THE PRESIDENT AND THE CONGRESS: IMPOUNDMENT OF DOMESTIC FUNDS

I. INTRODUCTION

The current battle over the propriety of executive impoundment of congressionally authorized and appropriated funds for domestic programs is not new to the political departments of the federal government. The history of presidential impoundment dates back at least to 1803, when President Jefferson informed Congress that he would not spend certain authorized and appropriated funds to purchase gunboats.[1] In recent history, Presidents Truman, Eisenhower, Kennedy, Johnson and Nixon have all exercised impoundment powers.[2] Because of the complexity of the issue of impoundment this Note will focus on presidential impoundment of funds authorized and appropriated for domestic programs. To do otherwise would require extensive treatment of the President's power as Commander-in-Chief of the armed services, and his power in the field of foreign affairs.[3]

Conflict over impoundment of funds for domestic programs is inevitable, given the amorphous region of shared powers and overlapping authority existing between Congress and the President. Additional impetus for conflict is produced by the disparate nature of the functions of the executive and legislative branches of the federal government, and the justifiable desire of each branch to protect its own bailiwick. Recent impoundments by the Nixon Administration have resulted in renewed debate on the propriety and legality of such actions.

The depth of feeling among the participants in the current confrontation is amply demonstrated by the plethora of bills introduced in the 93rd Congress,[4] the testimony of witnesses before the Senate Subcommittee on Separation of Powers,[5] the

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[1] See, e.g., Hearings Before the Subcommittee on Separation of Powers, Senate Judiciary Comm., 92d Cong., 1st Sess., on the Impoundment of Appropriated Funds [hereinafter 1971 Hearings]; L. Fisher, President and Congress: Power and Policy 122-27 (1972); 1 Richardson, Messages and Papers of the Presidents 360-61 (1896), presenting President Jefferson's Annual message to Congress with respect to the non-use of an appropriation for gunboats; Impoundment of Funds: Constitutional Crisis Ahead, 31 Cong. Quarterly 213 (1973); Boggs, Executive Impoundment of Congressionally Appropriated Funds, 24 U.Fla. L. Rev. 221, 222-24 (1972).

At an earlier stage of the nation's history, the House of Representatives attempted to use the power of the purse in a manner similar to the Nixon Adminstration's use of the statutory impoundment power. See W. Binkley, President and Congress 211, citing Williams, Diary of Hayes, March 23, 1879.

[2] See, e.g., L. Fisher, President and Congress: Power and Policy; Impoundment of Funds: Constitutional Crisis Ahead, supra note 1.

[3] Cf. United States v. Curtiss Wright Export Co., 299 U.S. 304 (1936).

[4] See, e.g., S. 394, 93d Cong., 1st Sess. (1973), co-sponsored by 51 Senators, directing the use of appropriated funds for Rural Electrification Adminstration loans (passed by the Senate, Feb. 21, 1973, 119 Cong. Rec. 3087 (1973)). See also S.653; S. 373; H.R. 5193; H.R. 4722; H.R. 2820; H.R. 2817; H.R. 2816; H.R. 2450; H.R. 2330; H.R. 2317; H.R. 2050; H.R. 1992; H.R. 1873; H R. 1845; H.R. 1844; H.R. 1843; H.R. 1760; H.R. 1584; H.R. 1131; H.R. 1035; H.R. 886; H.R. 622; H.R. 553; H.R. 415; H.R. 363; H.R. 238; H.R. 125; H.R. Con. Res. 3; H.R. Res. 154; H.R. Res. 122; H.R. Res. 76, 93d Cong., 1st Sess. (1973).

[5] See 1971 Hearings; Joint Hearings on S. 373 Before the Ad Hoc Sub-comm. on Impoundment of Funds of the Comm. on Government Operations and the Subcomm. on Separation of Powers of the Comm. on the Judiciary United States Senate, 93d Cong., 1st Sess. (1973) [hearinafter 1973 Hearings].

coverage of the issue in the media,[6] the multitude of cases challenging presidential impoundments which have been filed in the federal courts,[7] and the filing of amicus curiae briefs by twenty-two Senators, four Representatives and numerous states in *State Highway Commission of Missouri v. Volpe*.[8]

In order to determine the extent of the presidential powers to impound funds, and the ability of Congress to prevent such action, it is necessary to consider the constitutional and statutory bases for an assertion of powers by each branch, and the rationale supporting the exercise of such powers. The federal system is one of separate branches of government which share certain powers.[9] Although the Constitution states that the executive power shall be vested in a President "who shall take care that the laws be faithfully executed,"[10] and that "All legislative Powers" granted in the Constitution "shall be vested in a Congress,"[11] only during the peak of political struggle between the Congress and the President can attempts be made to delineate evanescent limits of legislative and executive power. This Note will discuss the hazards of attempting to make a final delineation, in the context of discussing the propriety and legality of executive impoundment of funds authorized and appropriated by Congress for the implementation of domestic programs.

II. THE NATURE OF IMPOUNDMENT

Before discussing the legality of impoundment, it will be helpful briefly to describe the general nature of such action. Although impoundment may serve as a vehicle for expression of presidential disapproval of congressional action on purely policy grounds, it may also serve a valid administrative function. When properly used as an administrative tool, impoundment does not affect the ability of the program whose funds are reserved to meet its intended goals. It merely attempts to get the most output for each tax dollar spent.

Administrative functions are complicated by an enormous governmental bureaucracy.[12] A President can no longer personally supervise this bureaucracy and requires assistance in the control and supervision of the executive department.[13] "The Bureau of the Budget . . . serves the President as an 'administrative general staff.' . . . Without it the President could not begin to do his job as Chief Executive. . . ."[14] The Bureau

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[6] E.g., N.Y. Times, March 7, 1973, at 50; The Wall Street Journal, March 2, 1973, at 5; N.Y. Times, February 28, 1973, at 43; N.Y. Times, February 25, 1973, § 3 at 1; Washington Post, February 21, 1973, at 1.

[7] See, e.g., 3 BNA Envir. Reptr. Cases 937, 1100, 1191 (1973).

[8] Brief for Senator Ervin et al. as Amicus Curiae, State Hwy Comm'n v. Volpe, No. 72-1512 (8th Cir. April 2, 1973).

[9] R. Neustadt, Presidential Power, the Politics of Leadership 42 (Mentor ed. 1964); The Federalist No. 47 (Madison).

[10] U.S. Const. art. II, § § 1, 3.

[11] U.S. Const. art. I, § 1.

[12] On June 30, 1816, there were only 535 government civilian employees in Washington, D.C., and another 4,302 dispersed throughout the states; Bureau of the Census, Statistical Abstract Supplement, Historical Statistics of the United States, Colonial Times to 1957, at 710 (1965). Total governmental civilian employment as of June, 1971 was 2,811,779, with 1,702,994 executive department employees and 1,061,272 employees of independent agencies. The 1973 World Almanac and Book of Facts, at 130-31 (1972).

[13] Cf. Exec. Order No. 11,609, July 22, 1971, 36 Fed. Reg. 13,747; Exec. Order No. 8248, Sept. 8, 1939, 4 Fed. Reg. 3864, establishing the Executive Office of the President.

[14] C. Rossiter, The American Presidentcy 102 (1956).

of the Budget[15] engages in a broad range of activities, including impounding of funds, which are designed to achieve "more efficient and economical conduct of the government service."[16]

The President could not validly be criticized if he reserved one billion dollars because a project was completed at a cost below the appropriated sum.[17] The Anti-Deficiency Acts of 1905 and 1906[18] demonstrate that the Congress has recognized the necessity of allowing the President to take such action, and has specifically provided for it. The President would be charged with mismanagement and waste if he did not reserve excess monies whenever programs were completed for less than their budgeted costs. In the absence of a statute, the duty to faithfully execute the laws should still make it incumbent upon the President to achieve congressionally mandated goals at the least financial cost to the taxpayer.[19] However, as will be discussed later, impoundment used as an administrative tool cannot constitutionally override the will of Congress.[20]

In addition to reserving unexpended funds from programs completed below budgeted cost, the President has another administrative task with regard to spending. Because of the sheer size of the federal government, Congress has become dependent upon the greater bureaucratic expertise of the executive branch for the preparation of an annual budget.[21] Such dependence places the executive in the advantageous position of having the initiative in the budgetary process and enjoying a vastly superior pool of talent and resources from which to draw in marshaling its fiscal arguments. Pursuant to the Budget and Accounting Act of 1921,[22] the President's budget messages include the administration's request for new obligational authority for the coming year, estimates for the current year and a breakdown of revenues and expenditures for the last completed fiscal year.[23] The yearly analysis of a budget of this magnitude and complexity severely taxes the limited resources of Congress.

New obligational authority requested by the President, allowing governmental obligations to be incurred and monies to be withdrawn from the treasury,[24] consists

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15 Now the Office of Management and Budget [hereinafter OMB], pursuant to Reorganization Plan No. 2 of 1970, effective July 1, 1970, Executive Order No. 1154, 35 Fed. Reg. 10737 (1970).

16 C. Rossiter, supra; see 119 Cong. Rec S 1968-71 (daily ed. April 4, 1973), summarizing the statutory functions of OMB.

17 See U.S.C. § 665 (1970); cf. statement by Rep. Mahon accompanying the introduction of H.R. 5193, 93d Cong., 1st Sess. (March 6, 1973):

> I believe that the Executive should have certain limited powers to reserve funds in public expenditures, as provided for in the Anti-Deficiency.
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> However, I agree with the Speaker that many of the recent impoundment actions by the Administration have overstepped the bounds of reasonableness. Such actions frustrate the intent of Congress by substituting the judgment of the Executive for the judgment of Congress.

18 Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of February 27, 1906, ch. 510, § 3, 34 Stat. 48-49 (codified at 31 U.S.C. § 665(c) (1970)).

19 See Church, Impoundment of Appropriated Funds, 22 Stan. L. Rev. 1240, 1245 (1970). The Bureau of The Budget, Examiners Handbook (1952) states that "[r]eserves must not be used to nullify the intent of Congress with respect to specific projects or level or programs," cited in Church, supra at 1245 n.29.

20 See Church, supra note 19 at 1245. See also H.R. Misc. Rep. No. 1797, 81st Cong., 2d Sess. 311 (1950).

21 The President has constitutional authority to recommend to the Congress "such measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3; see 31 U.S.C. § 11 (1970); Act of June 10, 1921, ch. 18, 42 Stat. 20 (1921); Act of August 23, 1912, ch. 350, § 9, 37 Stat. 415 (1912).

22 Act of June 10, 1921, ch. 18, § 201, 42 Stat. 20 (1921).

23 31 U.S.C. § 11(a) (1970); see the Annual Budget of the United States for Fiscal 1973.

24 Congressional Quarterly Service, Federal Economic Policy 76 (3d ed. March, 1968); see U.S. Const. art. I, §§ 8, 9, requiring congressional authorization to incur debt or withdraw money from the treasury.

largely of appropriations. Although most appropriations are for obligations to be paid within one year, some are for multi-year or no-year (indeterminate) duration. Impoundment affects each of these types of obligational authority differently. While one-year appropriations would probably expire during a period of impoundment, impoundment of multi-year or no-year appropriations would merely put off spending to a future time.

Accordingly, it is apparent that presidential action taking custody of funds can virtually cancel a program if the impoundment period exceeds the life of the appropriation; otherwise, such action may retard spending and seriously diminish the effectiveness of a congressional program. Strong reactions from potential beneficiaries of terminated or damaged programs and the vocal supporters of these programs may call into question the motives behind presidential action. The intensity of the current controversy is a reaction both to the fact that the Nixon Administration is impounding congressionally authorized and appropriated funds for domestic uses, and that these impoundments have a wide-ranging and conspicuous impact.[25] If the American people were firmly behind the policy aspects of the specific impoundments, Congress might not be as eager to restrict the administration's activities.[26] However, the effects of the $8.7 billion impoundment[27] have touched nearly every congressional district and have prompted the introduction of a multitude of bills,[28] including H. Res. 154, 93rd Cong., 1st Sess., which would enable Representatives to bring suits on behalf of the House for the purpose of releasing funds impounded by the President contrary to law.[29]

III. CONSTITUTIONAL OVERVIEW OF THE IMPOUNDMENT PROBLEM

A. A Broad Outline of the Controversy

The grey area of overlapping presidential and congressional powers, and the resulting potential for conflict, was discussed in a concurring option in *Youngstown Sheet & Tube Co. v. Sawyer.*[30] There, Justice Jackson stated that "Presidential powers

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[25] Statement by Barry Commoner, 1973 Hearings at 350.

[26] See E. Herring, Presidential Leadership: The Political Relations of Congress and the Chief Executive 68 (1940).

[27] Communication from the Executive Office of the President, Office of Management & Budget, transmitting a Report Pursuant to Title IV of Public Law 92-599, The Federal Impoundment and Information Act, February 5, 1973, printed as S. Doc. No. 93-4, 93d Cong., 1st Sess. (1973) at 11 [hereinafter OMB Report]. This figure does not include $6 billion of funds under the Water Polution Control Act Amendments of 1972, which the Nixon Administration has not allocated. See 31 Cong. Quarterly 270 (1973).

[28] See note 4 supra.

[29] The breadth of the conflict may be illustrated by comparing this statement made by Senator Long:

> If we can't restrain ourselves from spending $30 billion more than we are taking in . . . then we shouldn't complain about a fellow who refuses to bankrupt the country. The Washington Post, January 26, 1973, at A2.

With the following excerpt from the Senate Report of S. 394, the amendment to the Rural Electrication Act:

> [B]y attempting to enforce some laws, and ignor some others, the President is violating his duty to execute the laws passed by Congress. The Washington Post, February 21, 1973, at A1.

[30] 343 U.S. 579 (1952) (concurring opinion).

are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[31] Justice Jackson presented, in a simplified form, three possible situations "in which a President may doubt, or others may challenge, his powers."[32] Each of these situations focused on the degree to which Congress supported or opposed presidential action. Presidential power is at its maximum when Congress is supportive, at its minimum when the "President takes acts incompatible with the expressed or implied will of Congress," and in a zone of twilight when Congress has concurrent authority and has not expressed a disposition.[33]

The term "impoundment" has become a code word which is used as a label for various executive actions. The firmest bases for defending presidential impoundment of authorized and appropriated funds are found in statutory provisions. Where express statutory language authorizes the President to reserve funds, his actions fall into Justice Jackson's category of "maximum power."[34] Court challenges to such impoundments, where the impoundments are not excessive or when the result of the impoundments will not be to reduce significantly the level of operation of the funded program, will probably not succeed. Similarly, where Congress expressly or by implication demonstrates its intent to permit certain impoundments, or where Congress directs that monies may not be spent when statutory conditions are not met, presidential impoundments may be deemed immune from challenge.[35] Permissive congressional appropriations invite presidential discretion and, if Congress has not otherwise made its intent known, this type of appropriation may be interpreted so as to allow impoundment of funds.[36]

However, when the President's actions in impounding funds are incompatible with the expressed or implied intent of Congress, presidential actions falls into Justice Jackson's category of "minimum" power. In such situations, the President may "rely only upon his own constitutional powers minus any constitutional powers of the Congress over the matter."[37] He cannot trespass upon constitutional authority belonging solely to the Congress. The doctrine of separation of powers, although never explicitly enunciated in the Constitution as an internal check on each of the three great departments of government,[38] is a vital, cherished principle of democracy and "preserve[s] the liberties of the people from excessive concentrations of authority."[39] If the government is to function constitutionally, it is necessary for each of the repositories of constitutional power to keep within its proper domain.[40]

Finding limits upon the powers of coordinate branches of government when each is operating in the zone of twilight inevitably causes friction between the departments of government. It is at this point that conflict arises, and a restive Congress may, as in the current situation, seek to challenge executive action. Both sides of the impoundment issue claim infringement of their particular constitutional powers.

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31 Id. at 635.

32 Id. at 635-38.

33 Id.

34 See 31 U.S.C. § 665 (1970); Anti-Deficiancy Acts of 1905 and 1906. Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257 (1905), Act of February 27, 1906, ch. 510, § 3, 34 Stat. 48-49 (1906).

35 343 U.S. 635; see, e.g., Title IV of the Civil Rights Act of 1964, 42 U.S.C. § § 2000d to 2000d-4 (1970).

36 An example of permissive appropriation is the Rural Electrification Act of 1936, 7 U.S.C. § 901 et seq. (1970). See also Title II of the Revenue and Expenditure Act of 1968, Pub. L. No. 90-364 § § 202, 203, 82 Stat. 251, 271-72 (1968).

37 343 U.S. at 637. The four classifications used in this section are presented at length in Church, supra note 19.

38 National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 591 (1949).

39 United Pub. Workers v. Mitchell, 330 U.S. 75, 91 (1946). "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." Myers v. United States, 272 U.S. 52, 293 (1926).

40 Rescue Army v. Municipal Court, 331 U.S. 549 (1946).

Legislators challenge the President's refusal to spend authorized and appropriated funds as an encroachment upon congressional spending powers.[41] Alternatively, "if Congress tried to compel the President to spend the funds, he would charge usurpation of executive responsibilities."[42]

B. Relevant Constitutional Powers of the President and Congress

In order to clarify this area of controversy, it is necessary to investigate in more detail the constitutional powers possessed by the opposing institutional advocates, turning first to those powers granted by the Constitution to the President, and then considering the authority of the Congress.

The first words of article two of the Constitution, stating that the "executive Power shall be vested in a President," are not usually considered to be an affirmative grant of domestic power to the President.[43] However, since "the real potency of the Executive office does not show on the face of the Constitution,"[44] the executive power clause may arguably enlarge the authority granted to the President in domestic affairs by the balance of article II.[45] It may be viewed as the functional equivalent of the "necessary and proper" clause[46] which gives Congress freedom to choose a reasonable and appropriate manner of achieving legitimate constitutional ends.[47]

One may wonder why the founding fathers, in drafting the Constitution, did not use another term instead of executive power, or, as was done in article I (the legislative article), limit the executive power by using the words "all executive power herein granted." Clearly, after their experience with the Articles of Confederation, the members of the Constitutional Convention of 1787 wanted to create a strong central government with a strong executive department.[48] To advocate that the three branches of government are co-equal is inconsistent with an assertion that the chief executive's role is merely to implement blindly laws passed by the legislature. Therefore, the executive power clause must mean more than obedience; it must involve some degree of discretion.[49]

Different Presidents have taken different views of their constitutional role in the government. The Stewardship Theory of the Presidency, propounded by President Theodore Roosevelt, endorses the broader interpretation of executive power. Roosevelt believed that only the express limitations of the Constitution or statues passed in pursuance thereof could limit the power of the President. In his view,

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[41] Fisher, Funds Impounded by the President: The Constitutional Issue, 38 Geo. Wash. L. Rev. 124, 136 (1969); Fisher, Presidential Spending Discretion and Congressional Controls, _____ Law & Contemp. Prob. _____ (1972); reprinted in 1973 Hearings at 683.

[42] See Fisher, Funds Impounded by the President: The Constitutional Issue, supra note 41, at 136.

[43] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); United States v. Curtiss Wright Export Corp., 299 U.S. 304 (1936). See also W. Taft, The Chief Magistrate and His Powers, 139-44, 144-45 (1916). The Government may be on the verge of making such an argument. Cf. Points and Authorities in Support of Defendant's Motion to Dismiss at 19, City of New York v. Ruckelshaus, Civ. Action No. 2466-72 (D.D.C. 1973).

[44] R. Jackson, The Supreme Court and the American System of Government 64 (Harper Torch ed. 1963).

[45] See, e.g., United States v. Curtiss Wright, 299 U.S. 304 (1936) (inherent power in foreign affairs). See also the discussion of the Stewardship Theory in the text accompanying note 50 infra.

[46] U.S. Const. art I, § 8.

[47] Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[48] See, e.g., 1 M. Farand, Records of the Federal Convention of 1787, at 19, 21, 24-27 (rev. ed. 1966); 4 M. Farand at 31; The Federalist Nos. 70, 71, 72, 73.

[49] But see 1 M. Farand, supra note 48, at 61-67.

every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people.... [He] declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it....[50]

President Taft, however, held the opposite opinion. He stated that any claimed presidential power which cannot be fairly and reasonably "traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise," cannot be assumed by the executive.[51] He believed that the required specific grant of powers "must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof."[52] Taft's conclusion that there is no "undefined residium of power" which a President can exercise even where it seems to him to be in the public interest, can be used as a starting point to refute the assertion that the executive power clause is the elastic clause of article II.[53]

These two conflicting approaches define the opposite poles of executive power. There are a myriad of intermediate positions which can be adopted here, and which must be considered when comparing executive with congressional powers. The impoundment issue will not be resolved by determining which branch of government can deal most expeditiously with funding or spending, but must depend on the allocation of powers under the Constitution and on an analysis of the conditions which have given rise to the constitutional question.[54]

We turn now to an investigation of the constitutional powers of Congress. The Constitution expressly grants to Congress the "Power to lay and collect taxes, ... to pay the Debts [of the government, and] To borrow money on the Credit of the United States."[55] Further, the Constitution mandates that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[56] In carrying out these constitutional provisions it was not intended that Congress passively rubber-stamp the actions of the executive branch of Government. While discussing President Kennedy's impoundment of funds for the development of the B-70 bomber, a House Report expressed congressional feeling that "Congress is not a bank which can grant or refuse a loan. The committee submits that it can also make its own investments."[57] These two sections of Article I squarely place non-delegatable duties upon the Congress and limit the authority of each of the other branches of government in this area. When Congress exercises this financial authority, and its actions become law, each President is obligated by the Constitution and his oath of office to faithfully execute the laws.[58]

Another factor to be considered in the balance of power of the President and the Congress is the presidential veto. The power of absolute veto was considered and denied to the President by the Convention of 1787.[59] Although the President has a constitutional veto power, it may be overridden by a two-thirds vote of both houses of Congress.[60] It would seem improper to permit a President to veto a bill, have Congress

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50 C. Rossiter, supra note 15, at 77.

51 W. Taft, Our Chief Magistrate and His Powers 138 (1916), cited in J. Burns, Presidential Government: The Crucible of Leadership 110 (1966).

52 Id.

53 Id.

54 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 630 (concurring opinion).

55 U.S. Const. art I, § 8.

56 U.S. Const. art. I, § 9.

57 H.R. Rep. No. 1406, 87th Cong., 2d Sess. 7 (1962).

58 U.S. Const. art. II, §§ 1, 3.

59 See 1 M. Farand, supra note 48, at 103 (drafters intent not to give the President an absolute veto).

60 U.S. Const. art. I, § 7. See, e.g., Environmental Water Pollution Act of 1972, Pub. L. No. 92-500 86 Stat 816 (1972).

re-enact the bill over the veto, and then to find a constitutional rationale for allowing impoundment to nullify such a law. An overriden veto creates a law, and the President is bound to enforce the law. Contending 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 inappropriate.[61] Although the Constitution makes no specific mention of impoundment, such action might be interpreted to be an unconstitutional absolute veto,[62] or an unauthorized item veto.[63]

C. Executive versus Ministerial Duties

Although the President has a constitutional mandate to faithfully execute the laws, he possesses a great deal of discretion in carrying out this requirement. Conflict arises where the President, as a result of this discretion and as an incident of his own legitimate exercise of executive power,[64] acts within the ambit of powers belonging to Congress. Such discretion, derived from the word "faithfully" and the executive power clause, comes into play because the President must interpret the law and decide which laws to enforce – either vigorously, moderately, or not at all. The sheer number of laws in the statute books requires that the President pick and choose those to which he will give particular attention.[65]

President Kennedy's choice in 1963 not to impound education funds,[66] and President Taft's decision in 1915 to impound salable federal property,[67] were constitutional elections to faithfully execute independent presidential interpretations of the Constitution and relevant statutes. The Supreme Court sustained President Taft's "[i]n aid of proposed legislation" rationale for withholding from public sale land which Congress had specifically authorized for sale.[68] Although no court challenge to President Kennedy's action was mounted, commentators,[69] relying on the right to equal education in *Brown v. Board of Education*,[70] contested the constitutionality of the President's argument that impoundment of congressionally authorized monetary assistance to segregated schools was beyond his executive perogatives.[71]

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61 Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838).

62 Testimony by Senator Frank Church of Idaho, 1973 Hearings at 71-77.

63 See H. Black, The Relation of Executive Power to Legislation 102 (1919), quoting President Chester A. Arthur's Annual Message, December 4, 1882, recommending a Constitutional amendment to allow the President an item veto.

64 Accord, Stockman v. Leddy, 55 Colo 24, 129 P. 220 (1912); see Yakus v. United States, 321 U.S. 414 (1944). See generally Jaffe, An Essay on Delegation of Legislative Power: 1, 47 Colum. L. Rev. 359 (1947).

65 See J. Ferguson & D. McHenry, The American Federal Government 324 (9th ed. 1967).

66 See N.Y. Times, April 20, 1963, at 1. It should be remembered that Congress acted soon thereafter to authorize the president to impound such funds, 42 U.S.C. §§ 2000-d to 2000d-4 (1970).

67 United States v. Midwest Oil Co., 236 U.S. 459 (1915); see 29 Stat. 526 (1897).

68 United States v. Midwest Oil Co., 236 U.S. at 467.

69 Doyle, The Power of the President to Withhold Federal Funds from Educational Institutions Which Discriminate Among Students on Grounds of Race, U.S. Lib. of Cong. Legislative Ref. Serv. at 1-2 (American Law Division 1961). See also 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. 32 (1962); Kranz, A 20th Century Emancipation Proclamation: Presidential Power Permits Withholding of Federal Funds from Segregated Institutions, 11 Am. U.L. Rev. 48 (1962).

70 349 U.S. 294 (1955).

71 A strong constitutional argument could have been made based on Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that there was no real choice between the constitutional equal protection doctrine and the statute; i.e., the statute must accede to the superior constitutional doctrine of equal protection.

Discretion does not, however, exist at all times. The chief executive is constitutionally bound to perform a function that is purely ministerial. In *Marbury v. Madison*,[72] Chief Justice Marshall reasoned that the classification of executive action as ministerial or executive would revolve around the specific facts and law involved. This distinction is crucial to an understanding of the impoundment problem. The President can only be compelled to perform a ministerial function. The Supreme Court, in *Decatur v. Paulding*,[73] held that mandamus would not lie to require the executive to perform a duty involving the exercise of judgment and discretion.

Early in its history the United States Supreme Court decided, in *Kendall v. United States*,[74] that the President had no authority to withhold funds where a claimant had fully performed services for the government and was demanding payment pursuant to express congressional authorization. This case is often cited to support the proposition that the President has no authority to suspend acts of Congress.[75] On its facts, however, the case presented a situation where the President performed the ministerial function of paying a debt of the government to a clearly identified creditor with monies provided by Congress. The Court reasoned that such a vested right to receive payment could not be negated by the exercise of executive discretion.[76]

In the recent appeal of the federal district court decision in *State Highway Commission of Missouri v. Volpe*,[77] the State of Missouri and the amicus curiae argued that the President is bound to spend the appropriated funds at issue as part of his ministerial duties.[78] The *Volpe* fact pattern was similar to that which the Court held in *Kendall* resulted in a vested right to payment. The statute at issue anticipated early apportionment of authorized funds by a fixed statutory formula,[79] a purely ministerial task.[80] Further, subsequent to other required steps,[81] the statute anticipated federal government approval of state programs purusant to statutory guidelines,[82] and the signing of a formal project agreement with the state in which the highway was to be built. Such a contract was a "contractual obligation of the Federal Government,"[83] analogous to the vested rights in the *Kendall* case which mandated presidential completion of a nondiscretionary ministerial duty.

These cases indicate the type of situations where the President can be forced to carry out the statutorily enacted will of Congress. Later on, we will consider whether Congress can mandate spending through specific language to that effect.[84] For the present, it is important to emphasize that any court challenge to the power of the executive to impound funds appropriated for domestic programs must center upon the specific statutory or constitutional powers of the executive department. The motive that prompted the President to act is irrelevant if he acts within the limits of his

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72 5 U.S. (1 Cranch) 137 (1803).

73 39 U.S. (14 Pet.) 497 (1840); see Mississippi v. Johnson, 71 U.S. 475 (1866); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

74 37 U.S. (12 Pet.) 524 (1838).

75 See Fisher, Funds Impounded by the President: The Constitutional Issue, 38 Geo. Wash. L. Rev. 124, 126, (1969).

76 Kendall v. United States, 37 U.S. (12 Pet) 524, 612-13 (1838); Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803). See also United States v. Schurz, 102 U.S. 378 (1880); U.S. Const. amend. 5 (right to property).

77 347 F. Supp 950 (W.D. Mo. 1972), aff'd, No. 72-1512 (8th Cir. April 2, 1973).

78 See Brief of Senator Ervin et al., as Amicus Curiae, and Petitioner's brief in State Hwy Comm'n v. Volpe, No. 72-1512 (8th Cir. April 2, 1973).

79 23 U.S.C. § 104(b) (1970); 23 U.S.C. § 104(b)(5) (1970) requires apportionment of funds in advance of the year for which they are authorized.

80 See 1971 Hearings, supra note 1, at 80 (testimony of Turner, Federal Highway Administrator).

81 E.G., 23 U.S.C. §§ 105, 106, 110, 118(a) (1970).

82 23 U.S.C. §§ 106, 109 (1970).

83 23 U.S.C. § 106(a) (1970).

84 See text accompanying notes 87 to 181 infra.

statutory or constitutional powers.[85] If the President is considered to have executive discretion in this area, his supporters may properly assert that impoundment decisions "involve policy judgements concerning changing national needs and highly technical predictions about their effect upon the economy."[86]

IV. THE ROLE OF CONGRESS

A. Statutory Basis for Impoundment

On numerous occasions, Congress has recognized the fiscal necessity for granting the President discretion in spending monies authorized and appropriated by Congress. The result has been the enactment of a variety of statutes giving the President authority to create reserves and impound funds. The first of the modern statutes in this area were the Anti-Deficiency Acts of 1905 and 1906.[87] These early acts, as amended,[88] are still in force and permit the executive branch to apportion appropriations and authorizations in order to achieve the most effective and economical use of multi-year and no-year appropriations, and to establish reserves

> to provide for contingencies or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available.[89]

They further allow the executive the power to impound funds and create reserves in an effort to reduce the amounts in supplemental appropriation requests and deficiencies for appropriations expiring during the current year.[90] Additionally, the Acts require that whenever it is determined that any amount reserved under their authority "will not be required to carry out the purposes of the appropriation concerned, [the officer creating the reserve] shall recommend the recission of such amount" to Congress.[91]

This latter provision of the amended version of the Anti-Deficiency Acts was recently cited, in dicta, by the Eighth Circuit in the *Volpe* decision to support a limitation on the power of the executive branch to create reserves under the Anti-Deficiency Act.[92] A more literal interpretation, taking all of the provisions of 31 U.S.C. § 665 (c) as a whole, would probably find that the acts grant to the executive a limited power to create reserves while simultaneously obligating him to recommend recission of relevant authorization or appropriation statutes whenever reserved funds are no longer needed to fulfill the purposes for which they were provided.

Although the argument does not seem to have been made in any of the recent cases, the provision creating the duty to recommend recission presumes that, when the executive does not recommend recission, the reserved funds will indeed be required by

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85 See First Federal Savings and Loan Ass'n v. Loomis, 97 F.2d 831 (7th Cir., cert. dismissed sub nom. Martin v. First Federal Savings and Loan Ass'n, 305 U.S. 666 (1938).

86 Statement of Dean Joseph T. Sneed, Deputy Attorney General, on Presidential Authority to Impound Appropriated Funds, 1973 Hearings at 5.

87 Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of February 27, 1906 ch. 510, § 3, 34 Stat. 48-49 (codified at 31 U.S.C. § 665(c) (1970)).

88 31 U.S.C. § 665(c) (1970).

89 31 U.S.C. § 665(c)(2) (1970).

90 31 U.S.C. § 665(c)(1) (1970).

91 31 U.S.C. § 665(c)(2) (1970).

92 State Hwy Comm'n v. Volpe, No. 72-1512 at 32.

the executive in order to meet or fulfill the purposes of the statutory program. By implication, such an argument limits impoundments of one-year appropriations, since they may expire during the impoundment period, terminating the availability of the reserved funds. In fact, the 1952 Examiners Handbook of the Bureau of the Budget cautions that on an Anti-Deficiency Act basis, "[r]eserves must not be used to nullify the intent of Congress with respect to specific projects or level of programs."[93]

The ceiling on the National Debt, which has been enacted by Congress under its express constitutional power "to borrow Money on the Credit of the United States,"[94] has been cited by President Nixon as authority to impound monies appropriated for domestic programs.[95] Under this theory, it is argued that the President has been granted implied power to impound appropriations which, if spent, would cause the executive to borrow money in excess of the statutory debt limit. Such borrowing would be an ultra vires act.

Although the debt ceiling argument appears convincing, Congress can limit discretionary impoundments founded on this basis through the vehicles of creating expense priorities, interrelating all appropriations measures so as to make spending for every program dependent upon spending for every other program,[96] or mandating spending for particular programs.[97] Additionally, even conceding the existence of an implied power to impound funds derived from a debt limit, it is submitted that the President is still under an obligation to preserve the substantial effectiveness of *all* of the congressionally enacted programs, even if this means he must reserve the funds needed to stay within the limit from all departments on a proportionate basis.

A parallel statutory argument supporting the President's authority to impound funds may be implied from congressionally enacted spending ceilings. These ceilings, usually seen as moves toward fiscal responsibility, have in the past given the President implied powers to impound those funds which, if spent, would cause the federal government to exceed statutory spending limits.[98] On April 4, 1973, the Senate attached Modified Amendment 52 as a rider to an unrelated bill and overwhelmingly adopted the measure.[99] This rider, a product of lengthy hearings,[100] would establish a federal spending ceiling for fiscal year 1974 and impose general and specific impoundment controls on the executive.[101] The provision recognizes that a spending ceiling creates implied impoundment powers, expressly authorizes spending ceiling impoundment, and requires that funds reserved under its spending ceiling authority be taken "proportionately from new obligational authority and other obligational authority available for each functional category ... (as set out in the United States Budget in Brief)."[102] In addition, Modified Amendment 52 regulates all general

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93 See Church, supra note 19, at 1245 n.29. See also H.R. Misc. Rep. No. 1797, 81st Cong., 2d Sess. 311 (1950).

94 U.S. Const. art. I, § 8.

95 OMB Report; see, e.g., President Eisenhower's order for spending reductions in fiscal 1958 to remain within the debt ceiling, 1971 Hearings at 96.

96 See Statement of Hon. George E. Danielson, Representative from California, 119 Cong. Rec. H 2442-43, 93d Cong., 1st Sess. (daily ed. April 4, 1973).

97 Text accompanying notes 144 et seq. infra.

98 See, e.g., Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, title II, 82 Stat. 251, 327-30.

99 119 Cong. Rec. S 6664-6697 (daily ed. April 4, 1973).

100 See Id. at S 6668; 1973 Hearings, supra, at note 5.

101 See Amendment No. 77, as modified, Amendment 52 to S. 929, 93d Cong. 1st Sess. (1973), 119 Cong. Rec. S 6665 (daily ed. April 4, 1973) [hereinafter Modified Amendment 52].

102 Id.

statutory impoundment power,[103] and creates a class of programs which are immune from spending ceiling impoundments.[104]

Another implied basis for presidential impoundment of funds authorized for domestic programs may be found in the statutory duties of the President with respect to price and cost stabilization.[105] Such an argument was rejected by the federal district court in the *State Highway Commission of Missouri v. Volpe* case,[106] which found price and cost stabilization and the control of inflation to be impermissible reasons for executive action which would frustrate the purposes and standards of the enabling act.[107] In its holding, the court concluded that it is not within the descretion of the Secretary of Transportation to withhold obligational authority for highway construction.[108]

In addition to presidential power to impound funds for fiscal reasons, Congress has expressly and impliedly authorized the President to impound funds on policy bases.[109] Two examples of this broad grant of authority to impound funds are the provisions of the Environmental Policy Act of 1970[110] which limits spending until an environmental impact report is prepared, and the broad antidiscrimination provisions of Title IV of the 1964 Civil Rights Act[111] which was passed in reaction to President Kennedy's refusal to impound funds to prevent racial discrimination.

B. Ascertaining the Existence of Congressional Intent to Control Impoundment

Few cases have considered the broad issue of whether an appropriation is a congressional mandate to spend or merely permission to obligate the government up to an appropriated maximum.[112] After questioning the validity of the proposition that an appropriation is merely permissive, the Eight Circuit Court of Appeals in *Volpe* found the Secretary of Transportation to be without discretionary power to impound highway construction funds, stating that

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103 See Title I of Modified Amendment No. 52, supra, at S 6665.

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> (e) In no event shall the authority conferred by this spending ceiling be used to impound funds, appropriated or otherwise made available by Congress, for the purpose of eliminating a program the creation or continuation of which has been authorized by Congress.

Modified Amendment No. 52, § 202(e), supra at S 6665.

105 See OMB Report, supra note 27, at 4, citing Pub. L. No. 91-379, § 203, 84 Stat. 796, 799 (1972), in reference to price and cost stabilization.

106 State Hwy Comm'n v. Volpe, 347 F. Supp. 950, 954 (W.D. Mo. 1972); aff'd, No. 72-1512 (8th Cir. April 2, 1973) (not reaching the spending ceiling issue).

107 347 F. Supp. at 954.

108 Id.

109 See, e.g., 42 U.S.C. § § 2000-d to 2000d-4, 4332(c) (1970).

110 42 U.S.C. § 4332(c) (1970).

111 For a discussion of the background of this provision see text accompanying notes 68 et seq. supra.

112 See Boggs, Executive Impoundment of Congressionally Appropriated Funds, 24 U. Fla. L. Rev. 221, 228-29 & n.37 (1972), citing United States v. Lovett, 328 U.S. 303 (1946); McKay v. Central Elec. Power Co-op, 223 F.2d 623 (D.C. Cir. 1955); Compagna v. United States, 26 Ct. Cl. 316 (1891); Hukill v. United States, 16 Ct. Cl. 562, 565 (1880). Compare Hukill v. United States, 16 Ct. Cl. at 565 ("An appropriation ... is ... simply a legal authority to apply so much of any money in the Treasury to the indicated object") and 42 Op. U.S.A.G. No. 32 at 4 (1967), with State Hwy Comm'n v. Volpe, No. 72-1512 at 12-13. See also Defendants Brief at 24, 26, State Hwy Comm'n v. Volpe, No. 72-1512 (8th Cir., April 2, 1973); Corwin, The President: Office and Powers 127-28 (4th ed. 1957).

> although a general appropriation act may be viewed as not providing a specific mandate to expend all of the funds appropriated, this does not *a fortiori* endow the Secretary with the authority to use unfettered discretion as to when and how the monies may be used. The [enabling] Act circumscribes that discretion and only an analysis of the statute itself can dictate the latitude of the questioned discretion.[113]

A careful statutory analysis is necessary on a case-by-case basis in order to determine the authority of the executive to impound funds. As was cogently stated by Justice William Rehnquist while he was serving in the Office of Legal Counsel of the Department of Justice,

> the question of trying to find a mandatory intent on the part of Congress . . . is not a question of looking for the word 'shall' as opposed to 'may.'[114]

If one is to fathom congressional intent, the overall language of the authorization and appropriations statutes must be considered as a unit.[115]

Three very recent decisions have hinged on detailed statutory interpretations.[116] The problem in each was determining whether the statutory provisions under which the programs operated left sufficient discretion in the executive to sustain the impoundments made.[117] The district court in the *Volpe* case construed the comprehensive plan for the administration of the Highway Act and the language of a specific "sense of Congress" section of the Act[118] as not permitting the impoundment of Highway Act funds by the Secretary of Transportation, notwithstanding the Secretary's defense that there is an implied power to create reserves to prevent inflation of wages and prices.[119] On appeal to the Eighth Circuit,[120] Judge Lay, speaking for a divided court, did not find a need to depend on the "sense of Congress"

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[113] State Hwy Comm'n v. Volpe, No. 72-1512 at 12-13 (citations omitted); see Housing Auth. v. United States Dept. of H.U.D., 340 F. Supp. 654 (N. D. Calif. 1972) [hereinafter *Housing Authority*], looking to the language of both the authorization and enabling statutes to determine whether the Congress has mandated spending.

[114] See 1971 Hearings, supra note 1, at 234, 287-89. See also 1971 Hearings at 287, 289, memoranda by them Assistant Attorney General Rehnquist on the propriety of impoundment in school aid funding.

[115] 1971 Hearings at 234.

[116] State Hwy Comm'n v. Volpe, No. 72-1512 (8th Cir. April 2, 1973); Berends v. Butz, No. 4-73 Civ. 41 (D. Minn. March 20, 1973), *Housing Authority*.

[117] The *Volpe* case considered the Federal-Aid Highway Act of 1956, 23 U.S.C. § 101 et seq. (1970) [hereinafter Highway Act]; Berends v. Butz considered the Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. § 1921 et seq. (1970) [hereinafter FHA Act], and the Disaster Relief Act of 1970, Pub. L. No. 91-606, 84 Stat. 1744; Housing Authority considered the United States Housing Act of 1937, 42 U.S.C. §§ 401 et seq. (1970) and Pub. L. No. 91-609, 84 Stat. 1770 (1970).

[118]

> (c) 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 specified 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. § 101 (1970).

[119] State Hwy Comm'n v. Volpe, 347 F. Supp. at 952-54.

[120] State Hwy Comm'n v. Volpe, No. 72-1512. (8th Cir. April 2, 1973).

section of the Highway Act,[121] but preferred to focus on the express constitutional authority of Congress to establish "post roads,"[122] and the *"whole scope"* of the Highway Act which provides for a "coherent scheme of statutory duties."[123]

Although the precise decision by the court of appeals in *Volpe* can be limited by the nature of the statute construed, it does present a form of analysis which may be further developed if the government decides to petition the Supreme Court for certiori.[124] The circuit court reasoned that since the Secretary had been given specified statutory discretion in approving the expenditure of funds under a detailed formula,[125] Congress did not intend to delegate "authority *within the Act* to defer approval for reasons totally collateral and remote to the Act itself."[126] The court cautioned against finding implicit authority to impound funds in congressional acts,[127] and in dicta, on a point not submitted on appeal, rejected the Anti-Deficiency Act as a valid basis for impoinding funds under circumstances which violate the "purposes and objectives of the particular appropriation statute."[128]

In *Berends v. Butz*,[129] the court considered the Secretary of Agriculture's termination of an emergency loan program created under the FHA Act.[130] It found that "[t]he language in the statutes and regulations relied on by the plaintiffs is not of a permissive nature, but affirmatively directs defendants to perform."[131] In response to the government's argument that the Administrative Procedure Act was inapplicable,[138] the court stated that it would decide the case since the "plaintiffs ... [were] challenging only ministerial acts of the adminstrators."[133]

The *Berends* court concluded that the administrator could not impound funds or acquiesce in their impoundment. The Secretary was obligated to request an apportionment and to take all of the necessary procedural steps to insure that the financial needs of the plaintiffs were "fulfilled in the manner contemplated by Congress ... [whether] the Secretary questions the efficacy of the emergency loan program or not."[134] In addition, Judge Lord went on to say that neither a court nor an administrator may "pass upon the necessity or soundness of a duly promulgated law," and that it is the function of the administrator to enforce and effectuate the laws passed by Congress.[135]

The earliest of this trilogy of recent cases, *Housing Authority of San Francisco v. United States Department of H.U.D.*, was decided in April of 1972.[136] The district court, basing its decision on the language of the Housing Act of 1937 and of Public Law 91-609, dismissed the Housing Authority of San Francisco's action against the

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121 Id.

122 Id. at 17-18, citing U.S. Const. art. I, § 8.

123 Id. at 18.

124 Because the period in which the government may petition for certiorari has just begun to run, 28 U.S.C. § 2101(c) (1970), it is not at this time clear whether such action will be taken.

125 State Hwy Comm'n v. Volpe, No. 72-1512 at 18-23, & n.16. See Highway Act at 23 U.S.C. §§ 104, 105, 106, 109, 110, 118(a) (1970).

126 State Hwy Comm'n v. Volpe, No. 72-1512 at 23-24 (emphasis added).

127 It is impossible to find from these specific grants of authority discretion in the Secretary to withhold approval on projects Congress has specifically directed because of a system of priorities the executive chooses to impose on all expenditures. Id. at 24.

128 Id. at 32-33. Such purposes and objectives are necessarily violated when one charged with implementing the statute acts beyond his delegated authority. Id. at 33.

129 Berends v. Butz, No. 4-73 Civ. 41 (D. Minn. March 20, 1973) [hereinafter *Berends*].

130 Id.; see 7 U.S.C. § 1971 (1970); 37 Fed. Reg. 12854 (1972).

131 *Berends* at 9.

132 5 U.S.C. § 701 (1970).

133 *Berends* at 9.

134 Id. at 20.

135 Id. at 20-21.

136 340 F. Supp. 654 (N.D. Cal. 1972).

Department of Housing and Urban Development. The court initially held that the government was immune from suit because relief would require spending public money, and that none of the jurisdictional statutes relied on by the plaintiff waived the government's sovereign immunity.[137] In spite of this holding, which was dispositive by itself, the court went on to consider other issues. It found adequate statutory discretion in the executive to survive challenges based on allegation of the exercise of an unconstitutional item veto and the statutory obligation of the executive to spend all of the appropriated and authorized funds.[138]

When the enabling act itself affords no clear indication of congressional intent regarding the executive's obligation to spend appropriated funds, it may be necessary to look to other relevant legislation. It should be emphasized, however, that any related manifestation of intent, whether prior, subsequent or concurrent with the enabling statute, authorization or appropriation, should be evaluated cautiously. Each Representative and Senator will have his own reasons for voting or speaking on a bill, which may or may not accurately reflect Congress' intentions.

Beyond legislative indications of congressional disposition toward executive discretion, the precendent of successful impoundment throughout this country's history,[139] coupled with the unfruitful attempts by the Congress to control impoundment,[140] might create a presumption of propriety whenever the President acts to impound funds. Such a presumption would be compatible with the acquiescence theory discussed in *Myers v. United States*.[141] However, congressional silence on impoundment should not be misconstrued as acquescence. Congress may ignore impoundment for political reasons in one situation, and register its objections in other, less politically binding circumstances.[142] Moreover, the fact that Congress is considering different means of control, but has failed as yet to agree on a suitable method of limiting impoundment, should not be taken to prove more than grudging congressional recognition of delegated power to make adminstrative impoundments. Dissatisfaction in the halls of Congress puts the executive on notice that statutory impoundment powers are vulnerable to congressional revocation when abused.

C. Pending Legislation: Congressional Attempts to Restrict Impoundment

Congressional acquiescence in presidential impoundments arguably authorized by statute may soon be limited in matters of domestic spending.[143] The Senate has recently passed and the House is considering a bill to mandate spending under the Rural Electrification Act of 1936.[144] This bill S. 394 will serve as an illustration of how the Congress is trying to meet the political challenge presented by the President's assertion of his power to impound. The bill would amend section 2 of the Rural Electrification Act to read:

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137 Id. at 655. The statutes were 28 U.S.C. §§ 1331, 1336 (1970) and the Declaratory Judgement Act, 28 U.S.C. §§ 2201-02 (1970). Nor did the court find either of the two exceptions recognized in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

138 Id. at 656, 657.

139 See Boggs, supra note 112, at 222-24.

140 See, e.g., S. 4049, 90th Cong., 2d Sess. (1968); H.R. 1214, 91st Cong., 1st Sess. (1969); S. 3877, 92d Cong., 2d Sess. (1972). See also Boggs, supra note 112, at 224; Church, supra note 19, at 1242.

141 272 U.S. 52 (1926).

142 See L. Fisher, President and Congress: Power and Policy 122-26 (1972).

143 See the discussion of H.R. 5193 and Modified Amendment 52 infra; 1973 Hearings.

144 S. 394, 93d Cong., 1st Sess. (1973), passed the Senate by a vote of 69 to 20. 119 Cong. Rec. S. 3087 (daily ed. Feb. 21, 1973). See Rural Electrification Act of 1936, 7 U.S.C. § 901 et seq. (1970).

> The Administrator is authorized and *directed* to make loans each fiscal year in the full amount determined to be necessary by the Congress. . . .[145]

As of January 29, 1973, the Nixon Administration had reserved $456,103 while apportioning $283,972 of the monies appropriated and authorized for loans by the Rural Electrification Administration.[146] In its report to Congress on impounded funds, the OMB offered three justifications for its impoundment actions with respect to REA funds.[147] The first of these, grounded in the current version of the Anti-Deficiency Acts,[148] rested entirely on the President's *statutory* duty to

> effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such (funds were) made available.[149]

Were S. 394 to become law (possibly over a presidential veto), it would probably be held to remove REA loan money from the coverage of 31 U.S.C. §665, and thus exempt REA loans from presidential discretion to impound funds under authority of the Anti-Deficiency Acts.

The other two justifications for executive impoundment of REA funds offered in the OMB Report were the duty of the President to faithfully execute "existing tax laws and the statutory limitation on the national debt,"[150] and the "President's responsibility to help maintain economic stability."[151] These latter authorizations for impoundment, although just as susceptible to congressional revocation as 31 U.S.C. § 665, seem to be statutorily and politically stronger and less likely to be affected by S. 394 or similar bills.[152] Such bills do not include any priorities to guide the President in the exercise of his implied impoundment powers. Nor would they furnish guidance for presidential discretion in effectuating savings or in determining the amounts of reserves required to keep spending and borrowing within their respective congressionally established ceilings.[153] They would merely negate express powers of impoundment created by the Anti-Deficiency Acts.

Although the Congress can revoke all statutory authority to impound domestic funds, the President might well veto such legislation. This veto might prove difficult for Congress to override, since "if [the President] rightly interpret[s] the national thought and boldly insists upon it, he is irresistible."[154] However, a more flexible congressional response to unrestrained impoundment may be emerging in the form of a legislative veto.[155]

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145 119 Cong. Rec. S 3088 (daily ed. Feb. 21, 1973) (emphasis added). The law now reads: "the Administrator is authorized and empowered . . ." 7 U.S.C. § 902 (1970) (emphasis added).

146 Hereinafter REA. See OMB Report, supra note 27.

147 OMB Report at 4.

148 31 U.S.C. § 665(c)(2) (1970).

149 OMB Report, supra note 27, at 4, quoting 31 U.S.C. § 665(c)(2) (1970).

150 Id. at 4, citing Pub. L. No. 92-599, 86 Stat. 1324 (1972) as authority. Compare the Continuing Appropriations Act of 1972, Pub. L. No. 92-334, 86 Stat. 402 (1972) ("The following sums are appropriated out of any money in the Treasury not otherwise appropriated . . .") with the Public Debt Limit Act, title I, Pub. L. No. 92-599, 86 Stat 1324 (1972), increasing the ceiling of the National Debt.

151 OMB Report, supra note 27, at 4.

152 But see *Berends* and the district court opinion in the *Volpe* case, 347 F. Supp. 950 (W.D. Mo. 1972), which imply that the courts may not always find these bases for impoundment persuasive.

153 See text accompanying notes 87-107.

154 W. Wilson, Constitutional Government in the United States 68 (1911).

155 See, e.g., 1973 Hearings, supra note 5. See also note 4 supra.

The legislative veto is a relatively new phenomenon in American government.[156] It is a form of congressional interaction with the executive that was not expressly provided for in the Constitution. The first comprehensive statute creating the legislative veto was the Reorganization Act of 1939,[157] by which the Congress, while granting the President power to reorganize the executive branch, reserved the power to disapprove the alignment of departments and agencies.[158] Over the years, this method of assuring administrative accountability has been refined and reapplied, with some modifications, to divergent situations.[159]

This tool of the legislature, although varied in form to fit the exigencies of specific situations, retains certain distinguishing characteristics.[160] Statutes creating the legislative veto require that specified decisions, taken by the executive under delegated authority, be submitted to each house of Congress, or to their respective committees. The implementation of the decisions is delayed for a predetermined waiting period during which time Congress has the statutory authority to consider and disapprove of the decisions by concurrent resolution, simple resolution of either house or vote of a standing committee.[161]

Commentators have discussed the constitutional problems inherent in the legislative veto,[162] and Presidents have vetoed bills which incorporated veto provisions, often claiming that they usurp presidential functions and prevent effective adminstration.[163] Opponents of the legislative veto have pointed to the debate at the Constitutional Convention of 1789, during which concern was expressed over the need to protect executive power from encroachment by the legislature.[164] This concern prompted the adoption of article I, § 7,[165] providing for a presidential veto which

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156 See Cooper, Schauffler and the Veto: A Commentary, 8 Public Policy 328 (1958); Schauffler, The Legislative Veto Revisited, 8 Public Policy 296 (1958); Cooper, The Legislative Veto: Its Promises and Its Perils, 7 Public Policy 128 (1956); Cooper & Cooper, The Legislative Veto and the Constitution, 30 Geo. Wash. L. Rev. 467 (1962); Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569 (1953).

157 Reorganization Act of 1939, ch. 36, 53 Stat. 561 (1939) [hereinafter Reorganization Act of 1939].

158 Reorganization Act of 1939, supra note 157.

159 See, e.g., the Surplus Property Act of 1944, ch. 479, 58 Stat. 765 (1944); Dept. of Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 3, § 72 Stat. 514 (1958) (permitting veto by either house of Congress); Pub. L. No. 85-479, § 4(d), 72 Stat. 276 (1958) (amending the Atomic Energy Act of 1954 and providing for veto by concurrent resolution); The Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 6, 72 Stat. 673, 676 (permitting a veto by a two-thirds vote of presidential decisions *not* to act).

160 J. Harris, Congressional Control of Administration 204 (1964).

161 Id.

162 See, e.g., Cooper, The Legislative Veto: Its Promise and Its Perils, supra note 156, at 132; Ginnane, supra note 156; Cooper and Cooper, The Legislative Veto and the Constitution, supra note 156.

163 See, e.g., President Lyndon Johnson's veto message of August 21, 1965, 2 Pub. Papers of the Presidents, Lyndon B. Johnson 1965, at 907 (1966), 111 Cong. Rec. 12639 (1965); President Eisenhower's veto message, Pub. Papers of the President 1955, at 688 (1956); President Wilson's veto messages of June 4, 1920 and May 13, 1920, 59 Cong. Rec. 7026-027, 8609-610 66th Cong., 2d Sess. (1920); cf. 41 Op. of the Atty. Gen. No. 47 (1957).

164 E.g., 2 M. Farand, supra note 48, at 299.

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> Every Order, Resolution, of Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States, and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. U.S. Const. art I, § 7.

See the Federalist No. 73; Cooper, The Legislative Veto: Its Promise and Its Perils, supra note 156, at 133; Ginnane, supra note 156, at 573-74.

could be overriden by a two-thirds vote of Congress. Supporters of the legislative veto argue that "legislative action not subject to presidential approval is still constitutional if provided for in the enabling act."[166]

The major constitutional attack on the legislative veto has centered on its alleged reversal of the normal distribution of legislative and executive functions.[167] However, as Joseph Cooper pointed out in 1956, the overlapping zones of authority between the Congress and the President make the strict identification and allocation of the normal assignments of the legislative and executive functions of policy determination and performance impossible.[168] He concluded that "[p]olicy and performance form a continuum with one predominating at one end and one at the other."[169] Since impoundment is part of the spending and appropriations process, Mr. Cooper's fall-back position, that the legislative veto can "crawl behind the appropriations process" as a means of defense,[170] would be sufficient to support a statute creating a legislative veto with respect to impoundment of domestic funding.

The two major bills that would restrict presidential impoundments of funds provide for a legislative veto.[171] The bill that passed the Senate on April 4, 1973, as Title I of Modified Amendment 52 would require affirmative action on the part of both houses of Congress to ratify any presidential impoundment of authorized funds,[172] while its House counterpart would require the voting of a concurrent resolution by Congress within the waiting period to disapprove the specific impoundment. Each bill, if enacted, would provide expedited procedures for handling impoundment resolutions, prohibit amendment or modification of impoundment resolution,[173] and authorize a legislative item veto should the executive's message informing the Congress of his action include numerous individual impoundments.[174]

Although both bills would limit presidential impoundment, there are certain provisions that could be added to improve their effectiveness. Since it is unclear at what point in time funds are considered impounded, the bills should impose a duty on the executive to inform Congress of the nature and extent of every impoundment at least ninety days prior to the end of each fiscal year.[175] To avoid the rigidity inherent in the requirement of full spending of funds reported within the time period, specific provisions should be added creating exceptions to the ninety-day rule in order to allow for unforeseen situations where full spending is impossible. This ninety-day requirement would, in effect, mandate the spending of funds either not reported to the Congress as impounded or not within the enumerated categories of exceptions to the reporting rule.

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166 Cooper, The Legislative Veto: Its Promises and Its Perils, supra note 156, at 133, citing S. Rep. No. 232, 81st Cong., 1st Sess. 19-20 (1959), as containing a memorandum of the Attorney General substantially accepting this position.

167 Cooper, The Legislative Veto: Its Promise and Its Perils, supra note 156, at 133-149.

168 Id. at 134.

169 Id.

170 Id. at 137.

171 H.R. 5193, 93d Cong., 1st Sess. (1973) [hereinafter H.R. 5193]; S. 373 which passed the Senate as Modified Amendment 52, 93d Cong., 1st Sess. (1973).

172 See 119 Cong. Rec. S 6664, S 6696, 93d Cong., 1st Sess. (daily ed. April 4, 1973).

173 H.R. 5193, § 4; Modified Amendment 52, § 5. For a good discussion of the necessity for the provision against amendment, see Cooper, The Legislative Veto: Its Promise and Its Perils, supra note 159, at 160.

174 The House bill is more restrictive in its coverage than its Senate counterpart. It would apply to impoundment messages specifying more than one impoundment, while the Senate's version would permit disapproval of "any impoundment in whole or in part." Compare H.R. 5193, § 4(b)(1), with Modified Amendment 52, § 3.

175 Pub. L. No. 92-599, 86 Stat. 1324, requires the reporting of impoundments, but does not specify when impoundments occur, i.e., on the last day of the fiscal year or the day the decision to impound is made.

The executive's duties to provide for reserves, effectuate savings and allocate funds over the effective life of a program, which are imposed by the Anti-Deficiency Acts, would seem to be unduly restricted by the current form of pending legislation. The granting of an express, limited power to impound funds, if tied to a one-percent 'trigger'[176] requiring submission to Congress, would provide Congress with the supervisory mechanism it seeks while giving the executive sufficient budgetary discretion adequately to administer the federal bureaucracy. The one-percent trigger should be enacted to permit congressional modification for individual programs. Appropriations statutes could, by means of specific language, provide the vehicle by which the trigger percentage is raised, lowered or waived. Of course, the trigger and submission provisions should contain sub-provisions similar to those in the Federal Impoundment and Information Act, § 402, which provides for supplementary procedures in unusual fiscal situations.[177]

The trigger mechanism would also provide the courts with judicially manageable and appropriate standards for reaching the merits in cases challenging executive impoundments.[178] It would present a comprehensive statutory formula for impounding funds upon which aggrieved parties could base actions in the nature of mandamus and prohibition, demonstrating an administrative failure properly to perform ministerial functions.[179] And, as a further political and legal benefit, it would establish statutorily defined boundaries of spending discretion and thus prevent the executive from arguing that the Congress is infringing upon its constitutional authority.

Another modification of the pending legislation which would give Congress a stronger supervisory hand is a provision providing for the termination or repeal on a specific date of some or all of the current statutory bases for impoundment, unless Congress, by statute, extends said date. This would compel Congress to revaluate periodically its grants of impoundment power to the executive department. It is hard to see how periodic revaluation of congressionally delegated authority might be challenged as unconstitutional. In fact, such supervision in an agency situation should be supported.[180]

Finally, if Congress actually desires control of fiscal impoundment, it should include a provision preventing severability of the individual sections of the act. Prohibiting severability would require that if any of the provisions regulating impoundment were held unconstitutional, all grants of impoundment discretion to executive officials, whether in the control act or found in other statutes, would terminate. The presence of a nonseverability clause would demonstrate congressional intent to control *all* statutory impoundments and require and court that rejects the legislative veto to strike down the whole statute and all other express or implied grants of impoundment power. Only by enacting a section of this nature can Congress make its intent clear that each of the impoundment control provisions is essential to the function of the integrated network of impoundment authority, and that Congress would not have authorized any impoundment of domestic funds without such controls.[181]

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176 See section IV (B), infra.

177 See, e.g., Pub. L. No. 92-599, § 402, 86 Stat. 1324 (1972); H.R. 5193, Modified Amendment 52.

178 See section IV (B), infra.

179 Thus the *Larson* exception to the sovereign immunity defense would then be applicable as would Mandamus Act jurisdiction and 28 U.S.C. § 1331(a) jurisdiction; see the discussion in section IV, infra.

180 Cf. Restatement of the Law of Agency (Second), § 213(a), (c) (1958). See generally, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

181 See Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76 (1937).

V. JUDICIAL REVIEW

A. Introduction

Although most of the visible activity concerning impoundment has been occurring in the political arena, the Nixon Administration's impoundments have resulted in a flurry of litigation[182] which is now beginning to reach the opinion and judgment stage.[183] Two prérequisties for a court's reaching the merits of a litigated impoundment are the demonstration of jurisdiction and the presentation of a justiciable case or controversy.[184]

Federal courts are justifiably reluctant to entertain questions better adapted to solution by the political departments of the federal government.[185] Judicial review of presidential impoundments must rest on firm constitutional and statutory jursidictional bases. However, when the President claims a power which is "at once so conclusive and preclusive," courts must either cautiously srutinize the claim or risk jeopardizing the constitutional equilibrium.[186]

In *Powell v. McCormack*,[187] the Supreme Court, aware that it might be facing a political question and the possibility that a decision might embarass a coordinate branch of government, stated that notwithstanding any construction given the Constitution by another branch, it is the duty of the courts to interpret the Constitution.[188] It further decreed that any alleged conflict that such an adjudication may cause cannot justify the avoidance of a court's constitutional responsibilities.[189] When bases for establishing the court's subject matter jurisdiction can be found, it may be reasonable to expect the federal judiciary to decide specific impoundment questions.

B. Subject Matter Jurisdiction and Sovereign Immunity

To date, the highest jurisdictional hurdles seem to be those dealing with the politcal question doctrine, sovereign immunity, statutory jurisdiction and the presence of ministerial duty under appropriations and authorizations. Since the last three considerations are closely intertwined, they shall be discussed concurrently prior to an analysis of the political question doctrine.

The United States, as a sovereign, enjoys immunity from suits to which it has not given its consent.[190] If a judgment against a government official would "expend itself on the public treasury, or domain, or interfere with the public adminstration," then the sovereign is deemed to be the real party in interest and must consent to the action.[191] The fact that an action is against such a government official is not by itself

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182 See text accompanying notes 116 et seq. supra; 1973 Hearings, supra note 5, at 908-1010. See also Briefs and Memoranda filed in Campaign Clean Water, Inc. v. Ruckelshaus, Civ. Action No. 18-73-R (E.D. Va. 1973); City of New York v. Ruckelshaus, Civ. Action No. 2466-72 (D.D.C. 1972).

183 See text accompanying notes 116 et seq. supra.

184 See Baker v. Carr, 369 U.S. 186 (1962); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

185 But see Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959).

186 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 638.

187 395 U.S. 486 (1969).

188 Id. at 549.

189 Id.

190 United States v. Sherwood, 312 U.S. 584, 586 (1941).

191 Land v. Dollar, 330 U.S. 731, 738 (1947); see Dugan v. Rank, 372 U.S. 609, 620 (1963); United States v. Sherwood, 312 U.S. 584 (1941); *Housing Authority*, supra note 113.

dispositive of the sovereign immunity question. The Supreme Court has carved out two exceptions to the strict sovereign immunity rule.[192] These exceptions revolve around the statutory powers of the official against whom suit is brought, and whether his actions were within the scope of this authority.[193] Where there is no express statutory waiver of sovereign immunity these exceptions are of primary importance in enabling a plaintiff to seek redress of his grievances.

Section 1331(a) of Title 28 of the United States Code

The finding of jurisdiction by the federal courts is insufficient to overcome a sovereign immunity defense.[194] Among the statutory provisions which could be construed to waive the government's sovereign immunity are the standard federal question jurisdiction of the courts,[195] the Adminstrative Procedure Act,[196] and the mandamus statute.[197] Federal question jurisdiction under 28 U.S.C.§ 1331(a) cannot be read to imply a general waiver of sovereign immunity. To do so would lead to the conclusion that all actions for $10,000 or more are consented to, thus impliedly negatting the doctrine of sovereign immunity and the need for specified acts waiving statutory immunity for limited classes of suits.[198] Whatever the public policy reasons in favor of a general waiver of sovereign immunity, such a waiver should be enacted by the legislature.

Administrative Procedure Act

Finding jurisdiction under the APA poses a dilemma for a judge faced with an impoundment case. The circuits have not as yet adopted a uniform approach to the question of whether section 10 of the Act confers independent jurisdiction on the federal courts.[199]

However, the APA's criteria for judicial relief from adverse administrative action,[200] when read in the context of the Act's directive that the form of action appropriate for review is any "applicable form of legal action ... in a court of competent jurisdiction,"[201] and when combined with standard federal question

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192 Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); see Dugan v. Rank, 372 U.S. at 621-22; Marlowe v. Bowdoin, 369 U.S. 643 (1962); *Berends* at 8; *Housing Authority*, 340 F. Supp. 654 (N.D. Cal. 1972).

193 See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

194 The district court in the *Volpe* case, basing its jurisdiction on both the Mandamus Act and the Administrative Procedure Act, awarded mandamus and a declaratory judgment as appropriate remedies. State Hwy Comm'n v. Volpe, 347 F. Supp. at 951-52. The court of appeals took a different approach and found ample jurisdictional basis for adjudication under 28 U.S.C. § 1331(a). State Hwy Comm'n v. Volpe, No. 72-1512 at 4-5. In neither of these decisions were the courts faced with the sovereign immunity issue.

195 28 U.S.C. § 1331(a) (1970).

196 5 U.S.C. § 701 et seq. (1970); cf. State Hwy Comm'n v. Volpe, No. 72-1512, at 4 n.7 (citing cases). But see *Housing Authority*.

197 28 U.S.C. § 1361 (1970). But see *Housing Authority*, supra.

198 See, e.g., 28 U.S.C. § 1346 (1970).

199 5 U.S.C. § 701 et seq. (1970); see cases cited, State Hwy Comm'n v. Volpe, No. 72-1512 at 4 n.7.

200 The Act requires, inter alia, three findings before a party aggrieved by final agency action is entitled to relief. First, there must be no other adequate remedy; second, the action complained of must not be committed to agency discretion by law, and third, the action must be shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 706(2)(A), 701(a)(2), 702, 704 (1970); see Citizens Comm. to Preserve Overton Pk. v. Volpe, 401 U.S. 402, 410-13 (1971).

201 5 U.S.C. § 703 (1970).

jurisdiction or the mandamus statute, might support a conclusion that sovereign immunity has been waived for appropriate impoundment cases.

The APA by its terms applies to ministerial action of executive officials. When an official fails to perform a ministerial duty, cases seeking to compel his performance do not give rise to sovereign immunity defenses and mandamus may issue.[202] The act supports its provisions for review with a grant of broad remedial powers, while authorizing the reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning and applicability of the terms of an agency action."[203] The court in *Berends* held the language of the Act to be sufficient to sustain the jurisdiction of the court where palintiffs restricted their challenge to an administrator's failure to perform a ministerial duty.[204]

These decisions, and an expansive reading of the APA, would favor a finding of jurisdiction in impoundment cases which challenge ministerial actions.[205] There is no requirement that such a finding of jurisdiction be reached after a prior finding of an express waiver of immunity. The jurisdictional decision would be based on facts substantially identical to those needed to bring an action challenging executive impoundment within the judicially created exception to the immunity doctrine.[206] *Larson v. Domestic and Foreign Commerce Corp.* and its progeny would permit the federal courts to entertain actions where governmental officials act in excess of their statutory duties or exercise thier statutory authority in an unconstitutional manner regardless of the sovereign immunity doctrine.[207]

The Mandamus Act

In contrast to the APA, the mandamus statute has almost uniformly been held neither to be a waiver of immunity nor an independent exception to the doctrinal bar to suits against the government.[208] The mandamus statute is merely a grant of procedural jurisdiction.[209] Its purpose is similar to that of 28 U.S.C. § 1331 and confers jurisdiction in the federal courts over a specific class of cases. Although it should not be viewed as waiving any of the government's defenses, it can be interpreted to fulfill the APA's requirement of bringing an action in a court of competent jurisdiction.[210] Thus, where a plaintiff can prove that an official's actions fall within one of the exceptions to the sovereign immunity doctrine, or that the government has either expressly or by implication waived the immunity defense, the courts may rely on statutory mandamus and federal question jurisdiction to deny defendant's motion to dismiss.

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202 Udall v. Wisconsin, 306 F.2d 790, 792-93 (D.C. Cir. 1962); cert. denied, 371 U.S. 969 (1963), citing Clackamas County v. McKay, 219 F.2d 479 (D.C. Cir. 1954), vacated as moot, 349 U.S. 909 (1955).

203 5 U.S.C. § 706 (1970).

204 4-73 Civ. 41 at 9; see 5 U.S.C. § 701(a) (1970).

205 Cf. Cranston, Nonstatutory Review of Federal Administrative Action: the Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 387, 444 (1970); State Hwy Comm'n v. Volpe, No. 72-1512 at 4 n.7.

206 See text accompanying note 192 supra.

207 337 U.S. at 689; see note 195 supra; cf. *Housing Authority*, supra note 113.

208 See Cranston, supra note 205.

209 McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); Ogletree v. McNamara, 449 F.2d 93 (6th Cir. 1971); *Housing Authority*, supra note 113; Massachusetts v. Connor, 248 F. Supp. 656 (D. Mass.), aff'd, 366 F.2d 778 (1st Cir. 1966). But see State Hwy Comm'n v. Volpe, 347 F. Supp. at 951-52.

210 Compare 28 U.S.C. § 1361 (1970) with 5 U.S.C. § 703 (1970).

The doctrine that moot casee do not present justiciable cases and controversies can pose a difficult challenge to plaintiffs. The court of appeals in *Volpe*, when presented with a governmental attempt to moot the pending litigation by releasing funds, held that although an action for mandamus was mooted, a declaratory judgment action presented a "case or controversy" and was a proper method of seeking redress.[211] This reasoning rests on strong case law.[212] The defendant's concession that further impoundments "will be imposed and that Missouri will most certainly be affected" presented a sufficient factual basis for the court to find a reasonable expectation that the illegal conduct would continue and that there was certainty that the plaintiffs would feel the impact of these further impoundments.[213]

To avoid dismissal on a motion alleging mootness, the *Volpe* court, as it would have if it had faced an immunity defense, required a showing that the adminstrator's action was illegal or unauthorized. To determine whether an action is illegal or unauthorized, it is necessary to turn to a close statutory interpretation of enabling and appropriations statutes. Just as the executive officials are not permitted to begin domestic programs without statutory authority, they would have to be susceptible to challenge in the courts if they were to attempt, on their own authority, to terminate or emasculate them.

Statutory construction is primarily a judicial responsibility.[214] It is the duty of the judiciary to require that the executive stay within statutorily prescribed limits.[215] Court interpretations determine the ministerial or discretionary nature of specific statutory executive activity, thus setting the foundation upon which judicial review may proceed. A determination that an official is operating within the scope of his proper discretionary authority precludes a mandamus action[216] and closes the door to arguing a *Larson* exception to the sovereign immunity bar.[217] Such a determination, although resting on a consideration of the merits, goes to the jurisdiction of the court and must be made as a prerequisite to issuing relief.[218]

C. Political Question

After passing the jurisdictional hurdles already discussed, cases challenging executive impoundment of funds authorized and appropriated for domestic programs must confront the amorphous political question barrier to justiciability. As this Note has indicated, the courts have not yet been asked to decide any fundamental constitutional issues but are merely being requested to resolve potentially conflicting

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211 State Hwy Comm'n v. Volpe, No. 72-1512 at 5-6.

212 United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 203 (1968); United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953); State Hwy Comm'n v. Volpe, No. 72-1512 at 6, citing Powell v. McCormack, 395 U.S. 486 (1969); Gautreaux v. Romney, 448 F.2d 731, 736 (7th Cir. 1971); Committee to Free the Fort Dix 38 v. Collins, 429 F.2d 807 (3d Cir. 1970).

213 State Hwy Comm'n v. Volpe, No. 72-1512 at 6.

214 See Powell v. McCormack, 395 U.S. at 549; State Hwy Comm'n v. Volpe, No. 72-1512 at 7.

215 National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 695 (D.C. Cir. 1971).

216 See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

217 See text accompanying notes 192 et seq. supra; *Housing Authority*.

218 State Hwy Comm'n v. Volpe, No. 72-1512 at 9 et seq., finding the whole scheme of the Highway Act contradictory to an express or implied power to impound; see text accompanying notes 119 et seq. supra.

statutory provisions.[219] If the effects of presidential impoundments were the termination of funded programs or if impoundment affected a statutory scheme devoid of sections which explicitly or implicitly grant the executive powers to reserve funds, the impoundment of funds authorized and appropriated by the Congress might raise constitutional issues.

The black letter standards for determining nonjusticiable political questions were concisely presented by the Supreme Court in *Baker v. Carr*.[220] Litigation seldom presents situations where a mechanical application of these standards is possible. As a result, the criteria of *Baker v. Carr*, carried forward by stare decisis, have been gradually modified through later application.[221] In *Campaign Clean Water, Inc. v. Ruckelshaus*[222] and *City of New York v. Ruckelshaus*,[223] the federal government has moved for dismissal alleging, *inter alia*, that the grant of executive power in the Constitution "comes very close to a [*Baker v. Carr*] 'textually demonstrable' commitment of [spending control] to the President."[224] If such a textually demonstrable commitment could be supported, a court would be compelled to dismiss the action as a political question. However, by virtue of the constitutional prohibition against drawing monies from the treasury without express statutory authorization,[225] authority over spending would seem to lie with Congress.[226] This constitutional prohibition could be described as a textually demonstrable commitment to Congress of the alternate power to control spending.[227] Clearly, the executive, by raising the political question doctrine, cannot ask the judiciary to ignore its duty to arbitrate these conflicting interpretations of the Constitution.[228]

Baker v. Carr further suggests that where no judicially discoverable and manageable standards for resolving a specific case exist, the litigation presents a nonjusticiable political question and the courts are barred from reaching the merits.[229] This argument is dispositive of impoundment cases where standards are clearly absent. Where they are clearly present, and no other jurisdictional barrier prevents adjudication on the merits, a court cannot avoid its duty to rule on the propriety of specific impoundments. However, there are cases which do not readily fall into either category. This third situation presents the courts with a possibility of using the political question doctrine as a discretionary means for avoiding adjudication. Although a court might rely on this rationale to avoid reaching a hotly contested issue, the argument should not be dispositive of impoundment cases that merely present issues of statutory interpretation. The statutes involved in each of the challenged impoundments already discussed merely present the courts with an opportunity to exercise thier unimpeachable duty to interpret the laws of the United States.[230] The decision in *Housing*

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219 Compare the power to create reserves under the Anti-Deficiency Act, 31 U.S.C. § 665 (1970) with the Eighth Circuit's interpretation of the Highway Act in State Hwy Comm'n v. Volpe, No. 72-1512 (8th Cir. April 2, 1973), and the court's interpretation of the FHA Act in *Berends*, supra note 116.

220 369 U.S. 186 (1962).

221 See, e.g., Powell v. McCormack, 395 U.S. 486 (1969).

222 Civ. Action No. 18-73-R (E.D. Va. 1973).

223 Civ. Action No. 2466-72 (D.D.C. 1973).

224 See Defendant's Brief, Campaign Clean Water, Inc. v. Ruckelshaus, Civ. Action No. 18-73-R at 11; Defendant's Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment, City of New York v. Ruckelshaus, Civ. Action No. 2466-72 at 6.

225 U.S. Const. art. I, § 9.

226 See text accompanying notes 55 et seq. supra.

227 U.S. Const. art. I, § 9.

228 See Marbury v. Madison, 5 U.S. (1 Cranch) at 177; Powell v. McCormack, 395 U.S. at 549.

229 See Defendant's Brief, Campaign Clean Water, Inc. v. Ruckelshaus, Civ. Action No. 18-73-R at 11; Defendant's Points and Authorities in Answer to Plaintiff's Motion for Summary Judgment, City of New York v. Ruckelshaus, Civ. Action No. 2466-72 at 6.

230 See State Hwy Comm'n v. Volpe, No. 72-1512 at 7.

Authority of San Francisco v. United States Dept. of H.U.D.,[231] which unnecessarily reached the political question issue, can be distinguished because of its finding of minimal congressionally delegated discretion, and may be challenged because of its holding that Congress has the exclusive duty to determine when delegated authority is abused.[232]

The proposals made in section IV of this Note with respect to pending legislation would facilitate a court's search for standards. They would demonstrate a legislative decision that impoundments, in excess of one percent are *per se* abuses of statutory discretion, and even courts which find *Housing Authority* persuasive would be compelled to reach the merits.

Used as a rationale for avoiding political questions, the fear of embarassing a coordinate branch of government must be weighed against the necessity to preserve the constitutional equilibrium among the departments. The Supreme Court's decision in the Steel Seizure case[233] undoubtedly 'embarrassed' President Truman. However, the court did not shy away from its duty to face the constitutional issues presented. As Chief Justice Marshall said in *Cohens v. Virginia*, "the judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. . . . Questions may occur which we would gladly avoid, but we cannot avoid them."[234]

VI. CONCLUSION

The debate between the political organs of government over the powers of the executive and the Congress with respect to the appropriation and spending process – a debate begun by the founding fathers – may be nearing a high-water mark. It is a sign that the carefully balanced conflict built into the American system of government is continuing to function as a check on excessive aggregations of power by the President. The present confrontation seems to have caused the Congress to reassess its role vis-a-vis the President. Although need for impoundment as an adminstrative tool militates against overly severe restrictions, at the same time, impoundment should not be used as a policy tool of the executive or as a form of veto.

In the *Berends*, *Volpe* and *Housing Authority* cases, the courts have demonstrated their hesitancy to approach the constitutional issues allegedly surrounding the impoundment problem. This hesitancy is justifiable. If the judiciary were to delineate fixed *constitutional* boundaries in this gray area of concurrent authority between the Congress and the President, they would suppress the dynamic tension which lies at the heart of the system of checks and balances.[235] By approaching each impoundment controversy as a case which merely requires judicial interpretation of statutory provisions, the courts have resolved individual controversies without, themselves, entering the "political thicket."

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231 340 F. Supp. 654 (N.D. Cal. 1972).

232 Id. at 656.

233 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

234 Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404 (1821).

235 The purpose of the doctrine of separation of powers was, not to avoid the 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. Myers v. United States, 272 U.S. 52, 293 (1926).

In view of the economic and social importance of governmental activity and the widespread consequences of impoundment, there is a need for carefully drafted legislation, born of the conflict between the political branches of government. The proposals made in the Note with respect to the pending legislation are aimed at assisting an affective reassertion by Congress of its co-equal authority in spending and policy matters. If enacted, they would also serve as judicial guidelines and standards for determining whether government officials have overstepped their proper authority.[236]

BARRY J. BENDES

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236 As this Note was going to press, the United States District Court for the District of Columbia rendered a decision in Local 2677, Am. Fed'n Gov't Employees v. Phillips, Civ. Action No. 371-73 (D.D.C. April 11, 1973). The case is a consolidation of three actions brought to enjoin the dismantlement of the Office of Economic Opportunity (OEO) by the defendant, Phillips, Acting Director of OEO. The court, in holding for the plaintiffs, found that a justiciable case or controversy was presented to the court, that the case did not present a nonjusticiable political question, that a defense alleging sovereign immunity does not lie in an action seeking the release of monies appropriated by Congress and impounded by the executive, and that the plaintiffs had the requisite standing. As in each of the previous impoundment cases, the court's decision turned on the specific language of the statutes involved. See Economic Opportunity Amendments of 1972, Pub. L. No. 92-424, 86 Stat. 688.

Although this case presented the court with the most extreme form of impoundment, i.e., an impoundment which sought to terminate a program, the ratio decidendi that the President does not have the power to terminate a program where it is the clear intent of Congress that the program continue, may be a harbinger of cases that will extend this holding to bar the executive from any impoundments which reduce the effectiveness and level of operations of congressionally funded programs.