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THE BOTTOM LINE ON THE LINE-ITEM VETO ACT OF 1996

Michael J. Gerhardt†

INTRODUCTION

Sometimes it pays to remember the old adage that if it looks like a duck, walks like a duck, and quacks like a duck, it is in all likelihood a duck. The same logic applies in constitutional law — if a statute looks to be too good to be true, is said to solve a problem never previously solved legislatively in American history, and purports to be in just about everyone's best interests (including those of both the President and Congress), it probably is too good to be true. It probably is unconstitutional. Such is the case with the Line Item Veto Act of 1996.¹

Passed by the Republican-led Congress and signed into law by President Bill Clinton, a Democrat, the Line Item Veto Act of 1996 seemed to be the perfect solution in the midst of an election year to show both parties' commitments to work together and balance the budget. The problem with the Act, though, is that it is in all likelihood unconstitutional. As this Essay suggests, the Act violates Article I by allowing the President to sign or veto a measure in a form never actually approved by both houses of Congress; involves an illegitimate attempt by the Congress to redefine statutorily the constitutional term "Bill"; contravenes both Supreme Court authority severely restricting congressional discretion to delegate a core legislative function and longstanding congressional understanding of the prerequisites for a legitimate bill; and radically alters the fundamental balance of power between Congress and the President on budgetary matters.

Part I of this Essay offers a brief history of the movement culminating in the passage of the Line-Item Veto Act of 1996. Part II sets forth the basic arguments against the constitutionality of the Act. Part III sug-

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¹ P.L. 104-130, 110 Stat. 1200 (1996) (codified as amended in scattered sections of 2 U.S.C.A.).

gests that the constitutional defects undermining the Act are common to all statutory attempts to create a presidential line-item veto. The same flaws undermine other seemingly more attractive solutions, such as the passage of a bill authorizing the ministerial disassembling of any appropriations bill passed by Congress into separate lines, each of which would be subject to presidential veto, cancellation, or rescission. Part III concludes that the constitutional allocation of budgetary authority and procedures is clear — that any appropriations bill, in order to be legitimate, must be passed by both houses of Congress, signed or vetoed by the President, and take effect as a law in the precise configuration in which Congress has chosen. No matter how much the members of Congress want to strap themselves to the mast of budgetary restraint in the form of delegated responsibility to another branch in the hopes of avoiding the siren songs of special interests, the real siren that they should avoid is the one calling for abdicating their unique constitutional responsibility and thereby avoiding political accountability for not making the hard choices that they alone must initially make.

I. BACKGROUND

The allocation of budgetary authority between the President and Congress in the federal Constitution has evolved differently than what the framers anticipated or desired. The evolution and substance of the framers' and ratifiers' views on the appropriate allocation of budgetary authority within the federal government has been thoroughly canvassed elsewhere.² For present purposes, it should suffice to say that the framers took great pains to vest the power of the purse in, and primary federal budget authority to, the Congress. The framers made this vestiture plain in both the text of the Constitution and in the allocation of power between the branches. The Constitution empowers Congress exclusively "[t]o lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States[.]"³ Moreover, the Constitution prohibits money "drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"⁴ The framers placed this power outside of the executive, for fear of the consequences of centralizing the powers of purse and sword. As one of the most thoughtful commentators on the framers' expectations has suggested, the framers

² For perhaps the best and most frequently cited study of the framers' experiences with and views on federal budget authority, see Paul R.Q. Wolfson, Note, *Is a Presidential Item-Veto Constitutional?*, 96 YALE L.J. 838 (1987).

³ U.S. CONST. art. I, § 8, cl. 1.

⁴ U.S. CONST. art. I, § 9, cl. 7.

thought that congressional control over appropriations served as a crucial check against misgovernment by the executive. Most importantly, the [f]ramers gave the President no power over the content of appropriation bills even though they knew that during the colonial period, the colonial assemblies' insistence that money bills were unamendable once they had passed the lower house had greatly facilitated the expansion of legislative power.⁵

Not long ago, the Senate echoed this sentiment in its Iran-Contra Report, acknowledging the appropriations power as "the Constitution's most significant check on the Executive power."⁶

However, the *expenditure* of funds from the federal treasury pursuant to congressional authorization is an executive function, consistent with the President's duty under Article II, section 3, to "take Care that the Laws be faithfully executed."⁷ At least since Thomas Jefferson, every president has asserted or claimed that the Executive has some discretion to impound — i.e., to refuse to spend or withhold the expenditure of — monies appropriated by Congress.⁸ Moreover, at least eleven presidents since the Civil War have gone further to claim support for their exercise of a line-item veto.⁹ Only two presidents — William Howard Taft and Jimmy Carter — opposed the line-item veto authority for the President.¹⁰ In addition, the governors of 43 of the 50 states have some form of line-item veto authority.¹¹

The reasons for widespread presidential and gubernatorial (as well as popular) support for the line-item veto are evident: First, it is commonly thought that Congress lacks sufficient "fiscal discipline" to reduce significantly the federal deficit.¹² Second, the increasing use of omnibus legislation has arguably weakened the President's veto. The item veto thus, in the view of some, "helps restore" the appropriate balance of

⁵ Wolfson, *supra* note 2, at 841 (footnote omitted).

⁶ Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition & House Select Committee to Investigate Covert and Arms Transactions with Iran, Report, S. REP. NO. 216, H.R. REP. NO. 433, 100th Cong., 1st Sess. 18 (1987).

⁷ U.S. CONST. art. II, § 3.

⁸ Thomas Jefferson was the first President to refuse to spend congressionally appropriated money; he refused to spend \$50,000 allocated by Congress to provide gun boats to operate on the Mississippi River. See S. REP. NO. 104-9, at 3 (1995).

⁹ These Presidents include Ulysees Grant, Rutherford Hayes, Chester Arthur, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, Richard Nixon, Gerald Ford, Ronald Reagan, George Bush, and Bill Clinton. *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.*

¹² 135 CONG. REC. S614 (daily ed. Jan. 25, 1989) (statement of Sen. Dixon).

power between the President and Congress.¹³ Third, legislative horse trading (or logrolling) explains the inclusion of many items in an appropriation. Steps, therefore, must be taken to ensure majority support of appropriation provisions. The item veto would force Congress to garner at least a "simple constitutional majority"¹⁴ to support programs the President finds "wasteful."¹⁵ In other words, proponents of a presidential line-item veto view it as a mechanism to ensure that a majority of legislators actually supports items in previously enacted bills.

Motivated by these concerns, Congress passed the Line-Item Veto Act of 1996.¹⁶ The bill empowers the President to rescind all or any part of "any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit[.]"¹⁷ A presidential rescission has the effect of canceling a portion of a budgetary or appropriations bill unless a majority of each chamber of Congress agrees within a specified time period to pass a "disapproval bill,"¹⁸ specifying its intention to reauthorize the particular item rescinded by the President. The President may veto the disapproval bill, which can then become law only if two-thirds of each chamber of Congress agree to override his veto.

Perhaps the best summary of the arguments in favor of the constitutionality of the Act was set forth in the testimony of Walter Dellinger, then-Assistant Attorney General of the Office of Legal Counsel, United States Department of Justice.¹⁹ Mr. Dellinger suggested three arguments in support of the bill's constitutionality. First, he believed that the Supreme Court would be likely to uphold the rescission authority delegated to the President by this statute as being similar to the other kinds of "sweeping discretionary powers [delegated by Congress] to the Executive, including powers that relate directly to the Nation's fiscal [sic]."²⁰ Second, he found that the delegation of rescission authority to the President would satisfy the constitutional requirement of containing "'intelligible principles' that serve to direct Executive Branch action."²¹ He

¹³ *Id.* at S615 (statement of Sen. Dixon).

¹⁴ *Id.*

¹⁵ 135 CONG. REC. S15,340 (daily ed. Nov. 9, 1989) (statement of Sen. Coats).

¹⁶ 110 Stat. 1200. Another proposed statute for creating a presidential line-item veto is separate enrollment legislation, which failed to pass Congress as recently as 1995. This legislation would require each item in an appropriations or tax bill to be enrolled as a separate Act, allowing the President to veto these individual items. S. 4, 104th Cong., 1st Sess. (1995) (Dole amendment No. 347); see also 141 CONG. REC. S4301-01 (1995).

¹⁷ 2 U.S.C.A. § 691a (1)-(3) (West Supp. 1997).

¹⁸ 2 U.S.C.A. § 691d (West Supp. 1997).

¹⁹ *The Line-Item Veto: A Constitutional Approach: Hearing on S.J. Res. 2, S.J. Res. 16 Before the Subcomm. on the Constitution, Federalism, and Property Rights, 104th Cong. 40* (1996) (statement of Walter Dellinger, Assistant Attorney General, Department of Justice).

²⁰ *Id.* at 44.

²¹ *Id.* at 45.

suggested that even though the Act granted broad discretion to the President, it bounded his authority in several ways, including limiting the time period for presidential exercise of rescission authority and requiring the President to make "specific determinations regarding the effect of rescission on the public fisc, government functions, and the national interest" prior to exercising his rescission authority.²² Lastly, Mr. Dellinger argued that the Act was consistent with "other statutes [that] have authorized the President to control the outlay of appropriated funds."²³

II. CONSTITUTIONAL PROBLEMS

There are at least three fatal constitutional problems with the procedures set forth in the Line-Item Veto Act of 1996. First, the law effectively allows any portion of a bill enacted by Congress that the President signs but does not cancel to become law, in spite of the fact that Congress will have never voted on the bill in the precise configuration in which it has become positive law. This kind of lawmaking by the President clearly violates Article I, Section 1, which grants "[a]ll legislative powers" to Congress,²⁴ and Article I, Section 7, which grants to Congress alone the discretion to package bills as it sees fit.²⁵

Article I states further that the President's veto power applies to "[e]very Bill . . . , Every Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary."²⁶ As Professor Laurence Tribe has argued, this means that the President may block a bill only "in the form in which Congress has chosen to send it to the White House: be the bill small or large, its concerns focused or diffuse, its form particular or omnibus, the President must accept or reject the entire thing, swallowing the bitter with the sweet."²⁷ A law is valid only if it takes effect in the precise configuration approved by the Congress. The President does not have the authority to put into effect as a law only part of what Congress has passed as such. Nor does the President have authority to repeal a portion or provision of congressionally approved budget policy. The particular form a bill should have as a law is, as the Supreme Court has said, the "kind of decision that can be implemented only in accordance with the procedures set out in Article I."²⁸

The Line Item Veto Act of 1996 would enable the President to make affirmative budgetary choices that the framers clearly meant to preclude

²² *Id.* at 116.

²³ *Id.*

²⁴ U.S. CONST. art. I, § 1.

²⁵ *Id.* § 7, cls. 1, 2.

²⁶ *Id.* cls. 2, 3.

²⁷ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-13, at 265 (2d ed. 1988).

²⁸ *INS v. Chadha*, 462 U.S. 919, 954 (1983).

him from making. The framers deliberately chose to place the power of the purse outside of the executive because they feared the consequences of centralizing the powers of the purse and the sword. As James Madison wrote in the *Federalist* No. 58, "This power over the purse may in fact be regarded as the most complete and effectual weapon, with which any constitution can arm the immediate representatives of the people."²⁹ Every Congress (until this most recent one) — as well as all of the early presidents, at least before the Civil War — have shared the understanding that only Congress has the authority to decide how to package legislation, that this authority is a crucial component of checks and balances, and that the President's veto authority is strictly a negative power that enables him to strike down, but not to rewrite or reconfigure, the agreements a majority of Congress has sent to him in the form of a bill.

The wisdom of leaving the power of the purse in Congress as a means of checking the executive, as the framers desired, is reinforced by the recognition that pork barrel appropriations — the evil sought to be eliminated by the Republican draft — are just unattractive examples of legislating for diverse interests, which is the very stuff of representative government. Apportioning the public fisc in a large and diverse nation requires degrees of coordination and compromise that the framers left to the initial discretion of Congress, and to be undone only as specified in Article I.

The second constitutional defect with the Line-Item Veto Act of 1996 involves the legitimacy of the rescission authority given to the President. Proponents of this rescission power defend it as a legitimate delegation of congressional authority to the President; however, this argument rests on a misunderstanding of the relevant constitutional doctrine. This misunderstanding is reflected, for example, in the Report by the Congressional Research Service, which claims erroneously that "while the [Supreme] Court has used a balancing test in some separation of powers cases, it has never chosen to do so in delegation cases."³⁰ The latter assertion is simply wrong.

In fact, the Supreme Court has issued two lines of cases on congressional delegations. The first, which is not implicated by the Conference Report, involves delegations from Congress to administrative agencies or inferior bodies. The Court tends to evaluate such delegations under a "functionalist" approach to separation of powers, under which the Court balances the competing concerns or interests at stake to ensure that the

²⁹ THE FEDERALIST NO. 58, at 300 (James Madison) (Max Beloff ed., 1987).

³⁰ Congressional Research Service, Memorandum Regarding Constitutional Questions Respecting Bill to Grant President Enhanced Rescission Authority over Appropriations and Targeted Tax Benefits, at 16 (January 9, 1995).

core function of a branch is not frustrated. For example, the Court used this approach in *Morrison v. Olson*³¹ to uphold the Independent Counsel Act in which the Congress had delegated the executive function of criminal prosecution to an individual not formally associated with any of the three branches. Similarly, in *Mistretta v. United States*,³² the Court upheld the constitutionality of the composition and lawmaking function of the United States Sentencing Commission, at least three of whose members are required by statute to be lower court judges and to which the Congress delegated the authorities to promulgate, review, and revise sentence-determinative guidelines.

However, the Line Item Veto Act clearly violates the second line of Supreme Court decisions on congressional delegations. These cases involve delegations from Congress to the titular head of a branch, such as one of its chambers or the President. In these cases, the Court has not used a balancing test; rather, the Court has used a "formalist" approach that treats the Constitution as granting to each branch distinct powers and setting forth the maximum degree to which the branches may share those powers. A formalist approach to separation of powers treats the text of the Constitution and the intent of its drafters as controlling and changed circumstances and broader policy outcomes as irrelevant to constitutional outcomes. In recent years, the Court has used this approach to strike down the legislative veto in *INS v. Chadha*³³ because it would have allowed one House to take legislative action without complying with the procedures set forth in Article I; to hold in *Bowsher v. Synar*³⁴ that Congress may not delegate executive budgetary functions to an official over whom Congress has removal power; and to strike down the creation of a Board of Review partially composed of members of Congress with executive veto-like power over the decisions of the agency directors in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*.³⁵

Undoubtedly, the Court would follow a formalist approach in striking down the Line Item Veto Act. For one thing, the Court would not be able to escape applying the logic of *Bowsher v. Synar* to the Act. Whereas the crucial problem in *Bowsher* was Congress's attempt to authorize the exercise of certain executive authority by a legislative agent (the Comptroller General), here the problem is that the President would plainly be exercising what everyone agrees is legislative authority — the discretion to determine the particular configuration of a bill that will be-

³¹ 487 U.S. 654, 693 (1988).

³² 488 U.S. 361 (1989).

³³ 462 U.S. 919 (1983).

³⁴ 478 U.S. 714 (1986).

³⁵ 501 U.S. 252 (1991).

come law. Even the law's proponents admit that the law permits the President to exercise legislative authority, albeit in their view delegated to him by Congress.

A formalist analysis would be appropriate in evaluating such a delegation's constitutionality because it would be the kind of delegation about which the framers were most concerned; the checks and balances set forth in the Constitution deal directly with how the titular heads of each branch should interact. Hence, the Court has opted for a formalist approach to deal with delegations between the branches at their respective apexes to preclude one branch from aggrandizing itself at the expense of another. The Line Item Veto Act of 1996 would clearly undermine the balance of power between the branches at the top, because it would eliminate the Congress's primacy in the budget area and would unravel the framers' considered judgment to restrict the President's role in the lawmaking process to a qualified negative rather than to have him exercise an affirmative power to redraft or reconfigure a bill.

Even if the Court used a functionalist approach to evaluate the constitutionality of the Republican draft, it would, in all likelihood, strike down the proposed law. The reason is that the law establishes an uneven playing field for the President and Congress on budgetary matters. In so doing, it profoundly alters the balance of power set forth in the Constitution. As Professor Tribe has argued, such a scheme would enable the President

not only to nullify new congressional spending initiatives and priorities, but to wipe out previously enacted programs that receive their funding through the annual appropriations process. Congress, which the Constitution makes the master of the public purse, would be demoted to the role of giving fiscal advice that the Executive would be free to disregard.³⁶

The historical record is clear that the framers, as Professor Tribe has recognized, never intended nor tried to grant the President any "special veto over appropriation bills, despite their awareness that the insistence of colonial assemblies that their spending bills could not be amended once they [sic] had passed the lower house had greatly enhanced the growth of legislative power."³⁷

An example should illustrate the problematic features of the proposed rescission mechanism. Suppose that 55% of Congress passes a law which includes expenditures for a new Veterans Administration hospital in New York. The President decides he would prefer for Congress

³⁶ TRIBE, *supra* note 27, at 267 (footnotes omitted).

³⁷ *Id.* at 267 (citing Wolfson, *supra* note 2).

not to spend any federal money on this project, so, after signing the bill into law, he exercises his authority to rescind the allocations made for the new facility. Again 55 % of the Congress agrees to make this expenditure, but this time through the passage of a disapproval bill. The President vetoes the latter, and Congress fails to override his veto, with only 55% of Congress (yet again) voting for the appropriation. The net effect is that the President would get to refuse to spend money 55% of the Congress will have thrice said it wanted to spend. Thus, the Act would require Congress to vote as many as three separate times to fund a project while assuming in the process an increasingly defensive posture vis-a-vis the President. In other words, the Act allows the President to force Congress to go through two majority votes — the second of which is much more difficult to attain because it would have to be in favor of a specific expenditure that is now severed from the other items of the compromise giving rise to its initial passage — and one supermajority vote in order to put into law a particular expenditure.³⁸

³⁸ The argument that the President has either the inherent or delegated authority to rescind a congressional expenditure is problematic. First, it is well settled that the President does not have inherent authority to impound permanently funds appropriated or directed for expenditure by Congress. Surely, this is the import of the Supreme Court's seminal decision in *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1938). There the Court held that the President did not possess inherent authority to impound funds that Congress had ordered to be spent: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.* at 611. Chief Justice Rehnquist, when he served as the Assistant Attorney General in charge of the Office of Legal Counsel, read *Kendall* as precluding any such inherent presidential authority and endorsed a similar conclusion generally:

With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent. . . . It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend.

Hearing on the Executive Impoundment of Appropriated Funds Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., 279 (1971). Professor Tribe agrees that no authority exists to empower the President

[to] enjoy a roving commission to pick and choose among congressional mandates, carrying out only those programs that seem, from the President's perspective, to be consistent with the national interest — whether the President purports to divine that interest from goals articulated by Congress in other statutes, or from an assessment of how best to stay within congressionally mandated debt or budget ceilings.

TRIBE, *supra* note 27, at 259 (footnotes omitted).

Nor does the President necessarily derive legitimate authority to rescind certain congressional expenditures from the delegations made in the Line Item Veto Act of 1996. The difficulty is that usually such delegations would contemplate that the President could delay spending certain funds if he saw fit but could not refuse absolutely ever to spend the money appropriated by Congress. In other words, the President is obliged at some point in time to follow the will of Congress to spend the money it has appropriated. The obvious counterargument is that it is conceivable that the congressional will has been to empower the President to decide on whether ever to spend the money appropriated by Congress and, if he so

A third constitutional problem with the Act involves the constraints it tries to place on the President's rescission authority. The latter is for all intents and purposes a veto. It has the effect of a veto because it forces Congress, in the midst of the lawmaking process, into repassing something as a bill that ultimately must carry a supermajority of each chamber in order to become law. Nevertheless, the Act attempts to constrain the reasons the President may have for canceling some part of a budget or appropriations bill.³⁹ Just as Congress lacks the authority through legislation to enhance presidential authority in the lawmaking process by empowering him to reconfigure what Congress has passed as a bill into some other form prior to its becoming a law, Congress lacks the authority to *restrict* presidential authority by limiting the grounds a president may consider as appropriate for vetoing a bill.

Another conceivable constitutional difficulty with the Line-Item Veto Act is that, as Judge Gilbert Merritt, then the Chairman of the Executive Committee of the Judicial Conference, testified before the House, the President could use his line-item veto authority to target particular judges or judicial programs and thus under the law "the balance would be tilted dangerously toward executive dominance and control over the judiciary if the president had line-item veto authority over the judicia[ry]."⁴⁰ To be sure, the Constitution does not place any constraints on the reasons that a president may have in order to veto a piece of legislation. In the absence of the Line Item Veto Act, a president clearly has the authority to veto legislation because of his principled disagreements with the activities of the federal courts or the positions taken by certain judges or in certain judicial decisions. Insofar as the Act allows the President to veto appropriations meant to benefit the judiciary, it does not operate in any meaningfully different way from the constitutional order in place in its absence.

The critical difference, if there is one, is that the Act would make it easier for the President to single the judiciary out for punishment through the veto process. The question is whether the Act makes this targeting so

decides, on the appropriate timing. The response to this counter-argument is twofold: First, a great deal turns on the clarity of Congress' delegation of rescission authority with respect to the particular project or activity whose funding is at risk. One critical question is whether Congress intended to delegate to the President the discretion on when to make an expenditure or whether to make the appropriation at all. Second, the President's decision to sever one item from an appropriations bill obviously unravels the compromise initially giving rise to its inclusion in the appropriations bill of which it originally was a part and thus makes that particular item vulnerable to extinction. The constitutionality of this unraveling is one of the fundamental issues posed by the Line Item Veto Act of 1996 — an issue, at least in my view, that must be resolved in the negative given the imbalance of budget power created by the Act.

³⁹ 2 U.S.C.A. § 691a(A)(I-iii) (West Supp. 1997).

⁴⁰ John Flynn Rooney, *Federal Judiciary Should Be Exempt From Line-Item Veto*, *Congress Told*, CHI. DAILY LAWYER, Jan. 13, 1995, at 1.

much easier that it poses a fatal constitutional defect rather than just an undesirable policy choice. The likely answer is the latter, because the primary protection accorded to the judiciary in the budgetary process is undiminished compensation.⁴¹ The only other constitutional protection accorded to the judiciary that could be arguably put at risk by the President through the exercise of a line-item veto is not their entitlement to life tenure but rather the need for it to guarantee due process to litigants generally or in particular cases.⁴² If the President were to exercise the line-item veto in such a way as to make it practically impossible for certain cases to be heard by the federal courts over which they had exclusive jurisdiction, then a colorable due process claim would seem possible.

Even if the Act poses a practical rather than a constitutional problem insofar as the vindication of certain judicial interests are concerned, it poses other troubling practical problems. For example, the possibility for substantial judicial review of presidential or congressional compliance with its procedures is quite high. For example, it seems likely that lawsuits could be brought challenging whether the President has appropriately considered, as the Act directs, such things as "the circumstances bearing upon [his] decision to seek the rescission or veto and the likely impact of this action on relevant projects, purposes, and programs." At the very least, the bill requires that the President make some showing that he has taken certain things into account to the satisfaction of members of Congress (or at least those disposed to bring a lawsuit in the absence of such a showing). There are also numerous procedures that OMB and each house of Congress must follow⁴³ that, presumably, could become the basis for judicial challenge if not done completely to the satisfaction of partisan foes in the other branch.

The likely prospect of substantial judicial interference with the budgetary process is unsettling. The framers deliberately excluded the unelected federal judiciary from exercising any kind of decisive role in budgetary negotiations or deliberations. The Act does not ensure that this exclusion will always be honored. The framers wanted all of the key decisionmakers within budget negotiations to be politically accountable; any budgetary impasse between the President and Congress that the federal courts help to resolve in favor of one or the other will simply diminish even further the public's confidence that the political process is the place to turn for answers to such deadlocks.

⁴¹ See U.S. CONST. art. III, § 1.

⁴² See Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 *MERCER L. REV.* 697, 703-06 (1995).

⁴³ 2 U.S.C.A. § 691a-d (West Supp. 1997).

III. OTHER OPTIONS AND WHY THEY DON'T WORK

The constitutional infirmities undermining the Line-Item Veto Act of 1996 are common to other statutory mechanisms for empowering the President to exercise a line-item veto. Perhaps the most promising of these is the proposal (rejected by Congress as recently as last year) directing the clerk of the House in which an appropriation bill or joint resolution originates to disassemble the measure and enroll each item as a separate bill or joint resolution, which is then presented to the President for approval or disapproval. The most serious problem with this proposal is, however, that the enrollment process — the phase in which the proposal allows for the fragmentation of a bill to occur — is not mentioned in the Constitution as a step in the bicameral development of a bill or resolution to be presented to the President. Nor is it considered, as the Supreme Court wrote in *INS v. Chadha*,⁴⁴ an aspect of the “step-by-step, deliberate and deliberative process”⁴⁵ by which the two Houses consider and pass a legitimate bill or resolution. Enrollment is supposed to be merely the meticulous preparation of “the final form of the bill, as it was agreed to by both Houses, for presentation to the President.”⁴⁶ Yet, when an enrolling clerk disassembles a unitary appropriations bill passed by both Houses and rewrites it into many separate bills, the clerk is not enrolling what was in fact “agreed to by both Houses.” Rather, the clerk is dividing the bill into numerous separate bills — a task that can only be performed by both Houses, acting in the customary bicameral manner.

In addition, Congress’s delegation of its authority to enact each item of a bill into separate bills is illegitimate. The basic decision whether to adopt and then present one or many bills to the President is a legislative choice that is, according to the Supreme Court, the “kind of decision that can be implemented only in accordance with the procedures set out in Art. I.”⁴⁷ Congress cannot delegate to an enrolling clerk the core legislative function of deciding how many appropriation bills will be presented to the President or the form each of those bills should take.

Chadha’s reasoning is directly applicable to the proposal under consideration. *Chadha* held that Congress cannot delegate to a single house any kind of legislative function that must be performed by both Houses, such as the enactment of a bill or resolution that changes the status quo or affects the interests of those outside the legislature. Because an appropriation obviously affects existing relationships, it is the kind of legislative judgment both as to form and substance that Congress cannot

⁴⁴ 462 U.S. 919 (1983).

⁴⁵ *Id.* at 959.

⁴⁶ C. ZINN, *HOW OUR LAWS ARE MADE*, H.R. DOC. NO. 94-509, at 44 (1976).

⁴⁷ *Chadha*, 462 U.S. at 954.

delegate to an enrollment clerk. The proposal deals with an integral part of the deliberative bicameral process. As the Court explained,

[t]he President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person (citation omitted). It emerges clearly that the prescription for legislative action in Art. I § 1,7 represents the framers' decision that the legislative power of the federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.⁴⁸

Undoubtedly, the proposal would also significantly alter the balance of power between the President and Congress. The proposal would expand presidential involvement in the legislative process beyond what the framers intended. Such aggrandizement would be at the expense of Congress, which would lose its basic authority to present appropriation bills to the President in the precise configuration produced by the deliberative processes of the two Houses. The proposal would, as Professor Tribe suggested in his initial assessment of such a scheme, demote "Congress, which the Constitution makes the master of the public purse . . . to the role of giving fiscal advice that the President would be free to disregard."⁴⁹ The framers granted the President no such special veto power over appropriation bills, despite their awareness of contrary schemes or alternatives.⁵⁰

The proponents of separate enrollment argue, however, that the parsing and reformulating of bills by an enrolling clerk involves ministerial rather than legislative tasks. The problem with this contention is that Congress does not have the constitutional authority to redefine the necessary ingredients of legislative action for its own convenience. No case makes this point more clearly than *Chadha*, in which the Supreme Court declared that any action deemed legislative must be undertaken "only in accordance with the procedures set forth in article I."⁵¹ Unless both

⁴⁸ *Id.* at 951.

⁴⁹ TRIBE, *supra* note 27, at 267.

⁵⁰ See Wolfson, *supra* note 2, at 841-44.

⁵¹ *Chadha*, 462 U.S. at 954.

houses of Congress have enacted each item in an appropriations bill as separate bills, it would be unconstitutional for a clerk of either House to do so and to submit his handiwork as a legitimate "Bill" to the President for approval or disapproval.

CONCLUSION

The constitutional impediments to a statutorily created presidential line-item veto leave only two alternatives for those determined to put such a mechanism into place. The first is a constitutional amendment, which has yet to attract the requisite congressional or popular support. The second is that Congress will have to resolve itself to make the hard decisions to balance the budget and, if so, how and when. The attraction of the presidential line-item veto is not unlike that of term limits — both devices have been designed as constraints on members of Congress otherwise determined not to be restrained from being influenced by special interests in the legislative or reelection process. The presidential line-item veto, though, is likely to meet the same constitutional fate as term limits — it is likely to be struck down by the Court for violating basic structural norms of the Constitution.⁵² Term limits failed because they conflicted with the basic "relationship" between U.S. citizens and their federal government as defined by the Constitution,⁵³ while the presidential line-item veto will likely fail for violating the fundamental allocation of budgetary authority in the Constitution that imposes on each member of Congress the responsibility for directing the spending of federal funds wisely and being politically accountable for the failure to do so. The solution to congressional vulnerability to deficit spending or special interests rests not with congressional delegations of its fundamental authorities to another branch better suited, in its opinion, to handle them. No amount of hand-wringing or protestations about Congress' inability to withstand the siren song of special interests can relieve the members of Congress from embracing a truth as old as the Constitution itself — that the power of the purse rests primarily with Congress unless or until the Constitution says otherwise.

⁵² See *U.S. Term Limits, Inc. v. Thornton, et al.*, 115 S.Ct. 1842 (1994).

⁵³ *Id.* at 1882 (Kennedy, J., concurring).