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The Constitutionality of a Line-Item Veto: A Comparison with Other Exercises of Executive Discretion Not to Spend

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THE CONSTITUTIONALITY OF A LINE-ITEM VETO: A COMPARISON WITH OTHER EXERCISES OF EXECUTIVE DISCRETION NOT TO SPEND

I. INTRODUCTION*

Mention of the line-item veto to most anyone with political inclinations today is likely to elicit a strong opinion either for or against the veto's role in modern budget policy. During his two terms as president, Ronald Reagan familiarized the nation with this concept of allowing the President to veto individual items in an appropriations bill without having to veto the entire bill.[1]

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* "He" and "his" are used throughout this comment in their gender-neutral sense and for stylistic reasons only.

1. *See* Washington Post, Jan. 26, 1984, at A16, col. 1 (1984 State of the Union Address, in which Pres. Reagan called the line-item veto a "powerful tool against wasteful and extravagant spending"); Washington Post, Jan. 26, 1988, at A10, col. 1 (1988 State of the Union Address) (Pres. Reagan chided Congress for its ignorance of the contents of its catch-all spending bills and warned that he and the rest of the country had come to know "what was tucked away behind a little comma here and there." *Id.* The President cited as examples "millions for items such as cranberry research, blueberry research, the study of crawfish and the commercialization of wildflowers. And that's not to mention the $5 million so that people from developing nations could come here to watch Congress at work." *Id.* President Reagan accordingly urged, this time for his successors, "the right to reach into massive appropriations bills, pare away the waste and enforce budget discipline" by implementation of the line-item veto. *Id.*). *See also The Iron Triangle*, Wall St. J., Dec. 20, 1988, at A14, col. 1 (commentary on Pres. Reagan's farewell address on domestic policy); L.A. Times, Feb. 10, 1989, pt. I, at 20, col. 1 (Pres. Bush's budget speech to Congress, advocating the line-item veto).

Presidents Reagan and Bush have made much of the fact that 43 governors have been granted and currently exercise line-item veto power. *See* Washington Post, Jan. 26, 1984, at A16, col. 1 (Pres. Reagan); L.A. Times, Feb. 10, 1989, pt. I, at 20, col. 1 (Pres. Bush). As governor of California, Reagan himself line-item vetoed two percent of the spending that had been legislatively approved in that state. Will, *Bargain Government*, Washington Post, Jan. 27, 1984, at A17, col. 2. Several commentators, too, have viewed the line-item veto's apparent success at the state level as a strong argument for its implementation at the federal level. *See generally* House Comm. on Rules, 99th Cong., 2d Sess., ITEM VETO: STATE EXPERIENCE AND ITS APPLICATION TO THE FEDERAL SITUATION (Comm. Print 1986) (hereafter ITEM VETO STUDY); *see also* Dixon, *The Case For The Line-Item Veto*, 1 NOTRE DAME J.L., ETHICS & PUB. POL'Y 207, 213-14, 226 (1985) (Symposium on the line-item veto) ("The United States should take advantage of this wealth of experience at the state level and act to make the item veto part of the Constitution.").

Supporters of the line-item veto, for the most part Republican,[2] argue that Congress has become so debilitated by powerful special interest groups and the concern with reelection that it can no longer properly represent the spending interests of the nation as a whole.[3] In the supporters' view, the rider-laden and omnibus appropriations bills and last-minute continuing resolutions[4] which characterize modern congressional budget practice have upset the constitutional balance between the executive and legislative branches.[5] By presenting huge, omnibus appropriations

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Every state admitted to the Union after the Civil War included the item veto as part of its constitution. Dixon, *The Case For The Line-item Veto*, 1 NOTRE DAME J.L., ETHICS & PUB. POL'Y 207, 211 (1985). None of the 43 states which currently include item veto provisions in their constitutions have ever acted to repeal the provisions. Ross & Schwengel, *An Item Veto for the President?*, 12 PRES. STUD. Q. 66, 74 (1982). However, the 43 state item veto schemes vary considerably. *See* STAFF OF HOUSE COMM. ON THE BUDGET. 98TH CONG. 2D SESS. THE LINE-ITEM VETO: AN APPRAISAL 13-14 (Comm. Print Feb. 1984)(as revised from the Jan. 1984 publication.

Furthermore, the differences between the constitutions and budgeting systems of state and federal governments are fundamental and make analogy of state use of the line-item veto to the federal context untenable. *See* Edwards, *The Case Against The Line-Item Veto*, 1 NOTRE DAME J.L., ETHICS & PUB. POL'Y 191, 201-02 (1985) (Symposium on the line-item veto) ("While the comparison [between state and federal governments] is a handy tool for teaching governmental theory, in truth there is no valid parallel."); L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 159-60 (1985).

2. *See infra* note 19.

3. *See* Best, *The Item Veto: Would The Founders Approve?*, 14 PRES. STUD. Q. 183, 187-88 (1984); Dixon, *supra* note 1, at 215-18.

4. Congress attempts to act on 13 regular appropriations bills each year. Dixon, *supra* note 1, at 211 (citing F. RIDDICK, SENATE PROCEDURE (1981)). Between 1975 and 1988, however, Congress never completed action before the start of the fiscal year. *Id.* Instead, Congress took to the mechanism of the "continuing resolution." *Id.* This device allows Congress to continue spending despite Congressional failure to act on any regular appropriations bill. *Id.* (citing Calendars of the U.S. House of Representatives and History of Legislation, Final Editions; 94th-98th Congresses). The havoc such "continuing resolutions" and their "Christmas-tree" nature have wreaked on the federal budget has not gone unnoticed. *See* Edwards, *supra* note 1, at 196 (citing A. SCHLESINGER, THE IMPERIAL PRESIDENCY 2-3 (1973)); Dixon, *supra* note 1, at 211 ("Even the continuing resolution has grown beyond its original purpose of providing stopgap spending authority. It is now often used as a method of combining two or more appropriations bills into one giant legislative monster.").

In 1988 all appropriations bills were passed separately and on time, and there were no continuing resolutions for that year. *Bush Can Draw the Line.* Wall St. J. Jan. 25,1989. at A21, col.1. Nevertheless, "[one should not] think . . . that Congress had no place to hide its pork." *Id.* (Dole (Senate Minority Leader)). Furthermore, the fact that the budget process had not been orderly for at least 13 years suggests that Congress is more likely to revert to its former pattern than to maintain its newfound discipline.

5. *See* Dixon, *supra* note 1, at 215-18, 221-22; Best, *supra* note 3, at 187-88; Givens, *The Validity of a Separate Veto of Nongermane Riders to Legislation*, 39 TEMP. L.Q. 60, 61 (1965). *See also* Wolfson, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J.

bills to the President, Congress forces the President to accept, under the heading of one "bill," matters that should clearly be the subject of several bills and which, in all likelihood, would have been vetoed had they been presented separately.[6] The President's seeming options under Article I—veto or accept the entire "bill"—have, in the view of the item veto supporters, become illusory.[7] Congressional tactics, they argue, have usurped the President's power to veto appropriations legislation.[8] To its supporters, a line-item veto is necessary to remedy this modern power imbalance[9] and its alleged practical effect—an ever grow-

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838, 840 (1987) (opposition article which addresses and counters arguments of item veto supporters).

6. *See* Givens, *supra* note 5, at 60-61; Ross & Schwengel, *supra* note 1, at 75-77.

7. See Ross & Schwengel, *supra* note 1, at 77, summarizing, as follows, the effects of congressional tactics on modern presidential veto power:

> Despite constitutional provisions implying that the President shall be free to give effect to his independent judgment upon the merits of each bill which comes before him for approval, the President, in fact, has little or no choice. Appropriations bills almost invariably are composed of items necessary for public welfare as well as items not necessarily in the national interest. The President may "choose" to accept the bill in its entirety thus approving the undesirable and unnecessary items and the wasteful expenditure of funds, and assenting to any attached legislative "riders," or he may reject the bill in its entirety, thus risking delay if not discontinuance of necessary functions and work on needed projects. When 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. Yet it is under the stress of these conditions that some of the most objectionable features can be and are attached to appropriations bills.

8. *See* Best, *supra* note 3, at 187-88; Dixon, *supra* note 1, at 215-18, 221-22 ("So far as appropriations bills are concerned, Congress has usurped total power. The presidential veto has been reduced to a nullity." *Id.* at 215 (citing Hazlitt, *Line-Item Leash on Runaway Spending*, Wall St. J., Sept. 9, 1983, at 32, col. 4)).

9. *See* Best, *supra* note 3, at 188 (contending that Congress has invented techniques that give it less reason to anticipate a veto and to be restrained and responsible, and that a line-item veto is accordingly necessary to re-instill legislative self-control). Others have argued, to the contrary, that an item veto would encourage both fiscal irresponsibility in Congress and coercion by the President. *See, e.g.*, FISHER, *supra* note 1, at 161-62 ("To satisfy constituent demands, even of the most indefensible nature, a member need only add extraneous material to a bill with the understanding among his colleagues that the President will probably strike the offending amendment . . . [therefore] an item veto might make Congress more irresponsible."); Edwards, *supra* note 1, at 200-01 ("Today the Administration can withdraw its support from a project, but a majority of the Congress may decide to support it anyway. With the line-item veto . . . [w]e would have regressed from a system of presidential arm-twisting—"strong" persuasion—to a system of blackmail.").

ing budget deficit.[10]

Opponents of the line-item veto, for the most part Democrat,[11] argue that Congress continues today, as it has traditionally, to represent the interests of a majority of the nation.[12] "Pork-barrelling"[13] and "log rolling"[14]—identified by the item veto supporters as a source of the nation's budget problems—have, under the opponents' view, always served important functions in our government because democracy depends on persuasion and consent.[15] The item veto opponents argue that pork barrel exists to the very extent the People want it.[16] They argue, further, that budgetary problems are by no means unprecedented, and that such problems should be addressed as they have traditionally, from within Congress, through the political process.[17] They argue that such problems should not be addressed by what would amount to an unconstitutional transfer of spending authority to the President through a line-item veto.[18]

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10. *See* Best, *supra* note 3, at 187-88; Dixon, *supra* note 1, at 207-09.

11. *See infra* note 19.

12. *See* Wolfson, *supra* note 5, at 841, n. 11 ("pork-barrel appropriation is largely in the eye of the beholder"), 844, 851-52.

13. "Pork-barrelling" is defined as the promotion of government projects or appropriations which yield rich political patronage benefits. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1767 (1986). *See also* Ross & Schwengel, *supra* note 1, at 75-77 (discussing log rolling and pork-barrelling as "two of the most notorious practices engaged in by members of Congress in an effort to obtain public funds for projects in their districts or constituencies").

14. "Log rolling" is defined as the legislative practice of embracing in one bill several distinct matters, none of which, perhaps, the legislature would have voted for had the matters been submitted separately, and then procuring the bill's passage by combining the minorities in favor of each of the matters into a majority that will adopt them all. BLACK'S LAW DICTIONARY 849 (5th Ed. 1979). *See also supra* note 13 (reference to Ross & Schwengel, *supra* note 1, at 75-77).

15. *See* Wolfson, *supra* note 5, at 838, 851-52; Edwards, *supra* note 1, at 194-95.

16. Wolfson, *supra* note 5, at 851, n. 67 (citing D. STOCKMAN, THE TRIUMPH OF POLITICS 390-94 (1986)(arguing that the Reagan Administration failed to effect fiscal discipline because Congress correctly understood that the United States had opted for appropriations based on subsidies and largesse)).

17. *See* McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791, 812-17 (1986).

18. *Id. See also* Edwards, *supra* note 1, at 194, 204 ("Congress is giving the people the government which most Americans want. I therefore suggest that the solution to the problem is political. Rather than radically restructuring the federal government, we must persuade enough of the people to vote for candidates committed to a reduced federal role.").

Despite the near-perfect political division on the line-item veto issue[19] and the issue's politically-charged nature in modern times, the line-item veto cannot be reduced to a matter of mere political persuasion. Before President Reagan, at least six presidents, both Republican and Democratic, pressed for item veto power.[20] Most urged that it be implemented by constitutional amendment, the most permanent and incontestable means possible.[21] Thus, although Republican and Democratic presidents would surely have different line-item veto priorities,[22] the item veto's merits are not politically defined.[23]

If stripped of its political baggage, the line-item veto surfaces as an enduring test of the separation of powers concept.[24] The line-item veto "issue" has existed at least as early as 1873,[25] but has never been addressed by the Supreme Court. Almost

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19. *See* Wolfson, *supra* note 5, at 829, n. 2. Most, but not all of the line-item veto supporters are conservative Republicans; *see* 131 CONG. REC. S9873 (daily ed. July 23, 1985) (remarks of Sen. Kennedy). Most, but not all of its opponents are liberal Democrats; *see* CONG. REC. S9939 (daily ed. July 24, 1985) (remarks of Sen. Hatch).

20. Presidents Grant, Hayes, Arthur, Franklin D. Roosevelt, Truman, Eisenhower and Reagan expressed support for a line-item veto. Dixon, *supra* note 1, at 212. President Taft, however, who served both as President (1909-1913) and as Chief Justice of the Supreme Court (1921-1930), warned against "giv[ing], in such a powerful instrument [the line-item veto] . . . a temptation to its sinister use." W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 27 (1925); *see also* Edwards, *supra* note 1, at 200; W. TAFT, THE PRESIDENCY, ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS 20 (1916).

21. ITEM VETO STUDY, *supra* note 1, at 165-66.

22. *See* Edwards, *supra* note 1, at 193.

23. *See* Robinson, *Ethics and the Line-Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 157 (1985) (Foreword to Symposium on the line-item veto) ("However tempting it is to reduce issues of this sort to matters of mere [political] power, the item veto raises questions that conscientious politicians must address before they can cast a responsible vote on item veto proposals."); Edwards, *supra* note 1, at 193.

24. The United States government is modeled on the dual principles of separation of powers—a government should be divided—and checks and balances—each department should be given the powers necessary to defend itself and to curb the others. Under this governmental scheme, abuse of power is to be prevented only by a state of balance between the opposing powers. *See* THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961) ("The great security against concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."); THE FEDERALIST No. 71, at 481 (A. Hamilton) (J. Cooke ed. 1961).

25. Though most seem to date the first true line-item veto from its appearance in the Confederate Constitution, at least some commentators claim an item veto was in de-facto use as early as 1830. *See infra* notes 49, 108-10 and accompanying text. Certainly the line-item veto was an "issue" by the time of President Grant's proposal in 1873 to provide for the veto by constitutional amendment. *See* 9 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4196 (1897) (Fifth Annual Message, December 1, 1873).

since the Republic began, however, presidents have refused to spend congressionally appropriated funds by more indirect means. Only some of these means were deemed to have violated the separation of powers principle.[26] Other exercises of executive initiative not to spend—certain impoundments and spending decisions made by the President to serve broad congressional goals—were either acquiesced to by Congress, or expressly sanctioned by either Congress or the Supreme Court.[27] These were and still are considered non-violative of the separation of powers principle. In comparing the various forms that a president's refusal to spend has taken historically, it is difficult to see how a line-item veto would violate the separation of powers principle where these impoundments and executive spending decisions do not.

Furthermore, Congress's occasional indulgences in permitting non-expenditure or redistribution of funds by the President have arguably proved unsatisfactory in dealing with the wasteful and heavily-larded appropriations legislation passed by today's

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26. *See, e.g., infra* notes 156-70 and accompanying text (regarding the impropriety of Pres. Nixon's aggressive use of impoundment).

27. *See infra* notes 37,114,115 and accompanying text (regarding Impoundment): notes 175-79 and accompanying text (regarding Presidential spending decisions within guidelines set by Congress).

The Supreme Court has "studiously avoided" consideration of the issues surrounding impoundment. *See infra* note 169 and accompanying text. Thus, there is no express authority for the proposition that certain types of impoundments are, in fact, fully consistent with separation of powers principles and, therefore, constitutional. Of course, Congress's mere acquiescence to or even express sanctioning of actions taken by the President which arguably fall within its own sphere of authority—such as impoundment—do not render those actions constitutional. It might be argued, however, that impoundment amounts to a "long-continued practice, known to and acquiesced in by Congress" such as to raise a presumption of legality. *See* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952)(Frankfurter, J., concurring):

> [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.

See also infra notes 127-30 and accompanying text (regarding the 1974 Budget and Impoundment Control Act and why the Act indicates continued congressional approval of most impoundments). At least one commentator has expressed disagreement with this proposition by asserting that the "infrequent occurrence" and "exceptional" nature of the impoundments prior to those of the Nixon era make that conclusion impossible. *See* Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1511 (1973).

Congress. This comment poses a hypothetical situation in which Congress has surrendered control over national spending to the competing, individual demands of its hundreds of members and the tens of thousands each member in turn represents. As a result, the President is deprived of his own constitutional role in the spending process—the veto power. Of course most, if not all, of the item veto supporters claim that this situation is not hypothetical but in fact characterizes the state of modern budget affairs.[28] Whether or not that state exists or eventually will be reached is beyond the scope of this comment. However, this situation is at least conceivable, if only in the future, to even the staunchest of the item veto opponents.[29] On that assumption, it seems that now is the time to test the proposition that the President has indeed the constitutional authority to refuse to spend funds which he regards as wasteful or unwise, notwithstanding

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28. *See, e.g.*, Best, *supra* note 3, at 188; Ross & Schwengel, *supra* note 1, at 69; Robinson, *supra* note 23, at 159:

> [I]t is more than merely arguable that the national legislative process itself is out of control, that the colossal deficits of recent years suggest a serious failure of both intelligence and will on the part of those whom we have elected to exercise both wisdom and courage, and that this failure is a culpable one, victimizing this generation by the foolish or venal allocation of funds and the next generation by the debt and decay that they will inherit.

29. Certainly it is inaccurate to characterize congressional appropriations of public funds as inviolable. Scrupulous adherence to appropriations has never been commonly advocated. *See* L. WILMERDING, THE SPENDING POWER 3-19 (1943). Hamilton called such unyielding compliance with the written law a "pusillanimity." *Id.* at 6. Hamilton, Jefferson and most of the Founding Fathers recognized that:

> [I]n so complicated a government as that of the United States cases must sometimes, perhaps often, arise, where it would become the duty of the executive authorities, in the exercise of the discretionary powers vested in them, boldly to set aside the requirements of the Legislature . . . and it was felt that it would be not a public advantage but a public calamity if the Executive were to be deprived of the means of so exercising its discretionary authority.

Id. at 4.

The President has accordingly been allowed to vary appropriations in the interest of necessity, self-preservation and the public safety. *Id.* at 3-19. The President has also been allowed a certain amount of discretion in choosing whether or not to actually appropriate funds so long as he acts within congressional guidelines. *See infra* notes 175-221 and accompanying text (regarding presidential spending decisions within guidelines set by Congress). Finally, the President has been allowed to simply not spend appropriated funds, i.e., to impound, under certain circumstances. *See infra* notes 101-70 and accompanying text (regarding "proper" and "improper" impoundments and the characteristics that distinguish them).

his approval of all but a bill's objectionable line items.

This comment will explore the grounds upon which the line-item veto might be constitutionally upheld.[30] Preliminary refer-

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30. This comment addresses only the possible constitutional bases for a line-item veto. It does not address the possible means by which a line-item veto may be effectuated. The writer believes that the item veto's constitutionality does not rest on whether the veto is implemented by statute or constitutional amendment (or a combination of the two: an amendment to permit Congress to statutorily vest item veto power in the President; *see* FISHER, *supra* note 1, at 158) or without either of those arguably superfluous supports. Neither, however, does she feel compelled to take the rather strained approach, advocated by some item veto supporters, of reading the word "bill" broadly enough to encompass each section, paragraph or item contained in a single "bill" passed by Congress. (Under the Constitution, a president has veto power over only *bills*, orders, resolutions or votes. U.S. CONST. art. I, § 7, cls. 2, 3.) For an example of this approach, see 83 CONG. REC. APP. 200, 201, 75th Cong., 3d Sess. (1938), wherein Hatton W. Sumners, then Chairman of the House Judiciary Committee, suggested (at the request of the Chairman of the House Appropriations Committee) that:

> To hold that the word "bill" necessarily means . . . all the separate items assembled under one caption, each of which might have been the subject matter of a separate bill but which for convenience sake in expediting the public's business are assembled under one caption . . . would be a construction operative against the purpose and plan of the Constitution.

However, Chairman Sumners also asserted that Congress, and not the President, should specify which parts of a bill were to be separately considered and which were not. *Id.* "Otherwise, we would have a situation under which the President could cut away parts of a bill, leaving as the law an incomplete item of legislation which the Houses of Congress would not have approved in that form as an original proposition." *Id.* For a counter-argument to this latter assertion, see *infra* notes 72-75 and accompanying text. *See also* S. 43, 99th Cong., 1st Sess. (1985) (Senate Bill 43 proposed a partitioning ("enrollment") of appropriations bills by the clerk of the house in which a bill originated into component "items" for individual presentment to the President). For discussion of why the enrollment procedure of that item veto approach would violate constitutional bicameralism and presentment requirements, see Gressman, *Is the Item Veto Constitutional?*, 64 N.C.L. REV. 819, 819-23 (1986); Wolfson, *supra* note 5, at 838, 852-59 (Wolfson introduced the term "rules" item veto to define this particular form of item veto because it amounted to nothing more than a grant of non-legislative power which, though effectuated by statute, could be repealed or suspended by a one-house resolution, without the concurrence of the other house or the President. *Id.* The "rules" item veto would avoid the delegation problems posed by other types of item veto proposals—what Wolfson terms "impoundment" and "conventional" item vetoes. *Id.* However, such an item veto would "fail as a legal means of binding Congress to a regime of fiscal restraint." *Id.* at 839. Despite these practical failures, however, and unlike Professor Gressman, Wolfson believes that Congress may constitutionally have the power to enact such a mechanism. *Id.*).

For still another approach to the line-item veto issue, see Dole (Senate Minority Leader), *Bush Can Draw the Line*, Wall St. J., Jan. 25, 1989, at A21, col. 1 (arguing that the Constitution grants line-item veto power not through the President's power to veto "bills" (art. I, § 7, cl. 2), but through his power to veto "orders, resolutions or votes" (art. I, § 7, cl. 3)).

It might be mentioned that a line-item veto *by statute* arguably states a particularly

ence will be made to the express constitutional framework within which an item veto would operate. Examination of the constitutional provisions pertaining to Congress's spending and general legislative powers and to the President's counteractive veto power provides the necessary foundation. Of more genuine significance, however, are the actual tests of the executive versus legislative power balance posed by functional equivalents of the item veto. Analysis of executive/legislative interplay in the field

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strong constitutional case, if for no other reason, by virtue of the necessary and proper clause. U.S. CONST. art. I, § 8, cl. 18 (the Constitution grants to Congress the power to make all laws which Congress deems "necessary and proper" to fully execute the powers constitutionally granted to the United States Government, its Departments and Officers). *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Justice Marshall first gave the clause a very generous interpretation in stating, "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Id.* at 421. He cautioned against too strict and mechanical an application of the clause in his famous statement, "we must never forget that it is a *constitution* we are expounding." *Id.* at 407 (emphasis in original)). Were the nation's economy to reach a point where Congress recognized its need for presidential assistance in controlling national spending, the necessary and proper clause is arguably broad enough to encompass an item veto by statute. *See* Van Alstyne, *The Role of Congress in Determining Incidental Powers of The President and of The Federal Courts: A Comment on The Horizontal Effect of The Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102, 107 (Spring 1976) (Congress has considerable leeway in defining the relative balance of power between the executive and legislative branches of government. In a practical sense, therefore, *Congress* is allowed considerable leeway in interpreting what is or is not constitutional.).

This comment does not address several other peripheral issues which the line-item veto raises. In particular, this comment does not address the arguments regarding the item veto's realistic implementability or its practical effectiveness as a fiscal tool. For discussion of the first of these issues, see, e.g., FISHER, *supra* note 1, at 160 ("It is a misconception to think that a President could delete individual . . . projects in a bill . . . . [T]hese details are usually found only in the accompanying committee reports or other parts of the legislative history. The bill presented to the President contains a lump-sum amount."). For discussion of the latter issue, see e.g., Edwards, *supra* note 1, at 193-94 ("Most federal spending [entitlement programs and interest payments on the national debt which together account for an estimated 62% of all spending] would not be affected in any way by the use of a line-item veto."). *Contra* Dixon, *supra* note 1, at 214-15. Because the bulk of entitlements are subject to a "balanced budget" requirement and are supported by dedicated taxes, they do not call on general revenues. *Id.* at 215. By contrast, "those parts of the budget subject to the item veto are unsupported by sufficient tax revenue and therefore contribute more directly to federal deficits." *Id.* at 215. In any event, had an item veto been in place and saved just 1% per year of total federal spending, it has been estimated that the cumulative savings over the twelve-year period from 1974 to 1985 would have reduced the 1985 deficit by more than half its estimated amount for that year. *Id.* at 214 (citing Palffy, *Line-Item Veto: Trimming the Pork*, 343 HERITAGE FOUND. BACKGROUNDER 4 (1984)). *See also supra* note 9 (regarding the possible adverse affects of a line-item veto on Congress's fiscal responsibility and the danger of executive coercion posed by a line-item veto).

of spending either by the Supreme Court, or, absent that, by Congress, evidences what in fact underlies a proper power balance. Only by comparing the line item veto, an issue which has never been addressed by either Congress or the Supreme Court, to functionally analogous exercises of executive discretion can a reasonable argument be made for the item veto's constitutionality. Some of these functional equivalents, namely, certain impoundments and exercises of presidential budget allocation within congressional guidelines, have historically been either legislatively or judicially sanctioned.[31] It is the premise of this comment that the constitutional justifications for these functionally similar exercises of executive power are indistinguishable from those for an item veto.

The Supreme Court has recognized as constitutional at least three types of presidential decision making in the spending field: selective allocation of lump sum appropriations,[32] fact evaluation by the President[33] and suspension or non-expenditure in individual cases.[34] Like these exercises of spending authority, an item veto recognizes the value of executive involvement at the appropriation stage. Both, moreover, have built-in safeguards to prevent executive abuse: the use of such presidential spending powers is limited to effectuation of congressional purposes and an item veto by the ever-present possibility of override. There is little to distinguish the two in terms of relative power between the executive and legislative branches. There is, therefore, little to distinguish the two on constitutional grounds.

The practice of impoundment—a president's refusal to spend funds that have already been appropriated[35]—states a still stronger case for finding a line-item veto constitutional. Until 1974, impoundment by the President amounted to a veto which could not be overridden. Congress either acquiesced to the practice, or struck a political compromise with the President,[36] thereby avoiding judicial consideration of the issue. Until 1974,

31. *See infra* notes 37, 114, 115 and accompanying text (regarding impoundment); notes 175-79 and accompanying text (regarding presidential spending decisions within guidelines set by Congress).

32. *See infra* notes 187-96 and accompanying text.

33. *See infra* notes 197-216 and accompanying text.

34. *See infra* notes 217-21 and accompanying text.

35. *See infra* note 101 and accompanying text.

36. *See infra* note 115 and accompanying text.

there was no judicial authority for the constitutionality of impoundments other than those expressly prohibited by Congress.[37] Ultimately, however, in response to particularly bold use of impoundment by President Nixon,[38] Congress enacted the Budget and Impoundment Control Act of 1974.[39] The Act gave Congress unprecedented statutory authority to override presidential impoundments.[40] For the first time, however, the Act also statutorily authorized presidential impoundment of funds for both routine and policy purposes.[41] Neither the constitutionality of that Act, nor of impoundment in general, have been decided. However, examination of the factors which distinguish at least tacitly constitutional impoundments from the types of impoundments attempted by President Nixon show that the line-item veto is fully consistent with the principles underlying the former. Congress has always, by its acquiescence to impoundments before 1974, implicitly recognized the need for presidential assistance in the national budgeting process. The Act constitutes explicit recognition of that need. An item veto would serve the same goal—eliminating wasteful portions of appropriations legislation—but more directly and at an earlier stage.

II. THE CONSTITUTIONAL FRAMEWORK

Article I of the Constitution gives to both Congress and the President specific legislative powers.[42] Article I, section 1 vests in Congress "all legislative powers" granted by the Constitution.[43] Section 8 gives Congress the authority to make all laws "necessary and proper" for the full execution of its constitutional powers.[44] Section 8 also gives Congress "the Power . . . to pay the Debts and provide for the common Defence and general

37. *See* Kendall v. United States *ex. rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838) (*held* that the President has no constitutional power to impound funds where Congress has expressly directed that the funds be spent). *But see supra* note 27 (impoundment's long and largely uncontested history may have raised a presumption of legality or compel treatment of impoundment as a gloss on the "executive power").

38. *See infra* notes 124, 125 and accompanying text.

39. Pub. L. No. 93-344, Title X, § 1001, 88 Stat. 332 (1974) (codified at 2 U.S.C. §§ 681-88 (1985 & Supp.1989)).

40. FISHER, *supra* note 1, at 156.

41. *Id.*

42. *See infra* notes 43-48 and accompanying text.

43. U.S. CONST. art. I, § 1.

44. U.S. CONST. art. I, § 8, cl. 18.

Welfare of the United States."[45] Section 9 gives Congress the power to make appropriations for the nation.[46]

Article I gives the President the power to object to any bill and to demand congressional reconsideration of the bill's provisions.[47] Unless a two-thirds majority of both Houses votes to pass the bill regardless of executive disapproval, the President's veto prevents the bill from becoming law.[48]

It is this interplay of powers granted to different branches within the same legislative Article that first prompted, more than a century ago,[49] the debate over whether the President is constitutionally entitled to veto only those portions of an appropriations bill of which he disapproves and to have the remainder become law. The text of the Constitution is silent as to both the executive's power to veto only portions of a bill[50] and his duty to spend all funds appropriated by Congress.[51]

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45. U.S. CONST. art. I, § 8, cl. 1.

46. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

47. U.S. CONST. art. I, § 7, cl. 2.

48. *Id.*

49. An "official" line-item veto first appeared in the Confederate Constitution. *See* C.S.A. CONST. art. I, § 7 (1861) ("The President may approve any appropriation and disapprove any other appropriation in the same bill, designate the appropriations disapproved, and shall return a copy of such appropriations with his objections to the house in which the bill originated and the same proceedings shall then be had as in case of other bills disapproved by the President."). *See* Dixon, *supra* note 1, at 211, n. 32 and accompanying text. However, the practice may have "unofficially" existed much earlier. *See infra* notes 108-10 and accompanying text. The first line-item veto proposal introduced in Congress dates from 1876 (Congressman Faulkner of West Virginia proposed an item veto which was limited to deletion (i.e., it did not include allowance for reduction as well) of items from appropriations bills). Dixon, *supra* note 1, at 212, n. 35 and accompanying text.

50. The subject was also never discussed at the Constitutional Convention, or apparently even conceived of by that time. *See* C. ZINN, THE VETO POWER OF THE PRESIDENT 33 (1951)(printed for use by the House Comm. on the Judiciary); E. MASON, THE VETO POWER 20-23 (1890).

51. Indeed, it is the premise of this comment that the traditional practices of impoundment and executive allocation of funds within congressional guidelines indicate that at least some exercises of non-expenditure are completely consistent with this power of the purse. *See supra* note 27.

A frequent issue in the line-item veto debate is whether the non-germane "riders" which characterize modern appropriations bills were considered by the Constitution's Framers. *See* Wolfson, *supra* note 5, at 839-44 (Both omnibus appropriations bills and nongermane riders were techniques "consonant with the Framers' understanding, informed by the colonial experience, that the executive should veto appropriations bills only with great difficulty." *Id.* at 840-41); Best, *supra* note 3, at 183 (the Founders were

A. Spending Power Considerations

Undoubtedly the strongest argument of the line-item veto opponents is the enormously broad spending authority[52] explicitly granted only to Congress by the Constitution.[53] The opponents argue with considerable persuasion that placement of the

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unaware of such devices). Riders to other types of bills apparently date from at least 1820, when a bill for the admission of Missouri was attached to the bill for the admission of Maine. E. Mason, *supra* note 50, at 48, n. 1. Although there is considerable dispute among commentators and historians, America's experience with and imitation of Britain's legislative scheme before and during the colonial era suggests that the Framers were not unfamiliar with the practice. *See* Wolfson, *supra* note 5, at 840-44. For decades before the American Revolution, the lower houses of the colonial legislatures asserted their power over the colonial treasury by prohibiting amendment of their appropriations bills and attempting to prohibit amendment of even those bills containing riders. *Id.* at 841-43. Unamendability was eventually opposed at the Constitutional Convention only because it would have given the House of Representatives a critical advantage over the Senate. *Id.* at 844 (citing 13 The Documentary History Of The Ratification Of The Constitution 121 (J. Kaminski & G. Saladino ed. 1981)). To maintain the power balance between the two Houses, the Senate was given co-equal power to write appropriations legislation. (Although appropriations legislation must originate in the House, the spending power is vested in *Congress*. U.S. Const. art. I, § 8, cls. 1, 7.) Significantly, the President was given no such power. Had the Framers intended a comparable executive role in enacting spending legislation, it seems the Constitution would have made that clear. *See* U.S. Const. art. I, § 8, cl. 1; Wolfson, *supra* note 5, at 844. However, it is beyond the scope of this comment to engage in original intent analysis. Instead, this comment tests the constitutional propriety of riders and other alleged indicators of congressional fiscal abuse by tracing how they have actually affected the relative power balance between Congress and the President in the field of spending. This is done by examining the evolution of the President's ever-increasing involvement in national spending decisions and the accompanying recognition of that involvement by Congress or the Supreme Court.

52. Technically, the Constitution gives to Congress (so long as the President has at least nominally assented) the power to appropriate funds and gives to the President the power to spend them. *See* U.S. Const. art. II, § 1, cl. 1 (granting to the President the "executive power," which impliedly includes the power to execute appropriations legislation); *supra* note 46 and accompanying text; *see generally* L. Wilmerding, The Spending Power (1943) (historical study of the relationship between Congress and the President in the context of Congress's ongoing efforts to control national spending). For purposes of this comment, however, "spending power" is used in a broader sense, as the composite of all powers, legislative and executive, which play a role in the ultimate expenditure of national funds.

53. "This power over the purse may, in fact be regarded as the most compleat and 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." The Federalist No. 58 at 394 (J. Madison) (J. Cooke ed. 1961). *See, e.g.*, Wolfson, *supra* note 5, at 844, 851-52; Edwards, *supra* note 1, at 195-97, 198-201, 203-05. *But see* Dixon, *supra* note 1, at 221; Best, *supra* note 3, at 183-88 (arguing that current legislative practices were never envisioned by the nation's Founders and necessitate an item veto to rehabilitate an original and essential check and balance—the President's veto power).

primary spending power in Congress with a simultaneous de-emphasis of the President's spending role is not only telling, but well-reasoned evidence of the Framers' intent.[54] By design,[55] Congress's size and inherent diversity of opinion[56] allow it to hear and assess the validity of conflicting budget demands and to coordinate the trade-offs necessary in budgeting limited national funds.[57] Indeed, it is in the branch of government that is the most diverse and in which power is the least concentrated—the House of Representatives—that appropriations bills must originate.[58] The significantly shorter term of office for a United States representative—two years as opposed to four years for the President[59]—arguably ensures more earnest representation.[60] Finally, the exercise of all of Congress's other legislative powers depends on funding to be effective.[61] The appropriations process is "really a means by which the legislature assigns priority among its programs."[62]

Supporters of the line-item veto argue with comparable persuasion that Congress's natural diversity encourages excessive and wasteful spending.[63] Members of Congress trade support for one another's projects and proposals.[64] Ironically, the more

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54. *See* Wolfson, *supra* note 5, at 851 (spending power characterized as a "core" legislative power designed precisely by the Framers as a check on executive power).

55. *See infra* note 57 and accompanying text.

56. Each of the House of Representatives' 435 members represents either 30,000 inhabitants or an entire state (each state must have at least one representative) and is elected for a two-year term. *See* U.S. CONST. art. I, § 2, cls. 1, 3. Each of the Senate's 100 members (2 from each of the 50 states) is elected for a six-year term. *See* U.S. CONST. amend. XVII (1913). Passage of spending and all other legislation requires majority votes from both Houses. *See* U.S. CONST. art. I, § 5, cl. 1.

57. *See* Wolfson, *supra* note 5, at 851-52. *See also* THE FEDERALIST No. 55, at 372-78 (J. Madison) (J. Cooke ed. 1961) (ratio of 30,000 inhabitants to each representative is sufficient to guarantee competent representation of local interests; each representative need not be familiar with the minutiae of his constituency's character).

58. *See* U.S. CONST. art. I, § 7, cl. 1.

59. U.S. CONST. art. I, § 2, cl. 1; art. II, § 1, cl. 1.

60. *See* Edwards, *supra* note 1, at 194 (citing THE FEDERALIST NOS. 52-53, at 353-66 (J. Madison) (J. Cooke ed. 1961)) (the shorter term of office for a United States representative ensures that voters have available to them a ready political solution if they are dissatisfied with their representative's performance).

61. Wolfson, *supra* note 5, at 851.

62. *Id.* (citing United Auto. Workers v. Donovan, 746 F.2d 855, 862-63 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985)) (asserting that a line-item veto would constitute an improper transfer of spending power to the President because Congress would no longer have the primary authority to set legislative priorities).

63. *See, e.g.*, Dixon, *supra* note 1, at 215.

64. *Id.* (citing Ross & Schwengel, *An Item Veto for the President?*, 12 PRES. STUD.

broadly a bill is supported, the more excessive and wasteful it may be.[65] Additionally, members of Congress are elected from specific districts or states and therefore favor activities that benefit their respective regional constituencies and help assure reelection. The President, by contrast, is elected by the nation and has a tendency to heed the wishes of a national constituency.[66] Finally, both members of Congress and the President rely on the judgments of experts and staff members to make informed decisions on all spending issues.[67] Congress is arguably, therefore, in no less partisan a position than the President, and his own staff and agencies, in assessing national spending priorities.[68]

B. General Legislative Considerations

A key argument of the line-item veto opponents is that an appropriation is a legislative judgment not only as to substance, but as to form as well.[69] A president's parsing of an appropriation into discrete formulations ("items") would violate the constitutional requirement of bicameralism because none of the items would have been separately considered, voted on as such or "passed" by both Houses.[70] Allowing a president to delete portions might upset the original design of the legislation and render the remainder contrary to legislative intent.[71]

Arguably the better-reasoned counter-argument is that all items should have been fully considered. Congress should not be allowed to hide behind its admitted need to compromise and ac-

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Q. 66, 75-76 (1982)).

65. Dixon, *supra* note 1, at 215.

66. This was the view taken in the 1985 Economic Report of the President, which endorsed the line-item veto. Item Veto Study, *supra* note 1 at 56 (citing Economic Report of The President and Annual Report of The Council of The Economic Advisors 94, 96 (1985)). The report urged a change in the composition of federal expenditures, from projects preferred by Congress to projects preferred by the President, and of a relatively less "pork-barrel" and more national nature. *Id.*

67. Dixon, *supra* note 1, at 222.

68. *But see* Edwards, *supra* note 1, at 193 ("If the 1984 Democratic presidential candidate had been elected for example, he would certainly have stricken the MX missile and the B-1 bomber from the defense appropriation, and would just as certainly have stricken military assistance to the government of El Salvador from the foreign assistance appropriation."). Indeed, some have said that no single member of Congress even reads every line of the hundreds of pages which comprise a typical appropriations bill. *Id.*

69. Gressman, *supra* note 30, at 821-22.

70. *See* U.S. Const. art. I, § 7, cl. 2.

71. Fisher, *supra* note 1, at 160.

commodate in order to shield particular provisions of an appropriations bill from review. The "step-by-step deliberate and deliberative process"[72] by which Congress is supposed to consider and pass a bill surely encompasses each piece of that bill. The item veto opponents argue that nothing is contained in any bill passed by Congress except with the consent of a majority of its members.[73] This reasoning allows members to nominally support and vote for particular bill provisions as a means of securing reciprocal support for those provisions they do in fact support. As a result, particular provisions may slip by wholly unconsidered and still garner the requisite majority vote. Congressional decisions to attach riders and otherwise inappropriate bill provisions are not, however, "decisions which Congress has the right to make."[74] The President should have the authority to compel Congress to confirm that its deliberations were in fact "exercised in accord with a single, finely wrought and exhaustively considered, procedure"[75] and that each portion of each bill could in fact stand on its own merits.

C. Veto Power Considerations

Alexander Hamilton wrote that the veto power of Article I was designed as a "security against the enaction of improper laws"[76] and as a "check upon the legislative body calculated to guard 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."[77] James Madison wrote that the veto was designed "to restrain the Legislature from encroaching . . . on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form."[78] Indeed, Madison favored a three-fourths override rule on the grounds that the two-thirds rule made the veto too weak to accomplish its crucial purpose.[79] Alexander Hamilton stressed

72. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983).

73. *See, e.g.*, Edwards, *supra* note 1, at 196.

74. *Id.*

75. *Chadha*, 462 U.S. at 951.

76. The Federalist No. 73, at 495 (A. Hamilton) (J. Cooke ed. 1961).

77. *Id.*

78. Dixon, *supra* note 1, at 221 (quoting L. Fisher, Presidential Powers (Congressional Research Service Report)).

79. Best, *supra* note 3, at 186 (citing M. Farrand, The Framing Of The Constitution Of The United States (1962)).

that an executive veto forces reconsideration of "the passing of bad laws, through haste, inadvertence or design."[80] He wrote:

> The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those misteps which proceed from the contagion of some common passion or interest.[81]

President Wilson wrote that "in the exercise of his power of veto . . . the President acts not as the executive but as a third branch of the legislature."[82]

In theory, a line-item veto could surely fall within these traditional, democratic visions of the veto power. A line-item veto would force Congress to go on record to determine whether in fact there was sufficient support for individual appropriated items.[83] Such forced reconsideration does not assume, as some

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80. *See* THE FEDERALIST No. 73, at 495 (A. Hamilton) (J. Cooke ed. 1961); Best, *supra* note 3, at 184-88.

81. THE FEDERALIST No. 73, at 495 (A. Hamilton) (J. Cooke ed. 1961); Best, *supra* note 3, at 184. It has further been argued that although the text of the Constitution conspicuously de-emphasizes the President's legislative role relative to that of Congress, the mere inclusion of an executive veto power in the legislative Article is of considerable consequence. *See* Dixon, *supra* note 1, at 219. Before the American Revolution, colonial legislation was subject to veto by both the English King and a colony's governor. *Id.* (citing Ross & Schwengel, *An Item Veto for the President?*, 12 PRES. STUD. Q. 66, 67 (1982)). The vetoes, moreover, were absolute; the colonial legislatures had no power of override. *Id.* Because of natural colonial fear and resentment of this and any other indicia of centralized power, the Articles of Confederation did not even provide for an executive branch of government. *See* The Articles of Confederation art. IX (U.S. 1777); Dixon, *supra* note 1, at 219-20. However, by 1787 the Constitution's Framers apparently recognized that bicameralism was insufficient as a check on national spending. They instituted not only an executive branch and the powers specifically enumerated in Article II, but also the executive's power to veto appropriations, as well as any other legislation, and to prevail unless his veto were overridden by a two-thirds majority of both Houses. *See* U.S. CONST. art. I, § 7, cl. 2; Dixon, *supra* note 1, at 220 (citing Ross & Schwengel, *An Item Veto for the President?*, 12 PRES. STUD. Q. 66, 67 (1982)).

82. Black, *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 88 (1976).

83. *See* Dixon, *supra* note 1, at 222-23 ("An item veto . . . would make the President's veto power more effective by exposing log rolling, pork-barrelling and other legislative tactics that contribute to excessive spending and waste . . . [and would make] the presence of inappropriate items [less likely to] endanger items for which there is actually majority support." *Id.* at 223). An item veto may have incentive value as well. Best, *supra* note 3, at 187-88. Alexander Hamilton noted that even the mere anticipation of such a veto acts as a check and balance. *See* THE FEDERALIST No. 73, at 498 (A. Hamilton) (J. Cooke ed. 1961); Best, *supra* note 3, at 188.

have suggested, that "the executive branch is uniquely blessed with a penchant for economy."[84] The "submergence and avoidance of significant issues or facets of issues on which accommodation of conflicting . . . views are not possible" is a tendency no less characteristic of the executive than of the legislative branch.[85] An item veto would, however, force particularized examination of questionable bill provisions. Should Congress still support any portion of an appropriations bill after it has been vetoed, the line-item veto could be overridden by a two-thirds majority of each House.[86]

Whether a line-item veto is necessary to restore the constitutionally contemplated vision of separation of powers by restoring proper presidential powers,[87] or instead upsets that vision by granting the President significant new powers,[88] is a question left unanswered by the Constitution and one which apparently was not even considered by the Constitution's Framers.[89] At the time the United States Constitution was written, the states were the dominant political institutions.[90] Until 1940, federal expenditures were smaller than state and local expenditures combined.[91] By 1983, federal expenditures were almost twice the combined state and local spending amount.[92] "This is more than just a change of numbers. It represents a dramatic shift in the nature and role of the federal government" which could not realistically have been contemplated by the Constitutions's Framers.[93] The constitutionality of an item veto is, therefore, better tested by the manner in which these constitutional provisions, and their underlying considerations, work in practice.

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84. FISHER, *supra* note 1, at 160.

85. *Id.*

86. *See* U.S. CONST. art. I, § 7, cl. 2. Some proposals for an item veto by constitutional amendment have included a majority override provision—the veto of an item of appropriation could be overridden by a majority vote rather than the considerably more exacting two-thirds vote generally required to override a veto. *See, e.g.*, S.J. Res. No. 26, 98th Cong., 1st Sess., 129 CONG. REC. S836 (daily ed. Feb. 1, 1983). *See also* Dixon, *supra* note 1, at 208-09 (discussing his introduction of Senate Joint Resolution 26).

87. *See* Best, *supra* note 3, at 188.

88. *See* Edwards, *supra* note 1, at 192, 194; Wolfson, *supra* note 5, at 845-48 ("transfer of authority" through an item veto would be an unconstitutional delegation of Congress's spending power).

89. *See supra* note 50 and accompanying text.

90. Dixon, *supra* note 1, at 217.

91. *Id.*

92. *Id.*

93. *Id.* at 217-18.

III. A COMPARISON OF THE LINE-ITEM VETO WITH ITS FUNCTIONAL EQUIVALENTS

Congressional control over budget affairs and correspondingly decentralized executive involvement characterized the first one hundred years of the Republic.[94] Of course, through most of the nineteenth century, revenues from tariffs and taxes covered all congressionally-mandated spending, so there was no need for formal budget procedures.[95] After the Civil War, however, Congress began to lose a significant amount of control over the spending power to the President.[96] By the late 1800's, "in the wake of legislative extravagances" which resulted in a series of budget deficits, the roles had completely reversed; Congress's role as "guardian of the public purse" became nominal.[97] A series of subsequent legislative attempts to effect national savings—among them, mandated submission of an annual budget by the President and clear denomination of Congress's appropriations as mere ceilings on spending[98]—emphasized the shift in

94. Dixon, *supra* note 1, at 209.

95. *Id.*

96. Fisher, *The Politics of Impounded Funds*, 15 AD. SCI. Q. 361 (1970) (Fisher attributes this loss of congressional control to a splintering of appropriations responsibilities by the House Ways and Means Committee and the House Appropriations Committee to various smaller committees, each with autonomous spending powers).

97. *Id.* at 361-62.

98. *Id.* at 362-63. The Antideficiency Act of 1905 (Pub. L. No. 217-1484, 33 Stat. 1257 (codified as amended in scattered sections of 31 U.S.C.)) introduced the notion of allotting funds within a set time frame to prevent "undue expenditures in one portion of the year that may require deficiency or additional appropriation to complete the service of the fiscal year." *Id.* at 362. The Antideficiency Act of 1906 (Pub. L. No. 28-510, 34 Stat. 48 (codified as amended in scattered sections of 31 U.S.C.)) allowed a waiver or modification of appropriations in the event of "some extraordinary emergency or unusual circumstances which could not be anticipated at the time of making such apportionment." *Id.* These early attempts to curb excessive national spending proved unsuccessful, however. The magnitude of federal spending during World War I and the pressing need for managing the huge debt after the War together demanded far stronger measures. *Id.* In the Budget and Accounting Act of 1921 (Pub. L. No. 13-18, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.)), Congress created the Bureau of the Budget (precursor of the present office of Management and Budget (OMB)) to force agencies to cut spending below appropriated levels by effecting economies in agency practices, mandated submission of an annual presidential budget and clearly denominated its appropriations as mere ceilings on spending. *Id.* at 362-63; Dixon, *supra* note 1, at 209. However, after the 1921 Act, considerable spending responsibilities fell on the President and impoundments became a regular practice; "[t]hough legislators could reach agreement on the need for retrenchment, they were frequently unable, or unwilling, to make specific reductions and offend the affected constituents and interest groups." Fisher, *supra* note 96, at 373; *see also* Note, *supra* note 27, at 1508-09.

roles. Congress's delegation of spending power to the President under certain circumstances and its acquiescence to presidential impoundments apparently satisfied budgeting needs in a way that Congress increasingly could not.

Until enactment of the 1974 Congressional Budget and Impoundment Control Act, appropriations were generally considered permissive.[99] Presidents have successfully prevented the spending of appropriated funds since at least 1803,[100] and have employed a variety of methods to do so selectively and without the confrontational inevitability of a formal veto.

A. IMPOUNDMENT

Impoundment typically refers to a president's refusal to spend funds the appropriation of which he either approved or unsuccessfully attempted to veto.[101] An example often cited by the Nixon Administration[102] was Thomas Jefferson's withholding of $50,000 appropriated by Congress for gunboats in 1803.[103] Jefferson explained that "[t]he favorable and peaceable turn of

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99. McGowan, *supra* note 17, at 810; FISHER, *supra* note 1, at 155-56.

In 1876, the House of Representatives questioned the legal authority of an impoundment by President Grant. Grant's Secretary of War concluded the matter by stating that "the language of the appropriations act was 'in no way mandatory.'" ITEM VETO STUDY, *supra* note 1, at 129. In 1896, Republican Senator and Finance Committee member John Sherman expressed his regret that President Cleveland had vetoed a river and harbor appropriations bill: "If the President of the United States should see proper to say, 'That object of appropriation is not a wise one, I do not concur that the money ought to be expended', that is the end of it. There is no occasion for the veto power in a case of that kind." FISHER, *supra* note 1, at 155-56 (citing 28 CONG. REC. S6031 (June 3, 1896)). That is not to say that every instance of a president's refusal to spend has been tolerated by Congress. In 1842, President Tyler attempted a maneuver similar to that successfully attempted by President Jackson in 1830 (*see infra* notes 108-10 and accompanying text; FISHER, *supra* note 1, at 155 (citing 5 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2012 (1897) (June 25, 1842))): Tyler signed a bill but subsequently left with the Secretary of State "an exposition of [his] reasons" for questioning the constitutionality and policy of the entire act. *Id.* The House vigorously protested the President's response, claiming that the Constitution gave him only three options upon receiving a bill: a signature, a veto or a pocket veto. *Id.* To sign a bill and add extraneous matter in a separate document was "a defacement of the public records and archives." *Id.* (citing H. R. REPT. No. 909, 27th Cong., 2d Sess. (1842)).

100. *See infra* notes 103-06 and accompanying text.

101. *See, e.g.*, Note, *supra* note 27, at 1505, n. 1.

102. *Id.* at 1507, n. 7 (citing 1971 Hearings at 102 (testimony of C. W. Weinberger, Deputy Director, Office of Management and Budget)).

103. *See* ITEM VETO STUDY, *supra* note 1, at 128. *See also* Note, *supra* note 27, at 1507-08, n. 7.

affairs on the Mississippi rendered an immediate execution of that law unnecessary."[104] Within one year, however, the need for gunboats apparently resurfaced.[105] Jefferson carefully characterized his earlier action as a mere deferral of funds and notified Congress that he was ready to proceed with the gunboat program.[106]

A line-item veto, on the other hand, refers to a president's objection to a portion of the appropriation and his simultaneous approval of the remainder.[107] In 1830, President Jackson sent Congress a bill he had signed with a message that restricted the reach of the statute.[108] The House had recessed and was powerless to act on the message,[109] and Jackson's interpretation apparently prevailed. A later Congress deemed his action an item veto of one of the bill's provisions.[110]

In practice and in the minds of many commentators, the line between an impoundment and an item veto often blurs.[111] If the timing of a president's refusal to spend were the only distinction, our experience with impoundment would logically dispose of the item veto issue as well. In fact, however, the Presi-

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104. Note, *supra* note 27, at 1508, n. 7 (citing 1 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 348 (1897) (Third Annual Message, October 17, 1803)).

105. *Id.*

106. *Id.*

107. Wolfson, *supra* note 5, at 838; Edwards, *supra* note 1, at 191.

108. FISHER, *supra* note 1, at 155 (citing 3 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1046 (1897) (May 30, 1830)) (President Jackson wrote:

> I have approved and signed the bill entitled "An act making appropriations for examinations and surveys, and also for certain works of internal improvement," but as the phraseology of the section which appropriates the sum of $8,000 for the road from Detroit to Chicago may be construed to authorize the application of the appropriation for the continuance of the road beyond the limits of the Territory of Michigan, I desire to be understood as having approved this bill with the understanding that the road authorized by this section is not to be extended beyond the limits of the said Territory.).

109. *Id.*

110. *Id.* (citing H. R. REPT. No. 909, 27th Cong., 2d Sess. 5-6 (1842)).

111. *See, e.g.*, FISHER, *supra* note 1, at 155-56 (What are often cited as examples of item veto are probably more accurately seen as impoundments where the refusal to spend comes after an entire bill has already been approved. However, Mr. Fisher includes examples of these as support for the notion that presidents have been exercising line-item veto power since the early 1800's.).

dent acts pursuant to entirely separate constitutional powers when he chooses to impound (Article II) and when instead he asserts a line-item veto (Article I).[112] Analysis of one of these two types of executive refusal to spend appropriated funds cannot substitute for analysis of the other. Nonetheless, their similarity in effect and the degree of interchangeability many commentators have given the two forms of presidential savings initiative[113] make comparison between an impoundment and an item veto useful. Because presidents have traditionally have crafted their objections to spending bills only after a bill's passage, rather than simultaneously with their approval of any nonobjectionable portion, and because Congress and the Supreme Court have affirmatively passed on only the impoundment issue,[114] that comparison seems compelling.

Until Congress enacted the 1974 Act, impoundment was an accepted practice.[115] Between 1921, when Congress first legislated to force administrative agencies to cut spending below appropriated levels,[116] and 1974, impoundment had become a standard procedure.[117] Furthermore, in the eyes of many who define item veto broadly enough to encompass any presidential refusal to spend funds appropriated by Congress, a line-item veto of

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112. The President impounds pursuant to various Article II powers (the Commander-in-Chief clause, the more general "executive power"). *See infra* notes 135, 158, 159 and accompanying text. The President acts pursuant to his Article I veto power when instead he asserts a line-item veto. *See supra* notes 47, 48 and accompanying text.

113. *See, e.g.*, FISHER, *supra* note 1, at 154-58 (despite "substantial differences" between an impoundment and an item veto, both forms of "selective enforcement of laws" are treated as exercises of item veto power). *See also* Wolfson, *supra* note 5, at 838-39 (classifying three types of item vetoes, among them an "impoundment" item veto).

114. Congress largely acquiesced to presidential impoundments until it enacted the Budget and Impoundment Control Act of 1974. Pub. L. No. 93-344, Title X, § 1001, 88 Stat. 332 (1974) (codified at 2 U.S.C. §§ 681-88 (1985 & Supp. 1989)). *See* FISHER, *supra* note 1, at 156; McGowan, *supra* note 17, at 810. *See also supra* note 27 (impoundment's long and largely uncontested history may have raised a presumption of legality or compel treatment of impoundment as a gloss on the "executive power").

In 1838, the United States Supreme Court held that the President has no Constitutional power to impound funds where Congress has expressly directed that the funds be spent. Kendall v. United States *ex. rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838). In 1975, the Court held that the provisions of the Clean Water Act (86 Stat. 816 (codified in relevant part at 33 U.S.C. §§ 1285(a), 1287 (1986 & Supp. 1988)) were mandatory, and that President Nixon's impoundment of funds appropriated pursuant to that Act was therefore improper. Train v. City of New York, 420 U.S. 35, 42-49 (1975).

115. *See* FISHER, *supra* note 1, at 155-56; McGowan, *supra* note 17, at 810.

116. *See supra* note 98.

117. *Id.*

sorts was also an accepted, if not acknowledged, practice prior to enactment of the 1974 Act.[118]

The Congressional Budget and Impoundment Control Act of 1974 instituted congressional controls over impoundment for the first time. The Act directs the President to report two types of impoundments: a permanent cancellation of funds (rescission) and a temporary withholding of funds (deferral).[119] Rescissions require the approval of both Houses of Congress within forty-five days of continuous session; otherwise, the President must spend the impounded funds.[120] Deferrals require disapproval by both Houses, without which the impoundment apparently remains in force.[121] The Act also directs the Comptroller General to oversee executive compliance with the Act and to report to Congress any failure by the President to report an impoundment, or to properly classify an impoundment as such.[122]

Plainly, the 1974 Act was a determined attempt by Congress to prevent executive overreaching in the field of national spending.[123] The Act was, indeed, a direct response to the impoundments—unprecedented "in terms of [their] magnitude, severity and belligerence"[124]—of the Nixon Administration.[125] Specifically, the Act was directed at presidential attempts to set spending policies by withholding funds for programs objectionable to the President.[126] In contrast, an item veto by even the most aggressive president could never effect reorganization of national spending priorities as had these "policy impoundments." Put

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118. *See* FISHER, *supra* note 1, at 155-56. It is generally agreed that the practice was well-known by the time of the Civil War. *See* Dixon, *supra* note 1, at 221 (the legislative tactics that have eroded the President's veto power were uncommon when the Constitution was written and did not become prevalent until about the time of the Civil War when increased usage of such tactics caused the Confederacy to include an item veto in its constitution).

119. FISHER, *supra* note 1, at 156.

120. *Id.*

121. *Id.* Although the Act originally provided that deferrals could be dissapproved by either the Senate or the House, this one-house legislative veto is no longer available. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (deeming a one-house legislative veto unconstitutional); FISHER, *supra* note 1, at 156.

122. ITEM VETO STUDY, *supra* note 1, at 121.

123. *See generally infra* notes 124, 125, 156-62 and accompanying text (regarding 1974 Act as response to excessive use of impoundment by President Nixon).

124. FISHER, *supra* note 1, at 236.

125. *See* FISHER, *supra* note 1, at 156.

126. *See* ITEM VETO STUDY, *supra* note 1, at 121, 134.

simply, an item veto can be overridden; an impoundment before the 1974 Act could not. An item veto was therefore not something against which the 1974 Act or, more significantly, its underlying policies were directed.

Furthermore, the 1974 Act simply established congressional veto power over impoundments; it does not represent congressional disapproval of the impoundment process in general. Policy-motivated impoundments, at least where an executive's policies differ from those of Congress, are now disallowed.[127] Impoundment activity justified by other customary motives continues, however, subject only to the Act's presidential reporting, Comptroller General review and congressional action or non-action procedures.[128] Indeed, despite an initial decline in impoundment activity during the Ford and Carter Administrations,[129] President Reagan reversed the trend. Congress responded to the record-setting number of impoundments during President Reagan's first term with a ninety to ninety-five percent approval rate.[130] In a very real sense, therefore, the 1974 Act sanctioned, by institutionalizing impoundment, a functional equivalent of

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127. *See infra* note 128.

128. ITEM VETO STUDY, *supra* note 1, at 135-36 (citing L. FISHER, THE CONSTITUTION BETWEEN FRIENDS 92 (1978)). In the early months under the new law, President Ford attempted even more policy-motivated impoundments than had President Nixon. *Id.* at 135. The 90%-plus rejection rate for President Ford's rescissions (rescissions generally tend to be policy motivated, while deferrals are more often than not routine administrative actions) indicates that Ford was repeatedly rebuffed in his efforts to overturn congressional budget priorities. *Id.*at 134,135. By contrast, President Carter proposed far fewer total rescissions, and particularly far fewer policy-directed recissions, than had President Ford; Congress approved almost two-thirds of President Carter's rescissions. *Id.* at 135. *See also infra* note 130 (regarding Pres. Reagan's highly successful use of the impoundment device over much of his two-term presidency).

Furthermore, simply spending less than the full amount of an appropriation does not necessarily qualify as an impoundment, subject to statutory control under the 1974 Act. ITEM VETO STUDY, *supra* note 1, at 121. The definition of impoundment under the Act could, broadly interpreted, cover what have become even routine administrative actions which affect the rate and level of federal expenditure. *Id.* In practice, however, the Comptroller General, who is required to oversee executive compliance with the Act, has taken a very narrow view and apparently excluded at least non-expenditures of this sort. *Id.*

129. *See supra* note 128.

130. ITEM VETO STUDY, *supra* note 1, at 135-36. President Reagan's impoundments were of both types, rescission and deferral. *Id.* President Reagan's significant success rate has been explained by the fact that his rescissions, unlike President Nixon's, proposed program cuts, not outright terminations. *Id.* at 136 (citing OMB, Cumul. Rpt. on Rescissions and Deferrals, Sept. 1981, issued as H. R. Doc. No. 97-91, 97th Cong., 1st Sess. 37 (1981)).

the item veto.

The ineffectiveness of the 1974 Act as a means of controlling national spending is now well recognized.[131] In the words of one commentator. "[i]f restraining the growth of federal spending and closing federal deficits are the criteria for judging whether the Budget Act is a success, the Act is a failure. Deficits are generally much larger than pre-1974, and the budgetary trend is towards further deficit growth."[132] A comparison of proper and improper impoundments to an item veto, is, therfore, appropriate for reasons other than the fact that Congress and the Supreme Court have at least alluded to the constitutionality of only the impoundment issue.[133] Congress has effectively eroded the ability of the President to contribute to fiscal discipline without implementing any workable subsitute.[134] The resulting power imbalance arguably compels recognition of the item veto to address the national budgeting needs traditionally, if less directly, satisfied by impoundment.

Two types of impoundments in particular—where the President acts independently to control economic pressures, and where, pursuant to statutory authority, the President exercises his discretion to keep national spending within limits set by Congress—attest to the need for presidential assistance in managing national funds.[135] Like other impoundments to which Con-

131. Dixon, *supra* note 1, at 210.

132. *Id.*

133. *See supra*notes 37, 114, 115 and accompanying text.

134. *See*Dixon,*supra* note 1, at 218.

135. War and simple administrative efficiency probably state the least objectional grounds for impoundment. *See* Note, *supra* note 27, at 1507-12. In the former instance, the executive acts pursuant to an express grant of executive authority—the Constitution's Commander-in-Chief clause. U.S. CONST. art. II, § 2, cl. 1. Since just before World War II, presidents have asserted power to impound pursuant to their constitutional authority as Commander in Chief of the Armed Forces. U.S. CONST. art. II, § 2, cl. 1; *see* Note, *supra* note 27, at 1508-09. Between 1940 and 1943, Franklin Delano Roosevelt refused to spend over $500 million in public works funds because the projects would not contribute to the war effort and lacked the requisite priority to obtain scarce resources. *See* Note, *supra* note 27, at 1509; ITEM VETO STUDY, *supra* note 1. at129. Other presidents (Truman, Eisenhower, and Kennedy) refused to build new weapons systems for which Congress had appropriated funds. *See* Note, *supra* note 27, at 1509; ITEM VETO STUDY, *supra* note 1, at 130. In 1949, Congress voted to increase President Truman's budget figure for Air Force spending. ITEM VETO STUDY, *supra* note 1, at 130. Truman approved the increase by signing the bill, but announced that the Secretary of Defense was placing in reserve $735 million, the amount by which Congress's figure exceeded the President's earlier request. *Id.* Neither of the Appropriations Committee Chairmen ques-

gress and the Supreme Court have acquiesced, these, too, serve either as a release valve to legislative aggrandizement or a solution to congressional powerlessness. Both types of impoundments indirectly maintain the balance of power between the legislative and executive branches, and are at least tactily constitutional. Both accordingly, lend considerable support to the argument that an item veto, too, is, by analogy, constitutional.

1. *Impoundment as an Executive's Independent Means of Controlling National Economic Pressures*

Presidents have exercised budgeting initiative during periods of national crises other than war.[136] In 1876, Ulysses Grant signed a river and harbor appropriations bill but simultaneously announced his refusal to spend $2.7 million of the five million dollars that Congress had appropriated for the river and harbor project.[137] He justified the refusal to spend partly on grounds of national revenue deficiencies and the need for retrenchment.[138] However, he also refused to spend because the particular projects were "of purely private or local interest, [and] in no sense national."[139] In defending the impoundment against a House resolution questioning the President's legal authority, Grant's Secretary of War stated that "it was not fiscally practical or legally appropriate for the President's discretion to be otherwise limited than by the 'interests of the public service' and the 'condition of the Treasury.' "[140] Congress was apparently satisfied took no further action.[141]

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tioned the impoundment. *Id.* (citing L. FISHER, PRESIDENTIAL SPENDING POWER 163 (1975)). In 1961, Congress appropriated $380 million for development of the B-70 bomber though John F. Kennedy had earlier budgeted only $200 million. *Id.* The Secretary of Defense refused to release the $180 million in "unwanted funds." *Id.*

In the latter instance, the impoundment must be congressionaly sanctioned and is valid only to the extent that non-expenditure better serves the purposes underlying an appropriation than does additional spending. See *infra* notes 217-21 and accompanying text for full discussion of this congressionally sanctioned type of impoundment.

136. *See* Note, *supra* note 27, at 1508-10.

137. *Id.* at 1510.

138. ITEM VETO STUDY, *supra* note 1, at 129.

139. 9 J. RICHARDSON, *supra* note 25, at 4331 (August 14, 1876); *see also* Note, *supra* note 27, at 1510.

140. ITEM VETO STUDY, *supra* note 1, at 129.

141. *Id.*

In 1931, deficits appeared for the first time in a decade.[142] Apparently on his own initiative, Herbert Hoover ordered a slow-down in the pace of program implementation and the establishment of an annual budget reserve.[143] President Hoover thereby cut federal spending for that year by ten percent.[144] In 1966, Lyndon B. Johnson attempted a similar move to reduce inflation. [145] Rather than veto bills for highways, housing, education and other domestic programs, Johnson impounded $5.3 billion of the funds appropriated for those purposes and the amount of which had exceeded his own budget request.[146] In his economic message to Congress in 1966, Johnson stated that appropriations in excess of his recommendations would be withheld whenever possible.[147] The Budget Director articulated the prevailing sentiment in stating, "it is the general power of the President to operate for the welfare of the economy and the Nation in terms of combatting inflationary pressures."[148]

2. *Impoundment as a Statutorily Authorized Means of Using Executive Discretion to Keep National Spending within Limits Set by Congress*

Since the 1930's, Congress has also statutorily authorized the President to impound if necessary to keep total spending within a ceiling established by Congress.[149] In 1932, congress apparently

142. Fisher, *supra* note 96, at 363.

143. Note, *supra* note 27, at 1510.

144. *Id.* Congress responded the following year with broad statutory authority for this and similar economic measures. *Id.* at 1511. *See also infr* notes 150, 151 and accompanying text.

145. *Id.* at 1511.

146. *Id.* It should be noted that President Johnson's impoundments of funds appropriated for domestic programs met with considerable opposition from Congress and the States. FISHER, *supra* note 1, at 156. Political pressures ultimately forced him to release about 30% of the funds, but not for a lack of legal justification. Rather, President Johnson released the funds to placate localities affected by the cutbacks. Note, *supra* note 27, at 1511; Fisher, *supra* note 96, at 371.

147. Fisher, *supra* note 96, at 371.

148. *Id.*

149. *See, e.g.*, Revenue and Expenditure Control Act of 1968 (Pub. L. No. 90-364, tit. II, 82 Stat. 270) (establishing a $180.1 billion limit on spending for fiscal 1969 and expressly granting the President authority to impound to keep within that ceiling); Second Supplemental Appropriations Act, 1970 (Pub. L. No. 91-305, tits. IV, V, §§ 401, 501, 84 Stat. 405) (establishing a $197.9 billion spending ceiling for fiscal 1970 and a $200.8 billion spending ceiling for fiscal 1971, and impliedly authorizing the President to impound to keep within those ceilings). *See* Note, *supra* note 27, at 1508-10.

recognized that while its own attempts to effect savings had been thwarted by influential lobbyists, the President stood a considerably higher chance of success. In that year, Congress authorized Herbert Hoover to reduce compensation for public officials, make partial layoffs and consolidate executive agencies after funds had already been appropriated for those purposes. [150] Impounded funds were to be returned to the Treasury Department.[151]

In 1937, President Franklin D. Roosevelt proposed that Congress authorize the President to reorganize the executive branch on a continuing basis as Congress itself remained debilitated by lobbying pressures.[152] In 1939, Congress passed a bill stating that continuing deficits made cutbacks desirable and directing the President to effect savings by consolidating or abolishing agencies for efficient operation.[153]

Within fifteen years, Congress went still further by directing President Truman to cut the budget by a minimum $550 million if he could do so without impairing the national defense.[154] Congressman Phillips remarked that it was:

> an ironic paradox that members of Congress who

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150. Fisher, *supra* note 96,at 363. (Senator Reed stated on President Hoover's behalf, "[t]he only way by which we will get results is by putting the power into the hands of somebody who will assume the responsibility and use it . . . . Leave it to Congress and we will fiddle around here all summer trying to satisfy every lobbyist, and we will get nowhere.").

151. *Id.*

152. *Id.* at 364. Senator Tydings, upon hearing legislators complain that Roosevelt had asked for dictatorial powers, replied, "Of course he did. Why? Because Congress itself refused to do its duty, to protect the integrity of the national credit." *Id.* at 363. Indeed, Congressman Woodrum recommended that the President be authorized to reduce any appropriation whenever he determined, by investigation, that such action would help balance the budget or reduce the public debt, and would serve the public interest. *Id.* at 364. Woodrum had urged that the President be protected from congressional attachment of extraneous items to appropriations bills, a practice which put the President in a position of "having to swallow things he does not want or approve items he does not want in order to get an appropriation bill passed." *Id.* Opponents of the Woodrum motion argued conversely that the President could use the authority given to dominate Congress and intimidate opposition. *Id.* Congressman Maverick argued that legislators would hesitate to challenge the President if he "could single out any district or portion of America to have appropriations or not to have appropriations, as he pleased." *Id.* Congressman Ditter argued that the bill put the public purse at the President's disposal. *Id.*

153. *Id.* at 364.

154. *Id.* at 370.

> shudder at the thought of a constitutional amendment allowing a President to veto individual items in a bill have supported an extra-constitutional device which in effect gives the President the same veto power but allows the Congress no opportunity to override him.[155]

3. *The Contrast Posed by the Nixon Impoundments*

In marked contrast to the two foregoing types of traditionally recognized impoundments were those attempted by President Nixon during the early 1970's.[156] What distinguishes Nixon's impoundments from the more traditional types was the aggressive policy-making and priority-setting nature of the former.[157] The Nixon Administration maintained that the "executive power" granted by Article II[158] included presidential discretion to spend or not to spend congressionally appropriated funds.[159]

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155. *Id.*

156. *See* Note, *supra* note 27, at 1510-29; FISHER, *supra* note 1, at 236 (citing L. FISHER, PRESIDENTIAL SPENDING POWER 175-201 (1975)) ("The message from the White House came across without equivocation: congressional add-ons to the President's budget were irresponsible and wholly lacking in merit. Programs were either cut back to the President's request or, in some cases, terminated and dismantled.").

157. *See, e.g.*, L. FISHER, PRESIDENTIAL SPENDING POWER 148 (1975) ("Economy is one thing, and the abandonment of a policy and program of the Congress another."); ITEM VETO STUDY, *supra* note 1, at 131-33 ("Nixon attempted to eliminate previously established Democratic programs and to install new Republican ones, using the impoundment tool as a means to reorder the national priorities." *Id.* at 132-33).

158. U.S. CONST. art. II, § 1, cl. 1.

159. *See* Note, *supra* note 27, at 1512-16. The Nixon Administration claimed that authority for its impoundments came from two types of statutory sources as well. *Id.* at 1512, 1516-29. First and more generally, the Administration asserted that four statutes—(1) the Anti-Deficiency Act of 1950 (31 U.S.C. § 665 (1970)), (2) the Employment Act of 1946 (15 U.S.C. §§ 1021-25 (1970), *as amended by* 15 U.S.C.A. § 1026 (West Supp. 1973)), (3) the Economic Stabilization Act of 1970 (Pub. L. No. 91-379, tit. II, 84 Stat. 799 (1970) *as amended*, Pub. L. No. 92-210, 85 Stat. 743 (1971)) and (4) the public debt ceiling (31 U.S.C.A. § 757b (West 1970 & Supp. 1973), *as temporarily amended by* Pub. L. No. 92-599, tit. I, 86 Stat. 1324 (1972))—required impoundment where the federal spending threatened the goals of these statutes. *Id.* at 1516, nn. 57-60. The Administration argued that as the President was bound by his constitutional duty to faithfully execute all the laws of the United States, he needed the freedom to resolve conflicting statutory responsibilities by withholding funds from offending programs. *Id.* at 1513, 1516-17. Administration officials further argued that the statutes either authorized or obligated the President to impound in order to stabilize the national economy and promote economic growth. *Id.* at 1517-24, nn. 64, 72, 79, 83.

Second and more specifically, the Nixon Administration claimed that certain author-

Despite contrary Supreme Court authority, President Nixon impounded funds even where Congress explicitly mandated expenditure.[160] The similarly unprecedented effects of the Nixon impoundments were termination or drastic curtailing of significant domestic programs coincident with the funding of costly and politically controversial non-domestic projects,[161] among them, the supersonic transport, a manned landing on Mars, a larger merchant marine fleet, a new manned bomber and the Safeguard ABM system.[162]

Arguably the most conspicuous Nixon impoundment and the one which best distinguishes the impoundments of his term from those by former presidents involved the Federal Water Pollution Control Act Amendments of 1972.[163] President Nixon vetoed the Amendments.[164] Congress overrode his veto.[165] Nevertheless, Nixon proceeded to impound half of the eighteen billion dollars appropriated.[166] The Supreme Court deemed the impoundment improper,[167] but based its holding on principles of statutory interpretation and simply concluded that the allot-

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ization statutes or spending bills were worded in a manner so permissive that they allowed executive discretion as to whether or not to actually spend funds appropriated by Congress. *Id.* at 1513, 1524.

160. *See supra* note 37. The reasoning of *Kendall* has been followed by lower federal courts. *See, e.g.*, Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 73 (D.D.C. 1973) (*held* that the President's budget was "nothing more than a proposal to the Congress for the Congress to act upon it as it may please"); National Council of Community Mental Health Centers v. Weinberger, 361 F. Supp. 897, 902 (D.D.C. 1973) (noting that the President "does not have complete discretion to pick and choose between programs when some are made mandatory by conscious, deliberate congressional action").

The Nixon Administration also asserted that Article II's requirement that the President "faithfully execute" all laws required that he not spend funds in excess of the spending ceiling. *See* U.S. CONST. art. II, § 3; Fisher, *supra* note 96, at 372; ITEM VETO STUDY, *supra* note 1, at 131. Congress reacted to this assertion by reserving for itself the privilege of increasing appropriations and raising the spending ceiling, converting it into what Nixon called a "rubber ceiling". Fisher, *supra* note 96, at 373. *See also* Note, *supra* note 27, at 1511-16.

161. *See* ITEM VETO STUDY, *supra* note 1, at 131 (citing L. FISHER, PRESIDENTIAL SPENDING POWER 176 (1975)); Note, *supra* note 27, at 1512.

162. Fisher, *supra* note 96, at 372.

163. ITEM VETO STUDY, *supra* note 1, at 133.

164. *Id.*

165. *Id.*

166. *Id.*

167. Train v. City of New York, 420 U.S. 35 (1975) (the first modern impoundment case to reach the United States Supreme Court).

ment provisions of the Clean Water Act were mandatory.[168] As lower courts had traditionally done, the Supreme Court "studiously avoided" consideration of the constitutional issues surrounding impoundment.[169] By rejecting the impoundment in that case, however, the Court impliedly rejected constitutional authority to impound absent the types of non-policy-motivated circumstances outlined above and certainly where Congress had expressly mandated to the contrary.[170]

4. *How a Line-Item Veto Compares to Proper and Improper Impoundments*

It appears from a review of the history of impoundments that some such exercises of executive power do not violate the balance of power between the executive and legislative branches. Though claims of exclusive executive power that preclude much of Congress's lawmaking function "must be scrutinized with caution,"[171] the pre-Nixon impoundments for the most part seem to have survived such scrutiny. The "executive power" seems to authorize a president's refusal to spend appropriated funds where the refusal does not threaten Congress's power to establish national policies and fix national priorities.[172] On the other hand, absolute power to impound, independent of congressional action, "would be a severe incursion on [the] power to make law. It would convert the qualified veto into an absolute veto over spending programs and thus would render congressional action in the area of spending—traditionally perhaps its single most

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168. *Id.* at 42-49. *See* FISHER, *supra* note 1, at 237; ITEM VETO STUDY, *supra* note 1, at 133-34; R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7.4, at 455 (1986).

169. ROTUNDA, NOWAK, & YOUNG, *supra* note 167, at 455 (citing State Highway Comm'n v. Volpe, 479 F. 2d 1099 (8th Cir. 1973)). *Volpe* was the first appellate court decision to overrule a discretionary impoundment (one which Congress had not expressly disallowed). *Id.* at 454. The *Volpe* Court decided that the controversy did not involve a political question inappropriate for judicial resolution but rather a matter of statutory construction properly within the Court's competence. *Id.*

170. *Id.* at 456; FISHER, *supra* note 1, at 237.

171. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

172. The "executive power" clause is not a grant of all conceivable executive power. *See Youngstown*, 343 U.S. at 640-41 (Jackson, J., concurring). Rather, like almost every delegation of power in a system of separated branches exercising limited powers, it, too, is constrained by a grant of power elsewhere. *See* Myers v. United States, 272 U.S. 52, 292-95 (1926) (Brandeis, J., dissenting); Note, *supra* note 27, at 1514.

important responsibility—merely advisory or prohibitory."[173]

Unlike an absolute assertion of executive power, a line-item veto does not threaten congressional lawmaking power. Like modern impoundments, a line-item veto is limited and can be overridden. A line-item veto accordingly seems no less constitutional than the types of impoundments that traditionally have been and continue today to be recognized.

Furthermore, the argument for an item veto is not merely academic. Apparent congressional powerlessness to control national spending continues.[174] The ineffectiveness of the Budget and Impoundment control Act is perhaps another sign that savings initiative must come from a source other than Congress. Perhaps the Act is perhaps the best evidence yet that an item veto is necessary to restore budget controls and to reestablish the President's proper role in national spending decisions.

B. Executive Discretion In Making Spending Decisions within Guidelines Set by Congress

The line-item veto can also be compared to the exercise of presidential discretion in making spending decisions which are designed to effect broad congressional spending goals.[175] The Supreme Court has recognized as proper at least three broad types of presidential decision-making in the spending field:[176] selective allocation of lump sum appropriations,[177] fact evaluation within congressional guidelines[178] and suspension or non-expenditure in individual cases.[179]

The Court has stressed that what legitimizes these otherwise unconstitutional delegations of Congress's spending power is their "non-legislative" character.[180] Because Congress, it is

173. Note, *supra* note 27, at 1514.
174. *See supra* notes 131, 132 and accompanying text.
175. This discussion borrows heavily from Wolfson, *supra* note 5, at 848-51.
176. *See* Wolfson, *supra* note 5, at 848-51.
177. *See infra* notes 187-96 and accompanying text.
178. *See infra* notes 197-216 and accompanying text.
179. *See infra* notes 217-21 and accompanying text.
180. Wolfson, *supra* note 5, at 848-51.

premised, will have already outlined the general goals it hopes to achieve by spending or not spending in certain situations, and because[181] presidential discretion must be used to serve the legislative intent[182] and is, indeed, expected to ensure the effectiveness of congressional programs,[183] such exercises of presidential decision-making in the spending field are often referred to as delegations. As such, they appear as nothing more than outgrowths of the modern administrative state,[184] indistinguishable from delegations which are required simply because Congress itself has neither the time nor the resources to attend to the details associated with implementation of its spending policies.[185] A closer examination, however, reveals that although any spending decision by the President is an exercise of power which constitutionally is granted, limited and controlled by Congress[186] if only broadly,to better effectuate its own legislative purposes, such decision making practically accords the President an enormous amount of discretion and responsibility. It requires informed analysis and judgment and, within the guidelines set by Congress, is, therefore, far from ministerial activity. It constitutes policy-making, however subsidiary, by the President.

Like an exercise of presidential discretion in making spend-

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181. *Id.*

182. *Id. See, e.g.*, Yakus v. United States, 321 U.S. 414, 425 (1944):

> Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command . . . . [T]he only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

183. Wolfson, *supra* note 5, at 848-51.

184. *Id.* at 845 (citing Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 985-86 (1983) (White, J., dissenting)).

185. *See, e.g.*, Currin v. Wallace, 306 U.S. 1 (1939)(Secretary of Agriculture authorized to establish standards for grading tobacco because field was too technical for direct congressional regulation); Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968) (agencies must be allowed to adapt rules to fast-changing circumstances); Wolfson, *supra* note 5, at 846.

186. *See generally supra* notes 42-86 and accompanying text (regarding the constitutional framework for national spending powers).

ing decisions, a line-item veto assumes that there are situations where the executive and executive agencies can best judge when and for how much Congress's policy goals can be satisfied. Both devices recognize the value of executive involvement at the appropriation level. Both can be abused. In one sense or another, however, both are ultimately controlled by Congress—these presidential spending decisions by at least broad congressional guidelines, an item veto by the ever-present possibility of override.There is little to distinguish the two forms of executive decision-making in terms of the relative power held by the executive and legislative branches. There is, therefore, little to distinguish the two on constitutional grounds.

1. *Selective Allocation of Lump-Sum Appropriations—Budgeting, Transfer and Reprogramming*

Congress has traditionally budgeted appropriations so that each encompasses several projects or activities.[187] Such lump-sum budgeting allows the President and administrative agencies to determine how funds within and sometimes between budget accounts should be spent.[188] Were Congress instead to appropriate narrowly by line-item the President would, in the absence of an item veto, lose much of the discretion and flexibility he modernly enjoys at the appropriation stage.[189]

Lump-sum budgeting allows the President not only to selectively allocate lump sums, but also to transfer funds between budget accounts when necessary to save programs that might otherwise perish because Congress appropriated too little or was unable to anticipate unforeseen developments.[190] More significantly for purposes of comparison with a line-item veto, lump-sum budgeting also authorizes the President to shift funds within a single appropriation account by reprogramming. Unlike a transfer of funds, which typically requires either statutory support or a national emergency,[191] reprogramming is subject to mostly non-statutory controls "to be discovered in committee re-

187. ITEM VETO STUDY, *supra* note 1, at 86.

188. *See* Wolfson, *supra* note 5, at 849.

189. *See* ITEM VETO STUDY, *supra* note 1, at V (Letter of Transmittal from Chairman of House Committee on Rules, Claude Pepper).

190. Wolfson, *supra* note 5, at 849.

191. *See* ITEM VETO STUDY, *supra* note 1, at 120.

ports, committee hearings, agency directives, correspondence between subcommittee chairmen and agency officials, and also 'gentleman's agreements' and understandings that are not part of the public record."[192] The justification for reprogramming is congressional recognition "that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for 'unforeseen developments, changing requirements . . . and legislation enacted subsequent to appropriations.' "[193] Absent a congressional mandate to spend earmarked funds and so long as it does not result in a net withholding of funds, a reprogramming which even explicitly discriminates against particular programs is permitted.[194] Congress can, of course, retaliate with subsequent legislative controls should congressional guidelines be ignored too often or too flagrantly.[195] Short of that possibility, however, reprogramming amounts to a judicially recognized form of item veto which cannot be overridden. The constitutional justifications for an item veto and for this sort of spending decision seem particularly indistinguishable.[196]

2. *Fact Evaluation by the President*

Congress can also make a law's operation contingent on the President's judgment as to whether the factors necessary to

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192. *Id.*

193. United Auto. Workers v. Donovan, 746 F. 2d 855, 861 (D.C.Cir. 1984) (Scalia, J.)(quoting LTV Aerospace Corp., 55 Comp. Gen. 307, 318 (1975)), *cert. denied*, 474 U.S. 825 (1985).

194. *Id.* at 123 (citing June 23, 1977 ruling by Comptroller General) (Reprogramming does not constitute an impoundment action falling within the procedural requirements of the Budget and Impoundment Control Act of 1974 so long as there is no net withholding of funds:

> The Act is concerned with the rescission or deferral of budget authority, not the rescission or deferral of programs. Thus a lump-sum appropriation for programs A, B, and C used to carry out only program C would not necessarily indicate the existence of impoundments regarding programs A and B. So long as all budgetary resources were used for program C, no impoundment would occur even though activities A and B remain unfunded.).

195. *Id.* at 124.

196. *But see* Wolfson, *supra* note 5, at 848-49 ("The impermissibility of the item veto is highlighted by contrast with . . . permissible delegations" such as transfers and reprogramming of funds.).

bring congressionally intended savings into play exist.[197] This does not constitute lawmaking. Rather, "[t]here are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation . . . . To deny this would be to stop the wheels of government."[198] Congress has frequently recognized that the executive branch is in the best position to make such determinations.[199]

In 1890, Congress passed a bill which authorized the President to suspend free importation of certain goods "for such time as he shall deem just" whenever the countries from which those goods were exported imposed duties on United States products which the President found "reciprocally unequal and unreasonable."[200] The constitutionality of the Act was upheld despite allegations that the Act improperly delegated legislative powers to the President.[201] The Supreme Court explained, "[l]egislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law."[202]

In 1942, Congress passed the Emergency Price Control Act

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197. Wolfson, *supra* note 5, at 848-51; *see, e.g.*, Field v. Clark, 143 U.S. 649 (1892).

198. *Field*, 143 U.S. at 694 (citing Locke's Appeal, 72 Penn St. 491, 498 (1873)).

199. *See infra* notes 200, 201 and accompanying text (presidential discretion regarding import duties); notes 203-205 (presidential discretion regarding fixing "fair and equitable" commodity price levels); notes 210, 211, 217 (presidential discretion regarding budget reductions).

200. *Field*, 143 U.S. at 680. This type of act was by no means unprecedented. *See id.* at 683-89 (references to other such Acts of Congress). Furthermore, though the *Field* court emphasized the importance of executive discretion "in matters arising out of the execution of statutes relating to trade and commerce with other nations," its decision clearly had much broader application. *See id.* at 692-94.

201. *Id.* at 681.

202. *Id.* at 693. Specifically, the Court stated:

> For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea and hides, Congress itself determined that the provision of the act of October 1, 1890, permitting the free introduction of such articles, should be [so] suspended . . . Congress itself prescribed, in advance, the duties to be levied, collected and paid . . . . Nothing involving the expediency or the just operation of such legislation was left to the determination of the President.

Id. at 692-93.

of 1942.[203] The Act authorized the Price Administrator, appointed by the President, to fix commodity prices at a level which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" and when, in his judgment, industry prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."[204] The Supreme Court upheld such subsidiary administrative policy-making in stating:

> The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . . These essentials are preserved when [as there] Congress specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective.[205]

The Court was careful to stress the necessity of its holding:

> The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.[206]

Again, Congress and the Supreme Court were apparently satisfied that the executive branch was in the best position to make the requisite factual evaluations.

It is difficult to see how an item veto could not stand on similar constitutional footing with these sorts of spending decisions by the President. Congress entrusts considerable spending power to the President by such fact evaluations. The delegation

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203. 56 Stat. 23, 50 U.S.C. App. Supp. II, § 901 (*as amended by* Inflation Control Act of October 2, 1942, 56 Stat. 765, 50 U.S.C. App. Supp. II, § 961).

204. Yakus v. United States, 321 U.S. 414, 420 (1944).

205. *Id.* at 424-25.

206. *Id.*

of budgeting authority by the "Gramm-Rudman-Hollings" Act of 1985[207] perhaps best indicates the comparison.

Under this 1985 Act, Congress set a maximum deficit amount for federal spending over a period of five years.[208] If in any fiscal year the budget exceeded the maximum by more than a prescribed amount, the Act required across-the-board cuts in federal spending to reach the target deficit level.[209] The Comptroller General, who is nominated by the President,[210] was to determine and report to the President the type and extent of budget reductions.[211] A sequestration order issued by the President would then automatically mandate those reductions unless, within a specified time, Congress legislated reductions obviating the need for the sequestration order.[212]

The Act in its original form was held unconstitutional because the responsibility for execution of the Act was effectively taken out of the President's hands and put into Congress's by virtue of its de facto control over the Comptroller General.[213] However, a version which eliminated the Comptroller General's executive role in the process automatically took effect pursuant to the Act's own provision[214] and remains in effect today.

Here, as with other exercises of presidential decision making in the spending field, Congress had already made the important policy decisions about when, and by how much, to reduce the budget.[215] The reduction powers were and continue to be effective only to the extent that they advance congressional policies.[216] Within those policy boundaries, however, the President

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207. Public Debt Limit-Balanced Budget and Emergency Deficit Control Act of 1985 (Pub. L. No. 99-177) (codified in relevant part at 2 U.S.C. §§ 901-907 (Supp. III 1985)) (*held* unconstitutional in part, Bowsher v. Synar, 478 U.S. 714 (1986)); *see* Wolfson, *supra* note 5, at 848.

208. *Bowsher*, 478 U.S. at 717.

209. *Id.* at 717-18.

210. *Id.* at 718. The Comptroller General's nomination must, however, be confirmed by the Senate. *Id.* at 727-28.

211. *Id.* at 718.

212. *Id.*

213. *Id.* at 721-34.

214. *Id.* at 734-36 (the Act contained its own "fallback" deficit reduction process which simply eliminated the Comptroller General's executive role in the process).

215. Wolfson, *supra* note 5, at 848.

216. *Id.*

continues to exercise enormous discretion. In short, the constitutional justifications for these instances of executive budgeting assistance and for an item veto seem indistinguishable. Indeed, Congress's increasingly conspicuous abdication of spending responsibilities in recent years suggests that even such broad delegations of congressional spending power have, like impoundment, proved inadequate in controlling national spending and that the case for an item veto has become compelling.

3. *Suspension or Non-expenditure in Individual Cases*

Finally, Congress has authorized the President to make fact-specific decisions as to the appropriateness of appropriations enforcement in a particular case, thereby giving him what amounts to a congressionally sanctioned, if situationally limited, power to impound.[217] Congress has allowed the President to defer or spend only part of appropriated funds when to do so better serves the appropriation's purpose and is possible without threatening a program's effectiveness.[218] Congress has also allowed the President to suspend money for a program that is no longer achieving its purpose.[219] This statutory power to withhold funding is, like the foregoing exercises of presidential discretion in making spending decisions limited by congressional policies.[220] Congress merely recognizes by authorizing such executive decsion-making that, since it budgets well in advance and necessarily relies on occasionally faulty agency estimates, Congress

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217. *Id.* at 850. As early as the 1920, presidents had impounded funds which were no longer necessary for, or appropriate to, achievement of the purposes for which Congress had made them available. Note *supra* note 27, at 1508. Impoundments of this type were given statutory support when Congress passed the Antideficiency Act of 1950. *Id.* (citing 31 U.S.C. § 665(c) (1970)) (Congress apparently had no objection to this type of impoundment between the 1920's and passage of the 1950 Act. *Id.* at 1509). The Act authorized the Bureau of the Budget to impound in order to "provide for contingencies, or to effect savings whenever savings are made possible" by increased efficiency of agency operations, changed requirements, or other unanticipated developments. *Id.* at 1509. Since the Act's passage, congressionally supported impoundments of this type, so long as they do not interfere with achievement of an appropriation's goals and involve non-expenditure of only those funds in excess of the funds necessary to achieve a program's purpose, *Id.* at 1508-09. Furthermore, despite their impoundment-like nature, these sorts of non-expenditures probably do not fall within the statutory control of the Budget and Impoundment Control Act of 1974. *See supra* note 128.

218. *Id.*

219. *Id.*

220. *Id.* at 850-51.

cannot accurately gauge, at the time an appropriation is made, whether the appropriation will continue to serve the purpose for which it was authorized.[221] Like the President's authority to allocate and reallocate lump sums and to effect budget reductions based on his own judgment, these spending decisions accord the President no less spending power than would an item veto. The constitutional justifications for these exercises of executive discretion, too, seem indistinguishable from those for an item veto.

IV. CONCLUSION

The line-item veto is more than a political issue. It is more than an issue to be cavalierly disposed of by a neat conclusion that the item veto would either absolutely violate or absolutely restore the separation of powers principle envisioned by the Constitution's Framers. The Supreme Court has consistently interpreted that principle, as applied to the power balance between the executive and legislative branches, as one of interdependence.[222] The principle has, moreover, no real meaning except in a practical context, and is one the application of which is evolving constantly.

The foregoing comparisons of an item veto to other, func-

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221. *Id.* at 850.

222. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 121 (1976) (the Framers did not contemplate a "hermetic sealing-off of the three branches of Government from one another [as this] would preclude the establishment of a Nation capable of governing itself effectively"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (separation of powers is to be taken in a limited sense, recognizing the partial agency of each in the others—"[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed power into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."); United States v. Nixon, 418 U.S. 683, 707 (1974); Nixon v. Administrator of Gen. Services, 433 U.S. 425, 443 (1977) (citing United States v. Nixon, 418 U.S. 683, 711-12) (broadly stated, the Court's two-prong separation of powers inquiry focused on (1) the extent to which action by one branch prevented another branch "from accomplishing its constitutionally assigned functions," and, if that potential for disruption existed, (2) whether "that impact [was] justified by an overriding need to promote objectives within the constitutional authority" of the acting branch); Nixon v. Fitzgerald, 457 U.S. 731, 753-54 (1982).

These cases refer to the balance of power between branches exercising powers granted by separate Articles of the Constitution. It seems, however, their emphasis on interbranch cooperation applies, *a fortiori*, where, as in an exercise of item veto power, the branches act pursuant to powers granted by the same article. Placing counteractive powers within the same article was seemingly designed to ensure such branch interdependence.

tionally similar exercises of executive discretion not to spend should demonstrate that the constitutional case for a line-item veto is by no means frivolous. Supporters find the case compelling. Therefore, even a hesitant president, could readily confront the issue by choosing to veto those portions of an appropriation bill which he perceives to be wasteful or excessive. Although such presidential action would surely add to the tension between the executive and legislative branches, we at least will know more definitively whether the item veto proposition is anything more than a fit subject for law review articles.

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