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NOTE

THERE IS NO JOY IN D.C., THE MIGHTY COURT STRUCK OUT: AN ANALYSIS OF *CLINTON V. CITY OF NEW YORK*, THE LINE ITEM VETO ACT AND THE COURT'S FAILURE TO UPHOLD CONSTITUTIONALLY LEGITIMATE MEANS TO A VIABLE END

I. INTRODUCTION

Scholars and leading political figures touted the advantages of the line item veto for decades before Congress enacted the Line Item Veto Act of 1996 ("Act").[1] While rampant federal spending, a mounting national debt, and a Republican *coup de ete* in 1994 ensured the Act's passage,[2] its constitutionality was attacked from the outset. Shortly after being signed into law, the Act suffered a challenge from the National Treasury Employees Union claiming that the Act compromised its ability to influence favorable legislation that

1. Anthony R. Petrilla, Note: *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469, 474 (1993) (discussing the political impetus leading to the consideration of a federal line item veto statute). S*ee also* Line Item Veto Act of 1996, Pub. L. No. 104-130, § 3, 110 Stat. 1211 (codified at 2 U.S.C. §§ 691-692 (Supp. III 1997).

2. Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. 1605, 1607 (1997). *See also* Petrilla, *supra* note 1, at 469; Steven Erlanger, *Inflation and Unpaid Haunt Russia,* N.Y. TIMES, Feb. 14, 1994, at A9 (quoting Sen. Everett M. Dirksen). Also note that in 1994, the year when the real momentum had begun regarding a line item veto-like reform and two years before the passage of the Line Item Veto Act, the deficit was projected to hit $322 billion, and the national debt was to reach $4.2 trillion. *Id. See also* OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOV'T: FISCAL YEAR 1994 (1993); BUREAU OF THE CENSUS, U.S.A. STATISTICS IN BRIEF 1992: A SUPPLEMENT (1993); H.R. CONF. REP. NO. 104-491, at 15 (1996) (describing the growing national debt as "astonishing").

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would benefit its constituency.[3] The Union brought its complaint to the D.C. circuit, challenging the constitutionality of the Act; the case was dismissed because the issue was not yet ripe.[4] Certain members of Congress also challenged the Act and brought suit on the ground that it deprived them of their rights as legislators.[5] The Supreme Court turned them away as well, holding that they did not have standing to bring suit.[6] In *Clinton v. City of New York*,[7] however, the Court finally addressed the constitutional objections to the Act on their merits and struck it down as an unconstitutional violation of the Presentment Clause.[8]

This Note examines the Court's reasoning in *Clinton v. City of New York.* Following this brief introduction, Section II of this note examines the history leading up to the Court's decision in *Clinton.* First, the political events leading to passage of Act are investigated; [9] second, a legislative analysis is offered, focusing on the exact nature of the powers granted to the President under the Act;[10] third, a case history of *Clinton* is established;[11] and fourth, a brief examination of the history and meaning of the Presentment Clause is given.[12] Section III is a discussion of the majority, concurring and dissenting opinions in *Clinton*.[13] Section IV of this Note provides the author's analysis of the Act's procedures and consequences as related to the Presentment Clause and Separation of Powers principles, and further discusses the fate of the line item veto following *Clinton*.[14]

In conclusion, it is argued that the *Clinton* Court misread the Act. Contrary to the belief of the majority, the statute did not confer new and sweeping powers or threaten individual liberty.[15] The Court was distracted by the political hype and imaginary evils of the line item veto. Had the Act authorized the President to "decline to spend" rather than "veto," as previous statutes had authorized him to do, the Court likely would have followed its

3. National Treasury Employees Union v. United States, 101 F.3d 1423, 1425 (D.C. Cir. 1996) (the federal employees' union brought suit claiming the Line Item Veto Act was unconstitutional).

4. *Id.*

5. Raines v. Byrd, 521 U.S. 811, 815-16 (1997) (holding that members of Congress who brought the suit did not have standing to challenge the constitutionality of the Act).

6. *Id.* at 830.

7. Clinton v. City of New York, 118 S. Ct. 2091 (1998).

8. *Id*. at 2104.

9. *See infra* notes 19-40 and accompanying text.

10. *See infra* notes 41-49 and accompanying text.

11. *See infra* notes 50-60 and accompanying text.

12. *See infra* notes 61-65 and accompanying text.

13. *See infra* notes 66-158 and accompanying text.

14. *See infra* notes 159-256 and accompanying text.

15. *Clinton*, 118 S. Ct. at 2108-09 (Kennedy, J., concurring).

own precedent and upheld the Act.[16] The *Clinton* Court was so concerned with the apparent textual ramifications of the Act and its title that it failed to give proper context to a congressional attempt to police itself from decades of deficit spending[17] and restore the balance of power the Founding Fathers envisioned.[18]

II. BACKGROUND

A. Political History

In the years leading up to the passage of the Line Item Veto Act of 1996,[19] annual budget deficits and rampant federal spending had created a feeling that

16. *Id.* at 2118 (Scalia, J., dissenting).

17. Devins, *supra* note 2, at 1605.

18. *Id.* at 1610. Those who claim the line item veto inappropriately shifted power toward the President should remember that the 1974 Budget Impoundment Act, which is often cited as a cause of recent deficit spending, was a tremendous shift of power away from the Executive. *Line-Item Veto: Courting a Better Way: Congress Ought to Restore This Pork-busting Power*, CINCINNATI ENQUIRER, July 2, 1998, at A20 [hereinafter *Line Item Veto: Courting a Better Way*].

19. The Line Item Veto Act §691 provides:

(a) In general

Notwithstanding the provisions of subchapter I and II of [The Impoundment Control and Line Item Veto Chapter], and subject to the provisions of this subchapter, the President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole—

(1) any dollar amount of discretionary budget authority;

(2) any item of new direct spending; or

(3) any limited tax benefit;

if the President –

(A) determines that such cancellation will –

(i) reduce the federal budget deficit;

(ii) not impair any essential Government functions; and

(iii) not harm the national interest; and

(B) notifies the Congress of such cancellation by transmitting a special message, in accordance with section 691a of [Title 2], within five calendar days (excluding Sundays) after the enactment of the law providing the dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit that was cancelled.

Identification of cancellations

(b) In identifying dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits for cancellation, the President shall –

(1) consider the legislative history, construction, and the purposes of the law which contains such dollar amounts, items, or benefits;

(2) consider any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information; and

(3) use the definitions contained in section 691e of [Title 2] in applying this subchapter to the specific provisions of such law.

(c) Exception for disapproval bills.

the budget and the everyday appropriations process was spinning out of control.[20] This political and economic reality prompted many economists, government leaders and, most frequently, political candidates to call for affirmative steps to reduce budget shortfalls and deficit spending.[21] Many saw the presidential line item veto as a necessary weapon to restore some measure of fiscal discipline inside the Beltway.[22]

Years before the line item veto was enacted on the federal level, many candidates for political office had campaigned in support of a line item veto.[23] During the 1980s, President Ronald Reagan actively campaigned for a presidential line item veto to cut "wasteful spending."[24] President Reagan lobbied for an executive power similar to that exercised by forty-three of our nation's fifty governors. Like the federal line item veto power the President would eventually receive, line item veto authority of state governors also came under constitutional attack.[25]

In Iowa, Governor Ray used his line item veto power to excise particular sections from five separate appropriation bills.[26] State senator Rush filed suit claiming that the items vetoed were not items at all, rather, they were non-severable provisos or limitations and not subject to veto.[27] In *Rush v. Ray*, the Iowa Supreme Court held that the line item veto is a negative power that does not permit an executive to legislate by distorting legislative intent.[28] Hence,

> The authority granted by subsection (a) of this section shall not apply to any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit contained in any law that is a disapproval bill as defined in section 691e of this title.

2 U.S.C. § 691 (Supp. III 1997).

Section 692 of the Line Item Veto Act covering expedited appeal will be noted when appropriate.

20. *See* Petrilla, *supra* note 1, at 469.

21. *See* Devins, *supra* note 2, at 1609; *see also* CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 25 (Ed Gillespie & Bob Schellhas eds., Republican National Committee 1994) [hereinafter CONTRACT WITH AMERICA].

22. Damian C. Shammas, Casenotes; *Article I, Section 7, Clause 2 – Presentment Clause – A Federal Statute that Authorizes the President of the United States to Render Duly Enacted Items of New Direct Spending and Limited Tax Benefits Without Legal Force or Effect Violates the Presentment Clause* – Clinton v. City of New York, *118 S. Ct. 2091* (1998), SETON HALL CONST. L.J. 687, 688-89 (Spring 1999). *See also* Michael Gerhardt, *The Bottom Line on the Line Item Veto Act of 1996*, 6 CORNELL J.L. & PUB. POL'Y 233, 235 (citing 135 CONG. REC. S614 (daily ed. Jan. 25, 1989) (statement of Sen. Dixon); 142 CONG. REC. S2929, S2962 (1996) (statement of Sen. Lott); 142 CONG. REC. S2960 (1996) (statement of Sen. Gramm)).

23. Devins, *supra* note 2, at 1605.

24. *Id.*

25. Rush v. Ray, 362 N.W.2d 479 (Iowa 1985) (ruling on a challenge to Iowa's line item veto statute).

26. *Id*. at 480.

27. *Id*. at 480-81.

28. *Id*. at 482.

the court limited the Governor's line item veto authority so that its execution did not interfere with the intent of the entire bill.[29]

While *Rush* shed light on the subject in general, the Act that was passed at the federal level differed from state versions significantly.[30] This legislative appeal for fiscal responsibility at the federal level did not come about overnight, but the mid-1990s brought about a watershed event. No concerted effort had ever taken place like that which occurred in 1994.[31] Many Republican candidates for the House of Representatives in 1994 campaigned on the theme of smaller government, lower taxes, and fiscal responsibility.[32] The centerpiece of this strategy was the "Contract with America."[33] The "Contract with America" focused on ten points of action,[34] and one of these ten points was the line item veto.[35] A line item veto combined with a balanced budget agreement was essential to the goal of restoring budget surpluses.[36]

As a result of the 1994 election, the Republicans took over both houses of Congress,[37] and the Line Item Veto Act soon followed.[38] President Clinton, a supporter of the line item veto,[39] then reaped the fruits of the legislative labor that numerous Presidents of eras past desired: line item veto authority.[40]

29. *Rush*, 362 N.W.2d at 482-83. The power to excise can only be used when striking severable items from the rest of a bill.

30. Most state line item veto statutes allow the governor to strike provisions before becoming law. Under the federal Line Item Veto Act, *see supra* note 19, the President must first sign/pass the bill, in its entirety, into law then "cancel" the provisions that are subject to his "line item veto" authority. *See* 2 U.S.C. § 691(a).

31. *See* CONTRACT WITH AMERICA, *supra* note 21, at 19.

32. *Id.*

33. NEWT GINGRICH, TO RENEW AMERICA 116 (1995).

34. *Id.*

35. *Id.*

36. It has further been stated:

> A line item veto would restore the balance between the President and Congress . . . . By itself a line-item veto would not solve the deficit problem over night. But it would move us toward fiscal responsibility. It would enable the President to slash the pork residing in the federal budget. It would also allow the Congress to disagree with the President. The Congress could restore spending cuts by the President, if it thought the President's package of rescissions was inappropriate.

See CONTRACT WITH AMERICA, *supra* note 21, at 35.

37. Devins, *supra* note 2, at 1605.

38. *See* Louis Fisher, Symposium, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 1001 (1999).

39. Devins, *supra* note 2, at 1605.

40. The power included the power to cancel "any dollar amount of discretionary budget authority, any item of new direct spending, and certain limited tax benefits." *Id.*

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B. Legislative History

The appeals made to Congress by Presidents Reagan and Bush in the late 1980s were nothing new.[41] Presidents had argued for line item veto authority for over one hundred years,[42] and consideration of a line item veto in Congress began as far back as 1938.[43] These proposals did not, however, receive serious consideration until 1984.[44] At that time, the Senate proposed a statute requiring every appropriation be divided into separate bills, thus accomplishing the goals of line item veto legislation.[45] The proposal was never voted on, however, because of a Senate filibuster.[46] However, the calls for greater institutionalized fiscal reform did not end there. With political pressure escalating as feverishly as deficit spending, dozens of proposed bills and constitutional amendments addressing the line item veto or similar measures were introduced in the late 1980s and early 1990s.[47] Nevertheless, no substantial action was taken until 1996.[48] Despite considerable popular support, serious questions were raised about the authority the Act granted to the President.[49]

41. The President had no formal budget responsibilities prior to 1921; however, the Budget and Accounting Act of 1921, enacted due to the large debt accumulated from World War I, required the President to submit a formal budget proposal. Although Congress was free to alter, add, or subtract from any of the recommendations, the Act finally gave the President a recognized stake in the budgetary process. *Id.* at 1610-11. *See also* The Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20.

42. Devins, *supra* note 2, at 1605.

43. Michael G. Locklar, Comment, *Is the 1996 Line-Item Veto Constitutional?*, 34 HOUS. L. REV. 1161, 1163-64 (1997).

44. *Id.*

45. *Id.*

46. *Id.* at 1164.

47. *Id*.

48. Locklar, *supra* note 43, at 1164-65.

49. Devins, *supra* note 2, at 1605. Related to this topic, but outside of the narrow "line item veto" discussion, was a debate concerning presidential impoundment that raged for years. Throughout our nation's history, presidents have "impounded" appropriated funds—with or without specific legislative authority. *See* Locklar, *supra* note 43, at 1169. From Jefferson to Nixon, presidents have impounded appropriated funds for a variety political and/or policy reasons. *See generally id*. Thomas Jefferson was the first to refuse to spend appropriated funds because he considered the appropriation unnecessary. *See* Cathy S. Neuren, Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 695 (1984). President Nixon made it a common practice to impound billions of dollars worth of appropriated funds relating to domestic programs. *See Clinton*, 118 S. Ct. at 2117 (Scalia, J., dissenting) (Scalia touts President Nixon as the "Mahatma Ghandi" of all impounders). These presidential prerogatives helped spark the passage of the Impoundment Control Act of 1974, Pub. L. No. 93-344, Title X, 88 Stat. 332, in an attempt to impede any misuse of the power that may violate the balance of power principles set forth in the Constitution. *See* Locklar, *supra* note 43, at 1171; *see also* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 613 (1838). The *Kendall* Court attempted to limit the use of impoundment,

C. Case History

Clinton v. City of New York[50] was not the first constitutional challenge to the Act. The first case was *National Treasury Employees Union v. United States*.[51] In that case, the Union claimed that the Act compromised its ability to influence legislation favorable to its members.[52] The Supreme Court never decided the merits of the case, ruling that the plaintiffs had not suffered a concrete injury and that the Union's complaint and concern was not a case and controversy under Article III.[53]

The second challenge to the Act came from members of Congress, led by the senior Senator from West Virginia, Robert Byrd. In *Byrd v. Raines*,[54] the district court held that the Act violated the Presentment Clause of the Constitution.[55] The Supreme Court granted certiorari on expedited appeal.[56] Rehnquist, writing for the Court, held that the individual members of Congress who brought the suit had not suffered a clearly identifiable, concrete injury for which relief could be granted, and thus lacked standing to maintain the suit.[57]

Since the Act's passage, President Clinton had cancelled eighty-two items in eleven laws passed by the Congress.[58] However, Congress reinstated thirty-eight of those provisions over the President's veto.[59] Two of the aforementioned cancellations led to the legal challenges to the Act eventually decided in *Clinton*.[60]

holding that when Congress allocates money for a specific purpose, the Postmaster General could only perform the ministerial function to spend it. *See id.* Although impoundment has been employed for centuries, it has not been totally vilified and has been limited by the court. *See* Train v. City of New York, 420 U.S. 35 (1975). Hence, other attempts to curb Congress' huge appetite for spending had been attempted, yet failed. *See, e.g.*, Devins, *supra* note 2, at 1614-16 (noting that the Gramm-Rudman-Hollings Act failed to discipline Congress and even higher deficits followed). As a result, Congress took more aggressive action in 1996 to cut the deficit and control runaway spending. *See* Devins, *supra* note 2, at 1605.

50. *Clinton*, 118 S. Ct. at 2091.

51. National Treasury Employees Union v. United States, 101 F.3d 1423, 1425 (D.C. Cir. 1996).

52. Locklar, *supra* note 43, at 1191. *See also* National Treasury Employees Union, 101 F.3d at 1426.

53. Locklar, *supra* note 43, at 1191.

54. Byrd v. Raines, 956 F. Supp. 25, 27 (D.C. Cir. 1997).

55. *Id*. at 27, 38.

56. *Raines*, 521 U.S. 811.

57. *Id*. at 829.

58. WILLIAM N. ESKRIDGE ET AL., LEGISLATION 36 (1997).

59. *Id*.

60. *Clinton*, 118 S. Ct. at 2095.

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D. The Presentment Clause

The Presentment Clause is central to the majority's decision in *Clinton*. The Constitution mandates that every bill shall, before it becomes law, pass both Houses of Congress[61] and be presented to the President of the United States.[62] The Framers made it paramount and absolutely essential to the legislative process that legislation be presented to the President.[63] In *INS v. Chadha*, the Supreme Court announced that presentment to the President was so fundamental that special pains were taken to assure that the requirement could not be circumvented.[64] Furthermore, it was clear the Framers believed the Presentment Clause would provide an executive check on congressional power.[65]

III. CLINTON V. CITY OF NEW YORK

A. Summary of the Majority Opinion in Clinton v. City of New York

> "Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind."
>
> - Hugo L. Black (1970)

1. Justice Stevens' Majority Opinion

Justice Stevens delivered the opinion for the Court in *Clinton*, holding that the Line Item Veto Act violated the Presentment Clause by departing from the "finely wrought" constitutional procedure for enacting law.[66] The *Clinton* Court first addressed the justiciablity issue, which had prevented it from deciding a previous challenge to this statute one year earlier in *Raines v. Byrd*.[67] The Court ruled that the appellees[68] in this case had standing to

61. *See* U.S. CONST. art. I, § 7, cl. 2.

62. *Id.*

63. *See id.* at cl. 3.

64. Locklar, *supra* note 43, at 1176 (quoting INS v. Chadha, 462 U.S. 919, 947 (1983)).

65. J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 457 (1990). *See also* Locklar, *supra* note 41, at 1176 (quoting THE FEDERALIST NO. 73, at 492, 494 (Alexander Hamilton) (J. E. Cooke ed., 1961)). Alexander Hamilton stated that:

> If even no propensity had ever discovered itself in the legislative body to invade the rights of the executive, the rules of just reasoning and theoretical propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self defense.

66. *Clinton*, 118 S. Ct. at 2107.

67. *Raines*, 521 U.S. at 811 (holding that the members of Congress who brought suit did not have standing to challenge the constitutionality of the Line Item Veto Act).

68. *Clinton*, 118 S. Ct. at 2092. The appellees in this case were consolidated from two separate actions. The plaintiffs in the first case included the City of New York, two hospital associations, one hospital, and two unions representing health care employees. The second case

challenge the Act's constitutionality.[69] The Court concluded the appellees had suffered the requisite "immediate, concrete injury" to establish standing.[70]

On August 11, 1997, President Clinton cancelled an "item of new direct spending" and a "limited tax benefit" that prompted the two constitutional challenges examined in *Clinton*.[71] The first cancelled item, § 4772(c) of the Balanced Budget Act,[72] relieved New York of approximately $2.6 billion in tax liability.[73] The President complied with the procedural requirements of the Act.[74] Further, Congress failed to pass a disapproval bill; consequently, the cancelled item was not reinstated. The *New York* appellees then filed suit against the President and other federal officials.[75]

The President also cancelled § 968 of the Taxpayer Relief Act of 1997, which permitted qualified processing facilities and food refineries to defer capital gains taxes from the sale of their facility or refinery to a farmers' co-

involved the Snake River farmers' co-op and one of its individual members. For the purposes of this consolidated case, they will all be uniformly referred to as "Appellees." *Id.* at 2097.

69. *Id*. at 2095.

70. *Id*. at 2099. The Court held that New York had a multibillion-dollar contingent liability eliminated. Thus the state suffered an "immediate, concrete injury" the moment the section was cancelled by the President. *Id.* The Court additionally ruled that under New York statutes, the city and the appellee health care providers would be assessed by the state to recoup the state's losses. Therefore, the appellees have the same potential liability as the state. *Id*. Furthermore, another cancellation inflicted "a sufficient likelihood of economic injury" on the *Snake River* appellees, thus establishing standing under precedents. *Id.* at 2100. *See* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971) (holding that probable economic injury is sufficient to satisfy Article III requirements).

71. Shammas, *supra* note 22, at 694.

72. C*linton*, 118 S. Ct. at 2095.

73. Shammas, *supra* note 22, at 694-95. *See also Clinton*, 118 S. Ct. at 2095. Shammas noted:

> Under Title XIX of the Social Security Act, the federal government transfers money to the states to aid in financing medical care for the indigent. Under the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, these federal subsidies are decreased by the amount of certain taxes that the states impose on health care providers. In 1994, the Department of Health and Human Services (HHS) informed the State of New York that some of its taxes were covered by the 1991 amendments, thereby obligating the state to return nearly $1 billion to the federal government. The state applied for a waiver, but HHS had not determined at the time of the passage of Section 4722(c) whether or not to grant it. The uncertain status of the state's waiver request prompted the state to lobby Congress for relief.

Shammas, *supra* note 22, at 694-95.

74. Shammas, *supra* note 22, at 694-95.

75. *Id*. *See also Clinton,* 118 S. Ct. at 2102, 2095-97. The New York appellees included the city of New York, two hospital associations, one hospital, and two unions that represented the health care employees. *See id.* at 2097.

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op.[76] Congress again failed to pass a disapproval bill, and the *Snake River* appellees soon filed suit.[77] Due to these events, the *Clinton* Court held that the appellees in both aforementioned cases had suffered sufficient and concrete injuries to maintain their respective suits, which were later consolidated.[78] Justice Stevens then proceeded to decide the case on its merits.[79]

Construing the language of the Act itself, the Court found the authority granted to the President to be overly broad.[80] The Court reiterated the force of the statute, whereby the President had the power to "cancel in whole" three types of provisions after he or she has signed the bill into law.[81] The President could cancel "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."[82] The Court stated the *New York* case (one of the two cases joined here) clearly involved an item of new direct spending, and the *Snake River* (the other of the two cases joined) case involved a limited tax benefit.[83] The Court acknowledged the President acted within his power under the Act by canceling the above stated provisions,[84] but reasoned that the President amended two Acts of Congress by using his cancellation authority[85] and that any repeal of a statute passed by Congress must conform with Article I.[86] Since no provision in the Constitution

76. Shammas, *supra* note 22, at 695-96. *See also Clinton*, 118 S. Ct. at 2096; H.R. REP. NO. 105-148, at 420 (1997); 141 CONG. REC. S18739 (Dec. 15, 1995). The Taxpayer Relief Act of 1997 provides in pertinent part:

> For purposes of this subsection, the term 'qualified refiner or processor' means a domestic corporation – (A) substantially all of the activities of which consist of the active conduct of the trade or business of refining or processing agricultural or horticultural products, and (B) which during the 1-year period ending on the date of the sale, purchases more than one half of such products to be refined or processes from – (I) farmers who make up the eligible farmers' cooperative which is purchasing stock in the cooperation in a transaction to which this subsection is to apply.

The Taxpayer Relief Act of 1997, 26 U.S.C. § 968(g).

77. Shammas, *supra* note 22, at 696. *See also Clinton*, 118 S. Ct. at 2102, 2097. Further, if § 968 had become law, the farmers' co-op and an individual, potential seller, Mike Cranney, a member, Director, and Vice Chairman of the co-op, would have been able to defer payment of capital gains taxes. *Id.*

78. *Clinton*, 118 S. Ct. at 2099.

79. *Id*. at 2102.

80. The Court found the language overly broad because it allowed the President to strike or cancel entire provisions at a time. *Id*.

81. *Id.* at 2103.

82. *Id*. at 2102. *See also* 2 U.S.C. § 691(a) (Supp. III 1997).

83. *Clinton*, 118 S. Ct. at 2096-97.

84. *Id.* at 2102.

85. *Id*. at 2102. The two bills referenced are the Balanced Budget Act and the Taxpayer Relief Act. *Id*.

86. *Id*. (quoting *Chadha*, 462 U.S. at 954).

allows the President to amend or to repeal statutes, the Court held the Act was unconstitutional.[87]

The Court viewed the Act as distorting the legislative process set forth by the Founding Fathers.[88] The Court insisted that the President, based on the recognized powers granted to him in the Constitution, is authorized either to veto the entire bill and send it back to Congress with his objections[89] or sign the measure into law in its entirety.[90] The Court stated that cancellation power provided in the Act was not akin to the veto and return process described in Article I, § 7.[91] Hence, based on its historical and textual analysis, the Court concluded that the power to enact statutes must be taken very seriously and "exercised in accord with a single, finely wrought and exhaustively considered procedure."[92]

The majority then faced the issue at the heart of the Government's argument. The Government (appellant) contended that the presidential cancellations at issue in this case were not tantamount to an amendment or repeal of an already enacted statute, but rather were exercises of discretionary authority already granted to the President.[93] The Court disagreed and took issue with the Government's heavy reliance on *Field v. Clark*.[94] The *Clinton*

87. *Clinton*, 118 S. Ct. at 2103.

88. *Id*.

89. The Presentment Clause provides, in relevant part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. It after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

U.S. CONST. art. I, § 7, cl. 2.

90. *Clinton*, 118 S. Ct. at 2103.

91. *Id.*

92. *Id*. at 2104 (quoting *Chadha*, 462 U.S. at 951). *See also* 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940).

93. *Clinton*, 118 S. Ct. at 2105; Field v. Clark, 143 U.S. 649 (1892) (noting that the President under his discretionary authority was allowed to suspend spending on particular items in the Tariff Act of 1890).

94. *Clinton*, 118 S. Ct. at 2106; *Field*, 143 U.S. at 649 (holding that the Act Cong. Oct. 1. 1890, § 3, authorizing the President to suspend, "for such time as he shall deem just," the provisions of that act allowing the free importations of sugars, molasses, coffee, tea, and hides, as to any countries which impose upon the products of the U.S. duties which he "may deem to be

Court pointed to critical differences between this Act's cancellation authority and the power to suspend tariff exemptions that was upheld in *Field*.[95] The majority acknowledged that the President has traditionally enjoyed some statutory discretion and authority to decline to spend allocated funds.[96] Unlike previous statutes, according to the majority, the Act allowed the President unilaterally to change the text and substance of an already enacted statute.[97] The Court thus concluded there can be no such cancellation or repeal without first amending the Constitution.[98]

Many have argued that the Act fundamentally changed the balance of power between the executive and legislative branches by snatching the "purse strings" away from Congress and handing them to the President.[99] Kennedy's concurrence argued as much, and although the Court concluded that the President's actions were inconsistent with the Constitution,[100] it never formally decided the issues related to the balance of power, as the district court did. The Court stated, "[t]hus, because we conclude that the Act's cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court's alternative holding that the Act 'impermissibly disrupts the balance of powers among the three branches of government.'"[101]

The Court clearly indicated that it did not judge either the wisdom of the procedures authorized by the Act or the policy strengths or weaknesses of a line item veto in the abstract.[102] Instead, the Court addressed the specific procedures and consequences of the Act from a formalistic perspective, and in a manner whereby the framework set forth by the Act must conform with the "finely wrought" procedure insisted upon by the Constitution.[103]

reciprocally unequal and unjust," cannot be considered a delegation of legislative power, especially in view of the fact that, from the foundation of the government, Congress has frequently given the President similar discretion).

95. *Id*. at 2106. *See also Field*, 143 U.S. at 649.

96. *Clinton*, 118 S. Ct. at 2106. The Court recognized some discretion with the execution and implementation of allocated funds and/or tax measures, especially with respect to foreign trade.

97. *Id*. at 2106-07.

98. *Id.* at 2107.

99. Sen. Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297 (1998) (expounding the failures and faults of the Line Item Veto Act of 1996). It should be noted that Sen. Byrd opposed the legislation in the Senate, and later brought suit against the Act in 1997. *Id.*

100. *Clinton*, 118 S. Ct. at 2107.

101. *Id*. at 2108. (quoting City of New York v. Clinton, 985 F. Supp. 168, 179 (1998)).

102. *Id*. at 2107.

103. *Id.* at 2108. The majority also declared that if there is to be a different dynamic created between the Executive and the Legislature regarding the determination of the final text of a law, it must be done by constitutional amendment. *Id.*

2. Justice Kennedy's Concurrence

The Separation of Powers argument that the majority overtly bypassed was firmly espoused by Justice Kennedy in his concurring opinion.[104] Justice Kennedy stated the Constitution was, in part, designed to prevent concentrations of power.[105] One branch of government should not be able to control unilaterally entire aspects of the governing process.[106] Furthermore, Kennedy quoted the *Federalist Papers* stating "[w]hen the legislative and executive powers are in the same person or body, there can be no liberty."[107] Hence, Kennedy's contention was that the Act gave the Executive power expressly reserved for the Legislature.[108]

Almost defiantly, Kennedy further appealed to the Court's duty to uphold constitutional standards in the face of contemporary political pressures. He warned that if the Court waned from that responsibility, the liberty of the citizenry that the Separation of Powers was intended to protect would be dealt a harmful blow[109] if Congress, under political pressure,[110] were to surrender part of the legislative power of future Congresses.[111]

B. Summary of the Dissenting Opinions

> "We look to the history of the time of framing and to intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time."
>
> -William J. Brennan, Jr. (1985)

1. Justice Scalia's Dissent

Justice Scalia wrote a comprehensive rebuttal to the majority's holding that the parties in this action met all the standing requirements.[112] Scalia first claimed that the Court hastily disregarded the expedited appeal provision in the Act in order to rule on the merits.[113] He claimed that with the exception of

104. *Id*.

105. *Clinton*, 118 S. Ct. at 2109.

106. *Id*.

107. *Id*. (quoting THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961)).

108. *Id*. Kennedy declared that the undeniable effect of the Act was to give the President enhanced power beyond what the Framers would have endorsed. The fact that Congress voluntarily granted the President the powers in question was of no consequence. *Id.*

109. *Id*.

110. The line item veto. *See Clinton*, 118 S. Ct. at 2109; *see also* Freytag v. Commissioner, 501 U.S. 868, 880 (1991); *Chadha*, 462 U.S. at 942 n.13.

111. *Id*. at 2109.

112. *Id*. at 2110-14 (Scalia, J., dissenting).

113. Line Item Veto Act of 1996, 2 U.S.C. § 692 (1996).

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Mike Cranney (an appellee), a natural person, none of the other appellees fell within the statute as "individuals."[114] Scalia believed the Court ignored the plain language of the statute and without just cause afforded the appellees standing under the statute's expedited appeal provision.[115]

Scalia pointed out that for the Court to have Article III jurisdiction of the instant case, a plaintiff must allege a personal injury traceable to a defendant's unlawful conduct that is capable of being remedied by adjudication.[116] According to Scalia, the majority misinterpreted precedent.[117] Scalia argued

114. *Clinton*, 118 S. Ct. at 2110 (Scalia, J., dissenting).

115. *Id*. at 2111. Scalia further stated that, "[t]he only individual who has sued, thus the only appellee who qualifies for expedited review under § 692, is Mike Cranney. Since § 692 does not confer jurisdiction over the claims of the other appellees, we must dismiss them, unless we have jurisdiction under another statute." *Id.*

The Line Item Veto Act provides in pertinent part:

> (a) Expedited review
>
> (1) Any Member of Congress or any individual adversely affected by part C of Title X of the Congressional Budget and Impoundment Control Act of 1974 [2 U.S.C.A. §§ 691 to 691f] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part [2 U.S.C.A. §§ 691 to 691f] violates the Constitution.
>
> (2) A copy of any complaint in an action brought under paragraph (1) shall be promptly delivered to the Secretary of the Senate and the Clerk of the House of Representatives, and each House of Congress shall have the right to intervene in such action.
>
> (3) Nothing in this section or in any other law shall infringe upon the right of the house of Representatives to intervene in an action brought under paragraph (1) without the necessity of adopting a resolution to authorize such intervention.
>
> (b) Appeal to Supreme Court
>
> Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1) of subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 calendar days after such an order is entered; and the jurisdictional statement shall be filed within 30 calendar days after such order is entered. No stay of an order issued pursuant to an action brought under paragraph (1) of subsection (a) of this section shall be issued by a single Justice of the Supreme Court.
>
> (c) Expedited consideration
>
> It shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest extent the disposition of any matter brought under subsection (a) of this section.

2 U.S.C. § 692 (Supp. III 1997).

116. *Clinton*, 118 S. Ct. at 2111 (Scalia, J., dissenting). *See also Raines*, 521 U.S. at 818-19.

117. *Clinton*, 118 S. Ct. at 2112 (Scalia, J., dissenting). Scalia claimed that an authority the majority relies upon in deciding if the requisite injury was suffered, N.E. Fla. Ch., Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656 (1993), did not hold, as the majority claims, that harm to one's bargaining position is an "injury in fact." *Id.*

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that only one of the appellees had standing[118] but firmly believed the cancellations in question did not violate the Presentment Clause.[119]

Scalia explained that Article I, § 7 prevents the Executive from unilaterally canceling a law that Congress has not authorized him to cancel.[120] He claimed, however, that the Act did not violate Article I; rather, it was based on a long-standing tradition of allowing the President to cancel a law that Congress authorized him to cancel.[121] Scalia stated that the true issue in this case was not the Presentment Clause, as the majority claimed, but the Separation of Powers issue noted in *Field*.[122] Scalia criticized the majority for what he thought its opinion really represented – a fear that the Act had disrupted the balance of power between the respective branches of government and as a result, gave to the President a piece of law-making power traditionally held by the legislative branch.[123]

Scalia's major contention was that this "cancellation" process was not new. He cited numerous examples, dating back to the first Congress, in which the President was granted authority and discretion to withhold appropriated funds.[124] Scalia stated, "[t]here is not a dime's worth of difference between Congress's authorizing the President to cancel a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the Founding of the Nation."[125]

Scalia concluded with a poignant assertion that if the Act had authorized the President to "decline to spend" items of appropriation, there is no doubt such a measure would have been ruled constitutional. But since the word "cancel" is used, the majority became afraid of a constitutional erratum.[126] In other words, Scalia believed that the title of the Act, compounded with the

118. The *New York* appellees.

119. Thus, the *Snake River* appellees had no standing to bring the suit, and the Court did not have jurisdiction to resolve Snake River's challenge to the President's constitutional authority to cancel the "limited tax benefit." *Id*. at 2115. Although Scalia agreed that the *New York* appellees had standing to challenge the President's action because they did realize an immediate, concrete injury, he did not believe that the cancellation of § 4722(c) of the Balanced Budget Act amounted to a violation of the Presentment Clause. *Id.*

120. *Id*.

121. *Id*. at 2115. Justice Scalia points out that in *Field,* Congress passed a law authorizing the President to cancel certain trade restrictions. The Court upheld the constitutionality of that Act, and recognized previous precedent in allowing such power. *See also Field*, 143 U.S. at 690.

122. *Id*. at 2116. *See also Field*, 143 U.S. at 692.

123. *Clinton*, 118 S. Ct. at 2116 (Scalia, J., dissenting).

124. *Id*. at 2116-17.

125. *Id*. at 2116. Scalia further noted that Presidents have even claimed Executive authority to withhold appropriated funds without the consent of Congress. Although these attempts seem to have been thwarted in most cases by the Court's decision in *Train*, 420 U.S. 35 (1975) the Court still confirmed Congress' ability to confer discretion to the Executive to withhold appropriated funds for a specific purpose. *Id*. at 2117.

126. *Id*. at 2118.

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campaign pledges surrounding its introduction, had "succeeded in faking out the Supreme Court" into believing the Act violated the Presentment Clause.[127]

2. Justice Breyer's Dissent

Breyer did not challenge the Court's standing determination, but disagreed with the majority's conclusion that the Act violated the Presentment Clause and took on the Separation of Powers issue in his dissenting opinion.[128]

Breyer contended that the Line Item Veto Act represented a congressional attempt to give effect to some, but not all, expenditures and revenue-diminishing provisions of an enormous appropriations bill.[129] He further asserted this effort fully comported with the Constitution.[130] Breyer argued that because the modern budgetary process is so mammoth and complex, Congress can no longer subdivide each and every appropriation into separate bills.[131] The real issue, Breyer felt, was whether Congress could choose to create a contemporary solution (a line item veto) for a problem that did not exist in 1776.[132] Breyer maintained that the Court's previous holdings permitted interdependence and flexible relations between two branches of government in order to secure a "workable government."[133] Breyer quoted Justice Marshall in support of the functional notion that as the times and circumstances change, so may the measures a government adopts to remedy such circumstances.[134]

127. *Id.* Scalia further added that because he did not feel the *Snake River* appellees have standing in this case it is unnecessary to rule on the constitutional validity of the President's cancellation of § 968 of the Taxpayer Relief Act.

It should also be noted, that the process by which the Act authorized a "cancellation" was nothing more than a codification of a longstanding practice endorsed by the Court and our government since the founding of this nation. *Id.*

128. *Clinton*, 118 S. Ct. at 2118 (Breyer, J., dissenting).

129. *Id*.

130. *Id*.

131. *Id.* at 2119. Noting that logistically, the manner in which appropriation bills were passed two-hundred years ago, is no longer feasible.

132. Breyer stated that when our nation was founded the population was less than 4 million and now our population is upwards of 250 million. *Id. See also* U.S. DEPT. OF COMMERCE, CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, pt. 1, p. 8, pt. 2, p.1104 (1975); U.S. DEPT. OF COMMERCE, CENSUS BUREAU, 1990 CENSUS (noting that at our nation's founding the first budget outlays totaled approximately $4 million, whereas now the annual federal budget totals $1.5 trillion); OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1998.

133. *Clinton*, 118 S. Ct. at 2119 (Breyer, J., dissenting). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 597, 635 (1952) (Jackson, J., concurring).

134. *Clinton*, 118 S. Ct. at 2119 (Breyer, J., dissenting). Breyer quoted Justice John Marshall:

> To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by

The dissenters[135] did not feel the Act was in conflict with the literal text of the Constitution.[136] They argued a simple syllogism proved the fallacy of such a claim.[137] Furthermore, the dissent stated that, "[l]iterally speaking, the President has not 'repealed' or 'amended' anything. He has simply executed a power conferred upon him by Congress, which power is constrained in laws that were enacted in compliance with the exclusive method set forth in the Constitution."[138] Hence, the President followed the letter of the law[139] and exercised the authority it expressly permitted: he did not repeal the law, but rather executed it as the Executive.[140]

Breyer also engaged in a discussion concerning Separation of Powers principles.[141] In doing so, Breyer presented three questions: (1) Has Congress given the President the wrong kind of power? (2) Has Congress given the President the power to "encroach" upon Congress' own constitutionally reserved territory? (3) Has Congress given the President too much power, violating the doctrine of nondelegation? Breyer answered all three in the negative.[142]

Justice Breyer viewed Congress' delegation of power as altogether proper,[143] because he viewed the execution of that power as a normal executive function often delegated from Congress to the President.[144] Breyer asserted

immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.

See id. (quoting McCulloch v. Maryland, 4 Wheat. 316, 415 (1819)).

135. All three dissenters, Breyer, O'Connor, and Scalia joined in this section.

136. *Clinton*, 118 S. Ct. at 2120 (Breyer, J., dissenting).

137. The majority's syllogism is characterized as follows: Major Premise: The Constitution sets forth an exclusive method for enacting, repealing, or amending laws. Minor Premise: the Act authorizes the President to repeal or amend laws in a different way, namely by announcing a cancellation of a portion of a previously enacted law. *Id.*

138. *Id*. at 2121. *See also Field*, 143 U.S. at 693.

139. The Line Item Veto Act of 1996, 2 U.S.C. § 691.

140. *Clinton*, 118 S. Ct. at 2120 (Breyer, J., dissenting). Justice Breyer's dissent further pointed out that this was not the first time Congress had delegated to the President the power to deny force or effect of statutory language. *Id.* at 2121-22 (citing, e.g., 41 U.S.C. § 405b(e) which provides that "if the President determine[s]" that the regulations "would have a significant adverse effect on the accomplishment of the mission" of government agencies, "the requirement [to promulgate] the regulations . . . shall be null and void").

141. *Clinton*, 118 S. Ct. at 2123 (Breyer, J., dissenting).

142. *Id*.

143. *Id*.

144. *Id.* Breyer noted that "[c]onceptually speaking, it closely resembles the kind of delegated authority – to spend or not to spend appropriations, to change or not to change tariff rates – that Congress has frequently granted the President, any differences being in degree, not kind." Breyer reinforced the previous point by comparing this power to that of the presidential discretion to spend or not to spend appropriations or to change or not to change tariff duties. *See also Field*, 143 U.S. at 649. In sum, the delegations are only differences in degree and not in kind. *Clinton*, 118 S. Ct. at 2123 (Breyer, J., dissenting).

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that when the Court strikes down similar constitutional issues, the reasons are often attributed to the aggrandizement of power in one branch at the expense of another.[145] However, here, Congress retained the power to reinsert any section the President disallowed, or to insert the cancelled provision in any subsequent appropriations bill by a simple majority.[146] Thus, under the Act, the President's role was not aggrandized at the expense of Congress.[147]

Perhaps the Justice's most significant contribution to this constitutional controversy was his discussion of the "nondelegation" doctrine. The "nondelegation" doctrine prevents Congress from delegating solely congressional authority to the executive.[148] Breyer argued that no part of Congress' legislative power may be delegated *except* under the limitation of a prescribed standard, i.e., an intelligible principle.[149] The Act sought to satisfy this standard in three ways: (i) Procedurally, the Act forced the President to consider legislative history, construction, and intent before any cancellation was made;[150] (ii) Purposively, the Act intended to "eliminate wasteful spending and . . . special tax breaks;"[151] and (iii) Substantively, the President must be sure that prevention of a particular item must not have an adverse effect on the government's essential operation or national interest.[152] These standards are broad,[153] but the Court has routinely held congressional delegation of authority to the executive branch appropriate,[154] if "reasonable" and in the "public interest."[155]

Breyer admitted that this was a close constitutional issue. However, the means employed by the Act did not constitute enactment, repeal, or an amendment to an already duly enacted law. Moreover, the means employed did not violate the Separation of Powers or inappropriately shift lawmaking

145. *Id*. at 2124. *See also* Buckley v. Valeo, 424 U.S. 1 (1976); Bowsher v. Synar, 478 U.S. 714 (1986) (declaring congressional usurpation of execution power improper and unconstitutional).

146. *See* Line Item Veto Act of 1996, 2 U.S.C. §§ 691-692.

147. *Clinton*, 118 S. Ct. at 2124 (Breyer, J., dissenting).

148. *Id*. at 2125.

149. *Id*. *See also* United States v. Chicago, M., St. P & P.R. Co., 282 U.S. 311, 324 (1931).

150. *Clinton*, 118 S. Ct. at 2125 (Breyer, J., dissenting).

151. *Id*. *See also* H.R. CONF. REP. NO. 104-491, at 15 (1996).

152. *Clinton*, 118 S. Ct. at 2125 (Breyer, J., dissenting). *See also* 2 U.S.C. § 691(a)(A) (Supp. III 1997).

153. *Id*.

154. *See also* National Broad. Co. v. United States, 319 U.S. 190 (1943) (upholding the delegation authority given to the FCC as in the national interest and necessary); United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533, 537 (1939) (holding that if milk prices were deemed unreasonable, the Secretary could adjust said prices in lieu of a public interest).

155. *Clinton*, 118 S. Ct. at 2125-26 (Breyer, J., dissenting). Furthermore, judicial review of matters involving delegation to the President seems less important than reviewing powers granted to an agency because the President is held accountable to the electorate for the decisions made. *Id*. at 2128.

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power from Congress to the President.[156] Breyer agreed with Scalia that the title of the Act did not truly depict the powers it granted.[157] Thus, the Act merely represented an experiment that may or may not have made our government work better, but according to the dissenting justices' the Constitution clearly authorized "Congress and the President to try novel methods in this way."[158]

IV. ANALYSIS

On April 9, 1996, President Clinton signed the Line Item Veto Act.[159] The Act enabled the President to sign into law a comprehensive bill, then granted him the authority to prevent items[160] from having "legal force or effect,"[161] provided the cancellation "reduce[d] the Federal budget deficit," did "not impair any essential government functions" and did "not harm the national interest."[162]

For the purposes of this discussion, it will be assumed that the Court had jurisdiction and that all of the standing requirements were met.[163] It should be noted, however, that although *Clinton* will be remembered as the "line item veto case," its impact on the law of standing may be equally significant.[164]

156. *Id*. at 2131.

157. *Id.*

158. *Id*.

159. *See* Line Item Veto Act of 1996, Pub. L. No. 104-130 (1997).

160. 2 U.S.C. § 691 (chosen spending provisions and limited tax benefits).

161. 2 U.S.C. § 691(e)(4).

162. James I. Alexander, Note and Comment: *No Place to Stand: The Supreme Court's Refusal to Address the Merits of Congressional Members' Line Item Veto Challenge in* Raines v. Byrd, 6 J.L. & POL'Y 653, 653-55 (1998).

163. *See* William Funk, *Standing in the Supreme Court and Circuits: October Term 1997*, 51 ADMIN. L. REV. 343, 354 (1999). *See also Clinton*, 118 S. Ct. at 2110-31 (Scalia and O'Connor, however, dispute the standing credentials for the *Snake River* appellees). *Id.*

164. Shammas, *supra* note 22, at 732. Shammas stated:

> The Court has spawned an aberration to standing jurisprudence that will require substantial limiting or further development and refining in future cases. By finding that the Snake River appellees had standing to challenge the Act, the Court ignored standing precedents, especially the strikingly similar fact scenarios of Allen and Simon. In both cases, the Court refused to find standing based on a challenge to "the Government's tax treatment of a third party." While this similarity is sufficient, by itself, to deny standing, the majority instead relied upon equal protection cases and adopted a new standard, "harm to one's bargaining position." Moreover, the facts alleged by the Snake River appellees failed to demonstrate that they had personally suffered harm to their "bargaining position, or alternatively, that they had sustained even "a sufficient likelihood of economic injury." Despite the majority's conclusion that a finding of standing for the Snake River appellees was in accord with standing precedent and requirements, the unintended result of the Clinton Court's handling of the standing issue may be to allow future litigants with questionable credentials to gain standing.

Id. (citations omitted).

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A. The Presentment Clause and a Problem with Semantics

The central problem that the majority identified with the Act was that its procedures clashed with the "finely wrought procedures" of the Presentment Clause.[165] The Court was quick to point out that it was not ruling on the concept of a line item veto, *per se*, but rather its technical execution.[166]

In that context, a careful analysis of the procedures maligned by the majority exposes weaknesses in its holding. Principally, there is very little difference between the procedures prescribed by the Act and traditional congressional authorization of dollars to be spent on a particular item at the President's discretion.[167] Indeed, the majority would have likely viewed the law differently if it were instead named the "Decline to Spend Act of 1996."

Congress has been letting presidents "decline to spend" for two hundred years and the Court has endorsed these and other bold delegations of power.[168] For example, the Tariff Act of 1890 gave the President complete authority to suspend certain provisions of the Tariff Act if it was determined that other countries were imposing unreasonable duties upon the United States.[169] The Court also upheld this grant of discretion to the Executive in *Field*.[170] Moreover, executive agencies such as the Federal Communications Commission and the Environmental Protection Agency are delegated authority to spend billions of regulation dollars each year without congressional approval or the President's signature.[171]

In *Clinton*, the Court failed to recognize that although Congress cannot delegate the power to make a law, it can make a law to delegate a power.[172] If

165. *Clinton*, 118 S. Ct. at 2104.

166. *Line-Item Veto: Courting a Better Way: Power*, *supra* note 18, at A20. Sen. Dan Coats (R-IN) also remarked that the Court "decided on the basis of the procedure used, not on the basis of the principle involved." *Id*.

167. *Clinton*, 118 S. Ct. 2116 (Scalia, J., dissenting). Scalia also stated: "There is not a dimes worth of difference between Congress's authorizing the President to cancel a spending item, and Congress's authorizing money to be spent on a particular item at the Presidents discretion. And the latter has been done since the Founding of the Nation." *Id.* at 2116 (Scalia, J., dissenting).

168. Bruce Fein, *Profligacy Yes, Parsimony No*, WASH. TIMES, June 29, 1998, at A14. *See also A Big Day for Bacon*, GRAND RAPIDS PRESS, July 2, 1998, at A14. S*ee, e.g.*, Mistretta v. United States, 448 U.S. 361, 371-72 (1989).

169. *Clinton*, 118 S. Ct. at 2115 (Scalia, J. dissenting); *see also* Act of Oct. 1, 1890, § 3, 26 Stat. 612.

170. *Field*, 143 U.S. at 649) (upholding the constitutionality of the Tariff Act of 1890); s*ee also* Pub. L. 95-384, § 13(a), 92 Stat. 737 (Section 620(x) of the Foreign Assistance Act of 1961) Section 620(x) permitted the President to cancel certain provisions it he determined that the regulations would have an adverse effect on the accomplishment of the mission. Furthermore, the Court in *Field* gave an anthology of examples whereby the President had been conferred power by the Legislative branch to exercise such discretion.).

171. Fein, *supra* note 168, at A14.

172. *The Wrong Call on Line-Item Veto*, TAMPA TRIB., June 27, 1998, at 10.

it lacked such authoritative discretion, it could not give regulatory agencies the power to write rules.[173] Thus, it seems that the majority has placed its consternation and disapproval with this bill in the wrong categorical scheme.[174]

Historically, the Court has often legitimized the deferral of authority from Congress to the President,[175] and still other times Presidents have unilaterally sought more discretion[176] than they were granted,[177] but as the dissent pointed out, the effect of this Act was no different than what has been accepted by Congress, the President, and the Court for over one hundred years.[178] What is different about this case is that the Supreme Court misread the statute as conferring new and sweeping powers to the President.[179] In reality, however, the Supreme Court was duped by a campaign pledge and its worst fears. Had the Act authorized the President to "decline to spend," as previous statutes have, the Court likely would have upheld the Act.[180] It was this double standard employed by the Court, which made its holding so puzzling. In *Clinton*, the Court was so concerned with the apparent textual ramifications of the Act and the legislation's title that it failed to give proper context to a

173. *Id.*

174. *Clinton*, 118 S. Ct. at 2116 (Scalia, J., dissenting).

175. *Field*, 143 U.S. at 649.

176. Petrilla, *supra* note 1. (noting that Nixon impounded upwards of $18 billion in congressional appropriations and also used impoundments to kill entire programs). S*ee also* William F. Mullen, PRESIDENTIAL POWER AND POLITICS 67-69 (1976); Locklar, *supra* note 43, at 1170-71 (noting that presidents "from Grant to Johnson to Nixon" have sought presidential impoundments).

177. Some scholars argue that the second section of the Presentment Clause may already give the President line item veto power. The Presentment Clause provides:

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

See Sidak & Smith, *supra* note 65. The authors note that the reason the Presentment Clause, as instituted, was not to protect Congress, but rather to ensure the Executive played a vital role in the process. S*ee also* Stephen Glazier, *Reagan Already Has Line-Item Veto*, WALL ST. J., Dec. 4, 1987, at A14 (noting that President Bush contemplated a test case to determine if, in fact, he did already possess line item veto authority); Interview by Owen Ullmann and Ellen Warren of President George Bush, at the Office of the Press Secretary at the White House (July 25, 1989).

178. *Clinton*, 118 S. Ct. at 2116 (Scalia, J., dissenting). *See also* Act of Oct. 1, 1890, § 3, 26 Stat. 612.

179. *Clinton*, 118 S. Ct. at 2109 (Kennedy, J., concurring).

180. *Id*. at 2118 (Scalia, J., dissenting).

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congressional attempt to police itself from decades of deficit spending,[181] and conceivably restore the balance of power the Founding Fathers envisioned.[182]

The Court refused to deny Congress the power to write into any law that a particular provision would be effective only with the [P]resident's approval.[183] Ironically, that is exactly what Congress did with the Act.[184] In effect, Congress passed a law that put an asterisk next to every appropriation that referred to the earlier law providing for a presidential "OK."[185] In addition, Congress retained the power to insert language in any appropriation exempting it from the line item veto statute, so no law-making power was lost to the executive branch.[186]

Thus, semantics and a fear of a campaign pledge effectively scared the Court away from allowing a novel experiment.[187] The Court may have believed the Act's title implied an unconstitutional means to an end; but the Act expressly comported with the Constitution in an attempt to reform many of the indulgences of modern-day "logrolling."[188] The Framers intended the presidential veto to serve two functions: to protect the President from the encroachment of the Legislative branch, and to protect the country from harmful laws deemed appropriate by the majority.[189] The line item veto is consistent with both of these goals. First, it does not usurp any legislative function that the Court has not allowed before. Second, it would aid the attempt to institutionalize fiscal reform of a legislative process often dominated by "logrolling," "back scratching," and "pet projects."[190]

The line item veto is a vital piece of the long-term budget deficit-solving puzzle. If even symbolic, the line item veto represents the political will to cut deficit spending, and permanently restore fiscal responsibility to the nation's affairs.[191]

181. *See* Devins, *supra* note 2, at 1607 (stating that Congress may have wanted to take the political onus off of them and allow someone outside the internal legislative process be a check on their appropriation decisions. Thus, individual congressmen can benefit, politically, from balanced budgets without making the tough decisions).

182. *Id*.

183. *See The Wrong Call on Line-Item Veto*, *supra* note 172, at 10.

184. *Id.*

185. *Id.*

186. *Id.*

187. *See generally* CONTRACT WITH AMERICA, *supra* note 21.

188. *Clinton*, 118 S. Ct. at 2131 (Breyer, J., dissenting).

189. Sidak & Smith, *supra* note 65, at 446.

190. *Id*.

191. *Id*. This argument withstands contemporary criticism, if only for the fact that government spending is at an all time high. Currently, it could be argued that budget surpluses are, in part, the result of favorable economic conditions and not that of a deep-rooted resolve to permanently control deficit spending. Thus, it could be argued that the only long-term solution to

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B. Separation of Powers

The passage of the Act was a gallant attempt to employ measures of political and fiscal accountability that Congress had disregarded in the past.[192] In creating such a mechanism, many argue that the Act actually restored the proper balance of power to its rightful disposition.[193] Those who claim the line item veto inappropriately shifted power toward the President should remember that the 1974 Budget Impoundment Act, which is often cited as a cause of recent deficit spending, was a tremendous shift of power away from the Executive.[194]

Further, the line item veto properly addressed a contemporary problem associated with modern-day democracy in America without frustrating or compromising hallowed Separation of Powers goals. George Washington wrote that a President must "approve all parts of a bill, or reject it in toto."[195] However, things are much more complex now than they were in Washington's day. In 1789, the nation had only four million citizens and the first general appropriations bill was only sixteen lines long.[196] Now, however, four million people work for the federal government and a spending bill can have dozens of titles, hundreds of sections, and thousands of expenditures.[197] The effect of such omnibus legislation has been to weaken the Executive's veto power under the Constitution.[198] With legislative "horse-trading" as the usual cause for many unrelated items being included in appropriation bills, requiring a majority to reinstate cancelled items would only confirm the required majority support needed for an item in the first place.[199]

The appropriations process has evolved into a gargantuan endeavor involving "bundling" and "logrolling." Congress should be allowed to pass

combat the effects of economic conditions on government revenues is to employ institutional reforms such as the line item veto.

192. *See* Devins, *supra* note 2, at 1615 (explaining that Gramm-Rudman, a Congressional attempt to curb deficit spending, displayed Congress' inability to cut the deficit, raised questions of where such political accountability lies, and may have encouraged budget gimmickry and dishonest accounting schemes to hide obvious shortfalls in the budgetary process).

193. *See generally Line-Item Veto: Courting a Better Way*, *supra* note 18, at A20.

194. This shift deprived the President the historical authority to impound funds in the wake of Watergate and presidential mistrust. *Id*.

195. *See The Wrong Call on Line-Item Veto*, *supra* note 172, at 10. *See also Clinton*, 118 S. Ct. at 2118 (Breyer, J., dissenting).

196. *Id*.

197. *Id*.

198. Shammas, *supra* note 22, at 689. *See also* Gerhardt, *supra* note 22, at 235 (citing S. REP. NO. 104-9, at 3)

199. Shammas, *supra* note 22, at 689. *See also* HEDRICK SMITH, THE POWER GAME 470 (1989) (describing "horsetrading" as "barter politics: buying votes by doling out favors"); Gerhardt, *supra* note 22, at 236 (citing 135 CONG. REC. S15, S340 (daily ed. Nov. 9, 1989) (statement of Sen. Coates)).

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legislation to adapt to changes in the legislative process.[200] Whether the Framers foresaw bundling is unknown.[201] One thing that is known is that the Framers saw the veto as a presidential check against abuses of legislative power.[202] Since the Framers were clear that the first function of a veto was to protect the President from legislative encroachments,[203] it may also be plausible to accept the line item veto for that proposition alone. Moreover, scholars have argued that the same constitutional silence that allows for "bundling" may also sanction a presidential veto on something other than an all-or-nothing basis.[204]

The formalism of the majority was well intended yet still astigmatic. In this instance, the Court's elevation of form over substance was a mistake. Tolerance for government flexibility and innovation is a hallmark of democracy.[205] The Act was not inconsistent with the goals of the Separation of Powers doctrine.[206] The President was acting in an executive role and still had no formal function in the legislative process.[207] Some amount of executive discretion should be allowed. In fact, historical evidence shows the Framers may have even believed that congressional appropriations were considered permissive and not required.[208]

Part of the genius of the Constitution is its pragmatic vision and "room for necessary institutional innovation."[209] The government must be allowed to delegate authority to those most apt to handle particular problems or policies. In support of that proposition, a compelling argument can be made that the Act

200. Sidak & Smith, *supra* note 65, at 469-70.

201. *Id*.

202. *Id.* at 468-69.

203. *Id*. at 469.

204. *Id*. at 469.

205. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Richard D. Heffner, Penguin Books Mentor ed., 1984) (1956).

206. *Clinton*, 118 S. Ct. at 2118 (Breyer, J., dissenting).

207. Although some scholars argue that if the line item veto power were upheld, the power alone may preempt certain Congressional spending items that would likely be vetoed. *See* Devins, *supra* note 2, at 1621.

208. Some authors have even argued that while Congress has the authority to appropriate funds for an action of government, only the executive should have the power to carry out that task. Like with prosecutorial discretion, the executive should have a heightened role in decisions concerning government spending. And just like prosecutors in a criminal case, it is impossible to fund each and every program while staying within the confines of a, or the, budget. *See* Locklar, *supra* note 43, at 1187; *see also* L. Gordon Crovitz, *The Line Item Veto: The Best Response When Congress Passes One Spending "Bill" a Year*, 18 PEPP. L. REV. 43, 46-50 (1990) (describing why the line item veto was not necessary before the Impoundment Control Act).

209. *Clinton*, 118 S. Ct. at 2119 (Breyer, J., dissenting).

does not run afoul of the "nondelegation" doctrine.[210] According to the "nondelegation" doctrine, any congressional delegation of power must be accompanied by an intelligible principle for the executive to use in employing the delegated authority. First, the text of the Act reveals a principle sufficient to guide the executive in exercising the authority. To cancel an item, the item to be cancelled must "not impair any essential government functions," and "not harm the national interests."[211] The legislative history confirms the Act's purpose was deficit reduction.[212] Considering the Court has upheld congressional delegations driven by what some claim to be "empty standards," and "unranked decisional goals" before,[213] it is incredible that the Act's "clear purpose" would have been determined not to contain an intelligible principle.[214] Thus, the Court could have upheld the Act as a constitutionally legitimate delegation of power from the legislative branch to the executive.

Second, controlling the expenditure of federal funds arguably qualifies as the management of government property.[215] According to "nondelegation" scholars, this is not an inappropriate delegation of power.[216] Third, the cancellation authority granted in the Act could easily be characterized as "executive" authority.[217]

Despite the plausible argument that the Act could be upheld as a legitimate delegation of congressional authority, the Court, nevertheless, found the Act unconstitutional.[218] By doing so, the formalist majority, masking themselves as martyrs for the betrayed Presentment Clause, failed to address the more important issue of whether the all-or-nothing dilemma facing a President, when

210. *The Supreme Court 1997 Term Leading Cases*, 112 HARV. L. REV. 122, 130 (1998). *See* Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma and the Line Item Veto*, 44 VILL. L. REV. 189, 211 (1999).

211. *Id*. *See also* 2 U.S.C. § 691(a) (Supp. III 1997); *Clinton*, 118 S. Ct. at 2125 (Breyer, J., dissenting).

212. *The Supreme Court 1997 Term Leading Cases*, *supra* note 210, at 130-31; *see also* H.R. CONF. REP. NO. 104-491, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 892; *Clinton*, 118 S. Ct. at 2125 (Breyer, J., dissenting).

213. *The Supreme Court 1997 Term Leading Cases*, *supra* note 210, at 131; *Cf*. Loving v. United States, 517 U.S. 748, 771 (1996) (mentioning delegations written in sweeping terms that the Court has upheld); *Mistretta*, 448 U.S. at 372 (1989) (explaining Congress' need to "delegate power under broad general directives").

214. *The Supreme Court 1997 Term Leading Cases*, *supra* note 210, at 131.

215. Bell, *supra* note 210, at 208-09. S*ee also* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 46, 186 (1993) [hereinafter SCHOENBROD, POWER WITHOUT RESPONSIBILITY] ("Rather, Congress may allow the executive branch to manage the public domain, including making management rules.").

216. *Id.*

217. *See* Bell, *supra* note 210, at 208-09. "In enforcing the delegation doctrine, the Court can uphold statutes leaving the president [sic] with the discretion already within executive power, however defined."

218. *Id*. *See generally* SCHOENBROD, POWER WITHOUT RESPONSIBILITY, *supra* note 215.

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omnibus appropriation bills are sent to his desk, is vital to maintaining our hardy system of checks and balances.[219]

Moreover, under the Act, Congress delegated to the President the authority, validated in the past,[220] to refuse to spend allocated dollars or to cancel certain tax benefits signed into law. Under a doctrine set forth by Justice Jackson,[221] "[w]hen the President acts pursuant to an express or implied authorization by Congress, his authority is at its maximum,"[222] and thus such legislation should be shielded from the harsh judicial scrutiny as found in *Clinton*.

The *Clinton* Court shied away from directly discussing the Separation of Powers implications of the Act.[223] Consequently, we are left to work with the language of the Act. The major implication is that if the statute had been worded differently the Court probably would have allowed the statute to stand.[224] Thus, in subsequent legislation pertaining to the line item veto, Congress would be wise to insert a clause stating that the President may "decline to spend" an item of appropriation, rather than language suggesting either cancellation of an appropriation or that the President may prevent an item from having full "force or effect."[225]

C. Prospects for the Future

While the line item veto has been temporarily defeated,[226] the Supreme Court may have left the back door open. The Court's frustration with the Act was not with the concept itself,[227] rather its wording and its apparent violation of the Presentment Clause and the Constitution's "finely wrought" procedure.[228]

The debate surrounding this issue will not end with the *Clinton* decision. The Administration has already indicated it is looking into ways to exercise the line item veto consistent with the Court's ruling,[229] and lawmakers have pledged the same.[230]

219. *Id.*; *see also Clinton*, 118 S. Ct. at 2106.

220. *See Field*, 143 U.S. at 694 (validating the Act Oct. 1, 1890, § 3).

221. Known as "Jackson's Maxim."

222. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

223. *See Clinton*, 118 S. Ct. at 2108. No other Justice in the majority joins Kennedy's dissent, which addresses the Separation of Powers doctrine. *Id.*

224. *Clinton*, 118 S. Ct. at 2118 (Scalia, J., dissenting).

225. *Id*.

226. *Id.* at 2107.

227. *Id.* at 2104.

228. *Id.*

229. *Supreme Court Special Issue: What Has the Court Done? Constitutional Separation of Powers*, 19 NO. 8 JUD/LEGIS. WATCH REP. 5 (1998).

230. *See* Jeff Barker, *Veto Law Rejected by Court: McCain Vows to Retool Line-Item Authority*, ARIZ. REPUBLIC, June 26, 1998, at A1.

The most obvious solution would be to pass a constitutional amendment allowing for a presidential line item veto.[231] This would avoid any further litigation on the matter but is extremely unlikely to occur.[232]

Congress might also discipline itself to pass bills on single subjects, thus accomplishing the goals of the line item veto.[233] This initiative would require Congress to pass legislation on its merits or reject it. In addition, Congress would still have the constitutional right to override a presidential veto.[234] In a recent development, legislation was introduced into Congress to cut pork barrel spending in this manner.[235] Senator John McCain has introduced the "Separate Enrollment and Line Item Veto Act of 1999" ("Separate Enrollment Act").[236] The Separate Enrollment Act attempts to accomplish the goals of the fallen Act by requiring every spending item or tax benefit be presented to the President via a mini-bill. This would enable the President to pass or veto individual items as opposed to an all-or-nothing decision on entire bills. Congress would have to act separately to overturn a presidential veto as well.[237] For the time being, however, the renewed calls for line item veto authority or similar legislation may have fallen on deaf ears. The Separate Enrollment Act was introduced nearly one year ago in early 1999, and no vote has been taken on the measure since it was introduced.[238]

In an alternative to legislation, some authors have suggested that the President might already possess an excision power.[239] This power would allow the President to excise unsightly provisions from bodies of legislation on the supposition that it is within his duties "to faithfully execute the laws and

231. *See* J. Gregory Sidak, Essay, *The Line Item Veto Amendment*, 80 CORNELL L. REV. 1498 (1995) (discussing the benefits of a Line Item Veto Amendment).

232. *See* Stanley E. Collender, *Line-Item Veto Deserved Own Veto*, NEWSDAY, June 30, 1998, at A31.

233. Thus, Congress could pursue the goals of the line item veto by way of fiscal responsibility and cutting deficit spending by reintroducing political accountability to lawmaking and enactment. *See also* Sidak, *supra* note 231.

234. U.S. CONST. art. I, § 7, cl. 2.

235. *McCain Unveils Fiscal Priorities for 106th Congress*, Gov't Press Release, Jan. 15, 1999, *available in* 1999 WL 2221752.

236. *Id.*

237. *Id.* Senator McCain also seeks to end the practice of attaching riders to appropriations bills (amending Senate rules). Rep. John Kasich (R-OH) has also introduced legislation that provide for "Expedited Rescission" to relax the 1974 Budget Impoundment Act which deprived the President of his historical authority to impound funds. *See Line-Item Veto: Courting a Better Way*, *supra* note 18, at A20.

238. Although the bill was introduced January 19, 1999, the Senate has taken no action prior to the submission of this article). *See Bill Summary* (visited Jan. 31, 2000) <http://thomas.loc.gov> (click on "Bill Summary & Status-106th" then type "S100" into "Bill/Amendment No.").

239. Sidak & Smith, *supra* note 65, at 452.

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defend the Constitution."[240] This scheme is based on the premise that the provision in question violates the Constitution. Even assuming *arguendo* that in a hypothetical situation, the President would claim that strangling debt and unchecked spending threatened our nation's ability to function or even our national security,[241] it is unlikely the court would allow such a measure as within the scope of the President's constitutional duties.[242]

Another proposition might entail Congress invoking the Necessary and Proper Clause to allow the President apt discretion through a line item veto.[243] Congress has the power to make any laws necessary for carrying out its enumerated powers.[244] If the members of Congress determine that the line item veto is vital to the nation's effort to control spending and permanently restore fiscal responsibility to the federal government, then this rationale might pass constitutional muster under the "nondelegation" doctrine and its intelligible principle test.[245]

Simple impoundment of appropriated funds from legislation to legislation may provide another solution, but is unlikely to produce the long-term effect or legitimacy a line item veto would provide. Yet a bolder option may exist. A strong Executive might choose a politically propitious time to revive the lost art of mass impoundment[246] and use the forum created to take his or her case to

240. *Id*.

241. *Id*. at 453-54. Many argue that allowing the President to have the implicit power of excision is actually a structurally stronger argument than a line item veto, because it roughly resembles an impoundment, and has been used by President Reagan, for example; however, it again fails to give Congress the opportunity for a legislative override.

242. *Id*. This may work with matters of foreign affairs, but as general policy would probably be unconstitutional. *See also Youngstown Sheet & Tube Co.*, 343 U.S. at 549.

243. Locklar, *supra* note 43, at 1188-89.

244. The standard of review under this theory is the intelligible principle standard, as with the nondelegation principle discussed above. *Id.* at 1188; *see also* U.S. CONST. art. I, § 8, cl. 18.

245. *See* Locklar, *supra* note 43, at 1188. It is an attempt to control spending, and since Congress has the power of the purse, this may be a solution worth considering. *See also* Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 9 (1998). Prakash states that "the Necessary and Proper Clause permits delegation of cancellation and modification discretion." *Id.* at 11. It should further be noted that the line item veto might be a "harder sell" in 2000 and beyond while annual budget surpluses and a growing economy disguise the immediate need for such measures. So, in effect, the budget surpluses enjoyed now and sought by initiatives like the line item veto may have sealed its fate. However, one can suppose that was the goal all along, but time will certainly tell.

246. Again, impoundment refers to the refusal to spend appropriated funds. *See* CONGRESSIONAL QUARTERLY, INC., POWERS OF THE PRESIDENCY 94-95, 264-65 (2d. ed. 1997); Kristafer Ailslieger, *Supreme Court Vetoes the Line Item Veto Act* (Clinton v. City of New York, *118 S. Ct. 2091 (1998)*), 38 WASHBURN L.J. 893, 899 (1999). Impoundment has gained momentum throughout the twentieth century. The Anti-Deficiency Acts of 1905 and 1906 allowed the President to waive spending funds appropriated by Congress in the case of emergencies or other unusual circumstances. *See id.* at 899. *See, e.g.*, Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, ch. 510 § 3, 34 Stat. 48. In 1950, Congress

the populous[247] and create a public policy showdown. The President might then make the issue of fiscal responsibility a major theme and use the office as a bully pulpit to force Congress' hand in the matter. With the prospects of legislative action remote,[248] a presidential power play and a governmental showdown may be necessary to get the issue back on the legislative table and to the forefront of American politics.[249]

In reality, however, the *Clinton* decision has probably killed the line item veto, and the momentum that put it on the legislative agenda. On that account, it should be clearly stated that the fact this legislation (the Act) came about in the first place was extraordinary.[250] It may have taken a realigning election in 1994,[251] and the culmination of a generation's worth of political capital and momentum for any Congress to give up such grand appropriation power. With all that said, it seems unlikely that an atom's worth of the energy that fueled the astonishing reversal of a half century's worth of government excess exists today in a political environment insulated by economic prosperity some five years later.[252]

To that end, some scholars have argued that the line item veto has lost its significance because of the recent federal budget surplus the nation now enjoys.[253] To those, however, that may question the line item veto's

amended the Anti-Deficiency Act by expanding its scope to allow rescission of any funds not required to carry out the purpose of the underlying appropriation. *See* Ailslieger, *supra*, at 899. *See also Byrd*, 956 F. Supp. at 29. However, Congress curtailed the President's ability to impound funds with the Impoundment Control Act. *See* Ailslieger, *supra*, at 899; *see also* CONGRESSIONAL QUARTERLY, INC., *supra*, at 40.

247. It should be noted that the *Train* decision coupled with the Impoundment Control Act of 1974 did limit the use of impoundments. However, that is not the point. Impoundment could be used to force the broader issues of balanced budgets, and the necessity of a line item veto to the agenda in order to sustain projected budget surpluses and hogtie pork barrel spending.

248. *See supra* note 238.

249. Despite the claim that "the era of big government is over," federal spending is at all time heights. *See Prepared Statement of John E. Berthoud, Ph.D. President, The National Taxpayers Union Before the House Committee on Rules Subcommittee on Legislative & Budget Process*, FEDERAL NEWS SERV., Mar. 11, 1998.

250. *White House Defends Line-Item Veto; Justices Question Whether It Upsets Constitutional Balance of Power*, DES MOINES REG., Apr. 28, 1998, at 3. *See also* CAPITAL GANG, CNN TRANSCRIPTS, Apr. 10, 1993, Transcript # 67.

251. *See* STEPHEN J. WAYNE, THE ROAD TO THE WHITE HOUSE 1996 77-79 (1996); *see also* Thomas B. Edsall, *Huge Gains in the South Fueled GOP Vote in 1994*, WASH. POST, June 27, 1995, at A8. Numerous authors have speculated that Republican gains made in Congress and specifically in the South in 1994 signal a "realignment" that often occurs every thirty years or so, or once a generation.

252. This momentum that began with the 1994 midterm elections united strange bedfellows indeed, Democrats, Republicans, Congress, the President, supporters of enhanced executive powers, and those calling for legislative reform. *See* Fisher, *supra* note 36, at 1001.

253. *See supra* note 245; *see also* Alison Maxwell, *CBO Predicts Budget Surplus* (visited Jan. 15, 2000) <http:www.govexec.com/dailyfed/0398/030498a1.htm>.

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importance, it should be noted that the same fiscally responsible initiatives and sacrifices made in the mid 1990s by political leaders bore the line item veto legislation this note discusses.[254] The Act and its concept are part-and-parcel of the fiscal discipline that has produced the newfound budgetary freedom. As unlikely as current budget surpluses seemed just five years ago, it is equally unlikely that budget surpluses will continue without institutionalized reform, such as that embodied in the line-item veto.[255]

V. CONCLUSION

An examination of the Line Item Veto Act and its constitutional consequences should have persuaded the court that its means and ends were permissible. Nevertheless, the Court failed to allow for congressional deference to presidential discretion as it had in the past. In sum, the Court misinterpreted the statute and its implications, and declared unconstitutional a legitimate attempt to permanently restore fiscal responsibility to the federal government.

ERIC STEPHEN SCHMITT*

254. *See id.*

255. *Our Opinion Line Item Veto Still Needed,* N. Y. DAILY REC., July 5, 1998, at 02. This line item veto is welcomed either by statute or Constitutional Amendment. *See* Nancy Straud, *Constitutional Politics and Balanced Budgets,* U. ILL. L. REV. 1105, 1151 (1999).

* Ad Maiorem Dei Gloriam. The author would like to dedicate this Note to his extraordinary wife, Jaime. The author would also like to thank his entire family for their support and give special thanks to his parents, Stephen and Kathleen, for their unwavering encouragement and selflessness.