sum of $5 billion, to countermand the statutory mandate by directing that "[n]o more than $2 billion of the amount authorized . . . should be allotted."

In concluding our argument as to the reasons why the State of Georgia is entitled to relief, it might be well to

briefly point out that this case does not appear to pose any technical difficulties in the areas of standing, sovereign immunity, or justiciability. Georgia's standing to maintain the action, both in its own right and as *parens patriae* respecting the injuries inflicted upon its citizens seems clear under *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). This is not a situation where Georgia is seeking to protect itself and its citizens from the operation of federal statutes, but one where it asserts rights based upon federal legislation. Nor can there be any substantial question as to the inapplicability of the doctrine of "sovereign immunity" where as here the action is predicated upon the contention that the defendant federal officials have acted in excess of their authority and contrary to law. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Philadelphia Company v. Stimson, Secretary of War*, 223 U.S. 605, 621-22 (1912); *Toilet Goods Association v. Gardner*, 360 F.2d 677, 683n.6 (2d Cir. 1966), *aff'd*, 387 U.S. 158 (1967); *State Highway Commission of Missouri v. Volpe, Secretary of Transportation, et al.*, 347 F.Supp. 950 (W. D. Mo. 1972), *aff'd*, ____ F.2d ____ (8th Cir., No. 72-1512, decided April 2, 1973); Accord, *Ex Parte Young*, 209 U.S. 123 (1908).

Finally, looking to "justiciability", it must be emphasized that the question is not one of whether or not the defendant members of the Executive Branch of Government have exercised discretion wisely or unwisely in halting or curtailing the federal-aid programs in question (i.e., by withholding or impounding the funds necessary to operate these programs). The question is whether they have any discretion at all in the matter. It is "who decides", not the wisdom of the decision, which is in issue. The resolution of this question calls for no more than the con-

stitutional and statutory interpretation which this Court engages in daily. As stated in *Powell v. McCormack,* 395 U.S. 486, 548-549 (1969):

> "Respondents' alternate contention is that the case presents a political question because judicial resolution of petitioners' claim would produce a 'potentially embarrassing confrontation between coordinate branches' of the Federal Government. But, as our interpretation of Art. I, § 5, discloses, a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate [branch] of government,' nor does it involve an 'initial policy determination of a kind clearly for nonjudicial discretion.' *Baker v. Carr,* 369 U.S. 186, at 217. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility."

2. This is an appropriate case for the exercise of the original jurisdiction of this Court.

The State of Georgia believes that this case is one which eminently justifies the invoking of the original jurisdiction of this honorable Court. It is not a case which involves simply monetary considerations (although the sums of money involved are vast indeed). The case goes to the

heart of the Nation's constitutional framework, involving as it does the division or separation of powers between coordinate branches of our Federal Government. We obviously recognize and respect the delicacy of the issues we have raised. As Mr. Justice Frankfurter observed in his concurrring opinion in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 614 (1952):

> "It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world."

But as Mr. Justice Brandeis said in his dissent in *Myers v. United States,* 272 U.S. 52, 293 (1926):

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

Under our Constitution, it is this Court which is the final arbiter of the validity of the actions of the other

branches of government. With controversy, acrimony and litigation growing daily over executive termination or curtailment of congressionally enacted and funded federal-aid programs (i.e., through the executive withholding or impounding of the funds which the Congress has by law made available to carry out the programs), it would seem that the National interest, as well as convenience, efficiency and economy, would be best served by putting to rest, at the earliest possible time, the urgent and important constitutional question of who is entitled to decide whether a federal-aid program will continue. It may further be noted that the questions raised are essentially questions of law, with the prospect of any material facts being in dispute being unlikely.

CONCLUSION

For the reasons stated, we respectfully submit that the motion of the State of Georgia for leave to file its complaint should be granted.

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