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Whom Do You Trust?: Judicial Independence, the Power of the Purse and the Line-Item Veto

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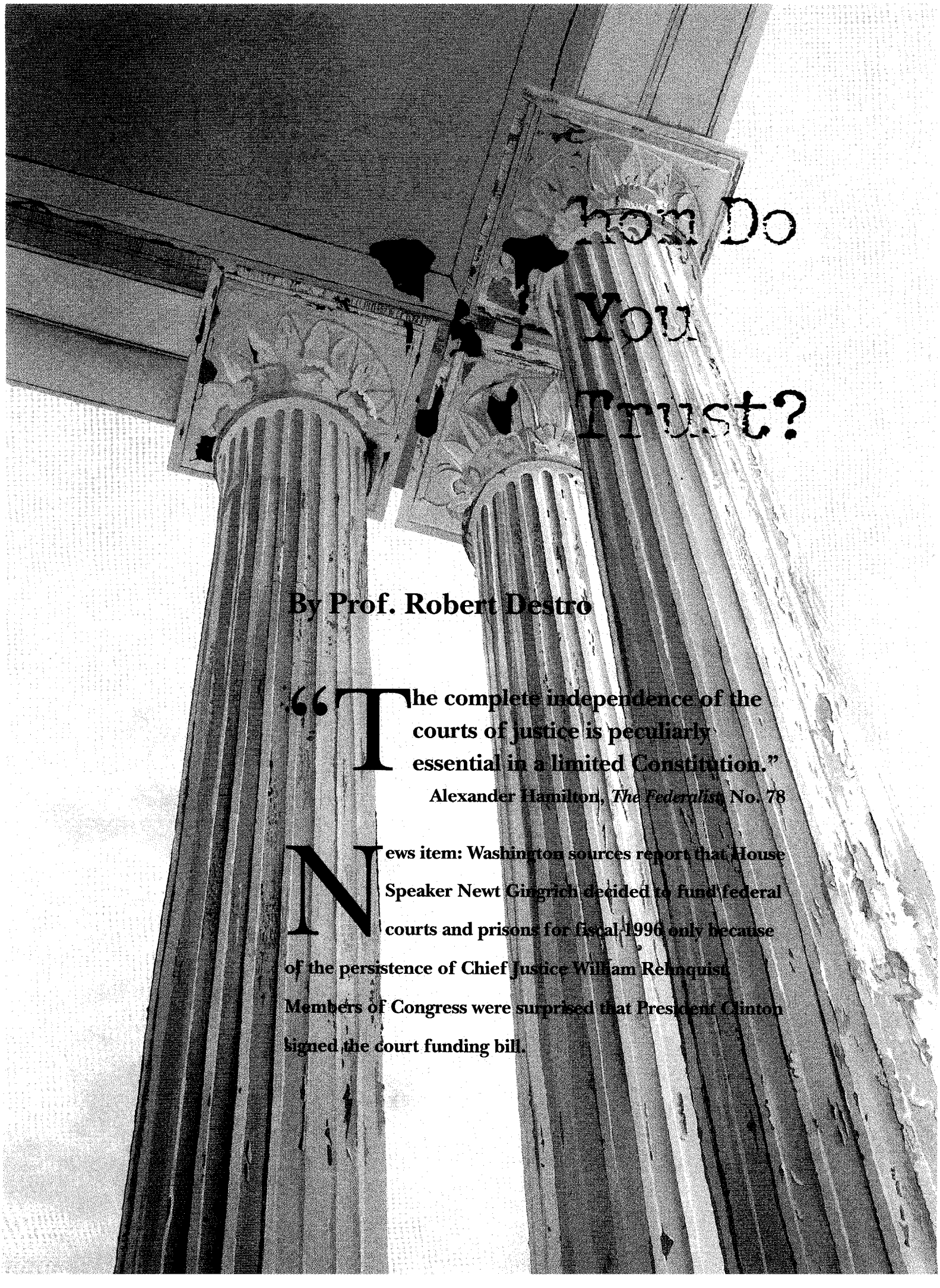


How Do You Trust?

By Prof. Robert Destro

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution."

Alexander Hamilton, *The Federalist*, No. 78

News item: Washington sources report that House Speaker Newt Gingrich decided to fund federal courts and prisons for fiscal 1996 only because of the persistence of Chief Justice William Rehnquist. Members of Congress were surprised that President Clinton signed the court funding bill.

It barely made the papers. With media attention focused on the struggle between Congress and the president to gain the moral high-ground on spending priorities, reporters hardly noticed that the chief justice of the United States had been forced to beg for funds to keep the judicial branch operating. Hat in hand, the chief told the speaker that the federal government shutdown had already forced him to draw down cash reserves and operate the federal courts with minimal personnel. Unless judicial branch funding were restored, he warned, the courts would have little choice but to release thousands of felony arrestees. Even when budget-cutting is the order of the day, speedy and public trials cost money. So do prisons. It would not be a pretty sight.

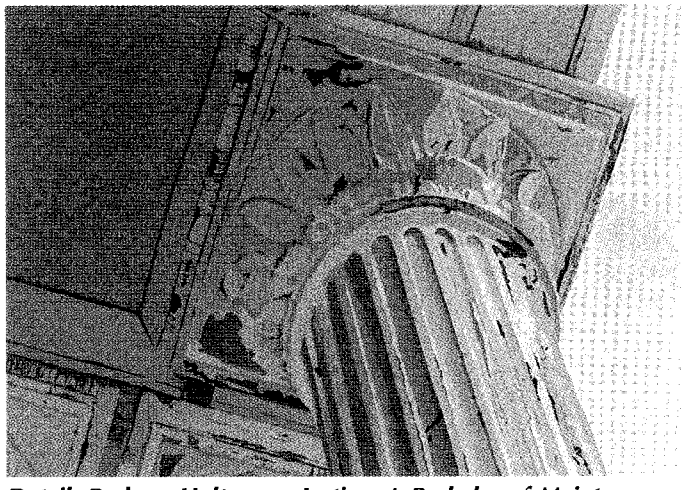
The politicians backed down. There was no question about it: The voters would blame them. The Republican Congress passed, and the Democratic president signed, a separate funding bill for the courts.

Fast forward to 1997. The 105th Congress is Republican, conservative, and ready to flex its budget-cutting muscles. The president is a two-term Democrat convinced that he can, once again, wrest the moral high-ground from his rivals on Capitol Hill. Is this "déjà-vû all over again" for the chief justice? Hardly. As of Jan. 1, the purse strings for the judiciary are now firmly in the hands of the president, not the speaker. If the chief must plead his case for extra money to operate the judicial branch, he will have to do so before the chief litigant himself – in the Oval Office.

The reason for this unseemly state of affairs is 2 U.S.C. §§ 691a to 691f, the line item veto. Bequeathed to President Clinton by the 104th Congress as a part of its "Contract with America," it provides in relevant part that when the president determines that the elimination of "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit" will "(i) reduce the Federal budget deficit; (ii) not impair any essential [g]overnment functions; and (iii) not harm the national interest," he may "cancel" it by simply informing "the Congress of such cancellation by transmitting a special message . . . within five calendar days (excluding Sundays) after the enactment of the law providing the dollar amount . . . that was canceled." [2 U.S.C. § 691a (1996)]

After Jan. 1, "All bills for raising [r]evenue" still "originate in the House of Representatives" and, as before, the Senate "may propose or concur with amendments as on other bills." [U.S. Const. Art. I § 7] In accordance with long-standing practice designed to keep the president out of the process by which the judiciary's budget is formulated and approved, the chief executive will still be required to include the budget requests of the Supreme Court in his own proposed budget "without revision."[2] The line item veto is designed to change the dynamic of the post-*enactment* political process set out by Article I, Section 7.

The current understanding is that the president may veto only an entire enactment, and Congress can override



Detail: Barbara Hultmann, Justice: A Probelm of Maintenance, acrylic/canvas, 50"x36", Art and the Law 1985, ©1985 West Publishing, Eagan, Minn.

that veto by two-thirds vote. Under the line item veto, "[t]he cancellation of any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit shall take effect upon receipt in the House of Representatives and the Senate of the special message notifying the Congress of the cancellation." In order to reinstate the items ("special messages") vetoed, Congress must enact a disapproval bill that is, itself, subject to veto pursuant to the presentment clause. [2 U.S.C. § 691b (a)]

The president has a new weapon, and the question on the table is whether or not he might be tempted to use it to put pressure on the judiciary. Answering that question in the affirmative in testimony before the Senate Government Affairs Committee, Louis Fisher, senior specialist on separation of powers at the Congressional Research Service, stated:

> The [p]resident can use the . . . process in a punitive way against the judiciary. In adversarial confrontations, it does not require an overheated imagination to think of [p]residents presenting ["cancellations"] for the courts in an innocent light (for "savings" and so forth) in an effort to conceal partisan and political motivations. [3]

Whether he will do so remains to be seen, but the temptations will be substantial. Louis Fisher's testimony recounts that a January 1938 article in the *Washington Post* warned that "that the [f]ederal government 'is the chief litigant in the [f]ederal [c]ourts. It is a party in interest not only in all the Federal criminal cases but in a large and growing number of civil actions involving the Government and its citizens.'" In the 59 years that have passed since those words were written, we have witnessed the exponential growth of the modern administrative state, and an equally exponential growth in the types, complexity, and importance of the issues that it must have resolved by the federal courts if it is to operate

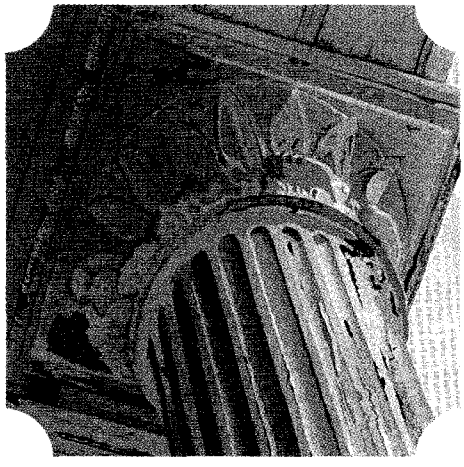
efficiently[4]. In each of these cases, either the executive branch, its "independent" appointees, or the president himself is a real party in interest.[5] When the president is involved personally, the stakes are even higher.[6]

As might be expected, the line item veto embodied in 2 U.S.C. § 691 includes provisions designed to limit president's ability to intrude on congressional power to control spending in politically sensitive areas such as defense and Social Security. It contains no protections whatever for the judicial branch. Problems, both real and potential, can arise should the president attempt to use his newly-acquired "power over the purse strings of the judiciary to bring a recalcitrant judge into line."[7]

THE ITEM-VETO DEFINED

Four basic veto forms have been identified in American constitutions: *no* veto, an *all-or-nothing* veto, an *item* veto, and an *item-reduction* veto.[8] North Carolina is the only state that does not grant its governor a veto. Six states and the federal constitution grant the executive an *all-or-nothing* veto.[9]

The item-veto originated in the Confederacy,[10] and empowers an executive to strike portions of legislation without rejecting the remainder. It is available in one form or another to 43 state governors.[11] The most limited form is the reduction-only veto, which allows the executive to alter only appropriations. A revision is valid as long as it authorizes less spending than the legislature provided, even if the line is reduced to zero.[12] The "strongest" item veto is that granted by Article V § 10 of the Wisconsin Constitution, which provides that "Appropriation bills may be approved in whole or in part by the governor, . . ., and the part objected to shall be returned in the same manner as provided for other bills." As construed by the Wisconsin Supreme Court, it permits the governor to veto phrases, digits, letters, and word fragments; to exercise partial veto power by striking digits resulting in reduction of appropriations; and even to change the meaning of legislation by selectively striking phrases and words within a sentence.[13]



Detail: Barbara Hultmann, Justice: A Problem of Maintenance, acrylic/canvas, 50"x36", Art and the Law 1985, ©1985 West Publishing, Eagan, Minn.

Dissenting in *New State Ice Co. v. Liebmann*, Justice Louis Brandies observed that it is "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose . . . try novel social and economic experiments without risk to the rest of the country." [285 U.S. 262, 311 (1932)] As a result, most of what we know about the item-veto and related devices like "single subject" requirements is based on the experience of the states. [14] At the federal level, however, innovation and experimentation are not possible, even though the first legislation calling for a presidential item-veto was proposed in 1876, and more than 150 proposals to grant one have been introduced since that time. The presentment clause, Article I, §7, cl. 2, and the amendment process set out in Article V are formidable obstacles.

The presentment clause requires 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 [p]resident of the United States" for approval or veto. No definition of "Bill" is provided, and there is nothing in the Constitution that requires Congress to present *any* bill in a form that includes readily-discernible "lines" that could be vetoed individually. The desire of successive presidents to acquire a subject – or rider – item-veto bears witness to the "liberal" construction given by Congress to the term "Bill." [15]

Exhibit "A" in this regard is the annual appropriations ritual that marks the beginning of the end of the federal government's fiscal year. As summer turns into fall, it becomes apparent that there is no way that the House and Senate will finish work on all the appropriations bills pending on their respective calendars. Like a train forming up in the yards, an "Omnibus" appropriations bill begins to take shape shortly before Oct. 1, the date on which the new fiscal year begins. With no rhyme or reason other than the press of time, the "log-rolling" begins. Massive budgets for diverse agencies and activities are thrown together into a single bill, and riders are attached, decorating it like a Christmas tree with legislation of "special interest" to core constituencies. Larded with substantial "pork" for the folks back home (and sometimes for the White House as well), such "bills" slide down the chute from Capitol Hill and land on the president's desk with a cover memo that says (implicitly, of course), "Take it, or leave it." A government shut-down is the alternative. [16]

This ritual has become so depressingly familiar in recent years that some writers have asserted that the language, structure, and purpose of the presentment clause implies the grant of some version of an item-veto, if only as a device that would enable the executive to maintain the integrity of the separation of powers implicit in the grant of a veto power in the first place. [17] Presidents Ford, Carter, Reagan, and Bush, for example, made extensive use of signing statements that challenged the constitutionality of specific provisions of the bills they had signed into law. [18] President Bush openly flirted with asserting an item veto, but like his predecessors, limited his actions to signing statements and refusals to enforce.

Most state constitutions seek to prevent log-rolling by requiring legislatures to limit bills to a single subject.[19] Wisconsin again goes the extra mile, and mandates that "no private or local bill which may be passed by the legis-

lature shall embrace more than one subject, and that shall be expressed in the title." [Wisconsin Const. Article IV § 18] The clear purpose of these "single-subject" rules is to limit legislative discretion:

> The item veto represents the coming together of three widespread state constitutional policies: the rejection of legislative logrolling; the imposition of fiscal restrictions on the legislature; and the strengthening of the governor's role in budgetary matters. The item veto may be said to be at the confluence of the policies underlying the single-subject rule, the balanced budget requirement, and the executive budget. [20]

PRESERVING THE SEPARATION OF POWERS

Although the president has an *all-or-nothing* veto pursuant to the terms of the presentment clause, the chief executive is not powerless to protect the office against legislative attempts to control the considerable discretion Article II vests in the office.[21] The most controversial of the devices available to the president are overt refusals to enforce, or instructions to subordinates to ignore a specific part of a bill signed into law. Because the goal is either to preserve the integrity of the veto power that is granted in the presentment clause, or to fend off attempts by Congress to encroach on other express powers of the executive or judicial branches, these devices are sometimes referred to as "constitutional excision," or "shield," vetoes. Since they cannot be overridden by legislative action, however, they are not actually vetoes at all.

Although some have argued that the presentment clause contains an item-veto in addition to the *all-or-nothing* power it clearly does confer, the president has never so interpreted it. The debates over the Constitution shed little light on that specific question, and it need not concern us here. What those debates *do* say about the veto, however, is clearly relevant to this discussion.

There is no doubt that the primary purpose for adopting a veto was to guarantee the separation of powers. [22] In *Federalist* No. 73, Hamilton focuses almost entirely on the dangers of unchecked legislative power. The veto power is necessary, in Hamilton's view, to accomplish two distinct goals.

The first is self-preservation. Hamilton wrote that a "qualified negative" is an essential precondition for an independent executive. Without it, he wrote, the executive will be "absolutely unable to defend himself against the depredations of [the legislature]. . . . He might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands." [id.]

The second reason for including the veto in Article I clearly anticipates the special interest bills and log-rolling that combine to comprise today's "Omnibus" spending bills. A veto, either absolute or qualified, guards "the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body." [id.]

With Hamilton's concerns in mind, we are now in a position to look at the line item veto enacted by the 104th Congress and signed into law by President Clinton. As passed by Congress, the provision cedes some budget-cutting authority – and the political accountability that accompanies it – to the president. It permits vetoes that do "not impair any essential [g]overnment functions" and do "not harm the national interest," [2 U.S.C. § 691a (A)] but it does not permit the president to raise or lower "new direct" appropriations. The only option is to cut them from the legislation entirely. [2 U.S.C. § 691a (2)] It must be exercised within five days from the date Congress passes a bill [2 U.S.C. § 691a (B)], and the chief executive may not cut appropriations that fund existing entitlement programs, such as Social Security and Medicare, but may cut appropriations for new entitlements or "discretionary budget authority." He may also veto only tax breaks that affect 100 or fewer persons, or 10 or fewer businesses. [2 U.S.C. §§ 691a(1), 691e(9)]. "Canceled" items are then subject to the normal legislative process: a majority vote in both Houses of Congress and presentment to the president for signature or veto. It is only at that point that the two-thirds override requirement incorporated into the presentment clause is applicable.

To the political branches, the deal is a "win-win" proposition. Legislators can continue to lard spending bills with "pork," and blame the president for taking it away. The president can take credit for eliminating new discretionary spending, entitlements, food stamp program increases, and a limited class of targeted tax breaks, but can do no real damage to existing programs, except one: the judicial branch.

THREAT TO JUDICIAL INDEPENDENCE

Although the primary topic of *Federalist* No. 73 is the need to protect the executive from the encroachments of the Congress, Hamilton made it clear that there was a need to protect the judiciary from the executive as well. *Publius* was blunt.

> It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws. It is peculiarly dangerous to place them in a situation to be either corrupted or *influenced* by the executive. (emphasis added)

Is it possible that the president might use this newly-acquired item-veto to manipulate the judiciary's budget, thus exerting pressure on them? Other than the admonition that a veto should "not impair any essential [g]overnment functions" and should "not harm the national interest," there is nothing in the line item veto that protects the judiciary. Chief Justice William Rehnquist, chair of the U.S.

Judicial Conference, has argued that the item veto in its current form threatens judicial independence. Testifying on behalf of the executive committee of the judicial conference during joint House-Senate hearings on the subject, Chief Judge Gilbert Merritt of the U.S. Court of Appeals for the Sixth Circuit in Nashville opposed the item veto on the same grounds. He gave two reasons:

> First and foremost, the Congress, which funds our budget and closely oversees our spending, does not litigate cases before us. No conflicts of interest for judges arises with Congress. The [p]resident and his Department of Justice litigate approximately half the cases before us. The Executive Branch is often upset with our rulings. . . .
>
> This puts the courts in a very difficult position. If the [p]resident cuts our appropriations, we are basically defenseless. We have no power to override his veto, and we are prohibited from engaging in politics. We have none of the power that protects the Congress in this situation. [p]residents, attorneys [g]eneral and [m]embers of the Department of Justice have great power. To permit them to control the [j]udicial budget would endanger the integrity and fairness of the [j]udiciary. Litigants against the Department of Justice would legitimately doubt the capacity of the courts to dispense even-handed justice. This may further erode public trust in the courts. This is our concern.
>
> Second, there is no evidence that the [j]udiciary is a part of the so-called pork-barrel process. Our budget is 2 tenths of 1 [percent] of the federal budget. It consists in large measure of salaries for judges and staff plus rent paid to the General Services Administration. There is nothing in our budget to build office buildings or courthouses. Congress appropriates money for courthouses and GSA builds them. Congress can eliminate the [j]udiciary from the line-item veto and the [p]resident will still have the power to veto courthouses.[23]

Judge Merritt is right. For the first time since 1938, the judiciary's budget is back under the thumb of the president. Is this a good idea, or not? The answer to that question depends upon the answer to a far more fundamental one: Assuming that we can learn about it, can the chief executive be held accountable, politically or legally, for bringing budget pressure to bear on the judicial branch?

The answer lies in the realm of practical politics. For Congress and the president, the item-veto embodied in 2 U.S.C. § 691 is a "no lose" proposition. Whatever real power is transferred to the president is offset by the subject matter limitations Congress has imposed. This compromise seeks, at best, to give the president power to eliminate the most egregious forms of log-rolling, special interest appropriations, and tax breaks by shedding welcome light on the political process by which they are incorporated into "omnibus" spending bills or attached as riders.

For the judiciary, however, the Line-Item Veto is a "lose-lose" proposition. Not only does it lose the protection from executive budgeting afforded it by the Budget and Accounting Act of 1921 [42 Stat. 20, § 201(a) (1921)], the very structure of the item-veto invites a disgruntled president to classify increases in the judiciary budget designed to offset the burden of an increasing caseload as "pork-barrel" and thus hide the exercise of raw political power behind the mantle of the public interest. Louis Fisher's testimony in opposition to any bill that did not exempt the Judiciary bears repeating here:

> [I]t does not require an overheated imagination to think of Presidents presenting ["cancellations"] for the courts in an innocent light (for "savings" and so forth) in an effort to conceal partisan and political motivations.

But is it realistic to argue that the line item veto could affect the balance of power between the executive and judicial branches? Could an executive use the line item veto to punish, reward, or otherwise influence the judiciary? Although an implicit guarantee exists in the statutory reference to "essential" government functions in the "national interest," experience at the state level suggests that the courts will not be immune from executive pressure.

A Brief Look at the State Experience

Cases involving the use by a governor of the item veto to cut or eliminate funding for the courts are rare, but consistently provoke controversy when they do arise. When Massachusetts legislators projected increased judicial costs and increased the courts' appropriation to $210.6 million, Gov. William Weld used his item veto to cut $6.5 million of that sum to reach the $90 million he needed to cut to bring the entire budget into balance. In California, Gov. Pete Wilson used his line item veto to cut 25 percent, or $205.7 million, of the state's $806.7 million budget for the judiciary. He also threatened to veto authorization another $430 million in block grants used by California counties to pay for courts. A crisis was avoided only after intense lobbying produced an agreement between legislators and the governor.

While financial pressures appear to have been the reason why the governors of Massachusetts and California used their item vetoes, the New York judiciary may well have been targeted by Gov. Mario Cuomo for retribution. After an agreement with the governor's office settled a series of lawsuits by judges against the state for regional pay disparities, New York became obligated to pay at least $4.5 million in pay equity awards. The legislature, recognizing the impact that such payments would have on judi-

cial operations, instructed that the pay equity awards should be paid from accounts generally used for claims against the state rather than from the judiciary budget. Gov. Cuomo vetoed that authorization, and effectively shifted the entire cost from the state operations budget to the $893 million court system budget.

A more obvious situation arose in Virginia when former Gov. L. Douglas Wilder put intense pressure on Virginia jurists to follow his lead and demonstrate the willingness of all state officials to make sacrifices in tough budget times. He wrote a letter to Chief Justice Harry L. Carrico in which he called upon the state's judges to give up their scheduled pay raises as a means of showing solidarity with the state employees who are not protected by a constitutional provision prohibiting reductions in salary. The effect would have been a 2 percent pay cut. In a not-so-subtle threat, he indicated that he wasn't so sure the issue could not be taken to court, and hinted that future judicial pay raises might be subject to his veto pen if they did not cooperate. The state chief justice, acting individually, declined to accept the $2,085 pay increase to which he was entitled, but pointedly reminded the governor "that the judiciary, a separate and equal branch of the government, 'has demonstrated its willingness to cooperate with the other branches in budget reduction efforts," even "at a time of unprecedented growth in case loads throughout the state. . . .'"[24]

Political Accountability

Can similar pressures be brought to bear on the federal courts? Assuming that the item-veto embodied in 2 U.S.C. §§ 691a to 691f is constitutional, there is nothing in the Constitution to prevent it. Article III prevents only *diminution* of judicial salaries, not of the operating expenses of the courts themselves or the elimination of proposed pay increases. Like Gov. Wilder, a president under pressure to cut the budget will *need* to demonstrate that proposed cuts are being administered fairly. Whatever the long-term impact on judicial independence, the short-term political benefits to be gained from applying a light public "squeeze" on the judges would be substantial. Pressures applied for purposes other than "solidarity" might pay political – or personal – dividends as well.

There is an ethical question here, and it is a substantial one. Canon 2(B) of the American Bar Association's *Model Code of Judicial Conduct* states that "a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment," and forbids political activity, save in very limited circumstances, for any incumbent judge. [id., Canon 5(D)] Federal bribery statutes also forbid the giving of gifts, promises, or compensation for services rendered while in service to the United States. [18 U.S.C. § 203] (See Ethics & Professionalism on page xx of this issue.)

What is the chief justice supposed to say if, during negotiations over the budget for the judicial branch, an incumbent president asks for a "clarification" of a hotly-disputed lower-court ruling over the scope of executive authority or privilege? Must he answer, then recuse from the inevitable appeal to the Supreme Court?[25] One would hope that the question would never be asked, but it seems inevitable that some president will do so. Congress has given the president power to "cancel" any discretionary increases in the judiciary budget, even "necessary" ones. The office of president is inherently political, and Hamilton himself wrote in *Federalist* No. 73 that "[e]nergy in the executive is a leading character in the definition of good government."

Not surprisingly, the antidote for this state of affairs is a return to the separation of powers embodied in the Constitution. It is far too late to credit feigned professions of "shock" and "surprise" when the chief executive acts like a politician. The power of the president exists to be *used.* If it should not be used, it should be eliminated.

Congress must take ultimate responsibility too. It is responsible for judicial salary increases, the number of judgeships, the expansion of the federal court caseload, and the increasing number of statutes that cede real lawmaking powers to courts and administrative agencies.

Congress should retain full control of the judicial budget, and present it, without riders, to the president for his approval under the *all-or-nothing* veto process specified in the presentment clause. If the president is dissatisfied with the judiciary's handiwork, let him veto the package and take full political responsibility.

If Congress is upset with the justices, it can take whatever steps it deems necessary to get its point across. It did not hesitate to abolish the 1802 term of the Supreme Court to make a political point, and it could do the same thing today. But it cannot be held responsible by the voters if it does not do so openly.

Alexander Hamilton made the case for judicial independence as well as it can be made in *Federalist* 78:

> [T]he judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. . . . [T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive.
>
> ...[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation . . .

Given "the natural feebleness of the judiciary" and its

"continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches," it is time for Congress to come to the rescue. Our "lives, liberty, and property" depend, in the first instance, upon the integrity of a judicial process that is already perceived in many quarters to be highly politicized. [26] It is time to exercise that power. Exempt the judiciary budget from the line item veto, and give Mr. Clinton a chance to take a bipartisan stand for judicial integrity. Quibble over the details. Enact reporting requirements. Make the chief justice appear and defend every dime of each budget request. But do not force him to negotiate with the litigator-in-chief. It just doesn't look good — and it would be unethical.

And thus, it is to Congress that we must turn to call a halt to this situation before it causes problems. Congress is the ultimate repository of the power of the purse and of the power to impeach. As such, it, not the judiciary, is the guarantor of our freedom. ■

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Endnotes

[1]"Washington Report," *The Journal of Commerce*, Monday, January 29, 1996, reported at 1/29/96 J. Com. Abstracts, A6, 1996 WL 8118960.

[2]Budget and Accounting Act of 1921, 42 Stat. 20, § 201(a) (1921), *quoted in* Testimony of Louis Fisher, Senior Specialist in Separation of Powers, Congressional Research Service, before the Senate Government Affairs Committee, February 23, 1995.

[3]Testimony of Louis Fisher, Senior Specialist in Separation of Powers, Congressional Research Service, before the Senate Government Affairs Committee, February 23, 1995.

[4]*See generally* Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What The Law Is*, 83 Geo. L.J. 217 (1994).

[5]*See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988). *See generally* Christopher T. Handman, Note, *The Doctrine of Political Accountability and Supreme Court Jurisdiction: Applying A New External Constraint to Congress's Exceptions Clause Power*, 106 YALE L.J. 197 (1996); Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020 (1996). *See also* Robert Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (New York: Free Press, 1990), pp. 158-159 (explaining that the modern administrative state born in the New Deal is unconstitutional, but refusing to sanction judicial activity to restore the Constitution); Peter B. McCutchen, *Mistakes, Precedent and the Rise of the Administrative State: Toward a Constitutional Theory of Second Best*, 80 CORNELL LAW REVIEW 1 (1994) (agreeing that the administrative state is unconstitutional, but accepting that it is a fact of life and that devices need to be developed to account for and control its actions).

[6]*See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Clinton v. Jones, 116 S.Ct. 2545 (1996) (NO. 95-1853); Jones v. Clinton, 869 F.Supp. 690 (E.D. Ark., 1994), aff'd in part, rev'd in part, 72 F.3d 1354 (8th Cir. 1996), reh'g and suggestion for reh'g en banc denied, 81 F.3d 78 (8th Cir., 1996), *certiorari* granted *sub nom* Clinton v. Jones, 116 S.Ct. 2545 (1996) (NO. 95-1853).

[7]*Washington Post*, January 8, 1939, *quoted in* 84 CONG. REC. 5791 (1939), and contained in the Testimony of Louis Fisher cited at note 3 above.

[8]David Schap, *Executive Veto and Spending Limitation: Positive Political Economy with Implications for Institutional Choice*, 65 PUBLIC CHOICE 239, 241 & n. 11 (Kluwer Academic Publishers, 1990).

[9]John R. Carter and David Schap, *Line-Item Veto: Where is Thy Sting?*, 4 JOURNAL OF ECONOMIC PERSPECTIVES 103, 104 (1990).

[10]*Id.* at 103

[11]*ID.* at 104.

[12]Anthony R. Petrilla, *The Role of the Line Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469, 480 (1994).

[13]State *ex rel.* Wisconsin Senate v. Thompson, 144 Wis.2d 429, 424 N.W.2d 385 (1988) (permitting governor to veto phrases, digits, letters and word fragments, and to exercise partial veto power by striking digits resulting in reduction of appropriations); State *ex rel.* Kleczka v. Conta, 82 Wis.2d 679, 264 N.W.2d 539 (1978) (veto allowed that changed the meaning of the legislation).

[14]*See, e.g.*, John R. Carter & David Schap, *Line Item Veto: Where is Thy Sting?*, 4 JOURNAL OF ECONOMIC PERSPECTIVES 103-118 (1990); James A. Dearden & Thomas A. Husted, *Do Governors Get What they Want?: An Alternative Examination of the Line Item Veto*, 77 PUBLIC CHOICE 707-723 (Kluwer Academic Pubishers, 1993); J. Gregory Sidak, *The Line Item Veto Amendment*, 80 CORNELL L. REV. 1498 (1995); David Schap, *Executive Veto and Spending Limitation: Positive Political Economy with Implications for Institutional Choice*, 65 PUBLIC CHOICE 239-256 (Kluwer Academic Publishers, 1990).

[15]L. Gordon Crovitz, *The Line Item Veto: The Best Response When Congress Passes One Spending "Bill" A Year*, 18 PEPP. L. REV. 43, 44-50 (1990).

[16]Dick Thornburgh, *The Separation of Powers: An Exemplar of the Rule of Law*, 68 WASH. U. L. Q. 485 (1990)

[17]*See, e.g.*, J. Gregory Sidak & Thomas A. Smith, *Why did President Bush Repudiate the "Inherent" Line-Item Veto?*, 9 J. OF LAW & POLITICS 39 (1992).

[18]*See* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994).

[19]*See, e.g.*, Porten Sullivan Corp. v. State, 318 Md. 387, 568 A.2d 1111, 1115-1122 (1990) (single subject requirement is intended to prevent the combination in one act of several and distinct incongruous subjects); Blanch v. Sub-

urban Hennepin Reg. Park Dist., 449 N.W.2d 150 (Minn. 1989) (all matters should fall under some one general idea, be so connected with or related to one another either logically or in popular understanding, as to be parts of, or germane to, one general subject); State v. Iowa Dist. Court, 410 N.W.2d 684 (Iowa 1987) (to be held unconstitutional, an act must encompass two or more dissimilar or discordant subjects that have no reasonable relationship to one another); Wall v. Board of Elections of Chatham County, 242 Ga. 566, 250 S.E.2d 408 (1978) (subject matter as used in the Constitution is given a broad and extended meaning to allow the legislature to include in one bill all subjects having a logical or natural connection). *See generally* Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171 (1993) According to one recent survey, 42 states have single subject provisions in their constitutions, including 40 of the 43 states having an item veto. Nancy J. Townsend, *Single Subject Restrictions as an Alternative to the Line-Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 248 & n.75 (1985).

[20] Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1177 (1993).

[21]Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What The Law Is*, 83 Geo. L.J. 217 (1994).

[22] *See, e.g.*, The Federal Convention of 1787, Debate on The Judiciary, the Veto and Separation of Powers (July 21) in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., Mentor, 1986) at 120-124.

[23]Testimony of the Honorable Gilbert Merritt, Chairman Executive Committee of the Judicial Conference of the United States, before the House Government Reform Committee hearings on the Line-Item Veto, January 12, 1995.

[24]Michael Hary, *Cutbacks Affect Judges, Roads, Mental Health: Top Judge Will Refuse 2% Raise*, Richmond Times-Dispatch, November 29, 1990, City edition, Area/State section, p. B1.

[25]See 28 U.S.C. § 144 (18ääØ¤ ¡¥ Ì _È AÉ_©Õ¥ "of Judge); § 455 ("Any Justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."). *Accord*, A.B.A. Code of Judicial Conduct, Canon 3(B)(9, 11), 3(E)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...") (1996).

[26]*See* Robert Bork, SLOUCHING TOWARDS GOMORRAH : MODERN LIBERALISM AND AMERICAN DECLINE (Harper Collins 1996) ; Michael J. Sandel, DEMOCRACY'S DISCONTENT : AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (Cambridge, Mass.: Belknap Press of Harvard University Press, 1996).

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