

# PRESIDENTIAL IMPOUNDMENT OF FUNDS: A CONSTITUTIONAL CRISIS

## I. INTRODUCTION

*The constitutional right for the President of the United States to impound funds . . . is absolutely clear . . . I will not spend money if the Congress overspends, and I will not be for programs that will raise the taxes and put a bigger burden on the already overburdened American taxpayer.<sup>1</sup>*

PRESIDENT NIXON  
(Jan. 31, 1973, news conference)

THESE ARE RINGING WORDS indeed not only in their claim to constitutionality but also in their symbolic value to the American citizen. They are also words that have not struck a responsive chord with the Congress of the United States.

Exemplifying congressional reaction, Representative Torbert H. Macdonald (D Mass.) when introducing an impoundment bill stated:

I feel this process of arbitrary impoundment has contributed to the constitutional crisis with which this body as an institution is now faced. It goes to the very heart of our authority—control over the expenditure of funds. The simple fact is that funds which the Congress has authorized and appropriated are being prevented from helping the people for whom they were intended.<sup>2</sup>

Not only are words being spoken by members of the Congress, they are taking action of both a legislative and judicial character. The legislative attack began in the 93rd Congress with hearings by the Senate Government Operations Committee. Further, bills have been introduced which would deny that the President had sole power to impound. For example, Senator Sam J. Ervin, Jr. (D N.C.), introduced a bill which would require the President to notify the Congress within ten days whenever the President impounded funds. The President would further be required to release the money if within 60 days the impoundment had not been approved by the Congress. This bill has been passed by the Senate.<sup>3</sup> A successful legal challenge was begun when 17 senators

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<sup>1</sup> 1973 CONG. Q.W. REP. 185.

<sup>2</sup> *Id.* at 215.

<sup>3</sup> S. 373, 93d Cong., 1st Sess. (1973); *See also* H.R. 8480, 93d Cong., 1st Sess. (1973). (Whereas S. 373 would require the release of impounded funds unless both Houses approved the President's action, H.R. 8480 would allow the money to remain impounded unless one House within 60 days voted to force the release.)

sought to intervene as friends of the court in a suit questioning the right of the President to withhold federal highway funds from Missouri.<sup>4</sup>

It seems that our maligned Congress, so docile at times in the face of presidential aggrandizement of power, is forging a constitutional crisis. The basic issue involved is whether the President has authority, either constitutional or statutory, to refuse to spend funds appropriated by Congress. The questions pursued in the following pages are basically four: does the President have the (1) statutory, (2) historical, (3) case, or (4) constitutional authority to continue to impound?

## II. HISTORY OF IMPOUNDMENT AND STATUTORY AUTHORITY

On February 5, 1973, the White House submitted to Congress a somewhat detailed list of the total impoundments for fiscal 1973.<sup>5</sup> The preparation of the list was a result of a requirement included in a law passed late in 1972.<sup>6</sup> The list included not only totals, but also cited authority for each action. In most cases, the President claimed statutory authority; although in certain cases the President claimed constitutional authority by citing the "faithful execution," the "Commander in Chief," and the "foreign affairs" clauses.<sup>7</sup> The latter three are discussed below.

The purpose of this section is to analyze not only the history of the statutory authority claimed by Mr. Nixon, but also to analyze the President's assumption that he is following in the footsteps of not only recent predecessors but also men like Mr. Jefferson.

The first case of impoundment of any importance occurred in 1803. In his annual congressional message, President Jefferson reported that "the sum of \$50,000 appropriated by Congress for providing gunboats remains unexpended. The favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary...."<sup>8</sup> Later in Jefferson's term, the President refused to spend amounts authorized for the salaries of certain governmental officials. Although no definite type of action was indicated, Congress threatened and the President retreated.<sup>9</sup> Consequently, Jefferson's only affirmative action was based on a desire to economize by not spending on a program no longer needed. He was effectuating congressional intent. This concept towards impoundment, *i.e.*, an attitude of economy and efficiency, would prevail until Franklin D. Roosevelt.

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<sup>4</sup> *State Highway Commission v. Volpe*, 347 F.Supp. 950 (E.D. Mo. 1972).

<sup>5</sup> 1973 CONG., *supra* note 1, at 270-274.

<sup>6</sup> Pub. L. No. 92-599 (Oct. 27, 1972).

<sup>7</sup> 1973 CONG., *supra* note 1, at 272.

<sup>8</sup> *Id.* at 213.

<sup>9</sup> *Id.* at 6.

The first major statute was not promulgated until the 1900's with the passage of the Anti-Deficiency Acts of 1905 and 1906. The 1905 Act provided that appropriations may "... be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made."<sup>10</sup> The 1906 Act added that these apportionments could be waived or modified if "... some extraordinary emergency or unusual circumstances which could not be anticipated at the time of making such apportionment ..." occurred.<sup>11</sup> It does not take a literalist to see that these provisions do not authorize the President to impound, but rather to pursue economy and efficiency<sup>12</sup> by apportionment of monies. Changes in these apportionments are possible but only within the parameters of emergency or unusual circumstances. The fact that no presidential authority to impound was authorized by these two statutes is further affirmed by the Revised Anti-deficiency Statute which states: "Whenever it is determined ... that any amount so reserved will not be required to carry out the purposes of the appropriation concerned, he shall recommend the rescission of such amount ..." <sup>13</sup> (emphasis added).

The Budget and Accounting Act of 1921<sup>14</sup> has also been cited by various Presidents as authority for impounding. However, this Act does not give power to the President to refuse expenditures after they have become law, but only to control budget requests from the Executive Branch.<sup>15</sup> This is true whether the appropriations have been requested or were in excess of the requests of the President.<sup>16</sup> The Budget Bureau's first director, Charles E. Dawes, justified impoundments based on this 1921 Act. But, Dawes' understanding of this statute was far narrower than that put forth today. Dawes merely believed that a governmental agency was not required to spend its total appropriation if it could fulfill its objectives by spending a lesser amount.<sup>17</sup>

When Franklin Roosevelt faced the depression and World War II, the attitude of the presidency towards impoundment switched from one of pursuing economy and efficiency to pruning specific programs. Although

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<sup>10</sup> Ch. 1484, § 4, 33 Stat. 1257 (now 31 U.S.C. § 665) (1970).

<sup>11</sup> Ch. 510, § 3, 34 Stat. 48-49 (now 31 U.S.C. § 665) (1970).

<sup>12</sup> Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons Systems Appropriations*, 57 GEO. L.J. 1159 n. 10 (1969).

<sup>13</sup> 31 U.S.C. 665, § 3678(c) (2) (1970).

<sup>14</sup> Ch. 18, 42 Stat. 20 (1921) (now 31 U.S.C. § 1-60) (1970).

<sup>15</sup> I CONGRESS AND THE NATION 1417 (1965); Stassen, *supra* note 12, at 1179.

<sup>16</sup> Goostree, *The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-in-Aid to Segregated Activities*, 11 AM. U.L. REV. 34 (1962).

<sup>17</sup> 117 CONG. REC. 7854-7855 (daily ed. May 26, 1971).

the Congress did not object because of the crisis situation,<sup>18</sup> the Bureau of the Budget searched for legal authority and was left doubting whether it had such authority. On the one hand, bureau personnel were certain that "...no statutory authority existed for specified projects as distinguished from annual appropriations for maintenance and operation of government agencies..." This belief was crucial during peacetime. On the other hand, it believed authority did exist during wartime by virtue of the President's power to prosecute the war.<sup>19</sup>

The Employment Act of 1946 is also cited as authority for presidential impoundment. Section 1021 states that it is: "...the continuing policy and responsibility of the federal government to use all practical means consistent with its needs and obligations and other essential considerations of national policy...to promote maximum employment, production, and purchasing power."<sup>20</sup>

Those who justify impoundment via this statute ignore the reality that the statute states "the federal government," not the President, has the responsibility. The federal government includes the Congress. Further, the language is clear that the Congress intended that the government's obligations and needs as defined by the Congress would be met.<sup>21</sup>

Further, the President is required by the act to submit an annual economic report to the Congress including "a program for carrying out the policy declared in Section 1021 of this title, together with such recommendations for legislation as he may deem necessary and desirable."<sup>22</sup>

The statutory presidential responsibilities for an economic report and recommendations to be submitted to Congress indicate that the Congress did not intend the President to be an authoritative impounder, but rather a prime mover to which Congress would respond.

The most cited statute to support the President's power to impound is a rider which was attached to the Omnibus Appropriations Act of 1951, which stated in part:

In apportioning any appropriations, reserves may be established *to provide for contingencies or to effect savings* whenever savings are made possible through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made.<sup>23</sup> (emphasis added).

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<sup>18</sup> Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 STAN. L. REV. 1242 (1970).

<sup>19</sup> Stassen, *supra* note 12, at 1177.

<sup>20</sup> 15 U.S.C. 1021 (1971).

<sup>21</sup> Pine, *The Impoundment Dilemma: Crisis in Constitutional Government*, 3 YALE REV. OF LAW AND SOCIAL ACTION 107 (1973).

<sup>22</sup> 15 U.S.C. 1022(a) (4) (1971).

<sup>23</sup> 31 U.S.C. 665(c) (2) (1970).

The italicized language makes it clear that no impounding authority is given.<sup>24</sup> This same conclusion is clear from congressional discussion. Congressman Mahon remarked: "I would not object, as I know other members would not object, to any reasonable economies in government. But economy is one thing and the abandonment of a policy and program of Congress is another thing."<sup>25</sup>

The House Committee on Appropriations stated that executive officials "... bear the final burden for rendering *all necessary service* with the smallest amount possible within the ceiling fixed by the Congress." (emphasis added). Further, the purpose of this reserve section was to "... require careful apportionment of all types of funds expended by federal agencies and effective administration of the government's business."<sup>26</sup> The statutory language and the legislative history make it clear that rather than authorizing impoundment the Congress intended that "all necessary service" would be provided in as economical a fashion as possible.

The executive branch even agreed with this position for the Budget Bureau stated in 1952: "Reserves must not be made to nullify the intent of Congress with respect to specific projects or levels of programs."<sup>27</sup>

Although it can be seen that any impounding for purposes other than economy and efficiency would rest on a flimsy rationale, Presidents from FDR on impounded various programs and irritated Congress in the process. Harry S. Truman confronted the Congress more than once. For example, Truman impounded \$735 million in additional funds appropriated by Congress to increase to 58 from 48 the President's request for air force groups. Dwight D. Eisenhower set aside \$137 million appropriated for initial procurement of Nike-Zeus anti-missile system hardware.<sup>28</sup> John F. Kennedy would not release the additional \$180 million appropriated by Congress over the President's request for B70 bomber development. Lyndon B. Johnson decreased federal spending by \$5.3 billion to hopefully cut the inflationary impact of the Vietnam War.<sup>29</sup>

Richard Nixon is following these presidential precedents, and arguing on the basis of the aforementioned statutes, albeit their lack of relevancy. President Nixon, however, is claiming two other statutory bases also—both as weak in substance as a foundation for impoundment as those statutes discussed above.

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<sup>24</sup> Boggs, *Executive Impoundment of Congressionally Appropriated Funds*, 24 U. FLA. L. REV. 224 (1972); Stassen, *supra* note 12, at 1178.

<sup>25</sup> 95 CONG. REC. 14,922 (1949).

<sup>26</sup> H.R. REP. NO. 1797, 81st Cong., 2d Sess., 310 (1950).

<sup>27</sup> Stassen, *supra* note 12, at 1179.

<sup>28</sup> I CONGRESS, *supra* note 15, at 253, 307.

<sup>29</sup> II CONGRESS AND THE NATION 119 (1968).

One statute is the Economic Stabilization Act Amendments of 1971 (P.L. 92-210). Under the Act the President received authority to issue regulations to stabilize prices, rents, wages, and salaries. One would need to stretch this statute further than congressional intent would permit to allow impoundment of open space land programs, water and sewer facilities, rehabilitation loan funds, etc. However, detailed consideration need not be given this statute, for the White House seemed to admit its weakness as a justification. In the February 5 detailed listing of impoundments and authority, this statute was listed as a sole justification only once.<sup>30</sup> Further, in a recent case, *State Highway Commission v. Volpe*, the court stated: "The reasons relied on are related to the prevention of inflation of wages and prices in the national economy. These reasons are impermissible reasons for action which frustrates the purposes and standards of the Act . . ."<sup>31</sup>

The second statute is the Public Debt Limitation Act of 1972 (P.L. 92-599), which set the debt limit so as to allow a \$250-billion budget for fiscal 1973. Nixon had desired the authority to decide where reductions were to be made, if necessary. However, in October, 1972, the Senate killed the President's request. Nixon is now attempting to stay within the debt limit by impounding.<sup>32</sup> This is the only statute which seems to come close to authorizing the President to take action. But, two points must be made. First, the President believes he is being confronted by the Congress with two incongruous directives, *i.e.*, (a) a debt limit, and (b) programs that carry the budget above that debt limit. Superficially, the canon of construction says the specific over the general. Further, the Congress has granted debt ceiling increases at the request of the President,<sup>33</sup> and at various times, the Presidents have discovered ways to circumvent ceilings imposed by Congress.<sup>34</sup> It appears, then, that depending on the President's priorities, he may call the ceiling a congressional mandate that he cannot ignore or on the other hand circumvent the ceiling. Finally, Mr. Justice Rehnquist has stated that at times a dilemma may be created for the President by the ceiling, "but it appears to us that the conflict must be real and imminent for the argument to have validity; it would not be enough that the President disagreed with spending authorizations established by Congress."<sup>35</sup> Secondly, the question remains as to whether the President or the Congress has the right to determine priorities. Senator Hubert H. Humphrey has stated: "... why is it that ... debt limits prohibit spending on the

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<sup>30</sup> 1973 CONG., *supra* note 1, at 270.

<sup>31</sup> 347 F. Supp. 954.

<sup>32</sup> 1973 CONG., *supra* note 1, at 213.

<sup>33</sup> 119 CONG. REC. 2492 (daily ed. Feb. 8, 1973).

<sup>34</sup> Pine, *supra* note 21, at 106.

<sup>35</sup> *Id.* at 106-107.

Economic Development Administration, grants for special water and sewer projects, housing, while at the same time permit spending on the B-1 bomber, Trident submarine, and various other military projects.”<sup>36</sup> Senator Sam J. Ervin agrees: “Impoundment does not save anybody any money, nor does it lead to lower taxes. It is merely a means whereby the White House can give effect to the social goals of its own choosing by re-allocating national resources in contravention of congressional dictates.”<sup>37</sup>

Thus, it is clear that the President is not authorized by statute to impound. Before this section is closed, note should be made of President Nixon's claim that precedent, *i.e.*, the impounding by previous Presidents as indicated *supra*, provides legal justification for his actions. Illegal actions perpetrated more than once do not produce a metamorphosis to legality. As Mr. Justice Black stated in the *Steel Seizure Case*:

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution “in the Government of the United States, or any Department or Officer thereof.”<sup>38</sup>

In summary, several points should be made: (1) The President has no statutory authority to impound. The relevant statutes only authorize economy and efficiency, not wholesale reductions of congressionally approved programs. (2) President Nixon is following in the footsteps of other Chief Executives, but only from Franklin D. Roosevelt on. Earlier Presidents, like Jefferson, held their actions in the mold of economy and efficiency. (3) The strain of impoundings beginning with Roosevelt does not constitutionalize impoundment.

### III. CASE AUTHORITY

Various individuals including current national political figures, political scientists, and constitutional law scholars have argued that the President does/does not have the power to impound based on court decisions. After a survey of these cases, it is clear to this author that the President does not have the authority to ignore Congressional intent by impounding funds appropriated for a program authorized by congressional enactment. However, one of the problems is the “simple” interrogatory, “When does the Congress intend that money appropriated be expended?” This is a major question, since most statutes are written in permissive language, and it is common sense that most statutes must be written in this form. Congress realizes that all statutes cannot be promulgated

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<sup>36</sup> 119 CONG. REC. 2492 (daily ed. Feb. 8, 1973).

<sup>37</sup> 1973 CONG., *supra* note 1, at 215.

<sup>38</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

in absolute language. Otherwise, monies might be spent in absurd manners, e.g., where the expenditure has, due to the course of events, become unnecessary. However, even where the language seems to be permissive, if Congress has authorized a program and appropriated monies for this program, the intent of the Congress is of a mandatory nature. As was stated in a memo prepared by the Congressional Legislative Research Service, where substantive legislation directs that action be taken supported by a later appropriation, "the two measures . . . constitute a mandate to spend so much of the appropriation as is necessary to give effect to the substantive law."<sup>39</sup> Therefore, most congressional enactments, even though seemingly written in permissive language, should be seen by the President as mandates. However, when legislation of a very broad nature and purpose with approval of a general expenditure of funds is involved, the courts have indicated that the President can impound.

The idea that courts will not toy with executive discretion in a case of the latter nature was made clear in *McKay v. Central Electric Power Cooperative*.<sup>40</sup> The Court stated that the Interior Department, operating under a congressional appropriation for flood control and electric power, was not required to honor contracts *already established* for the lease of power-producing facilities. The Court stated: "The Act is permissive only. It does not impose upon appellants a clear affirmative duty to use the funds for that specific purpose."<sup>41</sup>

In another suit brought to restrain the Rural Electrification Administrator from disbursing proceeds of a loan, the court, noting the statute was permissive, stated:

The duty must be plainly defined in the terms of the applicable law . . . where the duty to a court turns on matters of doubtful or highly debatable information from largely loose statutory terms, the very construction of the statute is a distinctive and professional exercise of discretion.<sup>42</sup>

The same result, where legislation of a permissive nature was the concern, was announced in *San Francisco Redevelopment Agency v. Nixon*.<sup>43</sup> District Judge Carter stated there was no authority for a district

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<sup>39</sup> Pine, *supra* note 21, at 105.

<sup>40</sup> *McKay v. Central Electric Power Cooperative*, 223 F.2d 623 (D.C. Cir. 1955).

<sup>41</sup> *Id.* at 625. See also, *National Ass'n of Int. Rev. Employees v. Richard M. Nixon*, 349 F. Supp. 18 (D.C. Cir. 1972); *Craig v. Commissioners of District of Columbia*, 112 F.2d 205 (D.C. Cir. 1940); *Cipriano Campagana v. United States*, 26 Ct. Cl. 316 (1891).

<sup>42</sup> *Rural Elec. Adm. v. Northern States Power Co.*, 373 F.2d 686, n. 14 (8th Cir., 1967).

<sup>43</sup> *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971).



court: "... to compel the head of the Executive Branch of Government to take any action whatsoever. No decided cases since *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803) have even contemplated this question."<sup>44</sup>

The problems inherent in determining whether Congress "intended" monies appropriated to be spent by the Executive has been made clear by two recent cases dealing with exactly the same fact pattern. In *City of New York v. Ruckelhaus*,<sup>45</sup> the plaintiff claimed that Section 205(a) coupled with Section 207 of the Federal Water Pollution Control Act Amendments required that the Environmental Protection Agency Administrator allot \$11 billion for fiscal years 1973 and 1974 for sewage treatment works construction. The administrator under presidential direction had allotted only \$5 billion. The plaintiff urged that the word, "shall," rather than "may" in the phrase, "shall be allotted," in Section 205(a) made plain the mandatory character of this section. The defendant urged that the administrator had discretion and pointed to the fact that Sections 205 and 207 were amended in the Congressional Conference Committee by the insertion of the phrase, "not to exceed," before each of the sums specified and by deletion of the word, "all," before the phrase, "Sums to be appropriated . . ."<sup>46</sup> The Court looking at legislative history and presidential statements at the time of the presidential veto stated that:

The question is whether the full allotments must be made, and the answer to that on the basis of the foregoing review of the sponsors' comments seems clear. The language of the pertinent sections of the Act, read in the light of their legislative history, clearly indicates the intent of Congress to require the Administrator to allot, at the appropriate times, the full sums authorized to be appropriated by Section 207. Hence, the court has no choice other than to declare that Section 205(a) of the Act requires the Administrator to allot among the states \$5 billion for fiscal year 1973 and \$6 billion for fiscal year 1974.<sup>47</sup>

A different result was reached in *Campaign Clear Water v. Ruckelhaus*.<sup>48</sup> Although noting that the President's allotment of only \$5 billion was a flagrant abuse of discretion and a violation of the act, the court stated that "the Congress did intend for the executive branch to exercise some discretion with respect to allotments."<sup>49</sup> The court based its

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<sup>44</sup> *Id.*

<sup>45</sup> *City of New York v. Ruckelhaus*, 358 F. Supp. 669 (1973).

<sup>46</sup> *Id.* at 676-677.

<sup>47</sup> *Id.* at 679.

<sup>48</sup> *Campaign Clear Water v. Ruckelhaus*, 41 U.S.L.W. 2675 (U.S.D.C. E. Va. June 5, 1973).

<sup>49</sup> *Id.*

finding of discretion on the same language in the act in which the court in *City of New York* *supra* found no discretion. The court stated:

The court finds highly significant an amendment of the language of the section by the House-Senate conference committee which deleted the word "all" before the phrase "sums authorized to be appropriated" and the addition of the phrase "not to exceed" in Section 207.<sup>50</sup>

Therefore, with the inherent potential for confusion in mind it must be stated that the essence of the question is whether the authorization of a program coupled with an appropriation is permissive or mandatory. As one Senator suggested, whether Congress uses words like "mandate," "direct," "require," "order," "shall," in one instance or "permit," "authorize," "may," in another, can very well be the determining factor as to whether or not the President can impound.<sup>51</sup> The ultimate point, then, is if it is mandatory, there is no question that the President cannot impound.

As to legislation of a mandatory nature, the major and first case is *Marbury v. Madison*.<sup>52</sup> In *Marbury*, Chief Justice Marshall distinguished between mere political acts belonging to the executive branch alone as opposed to those executive acts governed by congressional enactments:

He acts, in this respect . . . under the authority of the law, and not by instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose . . . [W]hen the legislature proceeds to impose on that officer other duties; when he is directed preemptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.<sup>53</sup>

Thus, from the earliest days of the Republic, it should have been clear that when Congress, which makes laws while the Executive executes laws, speaks through the promulgation of a law, the executive acting in its ministerial capacity cannot ignore the mandate of Congress. This concept has been stated in a number of subsequent cases.

In *Kendall v. United States ex rel. Stokes*,<sup>54</sup> President Jackson's Postmaster General decided not to pay Stokes who had contracted to carry the mails. The Congress had directed that the amount would be paid. The mail courier brought suit and the Supreme Court held that the Postmaster could not refuse payment. The Court stated:

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<sup>50</sup> *Id.*

<sup>51</sup> Church, *supra* note 18, at 1245.

<sup>52</sup> *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803).

<sup>53</sup> *Id.* at 158, 166.

<sup>54</sup> *Kendall v. United States ex Rel. Stokes* 37 U.S. (12 Pet.) 524 (1838).

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 . . . To hold otherwise would be to vest completely the legislative power in the President or to confer upon him a veto power over laws duly passed and enrolled.<sup>55</sup>

The Court emphasized again in *Kendall* that at issue was “. . . a mere ministerial act, which neither he nor the President had any authority to deny or control.”<sup>56</sup>

In *United States v. Price*, where the Secretary of the Treasury was authorized by Congress to pay specific monies to several named individuals, the court held that the Secretary had to pay the money because the Congress was explicit in its direction.<sup>57</sup>

In *State of Mississippi v. Johnson*,<sup>58</sup> where the prayer was for an injunction against the Reconstruction Acts, the Court, after noting the distinction between a discretionary and a ministerial act, stated:

The President is but the creation of the Constitution, one of the agents created by it to carry it into practical operation; and it would be strange indeed if he should be permitted to exert his agency in violating that instrument, and then claim exemption from the process of the Court whose duty it is to guard against abuses, because he is the chief executive of the government, and especially where he is exercising a mere ministerial duty for that is all he does exert in executing an act of Congress; he has no discretion in the matter.<sup>59</sup>

In *Trimble v. Johnston*,<sup>60</sup> an action to allow a newspaper to inspect governmental payroll documents, the court stated that a suit can be allowed: “. . . if the head of the department is acting contrary to the law that circumscribes his duties, and fails to carry out a Congressional mandate.”<sup>61</sup>

In the past year alone, in reaction to Nixon's rash of impoundments, approximately 30 cases have been decided, primarily at the Federal District Court level. Out of these 30, the administration's arguments have failed to convince the courts in 25 instances. The thrust of the court's reasoning is that Congressional language evidencing intent that monies appropriated be spent overrides any presidential discretion.<sup>62</sup> Illustrative

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<sup>55</sup> *Id.* at 613.

<sup>56</sup> *Id.* at 610; Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 126 (1969).

<sup>57</sup> *United States v. Price*, 116 U.S. 43, 44 (1885).

<sup>58</sup> *State of Mississippi v. Johnson*, 4 Wall. (71 U.S.) 475, 18 L.Ed. 437 (1866).

<sup>59</sup> *Id.*

<sup>60</sup> *Trimble v. Johnston*, 173 F. Supp. 651 (U.S.D.C. D.C. 1959).

<sup>61</sup> *Id.* at 654. *See also*, *United States v. Louisville*, 169 U.S. 249 (1898); *United States v. Jordan*, 113 U.S. 418 (1885); *Hukill v. United States*, 16 Ct. Cl. 562 (1880).

<sup>62</sup> 1973 CONG. Q.W. REP. 2395.

of these holdings against presidential impoundments are the following six cases, the first of which is *State Highway Commission v. Volpe*.<sup>63</sup> This case involved a suit for mandatory relief in connection with the President's withholding of authority from states to obligate appropriations from the highway trust fund. The District Court granted relief to the plaintiffs, stating that the Highway Trust Fund had been established by Congress to insure continuing money for the federal highway system. The court stated that Congress' intent was clear and, consequently, the Secretary of the Department of Transportation has no discretion in the matter and the funds had to be released.<sup>64</sup>

In the second case, *American Federation of Government Employees v. Phillips*,<sup>65</sup> the court was faced with President Nixon's phase-out of the O.E.O. Community Action Agencies. The court held that the 1972 Equal Opportunity Amendments, which provided for community action programs on a multi-year authorization basis, and the 1949 Reorganization Act, which requires the President to submit a reorganization plan to Congress before a federal agency is abolished, preclude presidential phase-out of O.E.O. programs. The defendant argued that since President Nixon had requested no more funds for O.E.O. in his fiscal 1974 budget, the fiscally responsible thing to do was to use funds appropriated for C.A.A.'s to phase out the operation.<sup>66</sup> The court reacted by stating:

Congress, by its use of a multiple year authorization has indicated its intent that the CAA function continue for at least that period of time. . . . The multiple year authorization enables the Congress to evidence its intent to continue to fund a program, with the option to terminate if it so pleases, without being forced to make that intent known by appropriating funds before the end of each fiscal year . . . Article I, Section 1, of the Constitution vests "[a]ll legislative powers" in the Congress. No budget message of the President can alter that power and force the Congress to act to preserve legislative programs from extinction prior to the time Congress has declared that they shall terminate, either by its action or inaction. . . . Thus, in absence of any contrary legislation, the defendant's plans to terminate the CAA functions and the OEO itself are unlawful as beyond his statutory authority.<sup>67</sup>

In the third case, which has not yet been decided on its merits, Federal District Judge Waddy held that the Department of Health, Education, and Welfare was required to set aside some \$380 million in education funds until the court decided whether the administration had

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<sup>63</sup> 347 F. Supp. 950.

<sup>64</sup> *Id.* at 950-954.

<sup>65</sup> *American Federation of Government Employees v. Phillips*, 358 F. Supp. 60 (1973).

<sup>66</sup> *Id.* at 73.

<sup>67</sup> *Id.* at 75.

a right to impound. The court stated that nothing in the order: "... is intended to require expenditure of the sums obligated and the court reserves the power to vacate the order should the plaintiffs fail to prevail on the merits and thereby to permit the funds at issue to revert to the general fund."<sup>68</sup> However, the court added that the plaintiffs "... demonstrated a substantial likelihood of success on the merits."<sup>69</sup>

In the fourth case, Federal District Judge Gesell ordered HEW to process grants totaling \$52.1 million appropriated to fund community mental health centers. Judge Gesell noted that the President's economic concerns were "pertinent," but cited clear statutory authority that the monies were intended to be spent.<sup>70</sup>

In the fifth case, Federal District Judge Garth ordered the Administration to spend \$239 million appropriated for the Neighborhood Youth Corps. The court stated: "There is no doubt it was the unequivocal intention of Congress that the amount be appropriated. . . . This is no raid on the public treasury. It is just action required to release appropriated funds."<sup>71</sup>

Finally, in *Pennsylvania v. Lynn*,<sup>72</sup> Federal District Judge Richey was faced with the termination by the Secretary of the Department of Housing and Urban Development of Sections 235, 236, and 101 of the Housing and Urban Development Act (12 USC Sections 1715z, 1715z-1, and 17015). In these sections, Congress provided federal subsidies for housing constructed by private enterprise for low- and moderate-income families. The government's basic argument was that HUD experienced difficulty in administering these programs in such a manner that would fulfill the congressional goal of a decent home for every American family. Therefore, the government reasoned, the administrator properly stopped the program's operation until such time as a study of the program could be accomplished. The district court via a search of the relevant statutes and their legislative history found, first, that Congress intended that these programs would operate on a continuing basis to achieve this goal of decent housing for every American family. Consequently, the Secretary's actions frustrated this clear intent. Further, the court found that the administrator's action was an usurpation of legislative authority granted to Congress by Article I of the Constitution:

The constitutional question raised by these actions is simply whether the executive, for whatever reasons, may refuse to carry out an

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<sup>68</sup> 1973 CONG. Q.W. REP. 1817.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 2395.

<sup>71</sup> *Id.* at 1818.

<sup>72</sup> *Pennsylvania v. Lynn*, 41 U.S.L.W. 2059 (U.S.D.C. D.C. July 23, 1973).

Act of Congress. The court finds unpersuasive defendant's arguments that the challenged actions are in accordance with powers granted to the executive by Article II of the Constitution. It is certainly true that such powers have long been interpreted as broad grants of authority necessary to the fulfillment of the many and varied duties imposed upon the President and the executive branch. It is not true that the executive has the authority to terminate or suspend indefinitely a statutory program such as that involved here for the reason that Congress may see fit to alter those programs at some date in the future. Congress has mandated that the programs continue. It is not within the discretion of the executive to refuse to execute laws passed by Congress but with which the executive presently disagrees.<sup>73</sup>

In summary, it is clear that case authority is not on the side of the President in his attempts to justify impoundment. The courts have been emphatic in stating that when Congress makes clear its intent by authorizing a program and appropriating funds for a program, the President as the executor of the law cannot ignore this mandate.

#### IV. CONSTITUTIONAL AUTHORITY

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. . . . The executive power shall be vested in a President of the United States. . . . No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . he shall take Care that the Laws be faithfully executed. . . . To raise and support Armies . . . The President shall be Commander in Chief. . . .

These provisions of Articles I and II are the crucial ones argued by either side of the impoundment issue. After discussion of these provisions, it hopefully will be clear that the Presidents in impounding have acted unconstitutionally.

One of President Nixon's advisors argued before a Senate committee in February, 1973, that the President has "an implied constitutional right" to impound.<sup>74</sup> This author assumes that the argument is very similar to that presented by President Truman during the *Steel Seizure Case*, i.e., that "... presidential power should be implied from the aggregate of his powers under the Constitution."<sup>75</sup> The fact that this is what is meant is clear, it seems, from Nixon's claims that he can impound due to his powers of "faithful execution," "Commander in

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<sup>73</sup> *Id.* at 2059-2060.

<sup>74</sup> 1973 CONG., *supra* note 1, at 291.

<sup>75</sup> Youngstown Sheet & Tube Co., 343 U.S. 579.

Chief," and "foreign affairs" listed in the detailed list of items impounded presented to the Congress February 5, 1973.<sup>76</sup>

### *Commander-in-Chief*

As to the President's power as Commander-in-Chief and also director of foreign policy, proponents of impoundment must first reconcile these presidential powers with the Congress' powers in Article I, Section 8, to declare war, to make rules and regulations for the Armed Forces, to raise and support armies and provide and maintain a navy, etc. These provisions make it clear that the founding fathers intended the war powers to be divided between the Congress and the President. Whereas the Constitutional Convention originally considered putting full war powers in the hands of the Congress, this august body realized that the Chief Executive might need to react to an imminent emergency when it would not be possible to consult with the Congress. Therefore, the founding fathers gave to the President the limited role of Commander-in-Chief.<sup>77</sup> This concept of the President's war powers being limited was emphasized by Alexander Hamilton's statement that the President's authority as Commander-in-Chief "... would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy. . . ." <sup>78</sup> This concept was reaffirmed when the Supreme Court stated that as long as the Congress did not impair the efficiency of the President as Commander-in-Chief by the promulgation of a law, the President "becomes as to that law an executive officer, and is limited in the discharge of his duty by the Statute."<sup>79</sup>

Thus, the point is that the prevailing number of the founding fathers believed that the President as to the war powers would be inferior to Congress.<sup>80</sup>

However, we know also that this attitude did not prevail throughout our history in that various Presidents beginning with Lincoln began to take extraordinary measures during time of war. But, even then, the Court has been careful in justifying presidential action as is evidenced by the Supreme Court's dependence on the idea of congressional ratification in the *Prize Cases*.<sup>81</sup>

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<sup>76</sup> 1973 CONG., *supra* note 1, at 270.

<sup>77</sup> CONGRESSIONAL QUARTERLY, GUIDE TO THE CONGRESS OF THE UNITED STATES 214 (1971).

<sup>78</sup> A. HAMILTON *et al*, THE FEDERALIST PAPERS 418 (Mentor ed. [1961]).

<sup>79</sup> *McBair v. United States*, 19 Ct. Cl. 528 (1884).

<sup>80</sup> Stassen, *supra* note 12, at 1188.

<sup>81</sup> *Prize Cases*, 67 U.S. (2 Black) 635 (1863).

Lastly, the proponents of using the powers as Commander-in-Chief as a justification for impoundment must reconcile this concept with the statements of men like Justice Black, who in the *Steel Seizure Case* stated:

... we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.<sup>82</sup>

Even though Americans in general, including the Congress, have been willing to support the President during times of war and depression as is evident from the earlier discussion of FDR's impounding during the 1930's and 1940's, the President would seem to be stretching the point if he were to impound based on his powers as Commander-in-Chief and also Director of Foreign Policy during peacetime. Justice Jackson stated it well when he wrote:

But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.<sup>83</sup>

Justice Jackson's remarks are even stronger when only domestic affairs without war are the concern.

### *Inherent Powers*

The President's power as Commander-in-Chief and also Director of Foreign Policy has been discussed separately, but this power along with the President's executive power and faithful execution powers has been argued as a combination out of which flows the so-called inherent powers of the President. The case which dominates over all others in answering this claim of inherent powers as a justification for impoundment is again the *Steel Seizure Case*. (Some authors have argued against impoundment by citing *The Floyd Acceptances*.<sup>84</sup> However, this case is readily distinguishable; for it dealt with overdrawing the congressional appropriations, which is clearly prohibited by Article I, Section 9.)

Commentators disagree on the holding in the *Steel Seizure Case*. Some say that the holding is clear that the President lacks inherent powers.<sup>85</sup> Justice Black stated:

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<sup>82</sup> 343 U.S. 587.

<sup>83</sup> *Id.* at 642.

<sup>84</sup> *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666 (1868).

<sup>85</sup> Goostree, *supra* note 16, at 40.



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 function in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.<sup>86</sup>

Other commentators believe that this strict separation of powers framework was only accepted by two of the nine justices, *i.e.*, Black and Douglas.<sup>87</sup> This latter group believes that the holding was that Truman's seizure was unconstitutional because it conflicted with congressional policy.<sup>88</sup>

Ultimately, which of the two is correct is an irrelevant concern as far as the question of impoundment is concerned. For even if the latter and more restrictive view of the *Steel Seizure Case* is accepted as the valid one, the President's power to impound has to be looked upon as an unconstitutional act. For there is no question that when the President impounds money appropriated and authorized by the Congress for a specific program, the President is acting against the express will of the Congress.

Presidential impoundment generally falls into the third of Justice Jackson's famous typology in the *Steel Seizure Case*:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential action in such a case only by disabling the Congress from acting upon the subject.<sup>89</sup>

There is no question that Congress has the power to authorize programs and appropriate funds in the various areas where President Nixon and those before him have impounded. It would seem then that "exclusive presidential action" cannot be sustained.<sup>90</sup>

### *Congressional Power*

Besides the Congress' affirmative powers in various areas (Article I, Section 8) which have been discussed *supra* and also Article I's general statement that vests all legislative powers in the Congress, not the President, two other sections of the Constitution should be considered. The first is Article I, Section 9: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."

Some commentators have read this provision as stating only that the

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<sup>86</sup> 343 U.S. 587.

<sup>87</sup> Fisher, *supra* note 56, at 131.

<sup>88</sup> Stassen, *supra* note 12, at 1159.

<sup>89</sup> 343 U.S. 637.

<sup>90</sup> The separation of powers argument was again put forth by various justices in *New York Times Co. v. United States*, 403 U.S. 713 (1971).

President may not spend more than the amount Congress has authorized as a ceiling. In other words, contrary to the discussion above, appropriations are permissive, not mandatory. As substantiating this view, Corwin suggests as evidence that appropriations early in the history of the Nation took the form of lump sum grants.<sup>91</sup>

Of course, Corwin forgets that appropriations in the early history were extremely minute in comparison.<sup>92</sup> Further, the idea that the Executive had discretion was argued in the early Congresses and was not settled. Even the position of those who supported administrative discretion was far from Corwin's idea and also that of the proponents of executive impoundment. For example, William Smith, a close supporter of Alexander Hamilton, stated the principal argument for executive discretion in 1793:

... there may be cases of a sufficient urgency to justify a departure from it...; as if an adherence would..., prove ruinous to the public credit, or prevent the taking measures essential to the public safety, against invasion or insurrection. In cases of that nature, which cannot be foreseen by the Legislature nor guarded against, a discretionary authority must be deemed to reside in the President...<sup>93</sup>

Therefore, contrary to Corwin's belief that the issue was settled, the amount of "reasonable discretion" was not decided in our early history.<sup>94</sup> Further, it would seem that the causes for discretion were urgency, not mere desire to hold the budget under the debt limitation.

In further reaction to those who believe that appropriations are permissive only, it would seem logical that if the Congress passes a bill which becomes law after the President's signature, Congress intended that the program be effectuated. Presidents argue the appropriation is only a ceiling. The total appropriation could, however, be considered an amount within which the President will achieve the goals of the program economically and efficiently.<sup>95</sup> As Woodrow Wilson stated:

The Congress and the Executive should function within their respective spheres... the Congress has the power and the right to grant or deny an appropriation..., or to enact or refuse to enact a law, but once an appropriation is made or a law passed, the appropriation should be administered or the law executed by the executive branch of the Government.<sup>96</sup>

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<sup>91</sup> E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 80 (1965).

<sup>92</sup> L. WHITE, *THE FEDERALISTS*, 326 (1956).

<sup>93</sup> *Id.* at 332.

<sup>94</sup> *Id.* at 334.

<sup>95</sup> Stassen, *supra* note 12, at 1181-1183.

<sup>96</sup> Davis, *Congressional Power to Require Defense Expenditures*, 33 *FORDHAM L. REV.* 51 (1964).

Further, Mr. Justice William H. Rehnquist stated in a memorandum written as assistant attorney general: "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent."<sup>97</sup>

Lastly, it must be asked whether the founding fathers would have given the Congress the power to override the President's veto by a two-thirds vote if they had wanted the President to have the type of discretion being argued for by the proponents of impoundment.

After commenting on this provision to allow the Congress to override the veto, Hamilton noted, "The king of Great Britain . . . has an absolute negative upon the acts of the two houses of Parliament."<sup>98</sup> This nation's President has a qualified negative. Further, the President's veto power will "... have the effect of preventing their becoming laws, unless they should afterwards be ratified by two-thirds . . ."<sup>99</sup> These words could not be clearer in their intent. Bills are law when ratified by two-thirds of the Congress or, of course, signed by the President. They are law, clearly not subject to any later retroactive item veto by impoundment.<sup>100</sup>

### *Separation of Powers*

One other constitutional argument against impoundment which should be considered is separation of powers. This concept can be traced back as far as Aristotle. He differentiated between the legislative, executive, and judicial functions and stated that these could be located in separate agencies.<sup>101</sup> Although others commented upon this concept, e.g., John Locke, the Frenchman Baron de Montesquieu is the man who provided the most lucid explanation of this idea.<sup>102</sup>

However, the concept was also rooted in our history. The distrust of executive power in the form of monarchy is too well understood to need documentation. Overtones of separation of power can be found in the Declaration of Independence statement that "He has made Judges dependent on his Will alone," and in state constitutions like North Carolina's provision that "The legislative, executive, and judicial powers of government ought to be forever separate and distinct of one another."<sup>103</sup>

Although more power was given to the President after the debacle with the Articles of Confederation, the concept of separation of powers

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<sup>97</sup> 1973 CONG., *supra* note 1, at 215.

<sup>98</sup> A. HAMILTON, *supra* note 78, at 416.

<sup>99</sup> *Id.* at 442.

<sup>100</sup> Stassen, *supra* note 12, at 1205-1206; Church, *supra* note 18, at 1249-1250.

<sup>101</sup> ARISTOTLE, *THE POLITICS*, 188-189 (Ernest Baker transl. 1946).

<sup>102</sup> C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent transl. 1900).

<sup>103</sup> D. MINAR, *IDEAS AND POLITICS—THE AMERICAN EXPERIENCE* 124 (1964).

can be seen in the division of powers in the first three articles of the Constitution and in later Supreme Court decisions. For example, Chief Justice Marshall stated in 1825, "the difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law."<sup>104</sup>

However, as subsequent court decisions have reinforced, the founding fathers did not mean complete separation. Madison stated it well when, in discussing Montesquieu, he stated:

... he did not mean that these departments ought to have no *partial agency* in, or *control* over, the acts of each other. His meaning, as his own words import, ... can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.<sup>105</sup>

When the President impounds funds from programs authorized and appropriated by the Congress, is not Madison's principle being violated?

## V. CONCLUSION

In summary, the ultimate point is that the President of the United States does not have the statutory, case, or constitutional power to impound funds appropriated by Congress. Even though the current President can claim that his recent predecessors did impound, this comment has attempted to show that Presidents before Franklin Roosevelt did so only for the purpose of economy and efficiency. The fact that an act is done more than once does not provide legal justification. Further, various constitutional provisions granting power to Congress, the fact that congressional acts in most cases are mandatory, the veto, and the concept of separation of powers substantiate the argument that the President lacks the power to impound.

However, at various times, Presidents have exercised powers where it would rationally seem there would be doubts as to whether the President had the powers. Power exercised is power. As one commentator has suggested, "... the President can and may withhold expenditures of funds to the extent that the political milieu in which he operates permits him to do so."<sup>106</sup> There is no question that, especially since FDR, the Presidential power has increased manifold due to crisis, war, and the complexity of governmental business. The question of impoundment

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<sup>104</sup> Wayman v. Southard, 23 U.S. 1, 44 (1825).

<sup>105</sup> A. HAMILTON, *supra* note 78, at 302-303.

<sup>106</sup> Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 43 N.C.L. REV. 533. (1965).

is only another example of this phenomenon of concentration of power into the hands of the Executive. Congress has at the same time stood by helplessly in many areas due to its inability to act swiftly with one voice and its lack of research and alternative policy formulation capabilities. This development towards executive hegemony is not an American anomaly. If anything, the United States Congress is more powerful in relation to its executive than any other legislative body in the world.

This constitutional crisis brought about by the question of impoundment has been long in coming. It is hoped that it will not fizzle out as Congress returns to the dustbins of history. It is time for Congress and the American people to question the operation of our government. The concept that we are and should be truly represented in a legislative body of men and women who attempt to speak the general will, rather than by one man, should be more than a myth. It should be a reality.

GERALD A. FIGURSKI

