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Aaron D. Zibart

University of Kentucky

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Eulogizing the Line Item Veto Act:  
*Clinton v. City of New York*  
and the Wisdom of Presidential Legislating

BY AARON D. ZIBART*

The Supreme Court caused little surprise when it declared the Line Item Veto Act of 1996 unconstitutional.1 Although the majority expressed "no opinion about the wisdom"2 of the Line Item Veto Act, and one dissent conceded the Act is a "novel" approach to alleviating federal budgetary woes,3 few commentators have inquired into the premise underlying the line item veto. This unarticulated premise, namely that the President stands in a better position than Congress to make difficult budgetary decisions, merits examination because of its apparent popularity and likelihood of reemergence in future legislation.

Part I of this Note examines the opinions in *Clinton v. City of New York*, as well as the Line Item Veto Act of 1996 itself.4 Part II presents some of the arguments advanced by supporters of presidential item veto authority and, conversely, the responses from opponents.5 Part III briefly contrasts the character of the modern presidency with that of Congress as a means of scrutinizing the rationale behind the line item veto.6 Finally, this Note concludes that the view favoring presidential item veto authority is inherently flawed, because the President is no less insulated than Congress from the causes of fiscal mismanagement.7

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* J.D. expected 2000, University of Kentucky.  
2 Id. at 2094.  
3 See id. at 2131 (Breyer, J., dissenting).  
4 See infra notes 8-48 and accompanying text.  
5 See infra notes 49-89 and accompanying text.  
6 See infra notes 90-114 and accompanying text.  
7 See infra notes 115-17 and accompanying text.
I. THE LINE ITEM VETO ACT UNDER FIRE:

CLINTON V CITY OF NEW YORK

A. Overview of the Line Item Veto Act

The Line Item Veto Act of 1996 ("Act") was the culmination of bipartisan efforts to create legislation widely perceived as necessary for gaining control over the then-growing federal budget deficit. Although congressional support for the Act was not universal (some congressional leaders held strong reservations about its constitutionality), the Act's passage in an election year was unremarkable. Certainly, the spectre of a budget deficit was a concern to most Americans during the mid-1990s. Even the least astute politician recognized the political capital to be gained by appearing aggressive on this issue.

The Act itself is straightforward. The President is vested with the expansive authority to "cancel in whole—(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit." In furtherance of the purposes of the Act, the President must "determine[ ] that such cancellation will—(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." Apparently to ensure that the President's cancellations are well-informed, the Act also requires the President to "(1) consider the legislative history, construction, and purposes of the law which contains such dollar amounts, items, or benefits; (2) consider any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information." The President must notify Congress of any cancellations within five days.

Interestingly, the President signs the bill or joint resolution into law before canceling any items of direct spending or taxation. The Act is distinct, therefore, from the President's prescribed constitutional authority

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9 See H.R. CONF REP No. 104-11, pt. 2, at 33-35 (1995) (expressing concern that the President would, in effect, control Congress's spending power unless a majority objected).
11 Id. § 691(a)(A).
12 Id. § 691(b).
13 See id. § 691(a)(B).
14 See id. § 691(a).
to veto an "Order, Resolution, or Vote" presented to him or her for approval. The President does not return an appropriations bill to Congress in toto, but rather in disembodied pieces. The Supreme Court's opinion in *Clinton v. City of New York*, as explained below, was based primarily on this perceived variation from the constitutionally prescribed method of legislating.

Upon receiving notice of the cancellations, Congress may simply allow them to stand. Alternatively, Congress may "disapprove" them by means of a disapproval bill sent to the President. As with any legislation, the President can then veto the disapproval bill, requiring the standard two-thirds majority vote of both houses to override. This procedure is therefore analogous to the manner in which Congress votes to overturn a presidential veto of an entire bill. As such, the Act is not an altogether unique idea, but an attempt to fashion a modified approach to presidential review of congressional legislation. Significantly, the Act enables the President to cancel not only amounts contained in bills or joint resolutions, but also "any dollar amount represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law". The President's ability to cancel items is directly proportional to the specificity of the congressional committee reports.

B. Setting the Stage: Challenge of Clinton v City of New York

The Supreme Court avoided reaching the merits in an earlier challenge to the constitutionality of the Act by holding that the petitioners, members of Congress, lacked standing. Thereafter, on several occasions, President

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15 U.S. CONST. art. I, § 7, cl. 3.
16 2 U.S.C. § 691b(a) (Supp. III 1997); id. § 691e(6) ("[D]isapproval bill" means 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 under this subchapter ").
17 See U.S. CONST. art. I, § 7, cl. 2 (Presentment Clause).
19 See id.
Clinton exercised his authority to cancel portions of appropriations bills, including § 4722(c) of the Balanced Budget Act of 199721 and § 968 of the Taxpayer Relief Act of 1997 22 These cancellations gave rise to separate actions directly challenging the Act’s constitutionality; they were subsequently consolidated by the district court.23 After initially determining that both groups of plaintiffs met the standing requirements,24 the United States District Court for the District of Columbia held that the Act violated the Bicameralism and Presentment Clauses, and impermissibly abrogated the separation of powers doctrine underlying the entire constitutional framework.25 The Government then sought, and the Supreme Court granted, expedited review of the district court’s decision pursuant to the provisions of the Act itself.26

C. The Majority Affirms: Violation of the Presentment Clause

Justice Stevens, writing for the majority, found the Act at variance with the “finely wrought”27 constitutional means of enacting law The Court focused its analysis squarely upon the text of the Constitution, applying a “formalist approach” as at least one legal commentator predicted.28 This approach “treats the text of the Constitution and the intent of its drafters as controlling and changed circumstances and broader policy outcomes as irrelevant to constitutional outcomes.”29 By concluding that the Act violates

23 See City of New York v. Clinton, 985 F. Supp. 168 (1998) (consolidating the complaint filed by one group of plaintiffs—the City of New York, two hospital associations, one hospital, and two unions representing health care employees—who claimed injury resulting from cancellation of § 4722(c) of the Balanced Budget Act of 1997, with the complaint filed by a second group of plaintiffs—a farmers’ cooperative and an individual member thereof—who alleged injury from the cancellation of § 968 of the Taxpayer Relief Act of 1997).
24 See id. at 173-77
25 See id. at 177-81.
29 Id.
the Presentment Clause, the Court did not reach the district court's further holding that the Act also contravenes the separation of powers doctrine.

The Court believed that, by granting the President the power to "cancel in whole" portions of bills, the Act permits nothing less than presidential legislating. Notwithstanding that the President first signs the bill or joint resolution into law before canceling any item, the majority held that the President was, "[i]n both legal and practical effect," amending and repealing portions of laws. The Court construed the "constitutional silence" on this issue as "equivalent to an express prohibition."

The majority then turned its attention to the two primary arguments advanced by the Government: first, that the cancellations under the Act were the exercise of discretionary authority that the Act contemplates, and second, that the power to cancel items is no different than the power to decline to spend or implement tax programs. The Court found no merit in either of these contentions; in the end, the Court held to its narrow conceptualization of the legislative procedures provided for by Article I, Section 7 of the Constitution, and did not permit this deviation from that model.

D. The Dissents

Clinton v. City of New York included two dissenting opinions, relevant to the discussion insofar as they relate to the constitutionality of the Act rather than the separate standing issue. The first, a partial dissent written by Justice Scalia and joined by Justice O'Connor, and Justice Breyer as to

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31 Clinton, 118 S. Ct. at 2103.
32 Id. (disposing of the Government’s argument that the cancellations were not repeals by pointing out that the canceled items were rendered inoperative as to the appellees).
33 See id. at 2105.
34 See id. at 2105-07. Field v. Clark, 143 U.S. 649 (1892), cited by the Government in support of the view that not all grants of discretionary authority to the President constitute delegations of legislative power, was distinguished by the Court on several grounds. In that case, the President held the power to suspend import duty exemptions, pursuant to a policy decided by Congress, whereas here the President was repealing acts of Congress according to his own policy agendas. Furthermore, the Court noted that in contradistinction to any of the statutes relied upon by the Government as purported examples of the authority to decline to spend congressionally-appropriated funds, the Line Item Veto Act of 1996 confers upon the President the greater power of changing statutes themselves.
Part III, takes a more expansive view of the Presentment Clause.\textsuperscript{35} To these three Justices, who considered only the presidential cancellation of the item in the Balanced Budget Act of 1997, the Act is constitutional.\textsuperscript{36}

The Justices acknowledged a "technical difference" between the actual cancellation of an item of spending and a hypothetical authorization to "decline to spend" an item of funding in the Balanced Budget Act of 1997.\textsuperscript{37} They did not consider this difference to have any bearing upon the requirements of the Presentment Clause, however.\textsuperscript{38} In their view, the ultimate issue is not whether the Presentment Clause forbids the means employed in the Act (which, according to this dissenting opinion, it does not), but rather whether the Act violates the nondelegation doctrine.\textsuperscript{39} Finding this instance of delegation "no different from what Congress has permitted the President to do since the formation of the Union,"\textsuperscript{40} these dissenting Justices effectively skirted the Presentment Clause analysis used by the majority.

The second dissent was written by Justice Breyer and joined by Justices Scalia and O'Connor as to Part III.\textsuperscript{41} Justice Breyer began with the proposition that the Act has the "constitutionally proper" objective of allowing the President to enact merely some of the items in what are typically "massive appropriations bills."\textsuperscript{42} Justice Breyer, clearly more deferential to this arrangement between the legislative and executive branches, did not accept the majority's conclusion that a cancellation under the Act is either an amendment or repeal of a law. Justice Breyer thought that the majority relied upon a faulty syllogism to reach its holding: the Constitution prescribes the exclusive method of enacting or amending laws, the Act varies from this method, and therefore the Act is at odds with the Constitution.\textsuperscript{43} The error lay, in Justice Breyer's estimation, in the minor

\textsuperscript{35} See \textit{Clinton}, 118 S. Ct. at 2110-18 (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{36} See \textit{id.} at 2118 (Scalia, J., concurring in part and dissenting in part) (Justices Scalia and O'Connor maintained that the plaintiffs challenging the cancellation of §968 of the Taxpayer Relief Act lacked standing).
\textsuperscript{37} See \textit{id.} (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{38} See \textit{id.} (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{39} See \textit{id.} at 2116 (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{40} \textit{id.} at 2118 (Scalia, J., concurring in part and dissenting in part) (Justice Scalia noted, for example, that President Jefferson had been granted complete discretion to either spend or decline to spend an appropriated sum for warships. \textit{See id.} at 2117).
\textsuperscript{41} See \textit{id.} at 2118-31 (Breyer, J., dissenting).
\textsuperscript{42} \textit{id.} at 2118 (Breyer, J., dissenting).
\textsuperscript{43} See \textit{id.} at 2120 (Breyer, J., dissenting).
premise that the Act does in fact vary from that narrowly-construed method.44

Disposing of the majority’s conclusion that the Act contravenes the Presentment Clause, Justice Breyer reached the issue the majority did not: whether the Act nevertheless runs afoul of separation of powers principles. Justice Breyer’s analysis embraced more diffuse notions of the boundaries between the federal branches. He clearly abandoned formalism’s stricter approach, favored by the majority 45 Concluding that the cancellation provision is “executive” and not “legislative” in nature, Breyer felt that Congress neither undermined its own authority nor impermissibly breached the nondelegation doctrine.46

The belief that the title “Line Item Veto” inaccurately describes the Act was common to Justice Scalia’s and Justice Breyer’s dissents. For Scalia, the Act’s title is a misnomer which “succeeded in faking out the Supreme Court.”47 Likewise, Justice Breyer found that the Act does not, in literal terms, equate to a repeal or amendment of laws.48

II. NATURE OF THE DEBATE:
THE NECESSITY OF A LINE ITEM VETO

A. Introduction

Support for a presidential line item veto is perhaps more “grassroots” in nature than the opposition raised against it. A great deal of public enthusiasm accompanied its passage in reaction to the very real dilemmas created by the growth of the federal budget deficit.49 As alluded to in Part I,50 politicians were keenly aware of increasing public dissatisfaction with the state of fiscal affairs. To this end, politicians were compelled to ignore glaring defects in proposed solutions for the sake of appearing decisive to

44 See id. (Breyer, J., dissenting).
45 See id. (Breyer, J., dissenting) (citing Justice Jackson’s famous concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 592 (1952)).
46 See id. at 2123-24 (Breyer, J., dissenting) (devoting the bulk of these pages of his dissent to demonstrating how the Act did not exceed the boundaries of the nondelegation doctrine).
47 Id. at 2118 (Scalia, J., dissenting).
48 See supra text accompanying note 8.
49 See id. at 2131 (Breyer, J., dissenting).
50 See id. at 2131 (Breyer, J., dissenting).
their constituents. In contrast, much of the recent legal scholarship accurately predicted that the item veto power, at least as expressed in its current form, would be declared unconstitutional.\textsuperscript{51}

B. Legislating Gone Awry

The support for the item veto stems not so much from dislike of the mechanisms established by Article I, Section 7 of the Constitution, but rather from frustration with either real or perceived abuses of those mechanisms. As noted:

The single most important factor spurring the call for item veto power has been the persistent practice by Congress of attaching riders and other nongermane amendments to legislation as a means to impel enactment and avoid a veto. It appears that this problem was not foreseen by the constitutional architects of the eighteenth century.\textsuperscript{52}

The legitimate concern is with what is termed "logrolling" or "pork barrelining," whereby members of Congress progressively fatten appropriations bills with their own expenditure items. These expenditures invariably have a local flavor, and give rise to the arrangements under which members consent to each other's additions. Appropriation bills receiving this treatment emerge as "omnibus" legislation comprised of "assorted legislation grouped together and presented in a single bill or resolution."\textsuperscript{53}

Proponents of the line item veto readily point to the simultaneous rise in special-interest groups and private lobbying as underlying reasons for the burgeoning pork barrel phenomenon. Justifiably or not, the public thinks Congress has succumbed to these pressures. The desire to be

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reelected necessitates great sums of campaign money, money most easily obtained from special interest contributors. This flurry of congressional fundraising activity, wholly separate from the legislative duties members are elected to perform, is problematic. One commentator, discussing perceived changes in the separation of powers between the President and Congress, has identified what he terms "fudged legislation."

Since the early 1960s there has been a proliferation and mobilization of interest groups and policy networks, both those favoring and those opposing various forms of government activism. At the same time, legislative power in Congress has become more decentralized in the hands of congressmen whose political careers owe little to their party and almost everything to their personal campaign organizations and fund-raising capacities. The result has been an increase in the range of contending groups and in the number of available veto points, and an every-man-for-himself mentality in the legislative process. In order for anything to pass in this situation, legislation typically has to be "fudged," embodying a host of concessions that render the statute ambiguous if not contradictory on key points in order to assemble the unpredictable votes and pass through numerous roadblocks.\(^5\)

In the midst of so much frenzied congressional fundraising, proponents contend, the coherence and logic necessary for budgetary planning cannot exist. Fiscal irresponsibility rises to ever-greater heights (or lows, depending upon one's vantage point), while the nation as a whole suffers the ongoing consequences. This view presupposes an inherent defect in Congress, principally that members lack the requisite will to restrain their inclinations.\(^5\) Assuming that members are deficient in this regard, it still must be shown that the President possesses this restraint.

Item veto advocates express the belief that omnibus legislation seriously infringes upon the President's normal veto powers. As such, the curative measures of the line item are needed.\(^5\) The current state of affairs,

\(^{54}\) Hugo Heclo, What Has Happened to the Separation of Powers?, in Separation of Powers and Good Government 131, 146 (Bradford P Wilson & Peter W Schramm eds., 1994) (discussing the gradual overlapping of these powers).


so the argument goes, "has turned the tables on the executive making the veto work for legislative license instead of against it." President often find themselves confronted with the lose-lose choice of vetoing needed and popular appropriations legislation because of the attachment of pork barrel riders, or alternatively, of signing the appropriations bill into law despite its flaws. This scenario may even become an ultimatum of sorts, confronting the hapless President with the risk of creating a complete budgetary impasse and halting government.

C. Historical Context of the Item Veto Concept

Despite what the recent clamor for the item veto leads one to believe, the item veto concept is far from new. Adherents to the line item veto idea, no less than its critics, ostensibly find authority in the Framers' discussions about the balance of power between the executive and legislative branches. Both sides have examined, in great depth, the historical documents for an answer to the question of whether the Framers would have approved. Illustrative of this debate, it has been suggested, on one hand, that the "opaque" language pertaining to the executive veto power reflects the Framers' desire to enable the President to confront situations not then foreseen. Conversely, the constitutional silence on the item veto has been interpreted as indicating a desire that the President rarely veto appropriations bills, and not as proof that the Framers were unfamiliar with omnibus appropriations. The majority in Clinton v. City of New York sided with the nay-sayers when it considered the constitutional silence as tantamount to an express prohibition on this authority.

D. Delegation or Impoundment?

Both sides of the item veto debate have valid concerns about the seemingly unchecked attachment of riders to appropriations measures.

57 Id. at 188 (cited in Spitzer, supra note 52, at 123)
58 See id. at 187 (cited in Spitzer, supra note 52, at 123).
60 See, e.g., Best, supra note 56, at 183 (arguing that the Framers would support an item veto to correct legislative "encroachment" on the presidential veto). But see Wolfson, supra note 51, at 840 (viewing the idea that the Framers would approve of an item veto to correct Congressional abuse as "flawed").
61 See Krasnow, supra note 53, at 595.
62 See Wolfson, supra note 51, at 839-41.
Indeed, few, if any, would champion the budgetary status quo. Advocates recognize the need to bolster their arguments by analogizing to currently accepted (or at least tolerated) practices. They seek to lend credibility to the item veto by holding it out as either (1) a permissible congressional delegation of discretionary budget authority to the President, or (2) as a manifestation of the President’s acknowledged power to decline to spend (or to impound) appropriated funds. Although the Government did not prevail under these arguments in *Clinton v. City of New York*, proponents maintain that clothing modified item veto legislation in either of these two raiments is nonetheless possible.

1. *Delegation*

Approaching the delegation issue first, two precepts emerge. One is obvious to the most casual observer of the law or federal government: the Constitution vests the legislative power in the Congress and the executive power in the President. The other is more intuitive: as a practical matter, even a legislative body as large and diverse as Congress cannot devote its attention to all matters properly falling beneath the legislative “umbrella.” Congress, either reluctantly or gleefully, but nonetheless routinely, delegates decision making powers to entities outside of itself. Members of Congress are no less immune than other citizens to the increasing complexity of our world, and consequently wish to delegate responsibility whenever feasible. Delegation to a technical or scientific administration may be sensible in light of the specialized knowledge required for particular decision making. Delegation in another setting, however, may be ill-advised, if not blatantly unconstitutional. Congressional delegations have been made to administrative agencies, independent commissions, and even to the President directly. On the judicial side, two delegation doctrine issues have weighed heavily upon the Supreme Court: first, whether delegation is ever possible (which as a settled matter it generally

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64 See infra notes 66-76 and accompanying text.
65 See infra notes 80-84 and accompanying text.
66 See generally U.S. CONST. art. I.
67 See generally id. art. II.
68 See Heclo, supra note 54, at 138.
69 See id. at 136-37
70 See id. at 138.
appears to be), and second, whether it is excessive or uncontrolled in any given instance.

The Supreme Court's pronouncements on the boundaries of delegation, however, have not always been clear or consistent. At least one commentator posits that the Court is retreating from the stricter standard (disfavoring delegation) it established not too many years ago. If accurate, supporters of an item veto power would regard the move as wise judicial policy. Arguably, loosening the strictures surrounding the legislative function allows for more expedient handling of issues such as federal budgetary crises. Justice Jackson's famous concurrence in Youngstown Sheet & Tube Co. v. Sawyer lends implicit ideological support to an item veto power. Indeed, dissenting Justice Breyer quoted this concurrence in Clinton v. City of New York: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."

Critics reply to this delegation argument by noting that the President performs a legislative function when he or she expunges parts of appropriations bills through the "cancellation" device. This manner of delegation therefore confers more than the authority to analyze a particular fact situation and then apply the result mandated by Congress as per the guidelines of its delegation. Instead, it is the much broader ability to

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71 See Wolfson, supra note 51, at 846 n.44 (noting that any allowable delegation of authority by Congress must, at a minimum, contain sufficient standards or principles by which to guide the agency in its decisions).

72 See id.

73 See id. at 848.

74 See Heclo, supra note 54, at 142. Heclo compares cases such as INS v. Chada, 462 U.S. 919 (1983) with Morrison v. Olson, 487 U.S. 654 (1988), and Mistretta v. United States, 488 U.S. 361 (1989). Heclo sees these later cases as evidencing the Supreme Court's amenability to a more "pragmatic approach that accepts the political reality of overlapping powers." Heclo, supra note 54, at 142.

75 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 592 (1952) (Jackson, J., concurring).

76 Clinton v. City of New York, 118 S. Ct. 2091, 2120 (1998) (quoting Youngstown, 343 U.S. at 635 (Jackson, J., concurring)).

77 See Lee, supra note 51, at 143 (arguing that the President is, in effect, legislating independently).

78 See, e.g., Field v. Clark, 143 U.S. 649 (1892). The Government in Clinton v. City of New York relied heavily upon Field v. Clark, arguing that the Line Item Veto Act of 1996 was indistinguishable from the type of delegation in that case. See Clinton, 118 S. Ct. at 2105-07 The Tariff Act of 1890, at issue in Field v.
unilaterally brush aside appropriations items with which the President disagrees and, in the process, to substitute his or her own policy agendas.\textsuperscript{79}

2. \textit{Impoundment}

Alternatively, and distinct from the delegation doctrine argument, is the contention that an item veto represents nothing more than an extension or modification of the President’s traditionally exercised power to decline to spend appropriations items. This is known in constitutional law parlance as the “impoundment doctrine.”\textsuperscript{80} The President’s refusal to spend funds is not rooted in any explicit constitutional provision, but in fact is held up as an abuse of those provisions.\textsuperscript{81} Beginning with President Thomas Jefferson in 1803,\textsuperscript{82} and increasing in both frequency and degree through a progression of Presidents during this century,\textsuperscript{83} impoundment attained almost unquestioned legitimacy before its curtailment due to overuse during the Nixon presidency.\textsuperscript{84} This practice, however, is by no means extinct.

To those who favor an item veto, the allure of the impoundment doctrine is inescapable; after all, it achieves largely the same result as an item veto. In both instances the President surveys the budgetary situation

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\textsuperscript{79} See \textit{Clinton}, 118 S. Ct. at 2106.

\textsuperscript{80} OTIS H. STEPHENS & GREGORY J. RATHJEN, THE SUPREME COURT AND THE ALLOCATION OF CONSTITUTIONAL POWER 275 (1980) (“Impoundment consists of the presidential practice of withholding or refusing to allow the expenditure of certain moneys appropriated by Congress.”).

\textsuperscript{81} See \textit{id}.

\textsuperscript{82} See \textit{id}. at 275-76 (relating how President Jefferson withheld moneys Congress had designated for warships, upon a change in circumstances which obviated the need for those warships).

\textsuperscript{83} See \textit{id} at 276 (President Franklin D. Roosevelt frequently spent sums below what Congress had allocated. Presidents Truman, Eisenhower, and Johnson also used this practice.).

\textsuperscript{84} See \textit{id}. ("Nixon, however, extended the impoundment power beyond acceptable limits and did so for clear policy purposes; his actions gave rise to efforts by Congress [to enact the Congressional Budget and Impoundment Control Act in 1974].")
and then effectively withholds funds. Affection for the impoundment
doctrine is not unqualified, however, because of the attending risks of
judicial intervention and public outcry. It is simply too easy for critics to
cry foul when the President acts so unilaterally. Because impoundment
owes its continuing existence to congressional acquiescence in the practice,
it seems a rather tenuous foundation upon which to predicate item veto
authority.

It is true that many Presidents have requested an item veto power, and
this fact has, in turn, added to the popularity of the idea over time.\footnote{See \textit{Spitzer}, supra note 52, at 126-29 (naming President Ulysses S. Grant as the first to publicly request an item veto).} Illustrating this popularity, many states have item vetoes which operate at
the state level of government.\footnote{See \textit{id.} at 134-38. Spitzer explores states' experiences with the gubernatorial item veto and identifies several shortcomings. After showing how operations at a state level do not translate so easily to the federal level, he predicts negative effects of an item veto far beyond its intended reach. Spitzer's main contention is that the gubernatorial item veto undesirably strengthens the governor's position to the
detriment of the legislature.} Although these gubernatorial item vetoes
provide convenient comparative models, they are not wholly applicable to
the federal government.\footnote{See \textit{id.}} In fact, the analogy between Congress and state
legislatures is poor.\footnote{See \textit{Fisher}, supra note 18, at 245.} Despite the persuasiveness of these contentions, they
cannot justify an item veto if it contravenes the federal Constitution. The
Court in \textit{Clinton v. City of New York} held that the line item veto, at least in
the form represented by the Line Item Veto Act of 1996, fails under the

III. \textbf{WHY THE \textsc{President}?:
UTILITY AND WISDOM OF PRESIDENTIAL LEGISLATING}

\textbf{A. Introduction}

Amid the flood of scholarship examining the constitutionality of the
item veto power, the fundamental question "why the President?" has
received comparatively scant attention. Indeed, the Supreme Court avoided
this ideological minefield with the terse statement that "[t]he Court
expresses no opinion about the wisdom of the Act's procedures and does
not lightly conclude that the actions of the Congress that passed it, and the

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President who signed it into law, were unconstitutional.\textsuperscript{90} Although it would be surprising if the Supreme Court instituted the practice of freely commenting upon the (mis)behavior of its coordinate branches of government, here the Court could have more fully elucidated its reasoning.

The final analysis inquires into the premise which breathes life into the whole notion of the item veto: that the President stands in a better position than Congress to make difficult budgetary decisions and therefore ought to have more control. Even those proponents of the item veto motivated exclusively out of animosity toward Capitol Hill cannot escape the need to defend their own policy. This can only be done by contrasting the supposed nature of Congress with that of a President. As discussed more fully below, if the President suffers from the same fiscal infirmities which afflict Congress, little may be gained from the item veto.

\textbf{B. The President's Influence on the Federal Budget}

The burden of showing the merit of change falls upon those seeking the change. Proponents of the Act would be remiss in failing to note that the President already assists in formulating the federal budget.\textsuperscript{91} The President currently sends Congress a suggested list of the amount to be spent and the manner in which to raise it.\textsuperscript{92} This function is advisory, of course, but it does carry political weight. This is especially true when a majority of Congress is from the President's party. The President's oversight on budgetary issues has been described as "dominant," when viewed from the practical perspective of real influence.\textsuperscript{93} Carrying this idea one step further, however, to allow presidential 'legislating' by means of an item veto should not be taken lightly.

One commentator on politics and the law has discussed the so-called "unwritten constitution," and identified it as a major current in national events:

The roots of the incoherence of policy which lead many critics to wish to amend the U.S. Constitution do not come from the Constitution but rather from the unwritten constitution—the fixed political customs that have

\textsuperscript{90} \textit{Id.} at 2094.


\textsuperscript{92} See \textit{id.} at 169-71 ("The president formulates budget estimates and submits them to Congress in accordance with the Budget and Accounting Act.").

\textsuperscript{93} See \textit{Spitzer, supra} note 52, at 139.
developed without formal Constitutional amendment, but that have been authorized by statute or frozen, at least temporarily, in tradition.\textsuperscript{94}

Politicking remains politicking, and the best practitioners of the art are those who effectively utilize the "power bases" which influence the public and fellow politicians alike. Television speeches and party platforms, for example, encapsulate grand ideas into simplistic slogans and are potent tools in the budgetary area. It is not an overstatement to suggest that a popular President may achieve the same result as a line item cancellation by simply speaking out against the not-yet finalized bill. If this is true, why not legitimize this ability in statutory terms? Is it not wiser, so the argument goes, to concede the realities of the political landscape and openly permit this type of delegation? One commentator, writing in a different context, suggests that we as a nation "quit talking about the Constitutional separation of powers" and recognize that "in all major issues of management and policy the Congress and the President are jointly involved in the direction and control of the departments and agencies."\textsuperscript{95} A literal application of that idea, however unlikely, might have unforeseen consequences beyond the scope of this Note.

C. Utility of Individual Leadership

The institution of the presidency has witnessed profound changes. These changes have outpaced any comparable changes in the Congress. Quite possibly, the presidency is no longer the institution the Framers envisioned. Its rise in prominence from more humble beginnings has been meteoric. While the earliest Presidents often found themselves performing "chores" for Congress,\textsuperscript{96} a modern President is a celebrity of sorts and, even on occasion, the focal point for our national aspirations.\textsuperscript{97} Presidents, in many instances, are "expected to be the nation's leading agenda setters,

\textsuperscript{94} DON K. PRICE, AMERICA'S UNWRITTEN CONSTITUTION: SCIENCE, RELIGION, AND POLITICAL RESPONSIBILITY 9 (1983) (noting price lists, party conventions, congressional committees, and press conferences as various manifestations of the "unwritten constitution").

\textsuperscript{95} Id. at 135-36.

\textsuperscript{96} See Heclo, supra note 54, at 137 (arguing that the presidency was formerly more of an assistant position to Congress).

policy initiators, problem solvers, and all-around leaders with a "vision." This phenomenon is attributable to, or even demanded by, the exponential rate of change and increasing complexity in our world.

Whether or not the ascendancy of the presidency was inevitable, there is a subtle appeal to leadership by a single individual. Direct leadership by an involved and proactive Chief Executive adjures to our national character. Concededly, it is more possible to hold the President individually accountable than it is to browbeat a representative body comprised of many constantly changing parts. Superficially, at least, this counsels in favor of a broader presidential budgetary authority.

A President, whether wise or misguided, presents an image quite unlike that of Congress. The workings of Congress no doubt remain a jumbled mystery to many Americans. At times, Congress resembles a feuding house divided against itself and incapable of sustained initiative. But Presidents, after all, are merely individuals. Hated or loved, an individual is at least predictable and describable. A President has a style which will be used to structure future decision making. Ultimately, these truths underlie much of the support for placing an item veto power in the hands of one individual.

D. Congress's Retreat from Responsibility

A skeptic might view an item veto simply as Congress's abdication of its spending authority in the face of pronounced voter discontent. This notion has been stated aptly, and colorfully:

No matter how much the members of Congress want to strap themselves to the mast of budgetary restraint in the form of delegated responsibility to another branch in the hopes of avoiding the siren songs of special interests, the real siren that they should avoid is the one calling for abdicating their unique constitutional responsibility and thereby avoiding political accountability for not making the hard choices

Delegation, once done, is hard to undo. This observation cautions against allowing Congress to slough off what is essentially its primary function and

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98 Heclo, supra note 54, at 136.
99 See id. at 137
100 See MERRY, supra note 97, at 90-91.
102 Gerhardt, supra note 28, at 234.
power to a co-equal branch of government. A Congress partially relieved of its “power of the purse” by an item veto appears superfluous at best. As a further consequence, the presidency is elevated to a level beyond which it was intended to rise. Repeating the view of another, it is best that “clear bright lines”103 remain drawn between the President and Congress. Indeed, one scholar has envisioned grave constitutional consequences, including a “radical restructuring of constitutional power,”104 emerging from a reform as ostensibly innocuous as the line item veto.

Does the President actually require congressional delegation to both achieve accountability as President and advance the cause of national policy in general?105 This seems unlikely, given that Presidents already command such a central role in the national political consciousness. One scholar voices the opinion that, “[t]o a ludicrous degree, Americans are governed by presidential instincts, whims, idiosyncracies, or mind-sets.”106 Presidential opinions in many instances become the de facto national policy. Swinging the pendulum so far in the direction of the President would inevitably lead to calls for the restoration of Congress’s abandoned authority.

E. Are the President and Congress Really So Different?

The realization that the President does not operate in a political vacuum lessens the seductiveness of the item veto. The President is merely one of the more prominent performers on the stage of public discourse and opinion. A President’s desire to leave a permanent imprint upon the office, and secure a favorable legacy, guarantees that all actions will be taken in full consideration of their impact on popularity ratings.

Admittedly, one difference between members of Congress and the President is that a President has a national rather than local constituency. In INS v. Chadha,107 the Court struck the so-called “one house legislative veto.” In that opinion, the majority repeated its statement in an earlier decision that “it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature.”108 This broader constitu-

103 Heclo, supra note 54, at 139.
104 FISHER, supra note 18, at 247
105 See SPITZER, supra note 52, at 132.
108 Id. at 2783 (quoting Myers v. United States, 272 U.S. 52, 123 (1926)).
ency does not mean, however, that a President lacks the incentive to favor particular local projects:

There can be no doubt of the president’s interest in pork barreling, distributive legislation, and in the patronage system in general. Like any elected official, the president has an obvious stake in electoral/popular support as well as support in Congress. Pork barrel projects can be extremely important in appealing to both of these constituencies. Special interest groups and campaign contributors do not stop at Capitol Hill, but continue on to the White House. Granting the President the item veto merely shifts more of this undue influence in his or her direction.

Artful use of an item veto power is not restricted to merely canceling appropriations items in the intended fashion. The preemptive threat of its use “could force legislators to scale back the size of a program” and thereby produce the desired budget reduction. Before proponents applaud this result, however, the potential downside is far greater and perhaps far more likely as well. Collusion between the President and Congress may in fact increase the federal budget. This easily-imagined scenario occurs where the President agrees to spare appropriations from an item veto in return for congressional votes for one of the President’s own expenditure programs. Rather than taming Congress, the item veto provides the President with an even more potent means of arm-twisting. It has been noted that “[t]he most plausible result [of the item veto] would be a reduction in pork for the President’s foes but an increase for his allies.” In practical terms, although the item veto preserves both the presidential veto and congressional power to override that veto, the likelihood of Congress mustering the necessary congressional votes decreases because the passage of an entire bill is not at stake. The consensus-building needed to pass the excised appropriations is unlikely to materialize where the interests involved have been narrowed.

IV CONCLUSION

Congress is perhaps forever tainted with the stigma of being a fiscal mismanager. This label is unfortunate, and not totally deserved. One

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109 SPITZER, supra note 52, at 132 (citation omitted).
110 See FISHER, supra note 18, at 243.
111 Id. at 247
112 See id.
113 See id.
114 SPITZER, supra note 52, at 134.
observer feels Congress, as much as anything else, “has taken a ‘bum rap’ in the persistent accusations leveled by presidents and others that it is a spendthrift.” He notes that “[u]p until 1980, most of the nation’s debt had accumulated because of war. Add to that presidential spending initiatives, and one is left with the conclusion that Congress’s principal sin has been going along with the President.” It seems anomalous to singularly apportion blame to the legislative branch of government for so large a problem.

Many factors interact over time to give rise to federal budgetary crises. Undoubtedly, some reasons have yet to be identified, much less understood. But giving the President the ability to ‘supervise’ Congress’s expenditures is a doubtful method of correcting longstanding and immense fiscal problems. If anything, practical experience shows that expeditious solutions rarely prove either effective or predictable in outcome. What is needed is a more earnest commitment from all sides of the federal government, and by Americans in general, to prioritize appropriations and exercise restraint. For their part, voters should not condition the reelection of their representatives upon the amount of local appropriations obtained.

The item veto concept is as much predicated upon a false conceptualization of the presidency as upon negative views of Congress. Otherwise, solutions would focus upon Congress rather than on the interactions of Congress with the President. The argument that an item veto is needed for “presidential self-defense and [as] a protection against the enactment of ill-conceived legislation” is pretextual because it is only seriously raised in the debate about the budget deficit. Regardless of whether the presidential veto has lost some of its practical usefulness, by no means has the presidency been subordinated to Congress.

Supporters of the line item veto fall short of proving either its wisdom or its ability to perform the function for which it was intended. Setting aside the constitutional deficiencies of the Line Item Veto Act of 1996, proponents have performed only half of the necessary analysis. More than simply condemning Congress for its demonstrated inability to balance the federal budget, proponents must justify the premise that the President stands in a better position to make the difficult, but needed, budgetary decisions. Thus they have not done, and ultimately are unable to do.

115 Id. at 141.
116 Id.
117 Krasnow, supra note 53, at 613.