Impoundment of University Funds: Seeking Relief in the Courts

Commenting the other day on the severe financial problems posed by the new Nixon budget for the major universities, one veteran Washington representative of some of these institutions observed: "All of us in the higher education community are just fumbling [for a solution]. We just haven't had any experience with this kind of thing." The individual speaking was Christian K. Arnold, associate director of the National Association of State Universities and Land-Grant Colleges (NASULGC). What Arnold was saying was, in effect, that not only would the cutting and phasing out of various federal aid programs leave the universities in a distressing bind, but that the usual avenues for mounting political rescue operations and keeping the federal dollars flowing either appear closed or look unpromising.

Arnold and other higher education spokesmen are, to be sure, finding many members of Congress sympathetic to their pleas. But the President, with the help of more or less anonymous and unseen officials on the White House staff and in the Office of Management and Budget (OMB), is stiff-arming senators and representatives with vetoes and impoundments of appropriations. Personal pleas to the President have been made in the past by some of the most prestigious university presidents in America, yet without lasting effect. A still untried possibility would be to have a number of the state governors appeal in concert to Nixon on the universities' behalf, but the governors have been having troubles of their own with the White House, as in difficulties over revenue sharing. A further possibility, now suggested by Christian Arnold, at least as a last resort in some situations where funds are impounded, is for the universities to go outside the usual political and administrative process and bring court suits.

Courts Rule Against the Executive

In Arnold's view, "the overriding issue is impoundments," for even with respect to those programs where no impoundment has yet occurred, there is every chance that the Administration will resort to an impoundment any time funds are appropriated in excess of budget requests. As it happens, three times in the last few weeks federal judges have ruled against the Administration in cases involving the impoundment of money or the phasing out of a congressionally authorized and funded program.

A ruling directly relevant to higher education was handed down on 2 April in a suit brought against the U.S. Office of Education (USOE) by the National Association of Collegiate Veterans, Inc., the Commonwealth of Pennsylvania, and the Community Colleges Section of the California School Boards Association. Last year, Congress appropriated $25 million to be used by colleges and universities in recruiting educationally disadvantaged Vietnam veterans and preparing them for post-secondary education. Earlier legislation had looked to the Veterans Administration and the Department of Defense to undertake such an "outreach" effort, but, with little having come of this, Congress was now looking to the educational institutions themselves to fill the void. Grants available under the new program were to pay for recruitment and tutorial programs and to give the schools a general cost-of-instruction allowance for each disadvantaged veteran recruited.

The Office of Education set up a special division to administer the program shortly after Congress funded it, but then, with USOE obviously acting on orders from the White House and OMB, all efforts toward program implementation ceased. Agreeing with the plaintiffs that this situation was intolerable, Judge Gerhard A. Gesell of the U.S. District Court for the District of Columbia ordered USOE to promulgate regulation under which institutions can apply for and receive grants before 30 June, when the initial appropriation will expire.

On 11 April, in a ruling relevant to higher education at least by way of analogy, another U.S. district judge declared that actions taken to terminate programs of the Office of Economic Opportunity were unlawful and represented what was, in effect, an attempt by the President to veto congressionally approved programs simply by not including funds for their continuance in his *proposed* budget. On 2 April, in still another case, the U.S. Court of Appeals for the Eighth Circuit affirmed a district judge's ruling that highway construction funds could not lawfully be withheld from the Missouri Highway Commission as a measure to combat inflationary pressures.

In the successful suits against impoundment of highway and veterans-outreach funds the plaintiffs had going for them the fact the grants were to be issued according to specific congressionally prescribed formula, with the program administrators allowed only limited discretion. In the case of suits brought against the impoundment of funds administered under a broader statutory authority, prospects of success are thought to be less certain. The Administration's current withholding of $10 million in formula-based Bankhead-Jones Act funds from the land-grant institutions is one of the more vulnerable targets for a court test, Christian Arnold believes.

The Thrust of Administration Policy

"The basic thrust [of Administration policy], is to eliminate sustaining programs and substitute short-term 'innovative' project grants," Arnold observes. Further, he views the Administration's action as guided not by a desire to reshape higher education in some particular way but simply by a desire to gain tighter control over federal spending. Spending for short-term grants is readily controllable, he points out, whereas spending for sustaining programs, as in the "capitation grants" in the health fields, is not.

Whatever the Administration's motives, implicit in Arnold's observations is a two-phased counterstrategy to the fund impoundments. First, Congress can write legislation spelling out specific steps for administrators to follow, with their discretionary authority to be no broader than necessary for soundly run programs. Second, universities and other institutions having a stake in these programs had best be prepared to go to court to see that the will of Congress is observed.

—LUTHER J. CARTER