NOTE

The Constitutionality of the Line Item Veto Act of 1996: Three Potential Sources For Presidential Line Item Veto Power

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I. Introduction

In April 1996 Congress passed the Line Item Veto Act of 1996[1] (hereinafter "Line Item Veto Act") which President William Jefferson Clinton signed into law.[2] The Line Item Veto Act gives the President[3] the power to cancel portions of an appropriations or tax bill after he has signed the bill into law.[4] The Line Item Veto Act is the product of a decade of debate on the line item veto power. Proponents assert that giving the President such power allows him to cut Congress' wasteful spending, while opponents argue that the line item veto power permits the President to legislate and control the nation's treasury.[5]

This Note assesses the constitutionality of the Line Item Veto Act. In order to determine whether the Act is constitutional, one must understand the nature of the power it grants to the President. The line item veto power has three potential sources under our constitutional system. First, the power may derive from congressional authorization for the President to amend or repeal laws, and thus constitutes an essentially legislative power. Characterizing the line item veto power as such implicates the lawmaking provisions set out in Article I, Section 7 of the Constitution.[6] The Constitution does not, however, explicitly give the President more than a veto over legislation.

Second, the line item veto authority may constitute a means of effectuating the President's Article I veto power over legislation presented to him by Congress.[7] Currently, members of Congress employ legislative tactics which prevent the President from effectively using his veto authority.[8] The Line Item Veto Act permits the President to circumvent congressional tactics and cancel singular items in an omnibus appropriations bill so that he can make effective use of his veto power.

1. Pub. L. No. 104-130, 110 Stat. 1200 (1996).

2. *See* Toni Locy, *Line Item Veto Law Challenged*, S.F. CHRON., Jan. 3, 1997, at A3.

3. This Note refers to the President of the United States in a masculine form since there has been no female President to this date.

4. 2 U.S.C. § 691 (1997).

5. *See* Locy, *supra* note 2.

6. The second clause of Article I, Section 7 states that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . . ." U.S. CONST. art. I, §7.

7. *See id.*

8. *See infra* notes 184-185 and accompanying text.

Finally, the line item veto power may be construed as congressional authorization for the President to exercise an impoundment power.[9] When the President impounds funds, he refuses to abide by Congress' mandate to spend or tax, thereby nullifying Congress' spending priorities. There is no explicit constitutional basis for impoundment authority, but courts and commentators have long suggested that such a power exists. The depiction of the line item veto power as impoundment power raises questions regarding the extent of Congress' delegation authority and whether such power is included within the President's mandate to execute the laws.

In evaluating the constitutionality of the Line Item Veto Act, this Note explores the three potential characterizations of the line item veto power and the constitutionality of the law under each characterization. After this introduction, Part II of this Note contains four subsections that discuss the evolution of the line item veto power. First, subsection A describes the political and economic setting in which the Line Item Veto Act was passed. Second, subsection B outlines the provisions of the Line Item Veto Act. Finally, subsections C and D summarize the Supreme Court's holding in the lawsuit challenging the constitutionality of the Line Item Veto Act and examines who will be a proper plaintiff in future suits. Part III assesses the constitutionality of the line item veto as presidential lawmaking authority, and concludes that while Congress can authorize the President to make laws to carry out Congress' intent, the Line Item Veto Act is not such a permissible delegation of lawmaking authority. Instead, the Line Item Veto Act empowers the President to independently legislate contrary to constitutional provisions and Congress' legislative mandate. Part IV demonstrates that if the line item veto power functions as an effectuation of the President's Article I veto authority, such authority is unconstitutional because it encroaches on Congress' legislative powers. Part V reveals that if the Line Item Veto Act's veto power constitutes presidential impoundment power, the Constitution does not explicitly bar such authority. Although the impoundment argument is the strongest one in support of the Line Item Veto Act, it ultimately fails because the line item veto power impermissibly tilts the balance of power between the President and Congress in favor of the President. In conclusion, this Note explains that regardless of the characterization or source of the line item veto power, the Line Item Veto Act is an unconstitutional violation of the separation of powers. Members of Congress should not rely on the Line Item Veto Act to control their excessive budgetary spending. Instead, they

9. This Note defines "impoundment" power as the authority of the President to use his discretion in executing appropriations and tax laws legislated by Congress.

should achieve fiscal discipline by exercising self-restraint and promulgating rules to govern their own self-interested behavior.

II. Evolution of the Line Item Veto

A. The Need for Presidential Line Item Veto Power and the Passage of the Line Item Veto Act of 1996

Although Congress appears recently to have regained control over the federal budget deficit and national debt, during the past two decades both figures have escalated exponentially. Despite Congress' attempts to restrain its spending and reign in the spiraling national debt,[10] the national debt has quintupled in the past 15 years as a result of unrestrained annual deficits.[11] It took the United States 192 years of operation (from 1789 to 1981) to accumulate its first trillion dollars of debt.[12] However, since 1981, regardless of whether there has been a Republican or Democratic President, the national debt has continued to rise every year.[13] As of January 29, 1998, the national debt was $494,031,011,931.75.[14]

The huge debt is commonly blamed on the federal budgeting process, which leads to overspending. Critics attribute one source of the breakdown in the budgeting process to Congress members' preoccupation with re-election and their susceptibility to the influence of special interests.[15] Congress members are often accused of logrolling, that is, voting for one another's pet projects in order to gain their constituents' favor.[16] Conse-

10. The national debt is the sum of all of the accumulated deficits since the beginning of this nation. Each year, the deficit contributes to and increases the debt of this country. However, if the nation's annual economic growth is large enough to sustain the debt, the debt is not of great concern.

11. *See* H.R. REP. NO. 104-11(II), at 7 (1995). On August 6, 1997, President Clinton announced the current state of the deficit. He forecast a smaller-than-expected $37 billion federal deficit for fiscal year 1997, which ended September 30, 1997. This projection would be the lowest since 1974, when the government shortfall was $6 billion. *See* Nancy Benac, *Deficit to Hit 23-yr. Low; Clinton Forecasts $37 Billion Shortfall*, CHI. SUN-TIMES, Aug. 6, 1997, at 1.

12. *See* H.R. REP. NO. 104-11(II), at 7 (1995).

13. *See id.* In the fiscal years 1991-92, when Republican George Bush was President, the national debt increased from $3,665,303,351,697.03 to $4,064,620,655,521.66. During the last two years of Democratic President Clinton's first term, the national debt rose from $4,973,982,900,709.39 in fiscal year 1995 to $5,224,810,939,135.73 in fiscal year 1996. *See* Department of Treasury, The Bureau of the Public Debt, *The Public Debt To The Penny* (visited Sept. 30, 1997) <http://www.publicdebt.treas.gov/opd/opdpenny.htm>.

14. Department of Treasury, The Bureau of the Public Debt, *The Public Debt To The Penny* (visited Feb. 1, 1998) <http://www.publicdebt.treas.gov/opd/opdpenny.htm>.

15. *See, e.g.*, Paul R. Q. Wolfson, *Is A Presidential Item Veto Constitutional?*, 96 YALE L.J. 838 (1987); Alan J. Dixon, *The Case for the Line Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207, 211-17 (1985) [hereinafter Dixon, *Case*].

16. *See* RICHARD A. WATSON, PRESIDENTIAL VETOES AND PUBLIC POLICY 171 (1993).

quently, appropriations bills are often filled with pork-barrel legislation[17] which does not benefit the nation as a whole, but only the districts of individual members of Congress.[18] Because these projects are slipped into omnibus appropriations bills[19] that fund valid projects, the President must often make the difficult decision of either vetoing an entire bill that includes beneficial programs or signing a bill that includes projects for special interests.[20] When Congress sent President Truman such an appropriations bill, which it knew would be approved even though it contained items which were not in the national interest and bore no relationship to the main purpose of the legislation, Truman is said to have called the practice "legislative blackmail."[21]

One example of pork-barrel legislation is the Revenue Act of 1992,[22] introduced to create enterprise zones in the aftermath of the Los Angeles riots.[23] As the bill made its way through Congress, legislators inserted more than fifty special tax breaks which exceeded the allocation for the enterprise zones themselves. The tax breaks included special exemptions for certain rural postal carriers, special rules for Federal Express pilots, deductions for operators of licensed cotton warehouses, and exemptions for certain manufacturers of small firearms.[24] Although President Clinton

17. Pork-barrel legislation refers to legislation which has been passed by "securing votes for legislation by which one congressman conditions his support for a colleague's bill on the colleague's support for his own. The resulting multi-faceted appropriations bill is then presented to the President." Diane-Michele Krasnow, *The Imbalance of Power and the Presidential Veto: A Case for the Item Veto*, 14 HARV. J.L. & PUB. POL'Y 583, 602, n.124 (1991).

18. *See* WATSON, *supra* note 16.

19. "Omnibus appropriations bills are an amalgamation of assorted legislation grouped together and presented in a single bill or resolution." Krasnow, *supra* note 17, at 584 n.6.

20. *See* WATSON, *supra* note 16.

21. *See* 141 CONG. REC. S4236 (daily ed. Mar. 21, 1995) (statement of Sen. Coats).

22. *See* H.R. REP. NO. 104-11(II), at 18 (1995).

23. *See id.*

24. *See id.* Legislators' inclusion of such tax benefits illustrates that the federal budget is an example of the tragedy of the commons. The "tragedy of the commons" is an economic concept used to describe the "commons" which are property for which there is widespread public access, but no private ownership. That is, the public at large owns the property and no private property rights exist in the property. The "tragedy" in the commons occurs because "all men rush [to maximize the benefit of the property], each pursuing his own best interest . . . ." Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968), *reprinted in* RICHARD J. PIERCE, JR., ECONOMIC REGULATION: CASES AND MATERIALS 24-25 (1994). For example, the national parks in the United States are "commons" which are shared by the nation's people. Since no one person owns the land, everyone uses the forests and parks as they desire without any incentive to limit their use for fear of excessive use. On the other hand, if private individuals owned the lands, they would possess greater incentive to regulate the land's use in order to preserve it. Private owners would not race to reap all of the benefits first. In the same way, the federal budget falls prey to individuals and interest groups which fight for their slice of the federal pie without an eye toward the overall effect on the nation's fiscal health. Because no one person owns the budget, the common owners desire to maximize their proportionate gain. Unfortunately,

vetoed the Revenue Act of 1992,[25] a President does not always have the option to exercise his veto power against outlandish spending or tax benefits if the same bill funds other necessary programs.

In order to combat growth of the national deficit and increasing congressional misbehavior, numerous Presidents have requested the power to exercise a line item veto that would allow rejection of individual parts of a proposed appropriations bill, while enacting the remainder as law.[26] In his 1992 State of the Union address, President Bush called for Congress to give him the power to veto items such as funding for a Lawrence Welk Museum that was included in a 1991 appropriations bill for the Department of Agriculture.[27] President Clinton also campaigned for a line item veto, claiming that he could decrease spending by $9.8 billion over four years if Congress gave him the line item veto power.[28]

Over the past two decades, the American public has consistently supported legislation which would grant the President line item veto power in order to reduce the federal deficit. The response to a 1992 joint poll by NBC and the *Wall Street Journal* showed that sixty-eight percent of citizens favored giving the President a line item veto so that he could curtail wasteful spending.[29] In a poll conducted on November 28-29, 1994, by CNN, *USA Today* and Gallup, seventy-seven percent of those polled stated that they would endorse legislation that gave the President such power.[30]

Not surprisingly, although various bills have been introduced, Congress has traditionally been reluctant to confer any form of line item veto power on the President.[31] During the 1980s, Congress considered three statutory approaches for line item veto authority.[32] The first, "separate enrollment," would require that each item in a spending or revenue bill be enrolled as a separate bill, thus allowing the President to exercise his execu-

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"[f]reedom in a commons brings ruin to all" and unfettered budgeting practices will ultimately lead to financial ruin for the United States. *Id.*

25. *See* H.R. REP. NO. 104-11(II), at 8 (1995).

26. Many modern Presidents, regardless of party affiliation, have stated support for the line item veto. Among them are Clinton, Bush, Reagan, Ford, Eisenhower, Truman and Franklin D. Roosevelt. Ulysses S. Grant was the first President to openly seek an item veto. *See* WATSON, *supra* note 16, at 154-55; S. REP. NO. 104-9, at 5 (1995), *reprinted in* 1996 U.S.C.C.A.N. 859, 864.

27. *See* JAMES L. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 281 (1992); George F. Will, *Lawrence Welk and Line Items*, WASH. POST, Feb. 23, 1992, at C7.

28. *See* S. REP. NO. 104-9, at 5 (1995), *reprinted in* 1996 U.S.C.C.A.N. 859, 864.

29. *See* H.R. REP. NO. 104-11(II), at 7-8 (1995).

30. *See id.* at 7-8.

31. Since Ulysses Grant first proposed the idea in 1873, more than 150 legislative proposals have requested that Congress give the President the authority to veto individual parts of a bill. Until 1996, Congress rejected every such suggestion. *See* 142 CONG. REC. S2966 (daily ed. Mar. 27, 1996) (statement of Sen. Levin).

32. *See* S. REP. NO. 104-9, at 5-6 (1995), *reprinted in* 1996 U.S.C.C.A.N. 859, 864-65.

tive veto on any of the individual items.[33] The second, "expedited rescission," would establish fast-track procedures for the consideration of the President's proposals to rescind the budget authority provided in appropriations acts or to repeal tax expenditures in revenue acts.[34] These proposals would not go into effect unless passed by a majority of each House and signed into law.[35] The last approach, "enhanced rescission," would authorize the President to take unilateral action to repeal budget authority provided in a spending bill or to cancel tax expenditures in revenue acts.[36] Congress would have to pass a separate law in order to overturn the President's cancellation,[37] and because the President would presumably veto a law reversing his own rescissions, a two-thirds vote of each House would be necessary to overturn his actions.[38] As of 1994, Congress had rejected all proposed legislation granting the President any form of line item veto power.[39]

In 1995, the Republican-controlled Congress adopted a more favorable attitude toward legislation granting the President item veto power due, in part, to Congress' "Contract with America," which called for deficit reduction.[40] On January 4, 1995, Senator Robert Dole (R-Kan.) introduced S.4, the Legislative Line Item Veto Act, which, if passed, would give the President enhanced rescission power.[41] On January 18, 1995, the Senate Budget Committee held hearings on the bill and adopted two amendments.[42] The committee ordered the bill reported without recommendation on February 14, 1995.[43] Throughout 1995 and at the beginning of 1996, Congress further deliberated on S.4 and extensively debated, among other

33. *See id.* at 5.

34. *See* S. REP. NO. 104-9, at 6 (1995), *reprinted in* 1996 U.S.C.C.A.N. 859, 865.

35. *See id.*

36. *See* S. REP. NO. 104-9, at 5-6 (1995), *reprinted in* 1996 U.S.C.C.A.N. 859, 864-65.

37. *See id.*

38. *See* U.S. CONST. art. I, § 7.

39. In 1990, the Senate Budget Committee defeated two proposals by Senator Armstrong: one for separate enrollment authority and the other granting the President enhanced rescission authority. Thereafter in 1994, the Senate Budget Committee did not take action on two House-passed bills which provided for expedited procedures for consideration of the President's proposed rescissions. *See* S. REP. NO. 104-9, at 8 (1995), *reprinted in* 1996 U.S.C.C.A.N. 859, 867. The General Accounting Office estimated in 1992 that a line item veto could have eliminated $70.7 billion in pork-barrel spending between 1984 and 1989. *See* 141 CONG. REC. S4241 (daily ed. Mar. 21, 1995) (statement of Sen. Feinstein).

40. *See* Tampa Wire Service Report, *Line of Power: New Veto for President Ok'd*, TAMPA TRIB., Mar. 29, 1996, at 1.

41. *See* S. REP. NO. 104-9, at 8 (1995), *reprinted in* 1996 U.S.C.C.A.N. 859, 867.

42. One amendment was introduced by Senator Domenici (R-NM) to end the provisions of the bill in 2002. Senators Snowe (R-ME) and Conrad (D-ND) proposed the second amendment which established a "lockbox," a provision which assures that any savings from the President's rescissions are devoted to deficit reduction. *See id.*

43. *See id.*

things, its constitutionality. Some members of Congress, such as Senator Robert C. Byrd (D-W. Va.), alleged that the bill implicitly vitiated the separation of powers because it transferred one of the most important Article I legislative powers, the authority to make or rewrite laws, to the Executive Branch.[44] Ultimately, Congress failed to conclude whether the bill was constitutional, instead, it amended the bill to provide for expedited judicial review[45] to allow the federal judiciary to determine the bill's constitutionality. Subsequently, President Clinton signed the line item veto bill into law on April 9, 1996.[46] The Line Item Veto Act went into effect on January 1, 1997.[47]

While most members of Congress, President Clinton, and the public at large have praised the Act's passage as a positive step toward controlling government spending and decreasing the federal deficit, other members of Congress and some scholars claim that the Line Item Veto Act "effectuated an unprecedented and unconstitutional allocation of power from the legislative branch to the executive."[48] Months after President Clinton began using the line item veto, several lawmakers introduced bills to repeal the Act.[49]

B. Summary of the Line Item Veto Act of 1996

The Line Item Veto Act amends the Congressional Budget and Impoundment Control Act of 1974[50] (hereinafter "Impoundment Control Act"),[51] which had provided the President with limited powers to impound appropriations and taxes by authorizing two types of presidential impoundments.[52] One type, a "deferral," allowed for a delay in the expenditure of appropriated funds.[53] The second type, a "rescission," provided for

44. *See* 142 CONG. REC. S2942 (daily ed. Mar. 27, 1996) (statement of Sen. Byrd).

45. This provision states that the Line Item Veto Act may be challenged in the United States District Court for the District of Columbia. 2 U.S.C. § 692 (a)(1) (1997). The District Court's decision may be appealed directly to the United States Supreme Court. *See* 2 U.S.C. § 692(b) (1997).

46. *See* Statement by President William J. Clinton Upon Signing S.4, 31 WEEKLY COMP. PRES. DOC. 637 (Apr. 9, 1996).

47. *See* 143 CONG. REC. S569-04 (daily ed. Jan. 21, 1997) (statement of Sen. Moynihan).

48. *Id.*

49. Associated Press, *Senators Lead Bid to Repeal Line Item Veto // Moynihan, Byrd Target 'Unconstitutional Act'*, ROCKY MOUNTAIN NEWS, Oct. 25, 1997, at 49A. In the Senate, Senators Robert C. Byrd (D-W. Va.) and Daniel P. Moynihan (D-N.Y.) introduced legislation to repeal the President's line item veto on October 24, 1997. *See id.* Representative David Skaggs initiated similar legislation in the House of Representatives on October 9, 1997. *See id.*

50. Pub. L. No. 93-344, 88 Stat. 297 (1974).

51. *See* S. REP. NO. 104-9 at 9 (1995), *reprinted in* 1996 U.S.C.C.A.N. 859, 866-67.

52. *See* WATSON, *supra* note 16, at 161.

53. *See id.*

a permanent cancellation of appropriations.[54] Upon exercising his impoundment power, the President would send Congress a special message informing it of his action.[55] Either House of Congress could disapprove a deferral at any time.[56] If, however, a President's proposed rescission was not approved by both Houses within forty-five days of the President's submission, the affected funds would be automatically released to be spent.[57] These deferral and rescission powers were invalidated after *I.N.S. v. Chadha*[58] and *City of New Haven v. United States*[59] on the ground that such powers violated the constitutional principles of bicameralism and presentment.[60]

Not only was the Impoundment Control Act unconstitutional; it was also inefficient. It inherently encouraged congressional inaction and delay,[61] because Congress was not obligated to consider or respond to any of the President's proposals. In fact, Congress often ignored Presidential proposals to rescind funds.[62] From 1974 to 1995, Presidents recommended $72.8 billion in rescissions, and of that amount, Congress agreed only to $22.9 billion.[63] Thus, the Impoundment Control Act did not give any real power to curb congressional excesses.

The Line Item Veto Act, by contrast, gives the President more effective authority in the form of "enhanced rescission" power. That is, the Line Item Veto Act gives the President unilateral authority to "cancel in whole" any dollar amount of discretionary budget authority,[64] any item of new direct spending,[65] or any limited tax benefit[66] from "any bill or joint

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. 462 U.S. 919, 956-58 (1983). Although *Chadha* did not directly address impoundment authority, in ruling that Congress' one house legislative veto was unconstitutional, the Court stated that the provisions of Article I of the Constitution require bicameralism and presentment on all legislation. *See id.*

59. 809 F.2d 900, 909 (D.C. Cir. 1987). In *City of New Haven*, the court held that the two veto provisions were inseverable and invalidated the entire Impoundment Control Act. *Id.*

60. *See* WATSON, *supra* note 16, at 161-62.

61. *See* H. REP. 104-11(II), at 8-9 (1995).

62. *See id.* at 9.

63. *See id.*

64. "Dollar amount of discretionary budget authority" means "the entire dollar amount of budget authority - (i) specified in an appropriation law . . .; (ii) represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law; (iii) required to be allocated for a specific program, project, or activity in a law . . . ." 2 U.S.C. § 691e(7)(A) (1997).

65. "Item of new direct spending" is "any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending relative to the most recent levels calculated pursuant to [section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. § 907]]." 2 U.S.C. § 691e(8) (1997). "Direct spending" is "the budget

resolution that [the President] has . . . signed into law pursuant to Article I, Section 7, of the Constitution . . . ."[67] However, the President's power is not absolute. Not only does Congress have the ultimate power to override a presidential rescission, but the President must also meet certain statutory requirements in order to exercise his authority. He may cancel an item of spending or tax benefit only if he determines that it will "reduce the Federal budget deficit," "not impair any essential Government functions," and "not harm the national interest."[68] He must decide within five days of signing a bill into law whether he wants to repeal an item of spending.[69] During this five-day period, he must send both the House of Representatives and the Senate a "special message"[70] notifying them of any rescission.[71] The President's cancellation of any dollar amount becomes effective on the date when the House of Representatives and the Senate receive his special message.[72]

The Line Item Veto Act provides Congress with the power to override the President's rescission. Congress can enact a "disapproval bill,"[73] which must be passed with bicameral consideration, presentment to the President, and a two-thirds override of the President's veto, assuming that the President would veto any disapproval bill that attempts to invalidate his

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authority provided by law (other than by an appropriation law), entitlement authority, and the food stamp program." 2 U.S.C. § 691e(5) (1997).

66. "Limited tax benefit" is "any revenue-losing provision which provides a Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries under Title 26 in any fiscal year for which the provision is in effect; and any Federal tax provision which provides temporary or permanent transitional relief for 10 or fewer beneficiaries in any fiscal year . . . ." 2 U.S.C. § 691e(9)(A) (1997).

67. 2 U.S.C. § 691(a)(1-3) (1997).

68. 2 U.S.C. § 691(a)(3)(A)(i-iii) (1997).

69. *See* 2 U.S.C. § 691(a)(B) (1997). While these standards are limitations on the President's veto power, the President can easily satisfy them.

70. A "special message" from the President shall specify: (1) the amount of the item canceled; (2) "the determinations required under § 691(a) . . . and any supporting material;" (3) "the reasons for the cancellation;" (4) "to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the cancellation;" and (5) "all facts, circumstances and considerations relating to or bearing upon the cancellation, and to the maximum extent practicable, the estimated effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided . . . ." 2 U.S.C. § 691a(b)(1)(A-E) (1997).

71. The President must transmit each special message to the House of Representatives and the Senate on the same calendar day. 2 U.S.C. § 691a(c)(1) (1997).

72. *See* 2 U.S.C. § 691b(a) (1997).

73. A "disapproval bill" is a "bill or joint resolution which only disapproves one or more cancellations of dollar amounts of discretionary budget authority, items of new direct spending, or limited tax benefits in a special message transmitted by the President . . . ." 2 U.S.C. § 691e (6)(1997). The Act provides for a simple format for the disapproval bill which must be followed. *See* § 691e(6)(A-C).

item cancellation(s).[74] There are also procedures for expedited consideration of disapproval bills in each House. For example, in order for a disapproval bill to be considered, it must be introduced no later than the fifth calendar day of session after receipt of the special message, and the review period lasts only thirty calendar days, beginning on the first calendar day after the special message is received.[75] Thus, unlike the Impoundment Control Act, the Line Item Veto Act requires Congress to take swift action to reverse the President's rescission.

The Line Item Veto Act also restricts the extent of the President's power in various ways. First, there is a "lockbox" provision which assures that any savings from the President's cancellations are devoted to deficit reduction, thereby restraining the President from applying the funds of a rescinded item to a program of his choice.[76] Second, the Line Item Veto Act requires the President to eliminate only dollar amounts specifically identified in a bill or those represented separately in a table, chart, or explanatory text included in the committee report.[77] Such "fencing language" in each appropriation bill prevents the President from arbitrarily determining the dollar amount of an item to veto.[78] Finally, the Line Item Veto Act limits the duration of the President's power. The line item veto authority ends on January 1, 2005, or when the federal deficit is eliminated, whichever occurs first.[79]

Furthermore, the Line Item Veto Act purports to authorize legal challenges by any harmed individuals or parties. The Line Item Veto Act also

74. *See* 2 U.S.C. § 691d (1997). This is the same process required by the Constitution for passing any bill into law. *See* U.S. CONST. art. I, § 7.

75. The Act provides other detailed rules and procedures governing the consideration of any disapproval bill. *See* 2 U.S.C. § 691d (1997).

76. *See* 142 CONG. REC. S2930 (daily ed. Mar. 27, 1996) (statement of Sen. McCain); *see also supra* text accompanying note 42.

77. *See* 2 U.S.C. §§ 691(b)(1-3) and 691d(7) (1997). The President may also refer to the statement of managers accompanying the bill or to dollar amounts in another law which mandate that some portion of the amount provided in the bill be allocated to a specific program, project, or activity. *See id.* For example, the fiscal year 1996 Agriculture Appropriations Act allocated $49,846,000 in special grants for agriculture research. The Conference Report contained tables and charts which appropriated the $49,846,000 into lesser amounts corresponding to individual research programs: for example, $3,758,000 for Wood Utilization Research in Oregon, Missouri, North Carolina, Minnesota, Maine and Michigan. In such a bill, the President could only line out the dollar amount of budget authority specified in the law or the report, which is the entire $49,846,000 or the entire $3,758,000. He has no authority to use his discretion to decrease a portion of either sum. CONG. REC. S2930-31 (daily ed. Mar. 27, 1996) (statement of Sen. McCain).

78. *See* 142 CONG. REC. S2930.

79. The second limitation, the elimination of the federal deficit, is not explicitly stated, but since the Line Item Veto Act mandates that all of the rescissions must reduce the federal deficit, the President cannot have item veto authority if there is no deficit. *See* 2 U.S.C. § 691 (1997).

specifically grants members of Congress standing to sue.[80] Since the constitutionality of the line item veto was in question during the debate over the bill, Congress enacted an expedited judicial review process to resolve the issue. An order from the District Court is reviewable by direct appeal to the United States Supreme Court.[81] Further, both the District Court and the Supreme Court have a duty to advance their dockets and expedite the disposition of any matter challenging the Act.[82]

C. The Initial Constitutional Challenge: *Byrd v. Raines*[83]

As a result of the expedited judicial review provisions, by the beginning of July 1997, the Line Item Veto Act had already completed its whirlwind tour through the Federal District Court for the District of Columbia and the United States Supreme Court, despite the fact that it did not become effective until January 1, 1997. Surprisingly, however, the question of its constitutionality remained unresolved.[84]

One day after the Line Item Veto Act became effective, six lawmakers[85] filed a District Court action challenging its constitutionality.[86] On April 10, 1997, District Court Judge Thomas Penfield Jackson found that the plaintiffs satisfied the requisite standing[87] and ripeness[88] requirements, and held that the President's line item veto authority was an unconstitutional violation of the separation of powers.[89]

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80. *See* 2 U.S.C. § 692(a)(1) (1997). "Any Member of Congress or any individual adversely affected by [this Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this [Act] violates the Constitution." *Id.*

81. *See* 2 U.S.C. § 692(b) (1997).

82. *See* 2 U.S.C. § 692(c) (1997).

83. 956 F. Supp. 25 (D.D.C. 1997) *overruled by* Raines v. Byrd, 117 S.Ct. 2312 (1997) (hereinafter "Byrd").

84. Prior to the 1997 suit challenging its constitutionality, the Line Item Veto Act faced another lawsuit filed before the law became effective. The case, *National Treasury Employees Union v. United States*, 101 F.3d 1423 (D.C. Cir. 1996), was dismissed. The court held that the union lacked legal standing to sue because the law was not yet in effect and therefore, could not be used against the Union, and it had not been injured. *See id.* at 1430-32.

85. The six plaintiffs who filed suit were Senators Robert C. Byrd (D-W. Va.), Mark O. Hatfield (R-Or.), Daniel P. Moynihan (D-N.Y.), Carl Levin (D-Mich.) and Representatives Henry A. Waxman (D-Cal.) and David E. Skaggs (D-Colo.). The defendants are Franklin D. Raines, Director of the Office of Management and Budget and Robert E. Rubin, Secretary of the Treasury. *See Byrd*, 956 F. Supp. at 27 n.1.

86. *See id.* at 27.

87. The standing inquiry examines whether the plaintiff is the proper party to bring the suit. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

88. A ripeness inquiry evaluates whether an injury has occurred or is "certainly impending." Whitmore v. Arkansas, 495 U.S. 149, 158 (1990).

89. *See* 956 F. Supp. at 30-32, 38. Judge Jackson explained that the line item veto power violated the careful design of the Constitution because Congress, the branch in which the Consti-

Pursuant to the Line Item Veto Act's expedited review provision,[90] the defendants appealed the District Court's ruling directly to the Supreme Court. Because of the Line Item Veto Act's importance in the budgeting process, the Court granted certiorari,[91] heard oral arguments, and rendered its decision[92] prior to leaving for its 1997 summer recess.

Surprisingly, the Supreme Court did not address the constitutionality of the line item veto power. Chief Justice William Rehnquist, speaking on behalf of the majority,[93] announced that the Court lacked jurisdiction to review the substantive provisions of the Line Item Veto Act because the appellees did not satisfy the necessary Article III "case or controversy" requirement that is the threshold requirement for federal court jurisdiction.[94]

Contrary to the District Court ruling, the Supreme Court found that the appellees failed to establish standing to sue, one element of the case or controversy requirement.[95] "To meet the standing requirements of Article III, '[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'"[96] Congress cannot abolish the Article III standing requirement by statutorily granting standing to a plaintiff who would not otherwise have a right to sue.[97] In *Raines*, the Supreme Court's examination of the plaintiff lawmakers' right to sue was one of first impression.[98] The Court relied upon two cases and the "historical practice" of legislators and executive branch members who experienced injury in their official ca-

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tution vested "all legislative Powers," relinquished to the President its legislative authority to repeal laws or portions of laws he does not like. *Id.* at 36. The constitutional scheme allots the President only a veto over legislation. U.S. CONST. art. I, § 7, cl. 2. Congress' ceding of such vast powers to the President was "revolutionary" and turned the division of Legislative and Executive Branch responsibilities on its head. *See* 956 F. Supp. at 37-38.

90. *See supra* note 80 and accompanying text.

91. Raines v. Byrd, 117 S.Ct. 1489 (1997).

92. Raines v. Byrd, 117 S.Ct. 2312 (1997).

93. The majority consisted of Justices Rehnquist, Scalia, O'Connor, Kennedy, Thomas, Ginsburg and Souter, who wrote a separate concurrence. The dissenters were Justices Breyer and Stevens.

94. *See Raines*, 117 S. Ct. at 2317 (citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982)); 117 S. Ct. at 2322.

95. *See id.* at 2317 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)); 117 S. Ct. at 2322.

96. *See id.* at 2317 (quoting Allan v. Wright, 468 U.S. 737, 751 (1984)).

97. *See id.* at 2318 n.3 (citing Gladstine, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979)).

98. *See id.* at 2318-21. The District Court based its finding of standing on the District of Columbia Circuit Court of Appeals' repeated recognition of Congressmen's standing to challenge measures that affect their constitutionally prescribed lawmaking authority. *See Byrd*, 956 F. Supp. at 30. The District Court relied upon the following cases: *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994), *Moore v. United States House of Representatives*, 733 F.2d 946, 950-53 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), and *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1168-71 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983). *See id.*

pacity,[99] in concluding that no legislative standing exists for a diminution of a lawmaker's legislative power.[100]

First, the *Raines* Court stated that in *Powell v. McCormack*,[101] its finding of legislative standing for a congressman who had been excluded from the House of Representatives (and consequently lost his salary) failed to support a similar finding for appellees.[102] First, the appellees were not individually selected from the House or Senate for unfavorable treatment as was Representative Powell.[103] All members of the House and Senate share equally in the harm to their official authority resulting from the President's line item veto power. Second, unlike Representative Powell, who was deprived of his House seat after his constituents elected him, the appellees made no assertion that they were deprived of a personal entitlement.[104] "[A]ppellees' claim of standing [was] based on a loss of political power, not loss of any private right, which would make the injury more concrete."[105] Thus, where there is an absence of personalized harm, no legislative standing exists.

Second, the Court discussed *Coleman v. Miller*,[106] the only case in which standing for legislators (albeit state legislators) claiming an institutional injury has been upheld by the Supreme Court.[107] In *Coleman*, a deadlocked senatorial vote which would ordinarily prevent passage of an amendment was disregarded, and the State Lieutenant Governor's vote ratified the amendment.[108] The *Coleman* Court held that the legislators who voted against the amendment had standing to sue because their votes, which would have been sufficient to defeat the proposed amendment, were nullified.[109] As to the Line Item Veto Act, however, the *Raines* Court found that the appellees' votes "were given full effect[;] [t]hey simply lost that vote."[110] Further, in the future, the Line Item Veto Act will not void

99. *See* 117 S.Ct. at 2318-21.
100. *See id.* at 2321-22.
101. 395 U.S. 486, 496 (1969).
102. *See* 117 S. Ct. at 2318.
103. *See id.*
104. *See id.* The Court "attach[ed] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit." *Id.* at 2322. In the accompanying footnote, the Court notes that in *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986), "members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." *Id.* at 2322 n. 10.
105. *Id.* at 2318.
106. 307 U.S. 433 (1939).
107. *See Raines*, 117 S.Ct. at 2318-19.
108. *See* 307 U.S. at 436-37.
109. *See id.* at 438.
110. *Raines*, 117 S.Ct. at 2320.

appellees' votes as the *Coleman* legislators' votes had been because Congress may repeal the Act or exempt an appropriations bill or provision from the Act.[111] Therefore, according to the Court, *Coleman* "provide[d] little meaningful precedent for appellees' argument."[112]

In addition to the lack of legal precedent to support appellees' claim for standing, the Court revealed that historically "in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power."[113] As examples, the Court cited the one-House veto provision at issue in *INS v. Chadha*[114] and the Tenure of Office Act passed in 1867.[115]

Chief Justice Rehnquist, writing for the Majority, noted that while strict compliance with the jurisdictional requirement has always been insisted on, in this case the standing inquiry was "especially rigorous [because] . . . reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[116] The majority opinion said the Court had to put aside its "natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency."[117]

As for future suits, the Court stated that its decision did not foreclose suit by an appropriate plaintiff.[118] Justices Souter and Ginsburg, although finding that standing was a debatable question, concurred with the majority's holding. They asserted that because an appropriate plaintiff would bring suit after the heated politics had subsided, it was worthwhile to "resolve doubts about standing against the plaintiff invoking an official interest."[119]

As the concurring Justices expected, in the months following the Supreme Court's decision, President Clinton grasped the first opportunity he was presented to exercise his line item veto authority and, thus, opened the

111. *See id.*
112. *Id.*
113. *Id.* at 2321.
114. 462 U.S. 919 (1983).
115. *See id.* at 2321-22.
116. *See* 117 S.Ct. at 2317-18. Traditionally, the Court has said that the standing doctrine "must be employed to prevent litigants from drawing federal courts into unnecessary conflict with coordinate branches." LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3-14, at 109 (2d ed. 1988). In *Allen v. Wright*, 468 U.S. 737 (1984), the Burger Court announced that the standing doctrine was "'built on a single basic idea—the idea of separation of powers,' recognizing 'the proper—and properly limited—role of the courts in a democratic society.'" TRIBE, § 3-14, at 109.
117. 117 S.Ct. at 2318.
118. *See id.* at 2322.
119. *Id.* at 2325. (Souter, J., concurring).

doors for those harmed to bring a legal action. On August 5, 1997, the President signed legislation to balance the budget by the year 2002 and to deliver $152 billion in tax cuts.[120] He then became the first American President to exercise line item veto power by canceling three separate items from the tax bill.[121] He stated that his vetoes, excising "unjustified" tax breaks costing an estimated $615 million over five years, would "ensure that national interests prevail over narrow interests."[122] Less than two months later, on October 6, 1997, President Clinton used the line item veto for the first time on an appropriations bill.[123] He "axed" 38 projects, totaling $287 million, from the fiscal year 1998 Military Construction appropriations bill.[124]

Assuming that Congress does not overrule the procedures provided by the Line Item Veto Act, those who stood to benefit from or were harmed by any of the cancellations may bring suit under the expedited review provision of the Line Item Veto Act. Potential challengers, both individuals and organizations, initially reacted with caution to the President's decision and were undecided as to whether to bring a judicial challenge.[125] As of January 1, 1998, three plaintiffs had filed lawsuits challenging the Line Item Veto Act's constitutionality.[126]

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120. Associated Press, *Clinton Still Unsure About Line Item Veto New Budget Bill Set for Signing Today*, FLORIDA TODAY, Aug. 5, 1997, at 3A.

121. The tax provisions excised by President Clinton are as follows: (1) a measure permitting financial services firms to defer taxes from foreign income earned in 1998, (2) a tax deferral for transactions involving sales of food processors to farm cooperatives, and (3) a special exception allowing the state of New York to continue claiming federal dollars for Medicaid. *See* Jackie Calmes and Gregg Hitt, *Clinton Uses Line Item Veto For First Time*, WALL ST. J., Aug. 12, 1997, at A3.

122. John F. Harris, *Clinton Wields New Authority, Vetoing 3 Items; President Strikes Down Tax and Spending Provisions*, WASH. POST, Aug. 12, 1997, at A1.

123. *Clinton Wields Line Item Veto to Strike 38 Military Projects*, CONGRESSDAILY, Oct. 6, 1997, *available in* 1997 WL 11443841.

124. *See id.*

125. *See Veto Power Clinton's Decision Sets Up Historic Confrontation, Paves Way For Legal Fight Over Separation of Powers*, SUN-SENTINEL FT. LAUDERDALE, Aug. 12, 1997, at 1A. On Tuesday, September 23, 1997, as a result of a deal negotiated with the White House, the House Ways and Means Committee approved a bill to modify and restore two tax provisions that were the targets of President Clinton's first use of the line item veto. Jerry Gray, *White House and Congress Reach Deal to Restore Two Tax Breaks*, N.Y. TIMES, Sept. 24, 1997, at A18. The deal between the Executive Branch and Congress concerns tax benefits for farmers' cooperatives and entities in international finance. *See id.*

126. Vandana Mathur, Mark Felsenthal & Chris Hanna, *Line Item Veto Law Face Court Challenges By Three Groups*, 66 U.S. LAW WEEK 2253 (1997). The three separate suits—*New York City v. Clinton*, No. 97-2393, filed October 16, 1997; *Snack River Potato Growers, Inc. v. Robert E. Rubin*, No. 97-2463; and *National Treasury Employees Union v. United States*, No. 97-2399, filed October 16, 1997—were consolidated for hearing in the District Court for the District of Columbia. *See id. See also Potato Growers Challenge Veto Power*, MILWAUKEE JOURNAL SENTINEL, Oct. 22, 1997, at 9; Susan Page, *Line-Item Veto Alters Political Landscape*,

D. Who Will Be a Proper Plaintiff in the Imminent Supreme Court Case?

According to the Supreme Court in *Raines*,[127] in order for any federal court to take a suit challenging the constitutionality of the Line Item Veto Act, the plaintiff must establish that "claimed injury is personal, particularized, concrete, and otherwise judicially cognizable."[128] However, as to the standing requirements, future plaintiffs will face differing hurdles, depending upon whether they challenge a canceled tax or appropriations provision.

The difference in the plaintiffs' burdens lies in proving causation. A plaintiff suing to contest a canceled tax benefit ("tax plaintiff") will find it easier—relative to a plaintiff challenging a non-military appropriation—to prove that the cancellation was a personal injury with a direct harm. The direct link is established between the tax plaintiff and the lost tax benefit simply by showing that the plaintiff stood to gain from the tax. For example, one tax benefit canceled by the President was a Subchapter F tax provision allowing investment companies and brokerage firms which trade securities abroad to defer tax liability until such profits are repatriated.[129] Without much effort, a brokerage firm that would have received a tax benefit should be able to show harm.

The task of proving causation will be more difficult for a plaintiff challenging a canceled appropriation provision for a non-military project. For example, if the President canceled a $20 million highway repair plan for the San Francisco Bay Area, which potential plaintiffs could make an adequate showing that they had been harmed by the President's veto? Residents and highway users of the San Francisco Bay Area and the citizens of California would lose the benefit of safer transportation ways. In addition, contractors would lose out on the federal dollars because the state would have passed along the funds in the form of construction projects. In such a case, two difficult questions must be answered to prove a concrete, personalized injury: (1) who is a harmed plaintiff(s) and (2) can the plaintiff(s) demonstrate injury.

USA TODAY, Oct. 31, 1997, at 6A. In the two suits brought by New York City and the Snack River Potato Growers, the United States District Court for the District of Columbia, on February 12, 1998, ruled that the Line Item Veto Act was unconstitutional. 1988 U.S. Dist. LEXIS 1295. Per the expedited review clause in Line Item Veto Act, the suits are on direct appeal to United States Supreme Court. The third lawsuit by the National Treasury Employees Union was resolved in a negotiated settlement approved by the District Court. *See id.*

127. 117 S.Ct. 2312.

128. *Id.* at 2318.

129. *See The White House: Press Briefing by Bob Rubin, Frank Raines, Gene Sperling*, M2 Presswire Aug. 12, 1997, *available in* 1997 WL 11443515.

Identifying a proper plaintiff to challenge a vetoed military appropriations provision is an even more difficult task. For example, one large spending project that President Clinton has excised would have appropriated a $19.9 million set-aside for a new wharf and the demolition of two buildings at the Norfolk Naval Shipyard in Virginia.[130] Another allocation in the 1998 Military Construction bill canceled by President Clinton was a $10 million project to consolidate a B-1B squadron operations facility at Dyess Air Force Base in Texas.[131] In these matters, the President, as Commander-in-Chief of the nation's armed forces, has broad authority to make decisions affecting national security and military spending that falls within that sphere. Thus, it is questionable whether there exists any plaintiff who can bring suit to contest such a veto. Once a plaintiff satisfies the standing requirements, the plaintiff must characterize the line item veto as a power that the President cannot constitutionally exercise. Parts III-V below present three potential characterizations of the line item veto and discuss the constitutionality of each characterization.

III. The Line Item Veto Power as Presidential Lawmaking Authority

The line item veto power may be viewed as the authority for a President to make laws. This section examines whether the Constitution permits the President to hold such power independent of the Legislative Branch, and if not, whether Congress, the nation's lawmaking body, can delegate legislative authority to the President.

A. The Constitutionality of Presidential Lawmaking

The President's item veto authority may be characterized as the power to legislate, which includes amending or repealing existing laws as well as introducing legislation. An exercise of the line item veto power constitutes a repeal of law because any item in an appropriations or tax bill that the President rescinds invalidates Congress' mandate in that law. Such rescissions also amend laws because the cancellations reconfigure the substance of the appropriations or tax bills. In essence, the Line Item Veto Act allows the President to use the line item veto power to repeal, rewrite, or amend laws unilaterally, without fulfilling the constitutional requisites of

130. *See Hill Riled By Latest Line Item Vetoes,* CONGRESSDAILY, Oct. 7, 1997, *available in* 1997 WL 11888689.

131. *See id.*

bicameralism and presentment.[132] The President is thus effectively empowered to independently legislate and control spending.[133]

The power of a President to legislate unilaterally to expend funds is unconstitutional. The Constitution vests legislative powers in Congress[134] and executive powers in the President.[135] In *Chadha*,[136] the Supreme Court discussed the proper balance of legislative power between the Executive and Legislative Branches as it considered the constitutionality of the Immigration and Nationality Act's[137] one-house congressional veto provision.[138] The *Chadha* Court stated that the bicameralism and presentment clauses imposed by the Framers were not an "abstract generalization."[139] Of the two, the Framers were more concerned with presentment because Congress' authority is to be most "carefully circumscribed."[140] They purposely gave the President a "limited and qualified power" to repeal proposed legislation by veto so that he could "check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures."[141] Thus, according to the Court, the Framers never intended the President to have any legislative function beyond his role of approving or rejecting entire bills presented to him by Congress.[142]

The line item veto power, however, reorders the constitutional duties of the President and Congress in the fiscal arena.[143] With regard to appropriations, the President has the constitutional duty to see that all funds are spent properly. This power emanates from the duty to "take Care that the Laws be faithfully executed . . . ."[144] As for Congress, Article I, Section 8 of the Constitution states: "Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the

132. *See* Michael J. Gerhardt, *The Bottom Line On The Line-Item Veto of 1996*, 6 CORNELL J.L. & PUB. POL'Y 233, 237 (1997).

133. *See* 142 CONG. REC. S2963 (daily ed. March 27, 1996) (statement of Sen. Levin).

134. *See* U.S. CONST. art. I. While the Founders vested Congress with most legislative powers, they did give the President an executive veto over legislation. *See id.* at § 7, cl. 3.

135. *See* U.S. CONST. art. II, § 1.

136. 462 U.S. 919.

137. 8 U.S.C. § 1254(c)(2).

138. *See* 462 U.S. at 945-48.

139. *Id.* at 946.

140. *See id.* at 947-48.

141. *Id.*

142. *See id.* at 948.

143. During the 20th century, Congress has statutorily increased the President and Executive Branch's role in the budgeting and appropriations process by enacting legislation such as the Budget and Accounting Act of 1921, the Antideficiency Act of 1950, and the Impoundment Control Act of 1974. *See* LOUIS FISHER, PRESIDENTIAL SPENDING POWER 35, 154-57, 198-201 (1975) [hereinafter FISHER, SPENDING].

144. U.S. CONST. art. II, § 3.

common Defense and general Welfare of the United States."[145] The Framers intentionally designated Congress, the representatives of the nation's people, to control the nation's purse strings.[146] By using the line item veto to cancel spending for certain projects or programs, the President reorders Congress' spending priorities without constitutional authority to do so. The Line Item Veto Act cannot grant the President the power to direct the nation's spending.

Not only is presidential lawmaking contrary to the text of the Constitution, but by giving the President the power to legislate and control the nation's treasury, the Line Item Veto Act violates a fundamental tenet of our nation: the separation of powers. The Framers purposely structured the United States government with three discrete and separate branches in order to disperse power within it and prevent tyranny of the majority or concentration of power in one dictator.[147] As to control over the nation's finances, James Madison, stated that the "power over the purse, may in fact be regarded as the most . . . effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[148] The Line Item Veto Act, however, gives the President access to the nation's purse strings, a power which the Framers purposely delegated entirely to the Legislature. The President thus impermissibly alters the balance of powers between the Executive and Legislative Branches in his favor when he exercises his item veto power; he will both legislate and execute the laws.

Analysis of possible Supreme Court approaches to the separation of powers reveals various alternatives, but they can be categorized mainly as a "formalist" approach and a "functionalist" approach.[149] A formalist approach treats the Constitution as granting each branch distinct powers and setting forth the maximum degree to which the branches may share such powers.[150] In contrast, a functionalist approach considers the distinctions

145. U.S. CONST. art. I, § 8.

146. THE FEDERALIST NO. 58 (James Madison).

147. In Federalist No. 47, James Madison wrote: "The accumulation of all powers, legislative, executive, judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison).

148. THE FEDERALIST NO. 58 (James Madison).

149. *See* Krasnow, *supra* note 17, at 609-10.

150. *See* 142 CONG. REC. S2948 (daily ed. Mar. 27, 1996) (statement of Sen. Moynihan) (citing Mar. 27, 1996 letter from Professor Michael J. Gerhardt to Sen. Moynihan). *See, e.g.*, *Chadha*, 462 U.S. 919.

between the branches as being imprecise.[151] Although the Court has not established any uniform approach to evaluating separation of powers questions,[152] the current Supreme Court will likely adopt a formalist view if the line item veto authority is characterized as legislative power. During the past two decades, when the Court has been posed with questions pertaining to the lawmaking provisions of Article I, Section 7, it has been quite literal in its textual interpretation. For example, in *Chadha*,[153] the Court abided strictly by the bicameralism and presentment clauses in Section 7 to find that a one-house legislative veto was unconstitutional.[154]

It is crucial in maintaining our representative government that the balance of powers remains unaltered. It seems likely that if the President has the authority to make laws and control the nation's purse strings through the Line Item Veto Act, the Court's application of the formalistic approach will reveal that the line item veto violates the separation of powers doctrine and is therefore unconstitutional.

The line item veto power not only violates the separation of powers, but has a concrete negative effect as well; it diminishes Congress' accountability. Without the line item veto, Congress is answerable to its constituents and the general public for the contents of all federal legislation, whether in the form of a single bill or an omnibus appropriations act. By delegating line item veto authority to the President, Congress has shifted some of its accountability to the Executive Branch. If the Line Item Veto Act withstands constitutional challenge, Congress will have reduced its responsibility for any special interest legislation passed. Every portion of an omnibus appropriations bill that the President does not veto will be legislation for which he will have to take personal and political responsibility.[155] Congress has given the President and his staff a large and potentially overwhelming task of evaluating each omnibus appropriations bill and excising, within the allotted five-day review period, all the special in-

151. *See* 142 CONG. REC. S2948 (daily ed. Mar. 27, 1996) (statement of Sen. Moynihan) (citing Mar. 27, 1996 letter from Professor Michael J. Gerhardt to Sen. Moynihan).

152. *See* Krasnow, *supra* note 17, at 609.

153. 462 U.S. at 919.

154. *See id.* at 944-59.

155. At the end of President Clinton's first "budget season of wielding the . . . line item veto[,]" the American public evaluated his use of the new power. Associated Press, *Line-Item Veto Scorecard: $1.9 Billion Over 5 Years*, WASH. POST, Dec. 4, 1997, at A21. "The president used the line item veto to eliminate only $491 million from more than $800 billion in spending in the 13 appropriations bills for the 1998 fiscal year. That amounts to less than one-tenth of one percent, leaving billions of dollars' worth of low-priority, unnecessary or wasteful projects." John McCain, *Line-Item Pork New Presidential Authority Isn't Achieving Its Purpose*, DALLAS MORNING NEWS, Dec. 15, 1997, at 19A.

terest legislation that may have been inserted.[156] The reduction of congressional accountability and the potential for placing overwhelming responsibility on the President illustrate the real dangers of significantly shifting the balance of powers.

Moreover, contrary to assertions by members of Congress in support of the Line Item Veto Act, the line item veto will not necessarily solve the problem of pork-barrel legislation. Senator Larry Craig (R-Idaho), for example, asserted that the Line Item Veto Act is "good public policy" because it "fine tune[s]" the legislative process and forces Congress "to do its homework in the kind of detail that [it had] not been producing in the past."[157] While Congress may be more careful in legislating for fear that the President will publicly announce and ridicule any favors for special interests that he finds, there are still means to circumvent the Line Item Veto Act's provisions and successfully pass pork-barrel legislation. For example, members of Congress could negotiate their votes on important issues with the President in order to prevent veto of projects favorable to their constituents. Congress can also provide a tax benefit for 101 separate entities that fall outside of the category of "limited tax benefits" that the President can veto pursuant to section 691 of the Line Item Veto Act. As Senator John McCain (R-Ariz.) has openly admitted, "every Congressman or Senator wants to get projects for his or her district. Everyone wants not only their fair share of the Federal pie for their States, they want more.... It is an institutional problem."[158] In light of this behavior, Congress may be motivated to utilize the Line Item Veto Act to shift a portion, if not all, of the blame to the President for excesses in appropriations where he fails to excise a specific item. In the end, Congress could use the Act to portray the President as the culprit responsible for the large federal deficit. Congress should not be permitted to hide behind a self-made curtain. Instead, it should be forced to confront the American public and give a full account of its deeds. This is another tangible benefit provided by separation of powers and another illustration why the Act violates that constitutional doctrine.

156. Even if the President uses all of the ten days which he is constitutionally given to evaluate a bill before signing it, fifteen days may be inadequate when the President is confronted with an eleventh-hour omnibus appropriations bill. Note that the ten day period comes from Article I, Section 7 which provides that "any Bill [which] shall not be returned by the President within ten Days ... after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it...." U.S. CONST. art. I, § 7.

157. 141 CONG. REC. S4224 (daily ed. Mar. 21, 1995) (statement of Sen. Craig).

158. 142 CONG. REC. S2931 (daily ed. Mar. 27, 1996) (statement of Sen. McCain).

B. The Constitutionality of Congress' Delegation of Lawmaking Powers to the President

Not only does the Constitution not permit the President to possess legislative authority in the guise of line item veto power, but Congress is constitutionally prevented from allowing the President such power. In Article I, Section 1, the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[159] From this broad language, the United States Supreme Court derived the nondelegation doctrine: Congress may not constitutionally abdicate its legislative powers to another branch of government.[160] Nevertheless, the Court has long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate branches.[161] The Constitution has never been regarded as preventing Congress from having the flexibility and practicality necessary to perform its functions.[162] The nondelegation doctrine merely bars Congress from relinquishing its responsibility in the federal government with respect to primary policy-making.[163] Congress does not violate the Constitution by legislating in broad terms and leaving a certain degree of discretion to executive or judicial actors. So long as Congress articulates "standards"[164] or an "intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[165]

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159. U.S. CONST. art. I, § 1.

160. "[T]he integrity and maintenance of the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another branch of government. Field v. Clark, 143 U.S. 649, 692 (1892). *See also* Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935); A.L.A. Schechter Poultry v. United States, 295 U.S. 495, 529 (1935). The principle of separation of powers underlies the doctrine of nondelegation. *See* Mistretta v. United States, 488 U.S. 361, 371 (1989). "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Id.*

161. *See* Opp Cotton Mills v. Administrator of Wage & Hour Div. of Dep't of Labor, 312 U.S. 126, 144 (1941). "[T]he delegation of legislative powers to executive and administrative agencies is essential to the modern administrative state." Wolfson, *supra* note 15, at 845. There are many reasons why Congress may be unable to carry out the entire job of legislating and must assign officials to assist with some of its duties: for example, (1) "[a] field may be too technical or fast-changing for Congress to regulate [it] directly;" or (2) "implementing a policy may demand such attention to detail that . . . [Congress] would become so mired in specifics that it could not proceed to matters of general importance." *Id.* at 846.

162. *See Panama Refining*, 293 U.S. at 421.

163. *See* Wolfson, *supra* note 15, at 845.

164. Although during the New Deal era, the Court invalidated congressional delegation of legislative power to federal officers in two cases, the Court in *Yakus v. United States*, 321 U.S. 414, 423 (1944), overturned long standing precedent by allowing delegation when Congress lays down standards to guide the delegee.

165. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). The Court has affirmed standardless delegations in limited instances where there was a transfer of power to an

Since the era of the New Deal, the Court has not invalidated any of Congress' broad transfers of lawmaking power to federal officials or agencies. Upholding such grants of power, the Court has adduced to its 1944 decision in *Yakus*,[166] which held that Congress may delegate legislative functions if it sets forth the underlying policy, prescribes the method of achieving the objective, and lays down standards to guide the delegee's actions.[167] The *Yakus* standard has proven to be almost toothless, as the Court has upheld statutes that provided minimal guidance for executive or administrative officials.[168] Some examples include: a statute allowing the Federal Communications Commission to regulate radio broadcasting according to "public interest, convenience, or necessity;"[169] a statute authorizing the Attorney General to temporarily add a controlled substance to the schedule denoting illegal substances when it is "necessary to avoid an imminent hazard to the public safety;"[170] a statute empowering the War Department to recover "excessive profits" earned on military contracts;[171] and a statute permitting the Price Administrator to fix "fair and equitable" commodities prices.[172]

In addition to the *Yakus* requirements, the Court in *Loving v. United States*[173] specifically held that even congressional delegation of lawmaking authority to the President himself is not unconstitutional.[174] In *Loving*, an Army private challenged Congress' power to delegate to the President the authority to prescribe aggravating factors in cases where members of the nation's armed forces commit capital murder.[175] After examining the legislative history of Article I, Section 8, Clause 14, the Court found that Clause 14—which empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval forces"—does not grant Con-

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entity possessing substantial inherent authority in the regulated field. *See e.g.*, Wolfson, *supra* note 15, at 859 n.44. One example is Congress' delegation to the President of authority which touches on foreign affairs. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Likewise, the Court has allowed Congress to give Indian tribes the authority to regulate the sale of alcoholic beverages on reservations without providing any standards to accompany the power. *See* United States v. Mazurie, 419 U.S. 544, 556-58 (1975). A standardless justification in that area was sufficient because the Court found that the tribes exercised autonomous power over "internal and social relations of tribal life." *Id.* at 557.

166. 321 U.S. 414.

167. *Id.* at 424-25.

168. The Court has "upheld, without exception, delegations under standards phrased in sweeping terms." Loving v. United States, 116 S.Ct. 1737, 1750 (1996).

169. National Broad. Co. v. United States, 319 U.S. 190, 216-17, 225-26 (1942).

170. Touby v. United States, 500 U.S. 160, 166-67 (1991).

171. Lichter v. United States, 334 U.S. 742, 746, 778-86 (1948).

172. *Yakus*, 321 U.S. at 426-27.

173. 116 S.Ct. 1737 (1996).

174. *Id.* at 1748.

175. *Id.* at 1740.

gress an exclusive, nondelegable power to determine military punishments.[176] Because the Court "give[s] Congress the highest deference in ordering military affairs," it did not read the clause to restrict Congress' flexibility to exercise or share power as the times demand.[177]

Given that Congress may assign lawmaking powers to the President and the *Yakus* standard is almost toothless, it is unlikely that Congress failed to meet the requirements when it enacted the Line Item Veto Act. Congress clearly articulated its goal of decreasing the federal deficit and its intent that the line item veto power serve as a means of achieving that goal.[178] It also provided "standards" that the President may use in exercising his line item veto authority (e.g., how to determine the amount of an item to veto).[179] Thus, Congress' delegation of lawmaking power to the President in the Line Item Veto Act is arguably proper and constitutional.

While the Constitution permits Congress to delegate lawmaking power to the President, however, the Line Item Veto Act does more than merely delegate. When Congress delegates its authority to make laws to an administrative body or an executive officer, it gives the recipient permission to enact legislation necessary to carry out Congressional directives. For example, in establishing the Environmental Protection Agency, Congress empowered the agency to pass any statutes needed to achieve Congress' goal of preserving the nation's environment, air, land and sea.[180] Congress' delegation of legislative power does not authorize any recipient, including the President, to overrule Congress' mandates. The Line Item Veto Act, however, permits just that. With the line item veto power, the President "cancels" specific appropriations and taxing measures previously deliberated upon and passed by Congress. Therefore, while Congress can give the President some power to legislate, the Line Item Veto Act is not an appropriate delegation of lawmaking authority since the President can legislate independently.

Because the line item veto authority fails to constitute a proper congressional delegation of lawmaking power, it cannot stand as legitimate presidential legislative authority. The President does not constitutionally possess any power to make laws and the exercise of such powers violates the separation of powers doctrine. Hence, the Line Item Veto Act is un-

176. *See id.* at 1748.

177. *Id.*

178. *See* 2 U.S.C. § 691 (1997).

179. *See* 2 U.S.C. §§ 691, 691e, 691f (1997). Alaska Senator Stevens stated: "I think we have a clear delegation of authority to the President for a specific purpose, and it is for the purpose of deficit reduction. That is what will pass constitutional muster . . . ." 142 CONG. REC. S2957 (daily ed. Mar. 27, 1996) (statement of Sen. Stevens).

180. Administrative Procedure Act § 553, 556-57 (1997).

constitutional if it indeed gives the President the authority to make laws and control the nation's purse strings in violation of the constitutional framework.

IV. The Line Item Veto Power as an Effectuation of the President's Article I Veto Authority

Rather than allowing the President to legislate, the Line Item Veto Act may simply allow the President to exercise the veto power explicitly provided by Article I.[181] Although the text of the Constitution does not include the word "veto,"[182] the presidential power is implied from the presentment clause which states:

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . . ."[183]

However, Congress currently employs tactics which prevent the President from fully utilizing his veto power. By presenting the President with eleventh-hour omnibus appropriations bills[184] or spending packages which are filled with pork-barrel legislation or nongermane riders,[185] Congress impairs the President's ability to veto discrete legislative measures. Without the line item veto power, the President risks shutting down the government if he chooses to veto an entire bill in order to prevent a single item from being enacted.[186] Although this procedure may be perceived as part of the regular checks and balances of the Constitution, in the context of line item

181. *See* Judith A. Best, *The Item Veto: Would the Founders Approve?*, 14 PRESIDENTIAL STUD. Q. 183, 188 (1984) (asserting that "[i]t is reasonable to assert that the Founders would not find the line item veto to be a dangerous innovation but rather a rehabilitation of an original and essential check and balance"); Alan J. Dixon, *Line-Item Veto Controversy*, 64 CONG. DIG. 259, 282 (1985) [hereinafter Dixon, *Controversy*] (stating "I say restore because the truth is that the presidential veto is now a much weaker weapon than it once was").

182. *See* Gerhardt, *supra* note 132, at 235; *see also* ROBERT J. SPITZER, THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY 17 (1988) (noting that "[n]owhere in the Constitution does the word veto appear, even though the paragraph that describes it is the second longest in the document").

183. U.S. CONST. art. I, § 7.

184. *See* Russell M. Ross & Fred Schwengel, *An Item Veto for the President?*, 12 PRESIDENTIAL STUD. Q. 66, 77 (1982) (asserting that "[w]hen appropriations bills are rushed through Congress in the closing days, and perhaps hours, of the legislative session, as is often the case, the President has, for all practical purposes, no choice at all").

185. Nongermane riders are amendments to an appropriations bill which are unrelated to the underlying subject of the bill. *See* LOUIS FISHER, THE POLITICS OF SHARED POWER CONGRESS AND THE EXECUTIVE 20 (1993) [hereinafter FISHER, POLITICS].

186. *See* Krasnow, *supra* note 17, at 584 n.8.

veto authority, it may not serve as a check because Congress' current legislative tactics prevent the President from exercising his veto effectively.

The Framers wanted the President to have the veto as a tool to protect the presidency from encroachment by the Legislative Branch[187] and to prevent the enactment of harmful laws.[188] Modern legislative practices have frustrated the Framers dual purpose in giving the President veto authority.[189] The techniques employed by Congress intrude on the Executive Branch and hinder the President from using his veto to halt the passage of laws that only benefit special interests. Although the Framers were aware that the process of legislating involved special interests, the modern legislating methods were not foreseen.[190]

The line item veto effectuates the President's executive veto by effectively dividing up omnibus appropriations and tax bills into a manageable size. Whereas the President had to veto entire bills previously, he may now selectively cancel singular items which represent benefits for special interests. Congress utilizes the line item veto to inject the executive veto with the power that the Founding Fathers intended the President to have in the legislative scheme. "The Congress shall have Power . . . To Make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers vested by this Constitution . . . ."[191] Thus, this argument suggests that the line item veto power does not infringe upon the powers of the legislative branch and does not violate separation of powers. Arguably, it serves to maintain the balance of power between the Legislative and Executive branches.

In determining the constitutionality of the line item veto power as an effectuation of the President's Article I veto, the Supreme Court could take a functionalist approach[192] since it has recently applied such an analysis to the issues of separation of powers in the executive-legislative setting. Such an approach would likely countenance an argument that the Constitution permits the use of an item veto to effectuate the President's veto. In

187. *See* James Madison, Notes of Debates in the Federal Convention of 1787, 66, 628-29 (Ohio U. Press 1966) (1840); THE FEDERALIST NO. 73, at 492, 495 (Alexander Hamilton)(Jacob Cooke ed., 1961). *See also* FISHER, POLITICS, *supra* note 185, at 19.

188. *See* FISHER, POLITICS, *supra* note 185, at 19.

189. The intent is discerned from James Madison and Alexander Hamilton's writings. *See* James Madison, Notes of Debates in the Federal Convention of 1787, 66, 628-29 (Ohio U. Press 1966) (1840); THE FEDERALIST NO. 73 (Alexander Hamilton).

190. *See* Dixon, *Case, supra* note 15, at 221 (stating that "[t]he legislative tactics that have eroded the President's veto power were uncommon when the Constitution was written"); Richard A. Givens, *The Validity of a Separate Veto of Nongermane Riders to Legislation* 39 TEMP. L.Q. 60, 60 (1965) (asserting that "[t]here is no evidence that the practice of attaching riders was foreseen at the time of the writing or adoption of the Constitution").

191. *See* U.S. CONST. art. I, § 8, cl. 18.

192. *See supra* notes 149-151 and accompanying text.

Chadha,[193] Justice Powell rejected the formal approach in his concurring opinion. He remarked that the Constitution does not establish precise boundaries between the branches,[194] but rather, fixes them "according to common sense and the inherent necessities of governmental coordination."[195] Likewise, Justice Jackson, in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[196] refrained from adopting any approach based on the notion that the scope of each branch's powers is clearly delineated. He felt that the Constitution distributes power among the three branches, but allows the political system to mold the separate branches into an operative and effectual whole.[197]

In the judicial-legislative and executive-legislative realm, the Supreme Court has recently applied this functional analysis to separation of powers questions. In *Thomas v. Union Carbide Agricultural Products*,[198] the Court evaluated the extent of congressional intrusion into the judiciary's dominion. Justice O'Connor, writing for the majority, rejected strict "doctrinaire reliance on formal categories."[199] At issue in *Thomas* was whether Article III of the Constitution forbids Congress from electing binding arbitration with only limited judicial review as the method for resolving disputes arising from the Federal Insecticide, Fungicide and Rodenticide Act.[200] The Court stated that in determining whether Congress has exceeded the limits of its authority in enacting a given statute, "regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required."[201]

The Court similarly refused to employ a formalistic analysis in *Commodities Futures Trading Commission v. Schor*.[202] Instead, it reviewed various factors to determine the effect of a congressional scheme to grant the Trading Commission authority to adjudge claims on the federal judiciary's constitutionally assigned role.[203] The Court found that the power

193. 462 U.S. 919.

194. *See id.*, at 962 (citing Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam)).

195. *Id.* at 962 (citing *J.W. Hampton*, 276 U.S. at 406).

196. 343 U.S. 579 (1952).

197. *See id.* at 635. "While the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id.*

198. 473 U.S. 568 (1985).

199. *Id.* at 587.

200. *Id.* at 571.

201. *Id.* at 586 (citing Crowell v. Benson, 285 U.S. 22, 53 (1932)).

202. *See* 478 U.S. 833, 851 (1986) (citing *Thomas*, 473 U.S. at 587, 590).

203. As the Court explained, "[a]mong the factors upon which we have focused are the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudi-

given to the Trading Commission did not pose any genuine threat under separation of powers principles.[204] Further, the Court stated that "bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III."[205] Although these two cases address congressional intrusion into the province of the judiciary, the separation of powers analysis used by the Court is no less applicable to similar intrusions into the executive branch.

In *Morrison v. Olson*,[206] the Court reviewed the effect of the Special Division court's[207] appointment of a special prosecutor on the balance of power between the Executive and Legislative Branches.[208] The Court stated the powers that Congress held under the Ethics in Government Act did not include any power to control or supervise an independent counsel.[209] Congress' role was confined to duties generally recognized as legislative: receiving reports or other information and overseeing the independent counsel's activities.[210] While the Court acknowledged that the Ethics in Government Act affected the Attorney General's (and therefore, the President's) control and supervision of the independent counsel's investigation and prosecution, it found that the Ethics in Government Act did not disrupt the proper balance between the coordinate branches because the Attorney General retained supervisory powers and the power to remove the independent counsel for "good cause."[211] Thus, the Court held that there was no "dange[r] of congressional usurpation of Executive Branch functions."[212]

Recent applications of the functional approach to separation of powers cases suggest that the line item veto power (when characterized as a means to return the President his executive veto authority) may be found constitutional. The theme of these cases has been the preservation of

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cated, and the concerns that drove Congress to depart from the requirements of Article III." 478 U.S. at 851 (citing *Thomas*, 473 U.S. at 587, 589-593).

204. *See id.* at 857.

205. *Id.* (citations omitted).

206. 487 U.S. 654 (1988).

207. A court of Special Division is a branch of the United States Court of Appeals for the District of Columbia and consists of three circuit court judges or justices appointed by the United States Chief Justice. *See id.* at 661 n.3.

208. *See id.* at 685-97. Congress provided for this in Title VI of the Ethics in Government Act, 28 U.S.C. § 591-599 (1982, Supp. V). Congress first enacted the Act in 1978, Pub. L. No. 95-521, 92 Stat. 1867. The Act has been amended twice. *See* Pub. L. No. 97-409, 96 Stat. 2039; Pub. L. No. 100-191, 101 Stat. 1293.

209. *See* 487 U.S. at 694.

210. *See id.*

211. *See id.* at 695-96.

212. *Id.* at 694 (citing *Schor*, 478 U.S. at 856).

checks and balances among the branches in accordance with Madison's pronouncement that "the constant aim [of the Constitution] is to divide and arrange the several offices in such a manner that each may be a check on the other."[213] Under the functionalist approach, the Court would examine the recent developments that have disabled the Executive Branch check on the Legislative Branch. In view of the legislative methods which Congress currently employs, the Court could find that the Line Item Veto Act merely reestablishes the balance of power that existed before Congress limited the effectiveness of the President's veto.

Despite the fact that the line item veto may correctly adjust the balance of power between Congress and the President, however, the line item veto cannot serve as an effectuation of the President's veto because it violates the legislative procedure set out by the Constitution.[214] To determine the proper legislative framework, the Court will likely employ the formalistic, rather than the functional approach because the Constitution has spoken clearly on the issue. Article I, Section 7 provides detailed procedures regarding the process of legislation—from the introduction of a bill to the legislative deliberation and possible executive veto of the bill. Instead of abiding by the constitutional requirement that Congress introduce and amend legislation, the Line Item Veto Act gives the President such powers. Once the President vetoes an item from a bill, he invalidates Congress' mandate as to that item of the particular bill and essentially rewrites and amends the contents of the legislation passed by Congress. In the presence of explicit textual guidance, the Court is unlikely to adopt a functionalist view, but will probably remain faithful to the language of the Constitution. Hence, if the line item veto power functions as an effectuation of the President's executive veto, it is a violation of the legislative scheme set out by the Constitution. Although the Court could employ a functionalist approach to uphold the Act, it is more likely to follow the explicit language of the Constitution and find the line item veto to be a violation of the legislative scheme created by the Founding Fathers.

V. The Line Item Veto Power as Presidential Impoundment Authority

Another way of characterizing the President's line item veto power is as the power to impound funds. This Note defines impoundment authority

213. THE FEDERALIST NO. 51 at 322 (James Madison) (Clinton Rossiter, ed., 1961).

214. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ." *Chadha*, 462 U.S. at 944.

as the power of a President to exercise discretion in executing appropriations or tax laws. Under the Line Item Veto Act, once the President signs a bill, he has the option of applying the funds for the legislated purpose(s) or withholding the money by sending a special message to Congress.[215] Thus, the "practice of impoundment, by which Presidents selectively refuse to spend appropriated funds, can be seen functionally as a line item veto under a different name."[216]

A. Historical Basis for Impoundment: Impoundment in the Absence of Congressional Authorization

Assessment of the line item veto in this section must begin with an analysis of the impoundment power itself. Although no explicit textual basis for impoundment exists in the Constitution, Presidents have consistently employed the power. They have historically justified the use of impoundment power on three bases: (1) as Commander-in-Chief of the nation's military, (2) by statutory authority, and (3) under the doctrine of inherent power.[217]

Presidents have justified impoundments by relying on the fact that they are the nation's Commander-in-Chief,[218] and thus, have the constitutionally enumerated power to refuse to carry out a law which threatens national security.[219] In the early 1940s, Franklin D. Roosevelt refused to spend over $500 million in funds for public works because the expenditures would not contribute to the war effort.[220] Presidents Truman, Eisenhower, and Kennedy declined to build new weapons systems for which Congress had allocated funds because they were not convinced of their effectiveness.[221] The Presidents who have relied on their power as head of the military argue that presidential authority exceeds Congress' authority in the area of national defense.[222]

Additionally, Presidents have relied on statutory authority for impoundment, stating that in certain statutes, Congress approved the im-

215. *See* 2 U.S.C. § 691 (1997).

216. J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 447 (1990).

217. *See* Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1507-08 (1973).

218. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called in to the actual Service of the United States . . . ." U.S. CONST. art. II, § 2.

219. The assertion that the Commander in Chief provision justifies impoundment in limited circumstances can be challenged. However, it is beyond the scope of this Note to discuss the issue. *See* Note, *supra* note 217, at 1509 n.14.

220. *See supra* note 217, at 1509.

221. *See id.*

222. *See Youngstown*, 343 U.S. at 583-84, 587.

poundment of funds necessary to decrease government expenditures. They have traditionally relied upon the Anti-Deficiency Act of 1950,[223] the Employment Act of 1946,[224] the Economic Stabilization Act of 1970,[225] and the public debt ceiling.[226] In several instances where increased federal spending has threatened the goals of these statutes that were designed to restrict expenditures, the President, who is bound by the Constitution to faithfully execute all laws of the United States, has withheld funds to resolve the conflicting statutory duties. President Nixon, for example, used the Employment Act of 1946 to justify his impoundments during the early 1970s.[227] In relevant part, the Employment Act states: "The Congress declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations of national policy . . . to promote maximum employment, production, and purchasing power."[228] President Nixon's staff stated: "The reference to purchasing power permits the Administration to assert that it is only giving effect through impoundment to a congressionally declared policy of fighting inflation."[229] Presidents have not relied on a statutory basis since the enactment of the Congressional Budget and Impoundment Control Act of 1974 because it prevented the President from exercising any impoundment power.[230]

Finally, Presidents have claimed a constitutional basis for impoundment in the inherent authority of their enumerated constitutional powers.[231] The Supreme Court has discussed the existence of the President's inherent authority in several cases. In *Cunningham v. Neagle*,[232] the Court implied that the President's duty to faithfully execute laws comprised not only the "enforcement of acts of Congress or of treaties of the United States according to their *express terms*," but also "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitu-

223. 31 U.S.C. § 665 (1970).

224. 15 U.S.C. § 1021 (1971).

225. Pub. L. No. 91-379, tit. II, 84 Stat. 799 (1970).

226. *See* 31 U.S.C. § 757b (Supp. 1972).

227. *See supra* note 217, at 1518-19.

228. 15 U.S.C. § 1021 (1971).

229. *Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong. 94-96 (1971) (statement of Casper Weinberger, Deputy Director of the Office of Management and Budget).

230. *See* Pub. L. No. 93-344, 88 Stat. 297 (1974). It is unclear whether the Congressional Budget and Impoundment Control Act is constitutional. To date, no President has challenged the constitutionality of that Act.

231. "The executive Power shall be vested in a President of the United States . . . ." U.S. CONST. art. II, § 1.

232. 135 U.S. 1 (1890).

tion."[233] Further, in *In re Debs*,[234] even in the absence of any statutory authorization, the Court affirmed President Cleveland's power to seek an injunction against the Pullman Strike which threatened interstate commerce and impeded delivery of the United States mail.[235] The Court justified the President's authority on the ground that "the wrongs complained of are such [that they] affect the public at large."[236] Finally, in *United States v. Curtiss-Wright Export Corp.*,[237] the Court distinguished a president's inherent powers in the domestic and international spheres.[238] The Court stated that the President, when acting in the international arena, has significant discretion in decision-making.[239] With respect to internal affairs, the Court in *Curtiss Wright*—issued its broadest 20th century ruling in favor of inherent presidential authority. The Court declared that the federal government can exercise powers "specifically enumerated in the Constitution" and "such implied powers as are necessary and proper to carry into effect [its] enumerated powers . . . ."[240] Under such inherent authority, Presidents have asserted that they may determine whether to spend or hold funds which Congress had appropriated.

Since the broad holding of inherent presidential authority in *Curtiss-Wright*, the Supreme Court has delineated some boundaries to the President's inherent authority in the domestic arena. In the context of determining whether the President was acting within his constitutional power when he issued an order directing the Commerce Secretary to take possession and operate most of the nation's steel mills, the Court in *Youngstown*[241] announced three views of presidential power.[242] Justice Black, in his opinion for the Court, articulated a formalistic approach towards presidential power. He held that the President derives his power from two sources: the Constitution and congressional authorizations for the President to act.[243] In *Youngstown*, the President did not draw his power to issue the seizure order from the Constitution or from any act of Congress, and thus, his action was unconstitutional; he had exceeded his authority. Pursuant to Justice Black's position, the President has limited, if

233. *Id.* at 64 (emphasis in original).
234. 158 U.S. 564 (1895).
235. *Id.* at 564-72, 599.
236. *Id.* at 586.
237. 299 U.S. 304 (1936).
238. *Id.* at 315.
239. *See id.* at 319-20.
240. *Id.* at 315-16.
241. 343 U.S. at 579.
242. There was a plurality in *Youngstown*. Justice Black delivered the Court's opinion while Justices Jackson, Douglas, Burton, Clark, and Frankfurter concurred in separate opinions.
243. *See id.* at 585.

any, inherent authority to either act or not act, and must simply carry out the orders of the Constitution and the Legislature, nothing more.

Justice Jackson, in his concurring opinion in *Youngstown*, established three categories of presidential power to determine the validity of presidential actions. The President possesses "maximum" authority when he acts in accordance to express or implied congressional authorization.[244] The President's power is at its "lowest ebb" when he takes measures incompatible with Congress' expressed or implied will.[245] In such situations, he can only "rely upon his own constitutional powers minus any constitutional powers of Congress over the matter."[246] When there is an absence of either a congressional grant or denial of authority, the President operates in the third category, a twilight zone.[247] A President in this predicament has uncertain powers although he may share concurrent authority with Congress in certain situations.[248]

Justice Frankfurter's concurrence, alternatively, endorsed the use of historical pedigree to govern the limits of inherent presidential power. In order to determine whether a President has the authority to act in a given situation, he would look into history and see if Congress had acquiesced to similar Executive Branch action for an extended time period.[249] Thus, the President essentially would have gained his power through the implied powers he and his predecessors had historically amassed.

In summary, while all three Justices agreed that when Congress either explicitly or implicitly disapproves of an action, the President has very limited authority to act independently, they diverged on the question of the President's power in situations of congressional silence. Under Justice Black's perspective, the President is barred from acting when Congress is silent on the issue because the President only executes the law. Justice Jackson's theory, however, allows the President to act when Congress has not spoken on a particular matter. Justice Frankfurter's approach of evaluating historical practice falls in between Justices Black and Jackson's polar views. Although Justice Black's opinion in *Youngstown* still stands, Justice Jackson's categorical framework seems to have become the accepted view for analyzing presidential action.[250] Given the categorical framework, the President retains some inherent authority to impound funds in situations of congressional silence.

244. *See id.* at 635.
245. *See id.* at 637.
246. *Id.*
247. *See id.*
248. *See id.*
249. *See id.* at 598-610.
250. Dames & Moore v. Regan, 453 U.S. 654 (1981).

B. Congress' Mandate to Impound

While Presidents have relied upon three different bases to justify their impoundments in the absence of congressional authority, under the Line Item Veto Act those bases are unnecessary because Congress has explicitly authorized presidential impoundment. The issue is whether Congress can give the President an executive authority to impound items within appropriations and tax bills. The President's power differs depending on whether a bill appropriates funds or levies taxes.

Giving the President impoundment authority over taxing measures conflicts with the explicit taxing scheme set out in the Constitution. Article I, Section 8, Clause 1 states: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."[251] The President has no role to tax; the taxing power belongs solely to Congress. Consequently, the Constitution prohibits the President from impounding and refusing to carry out a taxing provision that Congress has mandated through law and prohibits Congress from abdicating its authority to him.

The constitutionality of presidential impoundments of appropriation items is contingent upon the method by which Congress authorizes the impoundment—act by act permission, or as a unilateral grant of power. In the absence of any textual bar in the Constitution, Congress possesses the power to authorize the President to impound funds in any spending bill that it passes. Each piece of legislation authorizing impoundment would fulfill the constitutional requirements of bicameralism and presentment. Thus, it would be constitutional for Congress to empower the President to impound items of spending act by act.

If Congress delegates broad impoundment authority to the President in one fell swoop however, as it has in the Line Item Veto Act, then Congress has exceeded its constitutional powers. This statement assumes that impoundment is equivalent to lawmaking because characterizing impoundment as a mere execution of the laws would be a misnomer.[252] When Congress delegates impoundment authority across the board, the President receives the power to nullify laws which is essentially the power to rewrite laws. Thus, in giving the President his current line item veto power, Congress overstepped its legislative authority because the impoundment power was given to the President through one law that alters the legislative method for enacting future laws. The Constitution requires

251. U.S. CONST. art. I, § 8, cl. 1.

252. If impoundment does not constitute lawmaking, it is a closer question whether the line item veto is constitutional as impoundment authority.

that Congress, in enacting legislation, must not only deliberate each bill in both the House of Representatives and the Senate, but also present the bill to the President for his consideration.[253] Congress' singular grant of impoundment authority to the President is unconstitutional in violation of the formal requirements of the Constitution. Therefore, although Congress can delegate an impoundment power to the President bill by bill, it cannot constitutionally transfer a general grant of such power.

In the face of an explicit congressional decree and in the absence of proper congressional delegation of impoundment power, the President's impoundment power must independently withstand constitutional challenge. One alternative means is to evaluate whether any inherent presidential power exists for impoundment. The Supreme Court has directly spoken on the question of whether the President has an inherent authority to impound funds only once. In the 1838 case of *Kendall v. United States ex rel. Stokes*,[254] the Court stated: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution is a novel construction of the [C]onstitution, and [is] entirely inadmissible."[255] The Court further stated that it could not support the doctrine of inherent authority because "if [it is] carried out in its results, . . . [it] would . . . cloth[e] the President with a power . . . to control the legislation of [C]ongress, and paralyze the administration of justice."[256] Therefore, the only case addressing the issue indicates that the President does not have any inherent power to impound.

Since *Kendall*, lower federal courts and the Supreme Court have avoided consideration of the constitutionality of impoundment. Instead, they have based their holdings on principles of statutory interpretation.[257] The case of *Train v. New York*,[258] the first modern impoundment case to reach the Court, is an example of such a holding. In *Train*, the Administrators of the Environmental Protection Agency refused to allot $6 billion

253. *See* U.S. CONST. art. I, § 7.

254. 37 U.S. (12 Pet.) 524 (1838).

255. *Id.* at 613.

256. *Id.* The President's ability to impound funds also implicates a separation of powers issue between the Executive and Judiciary Branches. A President could potentially use the line item veto power to impound funds legislated for the judiciary to retaliate against its decisions or influence decisions on pending cases. This question is beyond the scope of this Note. For discussions on this issue, *see* Robert Destro, *Whom Do You Trust? Judicial Independence, The Power of the Purse & The Line Item Veto,* 44 FED. LAW. 26 (1997); Louis Fisher, *Judicial Independence and the Line Item* Veto, 36 No.1 JUDGES J. 18 (1997); Robert Pear, *Federal Judges Condemn Plans for a Line-Item Veto*, N.Y. TIMES, Mar. 27, 1996, at B8.

257. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 197 (1991) [hereinafter FISHER, CONFLICTS].

258. 420 U.S. 35 (1975).

appropriated by the Water Pollution Control Act.[259] Relying on legislative history, the Court skirted constitutional questions and held that the allotment provisions in the Water Pollution Control Act were mandatory, and the Administrator was required to allot the funds authorized.[260] In rejecting the Administrator's authority to withhold funds, the Court impliedly rejected any impoundment authority in a situation where the President could not reasonably claim special powers as the Commander-in-Chief[261] or an inherent power to conduct foreign affairs.[262] The Court also rejected constitutional authority for a President to impound funds in the face of a congressional mandate to the contrary. During the twentieth century, the United States Supreme Court has not explicitly ruled whether the President has inherent powers which include the authority to exercise his discretion in impounding funds.

Despite the fact that there is neither valid congressional authorization nor inherent presidential power to impound, another rationale does exist to support the use of the current line item veto power as impoundment authority. Recognizing an impoundment power for the President may be constitutional if such power merely reinforces his discretion in executing laws. As stated earlier, the Constitution explicitly delegates the Chief Executive the responsibility to "take Care that the Laws be faithfully executed . . . ."[263] If the President believes it will not serve the ends of the law to spend the money, then he cannot spend the money and faithfully execute the law.[264] Without discretion, the President would not be executing the laws as intended by Congress; he would be relegated to performing the job of a processing clerk.

Even though recognizing the line item veto power as a means to bolster the President's discretion in executing laws is thus far the strongest argument for constitutionality, it is unlikely that the Supreme Court will adopt such a theory and overturn the existing precedent against impoundment. An examination of American history reveals that for over a century,

259. *Id.* at 37-40.

260. *See id.* at 44-49.

261. *See* U.S. CONST. art. II, § 2. "The President shall be Commander in Chief of the Army and Navy of the United States . . . ." *Id.*

262. The President's inherent authority in foreign affairs is based on Article II, section 2 which states: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . ." U.S. CONST. art. II, § 2.

263. U.S. CONST. art. II, § 3.

264. The rationale can only be applied to appropriations bills and not taxation bills. As stated previously, the President does not have any taxing authority unless it is given to him by Congress.

Presidents actively sought the power to impound funds.[265] If previous Presidents believed that they legitimately possessed impoundment authority, they would not have continuously requested such power. In light of historical practice, the Supreme Court will probably be disinclined to recognize presidential impoundment authority to reinforce the president's duty to faithfully execute the laws.

Accordingly, without valid congressional authorization or proper constitutional authorization, the President's impoundment authority is unconstitutional because it violates separation of powers. The current Chief Justice of the Supreme Court, William Rehnquist, writing in his position as Assistant Attorney General during the Nixon Administration, stated that without proper congressional authority, presidential power to spend or save money "is supported by neither reason nor precedent. . . . The Constitution does not permit the President to repeal a law, to suspend a law, to ignore a law, unless he chooses to veto the law itself."[266] Accordingly, the impoundment power that the Line Item Veto Act confers on the President violates the separation of powers because it gives the President the authority to legislate and control the nation's spending.[267]

Applying a formalist approach[268] to the separation of powers question, the Court will likely find that the Line Item Veto Act impermissably alters the balance of powers, and is therefore, unconstitutional. The Court will likely apply a formalist analysis because such an analysis is usually applied to cases involving delegations from Congress to titular heads of a branch.[269] In this case, the delegation is to the President himself. Under a formalist analysis, each branch has distinct powers, and the Constitution establishes the branches' ability to share its powers.[270] The text of the Constitution and the intent of the drafters are controlling, and changed circumstances or broader policy outcomes are irrelevant to constitutional outcomes.[271] In recent years, the Court used this approach to strike down the legislative veto in *Chadha*[272] because it would have allowed one House to take legislative action without complying with the procedures set forth in Article I;[273] to hold in *Bowsher v. Synar*[274] that Congress may not delegate

265. *See supra* note 26 and accompanying text.

266. 142 CONG. REC. S2964 (daily ed. Mar. 27, 1996) (statement of Sen. Levin).

267. *See* discussion *supra* in Part III, subsection A.

268. *See* discussion *supra* notes 149-151 and accompanying text for an introduction of the formalist and functionalist approaches to separation of powers.

269. *See* 142 CONG. REC. S2948 (daily ed. Mar. 27, 1996) (statement of Sen. Moynihan) (citing Mar. 27, 1996 letter from Professor Michael J. Gerhardt to Sen. Moynihan).

270. *See id.*

271. *See id.*

272. 462 U.S. at 919.

273. *See id.* at 956-58.

executive budgetary functions to an official over whom Congress has removal power;[275] and to strike down in *Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*[276] the creation of a Board of Review partially composed of members of Congress with executive veto-like power over the decisions of the directors of the Metropolitan Washington Airports Authority.[277] Collectively, these holdings reveal that the Supreme Court is reluctant to allow Congress to enact any legislation which is inconsistent with formal constitutional procedures.

Under a formalist analysis of the Line Item Veto Act, the Court is likely to hold that the impoundment veto power violates the Article I provisions which give Congress the authority to legislate and control spending. The statement of the court in *Sioux Valley Electric Association v. Butz*[278] summarizes the situation: "Congress [can] confer[] a great deal of power upon the President .... But ... Congress [cannot go] so far ... [as] to confer upon the President the power to reassess and reorder Congressional priorities ...."[279] Because the Act allows the President to nullify congressional priorities in future matters, beyond the law conferring the power, the Act violates the constitutional balance.

VI. Conclusion

Regardless of whether the line item veto power is characterized as an impoundment power, a legislative power, or an effectuation of the President's executive veto, the Supreme Court is likely to find that the Line Item Veto Act of 1996 violates the separation of powers established by the Constitution. If the Court uses a functionalist approach to analyze the separation of powers question raised by the line item veto power, it will likely rule that the Line Item Veto Act improperly gives the President power to legislate and control the nation's purse strings. The Court may reach such a result by finding that Congress directly delegated legislative power to the President. In the alternative, the use of the line item veto to effectuate the President's executive veto is also unconstitutional because it violates the legislative scheme set out in Article I. Finally, the Court could find that while Congress can authorize presidential impoundments act by act, Congress cannot give the President general impoundment power in the guise of a line item veto power because it effectively allows the President to legislate and control the nation's treasury without meeting the bicamer-

274. 478 U.S. 714 (1986).
275. *Id.* at 732.
276. 501 U.S. 252 (1991).
277. *Id.* at 277.
278. 367 F. Supp. 686 (D. S.D. 1973).
279. *Id.* at 697.

alism and presentment provisions of the Constitution. Thus, all paths will lead the Court to the same conclusion: the Line Item Veto Act is unconstitutional because it violates the separation of powers doctrine.

Although Congress, and the President, may have had good intentions in enacting the Line Item Veto Act of 1996 to correct its spending excesses, Congress' inefficiencies do not serve as an excuse to endow the Executive Branch with extra-constitutional power. As Justice Brandeis once explained, "[t]he doctrine of separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of . . . governmental powers among three departments, to save the people from autocracy."[280] Perhaps as currently organized, Congress is incapable of fiscal planning. Perhaps necessity therefore requires that the President fill the void. But necessity does not give birth to constitutional power. Congress must use a different means to reach the desirable end; perhaps by promulgating rules to govern its own self-interested behavior or by giving the President impoundment power in each of its appropriations bills, or by initiating an amendment to the Constitution to permit line item veto authority for the President. Regardless of the necessity, the Constitution prevents Congress from sacrificing the principle of separation of powers in order to correct its own shortcomings.

280. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).