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IN SEARCH OF THE LOST CHORD: REFLECTIONS ON THE 1996 ITEM VETO ACT

Neal E. Devins[†]

For more than one hundred years, Presidents have clamored for item veto authority. Contending—as Ronald Reagan did in his 1986 State of the Union—that “I’ll take the responsibility, I’ll make the cuts, [and] I’ll take the heat,” Presidents have repeatedly challenged Congress to “give [them] the authority to veto waste.”¹ Thanks to the 1994 Republican takeover of Congress, Bill Clinton reaped an apparent windfall from the Contract with America, namely, the power to cancel (subject to congressional override) any dollar amount of discretionary budget authority, any item of new direct spending, and certain limited tax benefits.²

On January 2, 1997, one day after the self-described “Line Item Veto Act” became effective,³ a potent bipartisan coalition of lawmakers and former executive and legislative branch officials

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1. 22 WKLY. COMP. PRES. DOC. 135, 136 (1986).

2. See Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200 (1996). The constitutionality of this legislation is now before the Supreme Court. See Joan Biskupic, *Justices Put Line-Item Veto on Fast Track for Review*, WASH. POST, Apr. 24, 1997, at A23. The focus of this essay, however, is the likely operation of item veto reforms. Since such reforms can be achieved through a constitutional amendment or better crafted legislation, a decision striking down the 1996 Act will not kill the item veto. As such, irrespective of what the Supreme Court says about the 1996 Act, the workability of the item veto will remain an important policy question.

3. Despite its title, the Item Veto Act does not grant the President item veto authority. The President, rather than veto “items” in a bill of joint resolution, must sign or veto the entire measure. After signing a bill or joint resolution, the President may exercise his power—specified cancellation authority.

asked a court to strike the measure down because it "alter[s] the constitutional balance of powers between the Legislative and Executive Branches."⁴ Supporters of the Act, while conceding that the Congress is "taking action against [its institutional] interests,"⁵ describe this shift in budgetary power as salutary. In particular, as bill sponsor John McCain (R-Ariz.) put it: "Given Congress' predilection for . . . [veto-proof] omnibus spending bills, and continuing resolutions, it would seem only prudent and constitutional to provide the President with functional veto power."⁶ In other words, contrary to opponents' claims, "The Congress is not transferring power;" instead, "this bill does nothing more than" restore the President's veto power.⁷

Conflicting characterizations of the item veto bill do share a common ingredient, namely, that the act is momentous. For supporters, the bill promises to cut deficits and cures an imbalance of power between Congress and the White House; for opponents, the bill creates an imbalance of power. While legal challenges to the Act may well then turn on the courts' assessment of these competing spins,⁸ the Act's impact on both the budget and the balance of powers may be far less consequential than either supporters or opponents let on. Political will and socio-political context, rather than changes in the structural division of power, will likely prove dominant in defining the balance of power between the Congress and White House on budgetary policy.⁹ This was true before the

4. Complaint for Declaratory Relief at 5, *Byrd v. Raines*, Civil No. 97-0001(TPJ) (D.D.C. Apr. 10, 1997). The lawmakers include Robert Byrd, Mark Hatfield, and Daniel Patrick Moynihan. The government officials (who are the attorneys for these lawmakers) include former Clinton White House Council Lloyd Culter, one time Senate Legal Council Mike Davidson, and ex-Reagan Assistant Attorney General Charles Cooper.

5. 142 CONG. REC. S2929, S2962 (1996) (remarks of Sen. Lott).

6. 141 CONG. REC. S53, S104 (1995).

7. *Id.* Some supporters, however, see the item veto as a broad delegation of legislative power to the president. As majority leader Trent Lott (R-Miss.) put it: "This is a fundamental change; there is no denying it." 142 CONG. REC. at S2962. For these supporters, the item veto restores fiscal discipline to the appropriations process by "allowing the President to exercise leadership in controlling spending and to impose priorities." *Id.* at S2960 (remarks of Sen. Gramm).

8. U.S. District Judge Thomas Penfield Jackson's April 10, 1997 decision striking down the Line Item Veto Act concluded that Congress impermissibly "ceded basic legislative authority" by transferring to the President "the function of repealing a provision of statutory law." *Byrd v. Raines*, Civil No. 97-0001(TPL), 1997 U.S. Dist. LEXIS 4397, at *34 (D.D.C. Apr. 10, 1997). In reversing this decision, the Supreme Court expressed no opinion on the Act's constitutionality. Instead, the Court ruled that congressional plaintiffs lacked standing. See *Raines v. Byrd*, 117 S. Ct. 2312, 1997 U.S. Lexis 4040 (1997).

9. For a concise thoughtful explanation of why structural divisions of power do not

Line Item Veto Act was approved and will likely remain true. Put another way: Circumstances where the President is likely to make moderate use of the item veto are situations where the President would have successfully negotiated a budget compromise with Congress; circumstances where the President is likely to make aggressive use of the item veto are instances where the President would have used his veto and other powers to navigate a budget stalemate with Congress.

Along these lines, the very fact that Congress approved the item veto suggests that Congress may well see this deficit cutting mechanism as being more about symbolic politics than about a fundamental shift in the balance of powers. For more than a decade, Congress has been looking for ways to appear responsive to skyrocketing budget deficits without abandoning its taste for pork. The item veto is a curious but sensible solution to this dilemma. Indeed, irrespective of the Supreme Court's ultimate assessment of the Line Item Veto Act's constitutionality,¹⁰ the line item veto may well become a permanent fixture of budgetary policymaking. While the Supreme Court can compel Congress to pursue budgetary reform through alternative means (including a constitutional amendment), no Supreme Court decision can damper those political forces that prompted Congress to approve the Line Item Veto Act.

Why is Congress committed to item veto legislation? After all, the item veto allows the President to kill constituency-driven pork barrel appropriations. In reality, however, the President will be constrained in his exercise of the item veto for the very reason that Congress cannot resist deficit spending, namely, interest groups and voters alike want to protect, not eliminate, government largesse. No doubt, the President will make use of the item veto, especially on silly sounding projects that lack a politically potent constituency (endive farming, the Lawrence Welk museum, private schools in

define the ultimate division of power among the branches, see Michael A. Fitts, *The Foibles of Formalism: Applying a Political "Transaction Cost" Analysis to Separation of Powers*, 47 CASE W. RES. L. REV. 1643 (1997).

10. *Raines v. Byrd*, while not commenting on the Act's constitutionality, suggested that the Court would eventually decide this question. By referring to its "natural urge to proceed directly to the merits of this important dispute" and making clear that its decision does not foreclose "constitutional challenge (by someone who suffers judicially cognizable injury . . .)," the Court indicated that *Raines* will not be its last word on the Item Veto Act. *Raines*, 1997 Lexis at *33, *17. Instead, once the President exercises his item veto power, an individual adversely affected by the President's action undoubtedly will have standing to file suit. At that time, the Item Veto Act is likely to again make its way onto the Supreme Court's docket.

foreign countries, etc.). More significantly, the item veto will sometimes be used to place the President's priorities ahead of Congress'. Yet Congress has enough weapons in its arsenal to rein in an overly aggressive White House. For example, Congress can make use of many of the devices that state lawmakers now use to blunt governors' item veto power. Moreover, by shifting responsibility to the President, Congress can approve constituency-driven programs without having to take the heat for adding to the nation's deficit. As a result, rather than make some hard budgetary decisions, Congress can take cover behind its White House delegee.

In the end, the item veto is likely to add more nuance than substance to the elaborate stew of Congressional-White House power sharing. For the most part, the President's exercise of this authority will reflect the give and take between the branches that would have existed with or without the item veto. In this way, the item veto can be analogized to Japanese Kabuke theater—"[A] highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."¹¹

This essay, while downplaying the item veto's likely significance, will not embrace the item veto. My contention, instead, is that Congress and the White House would much prefer to operate within existing parameters than to dramatically restructure the balance of powers in the name of budget reform.¹² Part I will serve as a short course in President-Congress budgetary politics. This discussion will reveal that the item veto, rather than restore presidential power, expands the President's power of the purse. Part II, however, will cast doubt on the practical significance of this new power. Not only is the item veto unlikely to result in substantial (if any) deficit reduction, it is not likely to significantly alter the balance of power between Congress and the White House.¹³ In addition to considering the likely operation of the item veto, this discussion will also consider the dynamic between the Executive and Congress on post-*Chadha* legislative vetoes and congressional information access requests. Part III will serve as a synthesis of

11. E. Donald Elliot, *Reinventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

12. For an explication of why Congress and the White House almost always operate within existing parameters, see Theodore J. Lowi, *President v. Congress: What the Two-Party Duopoly Has Done to the American Separation of Powers*, 47 CASE W. RES. L. REV. 1219 (1997).

13. This conclusion is somewhat inconsistent with earlier writings of mine and testimony that I have presented to Congress. Those writings argue that the item veto, while resulting in little or no deficit reduction, will significantly shift the balance of power.

sorts. It will summarize the teachings, such as they are, of the first two parts as well as consider why Congress and White House resistance to a balanced budget amendment strengthens my central claim about elected government's disinterest in transforming itself in order to balance the budget.¹⁴

I. THE BUDGET AND THE BALANCE OF POWERS

The Line Item Veto Act is, at least for now, the culminating event in a twenty-five year struggle between the White House and Congress. On one side of the divide, the Act is deemed a necessary response to Congress's vitiation of the President's veto and, with it, the framers' belief that power should be shared among the three branches in order to limit the intrusiveness of the Federal Government.¹⁵ On the other side, the Act is deemed a sell out of Congress' power of the purse in favor of a return to the heretofore discredited Nixon administration campaign to advance presidential policy priorities through the impoundment of appropriated funds. While it is tempting to say the truth lies somewhere between these poles, it does not. The Item Veto Act embraces a vision of the separation of powers at odds with the constitutional design.¹⁶

A. The Rise and Partial Decline of Congress' Power of the Purse¹⁷

The power of the purse lies with Congress. The Constitution prohibits money "drawn from the Treasury, but in Consequence of

14. Larry Lessig makes a similar argument in his provocative, often compelling contribution to this symposium. See Lawrence Lessig, *Lessons From a Line Item Veto Law*, 47 CASE W. RES. L. REV. 1659 (1997). Unlike Larry Lessig, however, I do not think that a combined Balanced Budget/Item Veto Amendment will necessarily accomplish much. Unless and until elected government is willing to treat the national debt as a first order priority, existing incentives to maintain expenditures without reducing taxes will remain. For this reason, Balanced Budget Amendment proposals are typically filled with loopholes. Beyond those built in escape hatches, as Mike Fitts ably demonstrates, structure, and with it structural reform, is overestimated. See Fitts, *supra* note 9.

15. Greg Sidak makes an analogous argument in support of the president's inherent item veto power. See *Line Item Veto: The President's Constitutional Authority*, Hearing before the Subcommittee on the Constitution of the Senate Judiciary Committee, 103rd Cong., 1st Sess. 1074, 1088 (1993) (statement of J. Gregory Sidak).

16. In saying that the item veto is inconsistent with the constitutional balance of powers, I do not mean that the Act is unconstitutional.

17. Significant portions of the following section are borrowed from my prior work. See Neal Devins, *Budget Reform and the Balance of Powers*, 31 WM. & MARY L. REV. 993, 998-1004 (1990); Neal Devins, *A Symbolic Balanced Budget Amendment*, 9 J. LAW & POL. 61, 64-72 (1992).

Appropriations made by Law."¹⁸ This power was placed outside of the executive, for fear of the consequences of centralizing the powers of purse and sword. As James Madison wrote in *The Federalist* No. 58: "This power of 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."¹⁹ As characterized in the Senate's Iran-Contra Report: The appropriations power is "the Constitution's most significant check on Executive power."²⁰

The framers' conclusion that the "legislative department alone has access to the pockets of the people"²¹ does not mean that the President is proscribed from playing a role in legislative decision making on appropriations. Rather, the Constitution guarantees the President a large role in legislative decision making, including decision making on appropriations. In the first place, the President may recommend to Congress measures that he considers "necessary and expedient." More importantly, the President possesses a qualified veto over legislation that allows him to force Congress to pay heed to his view of what is unnecessary or inexpedient. The framers regarded these separately enumerated powers as mutually supporting an ongoing legislative role for the President.

Nonetheless, the President's budgetary role is clearly subordinate to that of Congress. Congress determines funding levels and establishes parameters for the expenditure of appropriated funds. Although the power to recommend, and especially the power to veto, enables the President to communicate vigorously his views to Congress and to participate actively in the process, Congress makes the ultimate decision whether and to what extent executive sentiments should prevail.

Through its control of budgetary decision making, Congress is also empowered to create formal mechanisms of communication between the executive and the legislature on budgetary matters. Prior to 1921, the President had no statutory responsibilities for submitting a budget.²² The President's formal role began with the

18. U.S. CONST. art. I, § 9, cl. 7.

19. THE FEDERALIST No. 58, at 300 (James Madison) (M. Beloff ed., 1987).

20. SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT, S. REP. NO. 216, H.R. REP. NO. 433, 100th Cong., 1st Sess. 18 (1987).

21. THE FEDERALIST No. 48, at 254 (James Madison) (M. Beloff ed., 1987).

22. See LOUIS FISHER, PRESIDENTIAL SPENDING POWER 9-35 (1975) (discussing presi-

Budget and Accounting Act of 1921 ("1921 Act"),²³ which Congress enacted in response to the huge national debt accumulated during World War I. The 1921 Act required the President to construct and submit an annual budget, but allowed Congress complete freedom to alter the budget. Congress was expected to coordinate its revenue and spending decisions with the President's budgetary recommendations. The President was supposed to be responsible for overall budget aggregates, with Congress retaining the right to set priorities within those aggregates.

Although the 1921 Act accorded greater budgetary responsibility to the President, it did not alter the fundamental balance of power between Congress and the President.²⁴ The President's responsibility to establish budget aggregates was more than tempered by Congress' power to increase or decrease the President's budget by a simple majority vote. The 1921 Act thus respected two essential constitutional principles: the President's responsibility for his own proposals and Congress' ultimate responsibility for appropriations, subject only to the President's veto. Under the 1921 Act, Congress did not surrender or dilute its fiscal prerogatives, nor invade any executive prerogatives. In fact, the 1921 Act did not subordinate either branch to the other but carefully preserved their respective roles.

Congress sought again to protect its budgetary prerogatives and preserve the balance of power between the executive and itself when it enacted the Congressional Budget and Impoundment Control Act of 1974.²⁵ Congress passed the Budget Act in response to the impoundment controversy of the early 1970s in which President Nixon claimed that the executive could refuse to spend appropriated funds if he judged such refusal to be in the national interest. Presidential impoundments threatened the budgetary balance of

dential duties in budget matters prior to the 1921 Budget and Accounting Act).

23. Ch. 18, 42 Stat. 20 (1921).

24. As stated in the House Report:

It will doubtless be claimed by some that this is an Executive budget and that the duty of making appropriations is a legislative rather than Executive prerogative. The plan outlined does provide for an Executive initiation of the budget, but the President's responsibility ends when he has prepared the budget and transmitted it to Congress.

H. R. REP. NO. 14, 67th Cong., 1st Sess. 6-7 (1921).

25. Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended in scattered sections of 1, 2 & 31 U.S.C.).

power. By withholding appropriations, the President could control aggregates and priorities.

The Budget Act contained a number of provisions designed to strengthen congressional control over fiscal affairs. Under the Budget Act, presidential rescissions of appropriated funds required both Senate and House approval.²⁶ The Budget Act also created Budget Committees in the House and Senate,²⁷ established a Congressional Budget Office to supply technical support,²⁸ and required the adoption of budget resolutions to set overall limits on budget aggregates (such as total outlays and revenues) and permit debate on spending priorities.²⁹ In formulating its budget resolutions since 1974, Congress has often applied economic, technical and policy assumptions different from those presented in the executive budget.³⁰

The 1974 Act then enabled Congress to defend itself against the so-called "imperial presidency."³¹ In particular, the Nixon administration had launched a concerted effort to extend White House authority through both governmental reorganization and claims of inherent presidential authority. Along with its claim of impoundment authority, for example, the Nixon White House centralized presidential control over the administrative state through its establishment, in 1970, of the Office of Management and Budget.³² Fearing these and other initiatives, Congress fought back through the 1974 Budget Act, the War Powers Resolution, and its use of the legislative veto to condition its delegations of policymaking authority.³³

26. See §§ 1012, 1017, 88 Stat. at 333-34, 337-39. The President could defer the spending of funds, subject to a one-house veto. See *id.* § 1013, 88 Stat. at 334-35. The Supreme Court struck down one-house legislative vetoes in *INS v. Chadha*, 462 U.S. 919 (1983).

27. See §§ 101-102, 88 Stat. at 299-302.

28. See *id.* §§ 201-203, 88 Stat. at 302-05.

29. See *id.* §§ 302, 305, 88 Stat. at 306-08, 310-12. Through the use of a congressional budget adopted in concurrent resolutions, Congress sets "macro" policy and allocates the outlays and budget authority among a number of broad categories, such as national defense, health, and agriculture. Congress is still supposed to formulate and fund specific programs through regular appropriation bills, but within the broad outlines of the budget resolution. See A. SCHICK, *LEGISLATION, APPROPRIATIONS, AND BUDGETS: THE DEVELOPMENT OF SPENDING DECISION-MAKING IN CONGRESS* 41-43 (Cong. Res. Serv. 1984).

30. See A. SCHICK, R. KEITH & E. DAVID, *MANUAL ON THE FEDERAL BUDGET PROCESS* 5 (Cong. Res. Serv. 1984).

31. See A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

32. See FISHER, *supra* note 22, at 46-58.

33. For case study treatments of the legislative veto and War Powers Resolution, see

The 1974 Budget Act's recalibration of the balance of powers came at a price, however. Specifically, the principal consequence of this transformation was fiscal irresponsibility. The Budget Act hinged on a centralized process, the budget resolution. Yet Congress, unlike the quintessentially centralized Executive, is strongly decentralized.³⁴ Whereas the Office of Management and Budget ("OMB") must answer to the President, and serves as the White House's authoritative voice on budget matters, the Congressional Budget Office ("CBO") has less institutional clout because it is not answerable to any of the 535 members for which it speaks. These institutional differences have contributed to the budget deficit in two quite distinct ways. First, by devaluing the President's budgetary role, Congress and the White House both pay more attention to program priorities than budget aggregates. Consequently, anticipated revenues have been overestimated in order to make way for greater spending. Congress accomplished this mischief by voting a generous ceiling in the budget resolution, while the President simply manipulated his aggregates to accommodate policy preferences.³⁵ Second, by centralizing its budgetary decision making through both the budget resolution and increased reliance on omnibus appropriations housed in a single continuing resolution (rather than thirteen separate appropriations bills), Congress became vulnerable to centralized but ill-conceived budget planning.³⁶

Witness the exponential growth of budget deficits since 1981. Prior to 1981, the accumulated national debt stood at roughly one trillion dollars. Although over-optimistic budget projections made deficits common (occurring in all but five years since 1950), deficit spending averaged only 5.1 percent of total outlays from 1950-1980.³⁷ That all changed in 1981. Riding the wake of Ronald

LOUIS FISHER AND NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 120-134, 151-172 (2d ed. 1996).

34. An explication of how Congress' decentralized structure creates collective action problems that adversely affect fiscal policymaking can be found in Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEO. L.J. 1737 (1992).

35. See LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 192 (3d ed. 1993).

36. See Rudolph Penner, *An Appraisal of the Congressional Budget Process*, in *THE BUDGET PROCESS: EXERCISING POLITICAL CHOICE* 67 (Allen Schick ed., 1986); Allen Schick, *How The Budget Was Won and Lost*, in *PRESIDENT AND CONGRESS: ASSESSING REAGAN'S FIRST YEAR* 26-27 (Norman Ornstein ed., 1985).

37. See Paul Peterson, *The New Politics of Deficits*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 367 (John E. Chubb & Paul E. Peterson eds., 1985).

Reagan's dramatic 1980 election victory, the Reagan administration successfully pushed through Congress a new vision of economic growth—supply side economics. Believing that a tax cut would spur more than enough economic growth to offset lost revenues, Congress slashed taxes by an estimated \$150 billion annually, while reducing expenditures by less than \$50 billion.³⁸ Things did not work out as planned. Supply side economics could not turn around restrictive Federal Reserve Board action and a sluggish economy.³⁹ As a result, the Reagan administration deficit estimate was off by over \$100 billion.⁴⁰

The 1981 deficit debacle reveals the failings of the 1974 Act structure. With neither branch taking the heat for unrealistic budget aggregates, the likelihood of widely supported social policy objectives (such as increasing programmatic expenditures or decreasing taxes) controlling aggregate figures was greatly increased.⁴¹ Furthermore, the unrealistic economic assumptions utilized in 1981 set in motion subsequent deficits. By 1985, budget deficits were so outrageous that Congress felt compelled to act. Its solution was the peculiar Gramm-Rudman-Hollings Deficit Control Act. Gramm-Rudman represents something of a hybrid. In enacting the bill, Congress proved it was no longer willing to trust either its own internal budgetary process or the President's.⁴² Consequently, an automatic sequestration procedure ensures that the budget conforms to deficit reduction targets. Specifically, if the regular appropriations process does not produce a budget within Gramm-Rudman's prescribed deficit reduction target,⁴³ the OMB prepares a sequestration order to be issued shortly after the start of the fiscal

38. See *id.* at 382 (citing 37 CONG. Q. ALMANAC 93,259 (1981)).

39. See *id.* at 382-84.

40. See *id.* at 384-85.

41. Indeed, while 1981 was a watershed, a comparison of the five years before and the five years after the 1974 Act reveals that the annual deficit had already quadrupled. See JOHN CRAWFORD, *BALANCED BUDGET AMENDMENT SUDDENLY COMES TO LIFE*, reprinted in 50 CONG. Q. WKLY. RPT. 1234-35 (1992) (National Taxpayers Union Chart). See also Louis Fisher, *Federal Budget Doldrums: The Vacuum in Presidential Leadership*, 50 PUB. ADMIN. REV. 693, 697 (1990).

42. See Jack Brooks, *Gramm-Rudman: Can Congress and the President Pass This Buck?*, 64 TEX. L. REV. 131, 131 (1985) (labeling Gramm-Rudman "a wholesale abdication of constitutional responsibility").

43. Under Gramm-Rudman, the calculation of the maximum expenditure level within the deficit reduction target is made by the OMB. See The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1985) (codified as amended in scattered sections of U.S.C.).

year.⁴⁴ In order to limit executive control, Congress specified mandatory formulae for allocating the spending cuts.⁴⁵ The executive, therefore, could not use the sequestration order as an opportunity to control budget priorities. As Senator Phil Gramm (R-Tex) explained:

Let me make note of . . . why this is significantly different than impoundment, and why it is significantly different than any line-item veto approach. We all know that the difficulties in those procedures is that Members of Congress are jealous of their powers, and they do not want to transfer power to the executive branch. . . . This bill does not create new powers.⁴⁶

Although Gramm-Rudman did not alter the fundamental budgetary balance of power, Congress' utilization of automatic mechanisms and reliance on entities outside its control paved the way for the further abdication of budgetary responsibility. As former Congressman Jack Brooks (D-Tex) wrote in his lament of Gramm-Rudman: "Active efforts to cure a problem may be controversial and are seldom risk-free. It is tempting to believe that avoiding blame is a safer course."⁴⁷ He added, "Gramm-Rudman demonstrates once again that political accountability is an extremely difficult problem for the American system of government."⁴⁸

Gramm-Rudman, in fact, exacerbated the failings of the 1974 Act. Rather than compelling realism, the Act spawned budget gimmickry. As former CBO head Rudolph Penner noted: "Gramm-Rudman produced forecasts that promised to achieve deficit goals when there was little hope of coming close to them. It promoted dishonest accounting that seemed to make the deficit lower than it really was."⁴⁹ Gramm-Rudman also contributed to the rise of om-

44. See Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 102(b)(1), 101 Stat. 754, 767 (1987) (codified as amended at 2 U.S.C. § 902(b)(1) (1989)).

45. For a description of this process, see Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 630-33 (1988).

46. 131 CONG. REC. 25,840 (1985) (statement of Sen. Phil Gramm).

47. Brooks, *supra* note 42, at 135.

48. *Id.* at 137.

49. Rudolph Penner, *No Will, No Way*, N.Y. TIMES, May 20, 1992, at A23. Examples of this include shifting costs away from the present year to an earlier year and raising revenue in the current year at the expense of future revenue. See *id.* Another tactic was for the OMB to limit program cuts by grossly overestimating revenues. See Jackie Calmes, *Despite Tough Talk, Big Cuts Unlikely*, 48 CONG. Q. WKLY. RPT. 218, 218-19

nibus spending bills housed in continuing resolutions. Appropriations subcommittees, fearing that their budgets would be cut a second time to make up for those subcommittees that failed to meet their deficit-reduction goals, refused to bring their bills forward.⁵⁰ As a result, Gramm-Rudman created disincentives for the making of hard budgetary choices. Moreover, by encouraging last minute action, Gramm-Rudman shifted control away from decentralized appropriation subcommittees to the more centralized Appropriations Committee, which hammered out the entire budget in the form of a continuing resolution.

Unrealistic budget projections and centralized budgeting are the hallmarks of Gramm-Rudman. This outcome should come as no surprise. From 1986-1991 (when deficit targets were in place), the nation's deficit rose \$1.2 trillion.⁵¹ During this period, the actual deficit exceeded deficit reduction targets by more than \$400 billion.⁵²

Gramm-Rudman is revealing for other reasons. Notwithstanding the high political stakes of reining in a runaway deficit, Congress' crafting of the original Gramm-Rudman statute seemed, at best, haphazard. The Senate held no hearings and House hearings were little more than a formality, with only four persons invited to testify.⁵³ Moreover, rather than seriously consider warnings that the Act was unconstitutional, Congress included within the statute a procedure that would guarantee expedited review by the Supreme Court.⁵⁴ This pass-the-buck mentality underscores the source of much of our deficit woes—Congress' unwillingness to hold itself accountable for the responsible exercise of its "power of the purse."⁵⁵

(1990). Former Senate Budget Committee Chair Jim Sasser (D-Tenn), expressing frustration at this subterfuge, complained that "we have ended up with two sets of books. . . . First, we keep a set for the Gramm-Rudman game—and this is a useful fiction manipulated to give the illusion of progress—and second, we keep a set of books that are the real books. This is the real deficit." *Budget Reform Proposals, Joint Hearings Before the Senate Comm. on Governmental Affairs and the Senate Comm. on the Budget*, 101st Cong., 1st Sess. 2 (1989).

50. Congressman David Obey, then an appropriations subcommittee chair, castigated the Gramm-Rudman model for creating "an incentive for every committee around here not to bring their bill out to floor." 134 CONG. REC. H66, H69 (daily ed. Feb. 2, 1988).

51. See ROBERT KEITH & EDWARD DAVIS, CONG. RESEARCH SERVICE, A BALANCED FEDERAL BUDGET: MAJOR STATUTORY PROVISIONS 3 (1992).

52. See *id.*

53. See FISHER & DEVINS, *supra* note 33, at 135.

54. See *id.* at 135-36.

55. In particular, rather than bear the decisional costs for tough budgetary choices,

The failure of Gramm-Rudman prompted further reforms in 1990. The Budget Enforcement Act of 1990 substituted heretofore impossible-to-meet deficit-reduction goals with spending guidelines.⁵⁶ These guidelines, by placing separate upper limits on defense, domestic, and international spending, were intended to keep expenditures stable. The problem is that the deficit once again exploded. The combination of a costly savings and loan bailout and a persistent recession that limited revenues resulted in a deficit estimated at more than \$350 billion for fiscal year 1992, the Act's first year in operation.⁵⁷ By ignoring the problems of revenues altogether, the Budget Enforcement Agreement accomplished little other than to provide the cover of "a supposedly statutory mandate" to the Congress and White House.⁵⁸

Fiscal year 1993 brought more of the same. Agreeing to an extension of the 1990 agreement, President Clinton and Congress congratulated each other for responding to the deficit crisis without making the hard choices necessary to eat into the ever-ballooning deficit. At the end of 1996, the public debt had grown an additional \$1 trillion and stood at \$5.3 trillion dollars. This figure is truly frightening. When Ronald Reagan became President, the debt stood at \$1 trillion. Since that time, it has grown at a rate of \$1 trillion every four years (\$3 trillion in 1989; \$4 trillion in 1993; \$5.3 trillion in 1997).⁵⁹ In other words, Congress and the White House's posturing as well as the enactment of several budget reform measures seem somewhat beside the point. Moreover, with annual interest on the national debt now standing at roughly \$1 trillion, there is reason to think that a dramatic restructuring of the current arrangement is in order. For that reason, the Item Veto Act is especially important.

Unlike earlier reform efforts, the item veto bill appears to be a license to kill.⁶⁰ Specifically, whenever the President signs an appropriations bill, he may (within five calendar days after enact-

Congress sought to hide behind Gramm-Rudmann's mandatory formulas.

56. See George Hager, *New Rules to Old Game*, 49 CONG. Q. WKLY. RPT. 336 (1991).

57. See George Hager, *Is the Deficit Now Too Big for Congress to Tame?*, 50 CONG. Q. WKLY. RPT. 1140 (1992).

58. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 211 (4th ed. 1997).

59. See *id.*

60. Congress, however, can end run many of the bill's specifications. See *infra* notes 106-12 and accompanying text.

ment) cancel dollar amounts identified in the bill as well as any dollar amount revealed in any table, chart, or explanatory text contained in a committee report or statement of the appropriation bill's managers.⁶¹ Once the President exercises this cancellation authority, Congress has thirty days to pass a bill disapproving of the President's cancellations.⁶² Any "disapproval bill" Congress passes is then subject to constitutionally specified presidential veto and congressional override procedures.⁶³ Hence, unless two-thirds of both houses of Congress disapprove of the President's actions, the President appears (legally) unrestrained in his ability to rescind discretionary appropriations.

The Line Item Veto Act appears, in critical respects, to be a sea change in presidential spending power. No longer is the President dependent on Congress; instead, cancellations take effect whenever one-third (plus one) of either house of Congress sides with the President. Nevertheless, some Act supporters cast the item veto as little more than a "restor[ation] [of] the constitutional system of checks and balances."⁶⁴ This characterization, as the next part will demonstrate, is incorrect. Rather than protect inherent presidential power from a Congress bent on "eliminating the President's veto authority,"⁶⁵ cancellation authority is a truly new power that threatens to misalign the balance of powers.⁶⁶

B. The Veto Power

Line item veto proponents argue that the item veto restores essential presidential power. This claim has two components. First,

61. Presidential cancellation power also extends to entitlement authority, food stamps, and limited tax benefits.

62. Congress may strike from the disapproval bill any canceled item that no longer commands majority support.

63. In this way, the Act avoids *Chadha*-like bicameralism and presentment problems. Specifically, whenever Congress acts, legislation is approved by both Houses and presented to the President for his signature or veto. In his opinion invalidating the Item Veto Act, however, Judge Jackson argued that, under *Chadha*, "there are formal aspects of the legislative process that Congress may not alter." 142 CONG. REC. S2929, S2999 (1996). For Jackson, the Act's broad delegation of legislative power is inconsistent with *Chadha*'s command that legislative power resides with the Congress. For further discussion, see *infra* note 99 and accompanying text.

64. 141 CONG. REC. H1143 (1995) (comments of Rep. Cox). Other Act supporters see the item veto as a very broad delegation of power necessitated by Congress' fiscal irresponsibility. See *infra* note 90 and accompanying text.

65. 141 CONG. REC. H1143 (1995) (comments of Rep. Cox).

66. For an explication of why such a misalignment is unlikely to happen, see *infra* notes 135-48 and accompanying text.

speaking of the 1974 Budget Act as a fundamental shift in power that "deprived the President" of his "right" to impound funds, Act supporters depict the item veto as little more than a return to the status quo ante.⁶⁷ Second, contending that "[t]he modern congressional practice of presenting the President with omnibus legislation reduces the President's ability to play the role in enacting laws that the Constitution intended," item veto authority has been heralded as a "practical and principled" way to resurrect the veto power.⁶⁸

Neither of these claims can withstand scrutiny. The veto power has always been limited to bills, not bill provisions. Along these lines, Nixon administration efforts to substitute impoundments for vetoes were an aggrandizement of presidential power, not the defensive exercise of preexisting power. Claims that omnibus bills unconstitutionally aggrandize legislative power are also unpersuasive. The Constitution places no single subject limitations on Congress. Moreover, the rise of omnibus legislation has not undermined the presidential veto. An energetic President, through the threatened use of his veto power, may take advantage of high stakes omnibus legislation to enhance his bargaining position.⁶⁹

Omnibus Legislation and the Constitution. Article I, Section 7 simply provides that every bill "shall have passed the House of Representatives and the Senate" and shall be "presented to the President" before it becomes law.⁷⁰ This process requirement neither limits the scope nor sweep of legislation. As such, it is preposterous to suggest that omnibus legislation runs afoul of this requirement. In fact, "we have had omnibus bills from the start," including the first three appropriation bills passed by Congress.⁷¹

The question remains whether the Constitution empowers the President with inherent item veto or impoundment authority to fend off Congress' bundling of disparate items into an omnibus bill. Although the Constitution does not explicitly repudiate such presidential authority,⁷² nowhere in the Constitution can there be found

67. 141 CONG. REC. S4153 (1995) (statement of Sen. McCain).

68. *Statement of President William J. Clinton Upon Signing S. 4*, 32 WKLY. COMP. PRES. DOCS. 637 (1996).

69. For a thoughtful treatment on what it means to be an energetic president, see TERRY EASTLAND, *ENERGY IN THE EXECUTIVE: THE CASE FOR A STRONG PRESIDENCY* (1992).

70. U.S. CONST. art. I, § 7, cl.2.

71. *Line Item Veto: Hearings on S. 43 Before the Senate Comm. on Rules and Administration*, 99th Cong., 1st Sess. 192 (1985) (statement of Louis Fisher); see also Note, *Is A Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 840-43 (1987).

72. Greg Sidak and Thomas Smith make much of this fact in their quasi-defense of

inherent item veto or impoundment authority. In particular, inherent item veto and impoundment authority seem at odds with the Constitution's designation of Congress as the lawmaking branch of government. Since neither house of Congress can insist on its preferred version of legislation without the others' consent, inherent item veto or impoundment authority would effectively give the President more power in the legislative process than the Congress. Specifically, since it would require two-thirds of both houses of Congress to overtake either a line item veto or impoundment,⁷³ the President could adjust legislation to suit his preferences without the assent of Congress. In other words, inherent line item veto or impoundment authority makes a mockery of the Framers' decision to limit the President's legislative role *vis-a-vis* Congress by favoring a qualified veto over an absolute veto.⁷⁴

Claims that the decision to spend or withhold appropriated funds are part and parcel of the President's duty to "faithfully execute" the law also fall short. This common sense conclusion, shared by "[v]irtually all commentators," is best expressed in a 1988 Office of Legal Counsel ("OLC") opinion.⁷⁵ Observing that "to give the president the authority to impound funds in order to protect the national fisc, creates the anomalous result that the President would be declining to execute the laws under the claim of faithfully executing them,"⁷⁶ the OLC rejected claims of inherent impoundment authority notwithstanding Reagan administration efforts to expand the President's role in budgetary policy.⁷⁷

inherent presidential item veto authority. See J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. L. REV. 437 (1990).

73. Item vetoes would be subject to Congress' traditional two-thirds override. Impoundments could only be nullified if Congress reenacts the appropriation and then overrides a near certain presidential veto. For further discussion of impoundment overrides, see *supra* notes 61-63 and accompanying text (describing Item Veto Act override procedures).

74. See Michael Rappaport, *The President's Veto and the Constitution*, 87 NW. L. REV. 735 (1993) (demonstrating that the Framers were aware of and rejected inherent item veto authority).

75. See 12 OP. OFF. LEGAL COUNSEL 159, 207 (Prelim. Print 1988).

76. *Id.* at 207-208.

77. Doug Kmiec, a former head of the OLC, took issue with this opinion's related conclusion that the President is without inherent item veto authority. Perceiving that the OLC should serve the President's political agenda through expansive interpretations of executive power, Kmiec criticized members of the OLC for trading off the President's interests for their personal interests in maintaining their reputation as neutral constitutional analysts. See Douglas W. Kmiec, *OLC's Opinion Writing Function*, 15 CARDOZO L. REV. 337, 353-59 (1993).

Omnibus Legislation and Veto Politics. "From the nature of the Constitution," as George Washington put it, Presidents "must approve all parts of a bill or reject it in toto."⁷⁸ With that said, Item Veto Act supporters argue that Congress' practice of bundling disparate items into a single "bill," even if technically constitutional, distorts the balance of powers by making it too difficult for the President to exercise his veto.⁷⁹ Accordingly, presidential item veto and impoundment authority are trumpeted as a "restor[ation] [of] what the founders saw as the strongest deterrent to wasteful spending by Congress, an energetic executive with the power to force a thoughtful and thorough debate on individual items of spending."⁸⁰ I find this argument shortsighted. Omnibus legislation has not proven the downfall of either the presidency or the veto power.

President Reagan, for example, was well served by the 1981 Omnibus Reconciliation Act. According to Louis Fisher, "The omnibus nature of the bill was championed by the White House and presidential supporters as the only way to make cuts in popular programs."⁸¹ Reagan-era omnibus continuing resolutions, moreover, did not undermine the veto power. Although omnibus legislation changes the nature of the exchange between the White House and Congress, the veto still functions as a mediating device. For example, in 1982, President Reagan vetoed two omnibus measures and weathered a shutdown of parts of the federal government.⁸² As a result, Congress was forced to rework these bills to satisfy presidential needs.⁸³ More significantly, in 1987 the White House and Congress undertook extensive negotiations to ensure that a fiscal year 1988 continuing resolution was satisfactory to both

78. Quoted in CHARLES J. ZINN, *THE VETO POWER OF THE PRESIDENT* 22 (1951).

79. See, e.g., 141 CONG. REC. H1078, H1099 (1995) (remarks of Rep. Rohrabacher); *id.* at H1102 (remarks of Rep. Torkildsen); *id.* at H1143 (remarks of Rep. Fox).

80. *Id.* at H1100 (remarks of Rep. Cox). Along these lines, an argument can be made that those "concerned with the task of preserving initial constitutional commitments in light of changes in the constitutional context" might support item veto authority. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 93 (1994). For reasons discussed in the balance of this section, however, I think that supporters of "translational" approaches to constitutional interpretation should reject claims of inherent item veto and impoundment authority.

81. Louis Fisher, *Continuing Resolutions: Can't Live With 'em, Can't Live Without 'em*, 48 PUB. BUDGETING & FIN. 101, 103 (1988).

82. William Chapman, *Congress Leaves for Holiday With Money Tangle Unsolved*, WASH. POST, July 2, 1982, at A1.

83. See, e.g., Sandra Evans Teeley, *GOP Floats \$1 Billion Housing Plan*, WASH. POST, July 22, 1982, at D1, col. 1.

sides. In the end, Congress abandoned the fairness doctrine and included Contra aid to stave off a threatened veto.⁸⁴ If anything, such legislative compromise reveal that a President who is willing to use his veto wields enormous power in such negotiations. The vitality of the veto power therefore cannot be measured by its exercise. Rather, the effectiveness of the veto power must be measured by its impact on the political process. The "all or nothing" stakes of omnibus legislation enabled President Reagan to enhance his veto power through its threatened exercise.

As a matter of simple mathematics, frequency of use is also a poor measure of the veto power's impact. Prior to the present era of omnibus legislation, Presidents infrequently used their veto power.⁸⁵ Washington vetoed only two bills. Seven Presidents never used the power. Two Presidents, Franklin Roosevelt and Grover Cleveland, account for roughly half of all vetoes. In short, although Presidents may underutilize the veto power, the advent of omnibus legislation is not the cause of its infrequent use.

The vitality of the veto power is today and has always been a function of presidential energy. Witness, for example, George Bush's extraordinarily effective and aggressive use of the veto power.⁸⁶ On forty-three occasions, Bush vetoed public bills. More striking, a predominantly Democratic Congress was able to override only one of these vetoes. As a result, Bush won important concessions from civil rights interests in the omnibus 1991 Civil Rights Act and preserved anti-abortion language in appropriations bills.⁸⁷ Furthermore, Bill Clinton's willingness to veto several appropriations bills and shut the government down rather than approve a

84. See Jackie Calmes, *Reagan Wins Concessions in Final Funding Bill*, 45 CONG. Q. WKLY. REP. 3185, 3186 (1987). The President also used his veto threat to preserve funds for anti-abortion counseling and for foreign assistance. See *id.*

85. See Calvin Bellamy, *Item Veto: Shield Against Deficits or Weapon of Presidential Power?*, 22 VAL. U. L. REV. 557, 574-75 (1988).

86. See Janet Hook, *President's Mastery of Veto Perplexes Hill Democrats*, 49 CONG. Q. WKLY. RPT. 2041 (1991).

87. On the 1991 Civil Rights Act, see Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 982-999 (1993). On Bush's abortion vetoes, see NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES* 102-104 (1996). In addition to these vetoes, Bush also made effective use of veto threats. For example, he threatened to veto the fiscal year 1990 budget bill and consequently let the Gramm-Rudman sequestration take effect in order to further both his budget priorities and his bargaining position with Congress. See Jodie Allen, *How the Administration is Beating Congress in the Budget Game*, WASH. POST, Nov. 8, 1989, at B3.

significant tax cut enhanced his bargaining position with Congress as well as his reelection prospects.⁸⁸

The Line Item Veto Act expands, rather than restores, essential presidential prerogatives in the budget process. Neither the rise of omnibus legislation nor the design of the Constitution supports presidential item veto or impoundment authority as a mechanism to preserve the President's role in the balance of powers. The veto power remains vital in this era of omnibus legislation. Its potency seems more a function of presidential energy than Congress' manipulation of the legislative process. Furthermore (and far more significant), outside of the power to veto legislation, the Constitution does not specify any budgetary role for the President. In fact, prior to 1921, the President had no formal budgetary responsibilities. Starting with the Budget Act of 1921, Congress shared some of its budgetary power with the President. Yet, until its approval of the Line Item Veto Act, Congress never ceded its power to set budgetary priorities to the White House.⁸⁹ For this reason, critics of the Act sound an apocalyptic warning. Depicting the measure as "a truly fundamental change to our system of government" which will "take the appropriation process out of . . . [Congress and] transport it down to 1600 Pennsylvania Avenue," Act opponents warn, "This is the Constitution. This is not the so-called Contract with America. This is the Constitution."⁹⁰ Section II will serve as a partial assessment of this claim.

II. POLITICAL WILL AND THE BALANCE OF POWERS: TOWARDS AN UNDERSTANDING OF THE LINE ITEM VETO ACT

Changes in the structural division of power, while hardly irrelevant, are but one ingredient that defines budgetary policy. Consider the Line Item Veto Act: Were structural divisions determinative, the Act would place presidential budget priorities ahead of

88. See Dan Balz, *Debates Offer Dole Opportunity to Reshape Struggling Campaign*, WASH. POST, Oct. 6, 1996, at A1. Clinton, however, did approve a modest tax cut and agreed to Republican imposed spending cuts on several federal programs. See Ann Devroy, *Bill Signed to Fully Reopen Government*, WASH. POST, Jan. 7, 1996, at A1.

89. Congress, however, has occasionally granted the President substantial power to set budget priorities. In the late 1960s, for example, the President was allowed to adjust spending ceilings. See LOUIS FISHER, *THE PRESIDENT AND CONGRESS* 106-110 (1971).

90. 141 CONG. REC. S4313, S4315 (1995) (remarks of Sen. Lautenberg); 141 CONG. REC. H1028, H1090 (1995) (remarks of Rep. Kajorski); 141 CONG. REC. S4222, S4227 (1995) (remarks of Sen. Byrd).

Congress' and severely limit one of the most potent weapons in Congress' legislative arsenal. As such, Congress' approval of the item veto would seem bizarre, a self-inflicted wound on a grand scale. In some measure, congressional debates on the Item Veto Act embrace this "structure is everything" vision. Act opponents, not surprisingly, depicted Congress' vote on the measure as a modern day Armageddon.⁹¹ What is surprising is that, in some measure, Act proponents agree with this characterization. Deeming the Act "a major, major change in the policy of the Congress toward the executive branch," some proponents claim that Congress must sever its own powers in order to extricate a cancer (Congress' fiscal irresponsibility) which "threatens to destroy the future well being of our great nation."⁹²

The truth, however, is that the Line Item Veto Act is not nearly as epic as its defenders and critics suggest. Although the Act transfers legislative power to the President, Congress can easily blunt this power by specifying appropriations priorities through unofficial and informal documents, by bundling disparate programs into a single item, and by financing programs indirectly through nonappropriation bills.⁹³ Congress, moreover, may rein in the President through its lawmaking, oversight, and confirmation powers. Furthermore, with much of the budget outside the reach of the Line Item Veto Act (either because the appropriation is mandatory or the spending program politically popular), the President will be constrained in his exercise of the item veto.

None of this is to suggest that the item veto is a nullity.⁹⁴ At the margins, it will enhance the President's position in budgetary

91. See *id.* and accompanying text; see also 141 CONG. REC. S2929, S2980 (1996) (remarks of Sen. Reid) (describing the Act as being about "abrogating constitutional responsibility. It is about ceding unbridled spending authority to one individual in one branch of the government."); *id.* at S2985 (remarks of Sen. Johnston) ("Why this Congress, this Senate would want to give up its constitutional powers . . . why we would want to do that, I do not know."); *id.* at H3000 ("[O]ne day there will be a Ph. D. writing a thesis about . . . how we gave up our power, how we gave up the balance of powers that exists in our democracy.").

92. 142 CONG. REC. at S2955 (remarks of Sen. Stevens). Other proponents characterize the Act as a restoration of presidential power, not a delegation of legislative power. See *supra* notes 67-68 and accompanying text.

93. See LOUIS FISHER, STATE TECHNIQUES TO BLUNT THE GOVERNOR'S ITEM-VETO POWER, CRS REPORT FOR CONGRESS (Dec. 12, 1996).

94. It is to suggest, however, that claims that the Item Veto Act unconstitutionally disrupts the balance of powers are over-blown. Unless and until the President makes aggressive partisan use of cancellation authority, courts should reject "balance of powers" challenges to the Act's constitutionality.

battles with Congress. In particular, Congress must have the political will necessary to fend off presidential encroachments. Yet, just as an energetic President can make effective use of his veto power in this era of omnibus legislation,⁹⁵ Congress too can retain its power of the purse. In the end, the reach of the item veto is as much a by-product of political will as it is of structural divisions of authority.⁹⁶ The truth of this proposition is the subject of this section.

A. *The Item Veto and Congress*

Congress had good reason to pass the Line Item Veto Act. The anti-incumbency sentiment that contributed to the 1994 Republican takeover of Congress made it impossible for Congress to ignore charges that its fiscal irresponsibility (or as Ross Perot put it "waste, fraud, and abuse") jeopardized our nation's economic well-being. Moreover, with the failure of Gramm-Rudmann and post-1990 budget summits to check the national debt,⁹⁷ Congress needed either to rely on traditional mechanisms (increase taxes, reduce spending) or find a new structural gimmick/approach. Traditional mechanisms, however, remained unappealing. Tax increases have no political constituency.⁹⁸ At the same time, Congress could not resist constituency-driven appropriations.⁹⁹ Interest groups and voters alike expect their representatives to deliver "private goods" in exchange for their support.¹⁰⁰ In other words, the very reasons our national debt has grown so large explain why Congress cannot take bold, decisive action to "balance the budget."

95. See *supra* notes 70-85 and accompanying text.

96. See *infra* notes 98-109 and accompanying text. For an analogous argument, see Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 272 (1993) (assessing how congressional grants of litigating authority to independent agencies affect White House control over independent agency operations).

97. See *supra* notes 41-59 and accompanying text.

98. In a recent survey, 75% answered "no" when asked whether "[t]he government should raise taxes now as one means of dealing with the federal budget." *Who are the Democrats?*, WASH. POST, July 12, 1992, at A12.

99. A March 1997 *Washington Post* Survey underscores this conclusion. In it, 77% of respondents opposed reductions in future spending on Social Security and Medicare in order to balance the federal budget. See Eric Pianin & Mario Brossard, *Americans Oppose Cutting Entitlements to Fix Budget*, WASH. POST, Mar. 29, 1997, at A4.

100. See Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403 (1988). Making a similar point in a far more entertaining way, see Dave Barry, *Backlight*, WASH. POST, Mar. 9, 1997, (Magazine), at W5 (explaining why members of Congress interested in reelection cannot cut social security benefits).

The Item Veto Act is a sensible response to these pressures. Unlike constitutional reform proposals (item veto, balanced budget), the Act does not prevent Congress from reasserting its formal authority over the size and content of appropriations. Specifically, while inconsistent with the constitutional separation of purse and sword, the Item Veto Act is, in critical respects, nonbinding. Congress, for example, could nullify the Act's application simply by prefacing future appropriations with the clause "Notwithstanding any provision of the Line Item Veto Act of 1996."¹⁰¹ With that said, unlike expedited rescission proposals (that require congressional approval of presidential cancellations but compel Congress to approve or reject proposed cancellations within a specified period of time), the Item Veto Act suggests that Congress is willing to change the structural division of authority in order to rein in wasteful pork barrel spending.

The Item Veto Act has another advantage. By shifting significant cancellation authority to the President, Congress need not make two types of hard choices. First, fears of a too powerful appropriations committee pruning subcommittee priorities are staved off by an inter-branch delegation.¹⁰² Second (and far more important), Congress need not eliminate constituency-driven programs in order to meet deficit reduction targets. Instead, members can still support programs that benefit politically powerful interest groups as well as their home districts.¹⁰³ This is absolutely critical. Members appear impotent if they cannot deliver private goods legislation to their sponsors, interest groups and voters. As such, it is imperative that members get their constituency-driven programs approved by the requisite subcommittees, committees, and the Congress.¹⁰⁴ By shifting the cancellation decision to the President,

101. Greg Sidak, in 1995 Senate testimony, made this point, noting that "commitments made in bargaining situations influence behavior of other actors only to the extent that the person making such commitments is credibly bound (by himself or others) to honoring them. A statute and a constitutional amendment differ markedly in their likely efficacy in protecting future generations." *The Line Item Veto: A Constitutional Approach, Hearing before the Constitution Subcommittee of the Senate Judiciary Committee*, 104th Cong, 1st Sess. 67 (1995) (statement of J. Gregory Sidak).

102. On member fears of omnibus appropriations elevating the status of appropriations committee leadership, see Neal Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389 (1988).

103. For an explication of the incentives members have to support private goods legislation, see Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207 (1984).

104. See DAVID STOCKMAN, *THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLU-*

members can better accomplish this categorical imperative. In this way, members of Congress are made better by asking the President to do a certain amount of picking and choosing of budget priorities.¹⁰⁵

What then of the balance of powers? The Item Veto Act, while suggesting that Congress is willing to trade off some of its power of the purse when the responsible exercise of that power is too costly,¹⁰⁶ is not a wholesale abdication of Congress' power of the purse. As noted above, Congress can refuse to give effect to the Act by formally waiving any or all of its provisions in subsequent enactments. Admittedly, Congress may well be reluctant to take the heat for such an obvious repudiation of the Act's laudatory deficit reduction objectives.¹⁰⁷ Nonetheless, Congress may limit cancellation authority by following some of the techniques that state lawmakers have used to limit the gubernatorial item veto.

Let me explain.¹⁰⁸ Unlike state constitutions that include specifications for the style and format of appropriations bills, Congress may decide to appropriate in only large, lump sum amounts, eliminating from the bill specific projects and activities that the President hoped to veto.¹⁰⁹ Furthermore, although presidential cancellation authority extends to items detailed in committee reports, Congress can easily sidestep project-specific cancellations. By identifying program priorities in unofficial and informal documents (a statement in the *Congressional Record* or a note on plain paper), Congress can communicate its preferences to agencies. Since agen-

TION FAILED 390-94 (1986) (blaming the failure of the Reagan Revolution on an appropriations process that revolves around subsidies and entitlements).

105. Thanks to Jerry Mashaw for this insight. Specifically, in a conversation we had about the item veto, Mashaw described this process as a lottery whereby members, rather than internalize the cost of budget cutting, would take their chances with the President.

106. Along these lines, when Congress enacted Gramm-Rudman in 1985, it ceded some of its appropriations power for precisely this reason. See *supra* notes 41-48 and accompanying text.

107. It is also possible that the President will refuse to approve any measure that limits Item Veto Act authority. Unless two-thirds of both houses of Congress overrode the veto, Congress may have little recourse but to concede presidential cancellation authority.

108. Some of these examples come from Louis Fisher & Neal Devins, *How Successfully Can the States' Item Veto be Transferred to the President*, 75 GEO. L.J. 175 (1986). Others come from Fisher, *supra* note 93.

109. In fact, both Congress and the executive prefer lump sum funding to accommodate the need for administrative discretion. Agency officials want the latitude and flexibility associated with lump sum funding. Members of Congress also benefit from lump sum appropriations because the only way to adjust statutory details to unexpected developments is to pass another public law.

cies are unlikely to risk retaliation in subsequent legislative cycles,¹¹⁰ this informal mechanism will detail legislative preferences as well as committee report specifications.

Congress can also bundle a number of disparate projects into a single item. Just as the Constitution places no limit on what constitutes a bill,¹¹¹ there is no constitutional limitation on what constitutes an item. The Constitution, moreover, contains few limitations on the spending power and is silent on the procedures Congress was to adopt to authorize and appropriate funds. Today, Congress may appropriate by tax, legislative and appropriations committees. If Congress chose to do so, it could place substantive legislation in appropriations bills and allow authorization committees to fund programs directly through the use of "backdoor spending." These matters are left exclusively to House and Senate rules, and to Congress' interpretation and execution of its rules.¹¹²

Congress' ability to blunt presidential cancellation authority, of course, does not mean that Congress will, in fact, limit its delegation of budgetary power. After all, the very reasons why Congress had incentive to transfer some of its appropriations power suggest that Congress will be reluctant to limit presidential cancellation authority. Moreover, by sending a message that the "President knows best" when it comes to deficit reduction, Congress must guard against the political fallout of ending the Item Veto Act. In the end, Congress will only restrict its delegation when it has the political will to do battle with the President. Congress' power to set budget priorities is therefore contingent on its having a sense of stake in either a particular appropriation or its power *vis-a-vis* the President. With that said, as the next section will show, battles of this sort will be infrequent, in part, because the President may well make limited use of his newly acquired cancellation authority.

B. The Line Item Veto and the President

Line Item Veto Act supporters, noting that the President serves a diffuse national—as opposed to local or regional—constituency,

110. See *infra* notes 141-42 and accompanying text (discussing agency compliance with nonstatutory congressional action).

111. See *supra* note 71 and accompanying text.

112. On the authorization-appropriation distinction, see generally Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U. L. REV. 51 (1979).

argue that the item veto enables the President to veto "private good" pork, while preserving valuable "public good" features of legislation.¹¹³ This vision of the President as nonpartisan deficit reduction czar misses the mark, however. State experiences with the gubernatorial item veto and common sense suggest that the President will use cancellation authority to advance his policy agenda. Furthermore, discretionary federal spending is not a particularly rich ore for the President to mine in his efforts to limit deficit spending. Mandatory spending, outside the direct control of Congress, now accounts for roughly sixty percent of the federal budget. Beyond this inherent limitation on cancellation authority, the President may well be cautious in asserting item veto authority for political advantage. Congressional appropriations are often backed by politically potent interests and, as a result, aggressive use of the item veto may prove too costly. In other words, while the item veto is more about expanding presidential prerogatives than reducing the federal deficit, the President may gain little real power through this mechanism.

State experiences with the gubernatorial power to eliminate or reduce items in an appropriation have been unquestionably mixed.¹¹⁴ Although some evidence supports the notion that the item veto can be a significant deficit reduction measure,¹¹⁵ several

113. See Robinson, *supra* note 100; Stephen G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 78-81 (1995). For a competing perspective, see Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385 (1992).

114. The sweep of gubernatorial item veto authority varies from state to state. See THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 113-14 (1988-89) (comparing state item veto provisions). In the context of this essay's discussion of state item veto experiences, the phrase item veto refers to both gubernatorial item veto authority and gubernatorial reduction authority.

115. The item veto has a reputation for saving money. A 1984 legislative analysis prepared by the American Enterprise Institute concluded that "governors have vetoed or reduced appropriations to achieve substantial savings." AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, PROPOSALS FOR LINE-ITEM VETO AUTHORITY 17 (1984), reprinted in *Line Item Veto: Hearings on S. 43 Before the Senate Comm. on Rules and Administration*, 99th Cong., 1st Sess. 153 (1985) [hereinafter *Hearings on S. 43*]. Specifically, this study pointed to Governor James Thompson of Illinois, who vetoed \$174.7 million and used his item reduction powers to cut appropriations by an additional \$26 million (about three percent of the appropriations), Governor George Deukmejian of California, who achieved savings of \$1.2 billion (more than four percent of the state budget), and Governor Richard Thornburgh of Pennsylvania, who used the item veto to reduce spending by \$1.15 billion (twelve percent of the budget). *Id.* at 18. Mark Crain and Jim Miller's recent analysis is even more striking. By focusing on states that allow governors to reduce items in appropriations, Miller and Crain conclude that an item-reduction veto

studies call into question the item veto's effectiveness for reducing expenditures.¹¹⁶ Moreover, available evidence suggests that the item veto often functions as a partisan political tool that causes strife between the executive and legislative branches in state government.¹¹⁷ As Senator Mark Hatfield, Governor of Oregon from 1958-66, testified in 1984: "Legislators in states which have the line-item veto routinely 'pad' their budgets. It is a wonderful way for a Democratic-controlled legislature to put a Republican Governor on the spot: Let him be the one to line-item these issues that were either politically popular, or very emotional."¹¹⁸

Studies from Pennsylvania and Michigan support this conclusion.¹¹⁹ The Pennsylvania study suggested that "[w]hen a legislator, even though opposed in principle to an appropriation, is reasonably certain that the governor will slice it down to more moderate size, he is tempted to bolster himself politically by voting large sums of money to a popular cause."¹²⁰ The Michigan study claimed that the item veto at the state level encouraged legislators

cuts spending growth in half. See W. Mark Crain & James C. Miller III, *Budget Process and Spending Growth*, 31 WM. & MARY L. REV. 1021, 1045 (1990)); see also Ray L. Brown, *The Line Item Veto: How Well Does it Work?*, 36 GOV'T ACCTS. J. 19 (Winter 1987-88) (concluding that item reduction veto is an effective deficit reduction tool).

116. See Glenn Abney & Thomas P. Lauth, *The Line-Item Veto in the States: An Instrument for Fiscal Restraint or an Instrument for Partisanship?*, 45 PUB. ADMIN. REV. 372, 374 (1985) (legislatures whose appropriations are subject to item veto are more "fiscally irresponsible"); James J. Gosling, *Wisconsin Item-Veto Lessons*, 46 PUB. ADMIN. REV. 292, 298 (1986) (presidential "item veto will likely result in budget reductions," though the size of the reduction may not be great); see also *Expedited Recision Authority for the President, Hearing Before the Legislation and National Security Sub-committee of the House Committee on Governmental Operations*, 103d Cong., 1st Sess., at 129-141 (1993) (statement of Louis Fisher) (challenging veracity of 1992 GAO Report estimate that item veto might well reduce the deficit by \$70 billion over six years).

117. A 1988 regression analysis of the item veto and expenditure restraint did not find "a single instance of a significant negative relationship between item veto powers and government spending." David C. Nice, *The Item Veto and Expenditure Restraint*, 50:2 J. POL. 487, 497 (1988). Indeed, according to Nice, "the few significant relationships were in the wrong direction." *Id.* See also Abney & Lauth, *supra* note 116, at 375 (concluding that use of item veto is influenced by political partisanship); Gosling, *supra* note 116, at 298 (concluding that Wisconsin experience suggests that the President may use the item veto to control a Congress dominated by opposing political party).

118. *Line-Item Veto: Hearings on S.J. Res. 26, S.J. Res. 178, and S. 1921 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98 Cong., 2d Sess. 21 (1984).

119. See Nelson McGeary, *The Governor's Veto in Pennsylvania*, 41 AM. POL. SCI. REV. 941 (1947); JOHN A. PERKINS, *THE ROLE OF THE GOVERNOR OF MICHIGAN IN THE ENACTMENT OF APPROPRIATIONS*, MICH. GOV'T'L. STUD. NO. 11 (1943).

120. McGeary, *supra* note 119, at 943.

to please their constituents by voting for appropriations far in excess of anticipated revenues, thus forcing the governor to make the inevitable reductions and incur the wrath of the interests adversely affected.¹²¹ In other words, the availability of an item veto allows legislators to shift more of the responsibility for the fiscal process to the executive.¹²²

The Item Veto Act likewise promises to spur on political conflict. Like his gubernatorial counterparts, the President will seek political advantage through his use of cancellation authority. At the least, because the decision of whether a program is subject to cancellation lies with the President, programs favored by the President are not subject to cancellation.¹²³ Relatedly, the President may demand that members support programs that he favors to secure his acquiescence to congressionally approved appropriations.¹²⁴ In addition to allowing the President to preserve some programs that are at least as wasteful as those canceled, ideology and partisanship will also define the exercise of presidential cancel-

121. See PERKINS, *supra* note 119, at 56 (citing A. MACDONALD, *AMERICAN STATE GOVERNMENT AND ADMINISTRATION* 209-10 (1940)).

122. Available evidence suggests, moreover, that the item veto is used more frequently as a political tool than a fiscal one. The 1986 Rules Committee study determined that the item veto "remains first and foremost, a political instrument." See Nice, *supra* note 117. A 1985 survey of budget officers in 45 states likewise concluded that the item veto is used more to accomplish political aims than to reduce the budget. A 1985 study comparing 28 states found that governors of states in which the legislature and governor were from opposing parties were more likely to use the item veto. See Abney & Lauth, *supra* note 116.

Studies of the item veto in selected states likewise support this conclusion. A 1986 Wisconsin study concluded that states use the item veto primarily as a tool of policymaking and partisan politics. See Gosling, *supra* note 116. A 1985 review of Illinois Governor James Thompson's use of the item veto argued that the veto triggered numerous political battles. See Sevensen, *The Amendatory Veto: To Be or Not To Be So Powerful?*, 11 ILL. ISSUES 14 (1985). Finally, a 1984 review by the House Budget Committee determined that "[t]he power of the line-item veto in states [such as California and Pennsylvania] has given rise to significant political strife which has, at times, threatened the shutdown of Government services and withholding of payments." STAFF OF HOUSE COMM. ON THE BUDGET, *THE LINE-ITEM VETO: AN APPRAISAL*, 98th Cong., 1st Sess. 11 (1984).

123. Correspondingly, the President is apt to favor programs in states which support either him or members of his party at the expense of states that offer little political advantage to the President and his allies.

124. See Fisher & Devins, *supra* note 108 at 189-91 (discussing ways in which the President and Congress may horsetrade over favored appropriations). See also *Hearings on S. 43*, *supra* note 115, at 117 (statement of Milton J. Socolar) (concluding that item veto and cancellation proposals "cannot be expected" to reduce the deficit and, therefore, "should be viewed in the context of their effect on the relative balance of powers.").

lation authority. As such, conflicts between the branches—as the states' experiences reveal—are likely to arise.¹²⁵

The exercise of cancellation power, however, is not necessarily a boon to the presidency. In particular, the President may well find himself in a Catch-22. On the one hand, rather than take a political beating for failing to reduce the size of the national debt, the President may feel obligated to exercise cancellation authority. On the other hand, the exercise of cancellation authority may prove politically costly. Congress, like state lawmakers, may approve costly but politically popular initiatives and thereby invite cancellations that might damage the presidency.¹²⁶ In other words, the Item Veto Act may "actually undermine the President's reputation, his ability to resolve conflicts and, ultimately, his political strength."¹²⁷

Another (and more probable) outcome is that presidential cancellation authority will not matter that much after all. Unlike governors who are often bound by balanced budget obligations, the President may limit his cancellations to highly visible and politically vulnerable items. For example, when Presidents identify the types of items they will cancel, prime candidates are silly sounding but not particularly costly items. Accordingly, Presidents may "speak loudly but carry a small stick," that is, they may make much of the accounts they cancel but may not cancel all that much.¹²⁸ In this way, Presidents do not suffer the costs of cancel-

125. This conflict may well result in substantial delays in the enactment of appropriations bills and uncertainty on the part of agencies, state governments, and private citizens regarding their funding levels.

126. See *supra* notes 119-22 and accompanying text; see also FISHER, *supra* note 93, at 3-4 (discussing ways in which state lawmakers use the item veto to punish governors); *The Balanced Budget Amendment—Volume 2, Hearings Before the House Committee on the Budget*, 102d Cong., 2d Sess. 9 (1992) (Statement of Rep. David Obey) (stating that Congress should consider "giv[ing] back the President impoundment authority, lock, stock and barrel. I think that would scare the hell out of the White House, because right now the White House . . . escape[s] all responsibility").

127. Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized, Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 835 (1996). For this reason, George Bush's highly publicized refusal to exercise inherent item veto authority may well have been a by-product of the President's fear that he no longer would be able to blame Congress for skyrocketing deficits. See J. Gregory Sidak & Thomas A. Smith, *Why Did President Bush Repudiate the "Inherent" Line-Item Veto?*, 9 J. L. & POL. 39 (1992).

128. For example, from 1981-1992, only two domestic programs of significance were terminated by the White House and Congress. See Lawrence Haas, *Never Say Die*, 24 NAT'L J. 755, 756 (March 28, 1992). More strikingly, while President Bush proposed to terminate 246 programs in fiscal year 1993, only \$5 billion of a \$350 billion deficit

ing politically popular programs while reaping the benefits of a demonstrable commitment to cutting government waste.¹²⁹

The likely limits of presidential cancellation authority are best revealed in a list that President Reagan submitted to Congress of "wasteful, unnecessary, or low priority spending projects" in the fiscal year 1988 continuing resolution.¹³⁰ The continuing resolution contained \$604 billion in budget authority; the Reagan list of projects that could have been excised with an item veto contained \$970 million.¹³¹ Moreover, with respect to presidential rescissions, the Reagan administration proposed \$43.3 billion during its tenure.¹³² Savings of \$970 million in one year or even \$43 billion over eight years simply do not dent a \$150 billion annual deficit. Indeed, the President's 1985 Economic Report proclaimed bluntly that the item veto "may not have a substantial effect on total Federal expenditure," but may be used by the President "to change the composition of Federal expenditure—from activities preferred by the Congress to activities preferred by the President."¹³³

Preexisting budgetary demands also suggest that presidential cancellation authority is more about the balance of powers than deficit reduction. Sixty percent of the budget is nondiscretionary and therefore is not even covered by annual appropriations. Entitlements such as social security and medicare as well as interest on the national debt are handled by permanent appropriations

would have been reduced through those program cuts. *See id.*

129. With respect to the Item Veto Act, this conclusion is buttressed by the fact that canceled appropriations cannot be transferred to programs favored by the President. As a result, other than make a minuscule impact on a \$5.3 trillion (and still rising) national debt, the President gains very little by canceling appropriated funds. In contrast, whenever the President exercises his cancellation authority he bears the costs of disappointing the expectation interests of program beneficiaries as well as some members of Congress.

130. H.R. DOC. NO. 174, 100th Cong., 2d Sess. 1 (1988).

131. *See Hearings on S.J. Res. 9, S.J. Res. 23 and S.J. Res. 31, supra* note 5 (submitted statement of Louis Fisher of the Congressional Research Service).

132. *See V. MCMURTRY, RESCISSIONS BY THE PRESIDENT SINCE 1974: BACKGROUND AND PROPOSALS FOR CHANGE* 10 (Cong. Res. Serv. 1989).

133. This conclusion applies with equal force to the Bush and Clinton administrations. Witness the tug of war between President Bush and Congress over 1992 rescissions. While agreeing on the total amount of rescissions, the Congress and White House fought a pitched battle over whose preferred programs would be cut. In the end, a compromise was reached that merged legislative and executive preferences. *See Vivica Novack, Defective Remedy*, 25 *Nat'l J.* 749 (1993). Along the same lines, President Clinton and the Republican Congress fought over the content of fiscal year 1995 rescissions. The President preferred Democratic social initiatives; the Congress preferred courthouse and highway projects. *See Andrew Taylor, Spending Powers: Clinton Criticizes Republicans for Line-Item Veto Delay*, 53 *CONG. Q. WKLY. RPT.* 1627 (1995).

and therefore are within the jurisdiction of the tax committees. Entitlements, moreover, are controlled by changing substantive law (for example, eligibility and level of benefits) rather than through the appropriations process. Finally, although technically subject to veto or rescission, appropriations that further presidential priorities are effectively veto-proof. For example, in light of President Reagan's commitment to maintaining defense spending, enhanced rescission authority or an item veto in the hands of the Reagan administration would have applied at best to less than fifteen percent of the budget.¹³⁴

Presidential cancellation authority offers little hope of fiscal salvation. Its impact, if any, will be felt in Congress-White House relations. With that said, the ways in which the Item Veto Act will affect the dance that takes place between Congress and the President over budget priorities is indeterminate. Will the President use this new power to aggressively advance his budget priorities? Will presidential cancellation prove little more than symbolic measures that neither advance the President's agenda nor reduce the deficit? Will Congress force the President to choose between either canceling politically popular programs or allowing the national debt to continue its steady rise? The answer to these and other questions will be decided by political will, not structural divisions of authority. As the next section will detail, the triumph of politics over structure is quite typical in the resolution of conflicts between Congress and the White House

C. Political Will and the Balance of Powers

Formal divisions of authority between the branches, whether an outgrowth of statutory delegations or constitutional design, inform but do not define Congress-White House relations.¹³⁵ Indeed, formal power sharing arrangements play, at best, a marginal role in resolving conflicts between Congress and the President. These conflicts, instead, are typically resolved through informal negotiation. While formal divisions of authority lurk in the background of these disputes, base political concerns often are at the fore of these conflicts. For example, the President's exercise of cancellation authority is largely dependent on his political popularity, his will-

134. See Fisher & Devins, *supra* note 108, at 189; *Hearings on S. 43*, *supra* note 115, at 171.

135. For an explication of why structural arrangements do not define interbranch relations, see Fitts, *supra* note 9.

ingness to make deficit reduction a centerpiece of his policy agenda, and whether Congress is controlled by his political party. This conclusion hardly qualifies as rocket science. Nevertheless, the suggestion that presidential cancellation authority is indeterminate is reenforced by an examination of other topics that likewise show that pressures outside of the constitutional specification of powers define the ways the branches communicate with each other. This section will do just that, considering congressional-executive information access disputes and the legislative veto.¹³⁶

To begin with, Congress and the Executive have strong incentives to work with each other. For Congress, broadly worded statutes that set forth generalized objectives, but are silent on the details of administration, are far easier to enact than highly detailed legislation that specifies the distribution of benefits and burdens. Making use of public choice theory, Harold Bruff has explained this phenomenon: "Selecting a decision rule requires a prospective—and necessarily rough—judgment about which rule will produce the lowest sum of two kinds of costs: the decision costs of obtaining assent from the requisite number of participants and the external costs of decisions that disfavor a given participant."¹³⁷ At the same time, while Congress prefers to lower its decision costs by delegating power, Congress conditions that delegation on its ability to protect its institutional priorities "at the operational stage [when] it is much easier to predict the winners and losers from a change in the decision rules."¹³⁸ For this reason, Congress has a strong incentive to couch its delegation with mechanisms that enable it to "veto" administrative decisions that it disapproves of without enacting legislation. Likewise, Congress has strong incen-

136. Another example is War Powers. Specifically, although the Constitution envisions a significant legislative role in military policymaking, Presidential priorities tend to dominate War Powers decision making. See generally LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237 (1997). The reason for this is that "decisions about such matters as troop commitments and the conduct of negotiation are so much more central to executive interests than to those of the judiciary or Congress." John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 294 (1993). In other words, "the interests and capacities of the branches," rather than formal divisions of authority, often define which branch of government will exercise authority. *Id.* See also John O. McGinnis, *The Spontaneous Order of War Powers*, 47 CASE W. RES. L. REV. 1317 (1997); Fitts, *supra* note 9.

137. Bruff, *supra* note 103, at 218.

138. *Id.* at 221.

tives to insist that the Executive share with it information necessary to monitor the administration of federal programs.

The Executive also benefits from these power-sharing arrangements. Witness the White House's participation in the establishment and the growth of the legislative veto, a procedure by which departments or agencies would make proposals that would become law unless Congress rejected them by a majority vote of either one or both house of Congress. Originally proposed by Herbert Hoover in 1929, the legislative veto enabled Hoover to "make law" and reorganize executive branch operations without subjecting his plan to the cumbersome and uncertain lawmaking process.¹³⁹ Over time, the legislative veto grew in popularity but became more controversial. Perceiving that Congress was using this procedure to micromanage its operations, the Reagan administration—while willing to accept the legislative veto as a condition on its discretion by signing onto statutes containing legislative vetoes—successfully challenged the procedure's constitutionality in *INS v. Chadha*.¹⁴⁰

Chadha, rather than suggesting that courts are likely to play a large role in resolving disputes between Congress and the White House over the line that separates lawmaking from administration, spoke to the forces that propel the legislative and executive branches to resolve informally their institutional disputes with one another. In the decade after *Chadha*, 1983-1993, well over two hundred legislative vetoes were enacted into law. Although presidential signing statements sometimes cite *Chadha* and proclaim that these measures will be treated "as having no legal force or effect,"¹⁴¹ it is quite clear that affected agencies comply with legislative veto provisions. "Agencies cannot risk . . . collisions with the committees that authorize their programs and provide funds."¹⁴² As Louis Fisher observed in his definitive study of this device, "In one form or another, legislative vetoes will remain an important mechanism for reconciling legislative and executive interests."¹⁴³ In fact, Fish-

139. See generally Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273 (1993).

140. 462 U.S. 919 (1983).

141. WILLIAM FRENCH SMITH, LAW AND JUSTICE IN THE REAGAN ADMINISTRATION: THE MEMOIRS OF AN ATTORNEY GENERAL 221 (1991).

142. Fisher, *supra* note 139, at 288.

143. *Id.* at 292.

er argued, "[n]either Congress nor the executive branch wanted the static model of government offered by the Court."¹⁴⁴

Information access disputes tell a nearly identical story. In particular, the executive sees little to be gained from fighting emotionally pitched battles over whether information access is necessary for Congress to perform its legislative duties or, alternatively, whether information access requests improperly intrude upon the executive's duty to administer governmental programs.¹⁴⁵ Executive compliance, however, does not mean that the executive is convinced of the appropriateness of the information access request. Instead, Congress' success is often a byproduct of the numerous weapons in its arsenal that can be used to punish recalcitrant executive branch officials. Congress, among other things, may publicly embarrass executive branch officials, hold up confirmation hearings of presidential nominees, and enact legislation that restricts agency operations.

These congressional powers are potent. For example, executive branch officials have no interest in seeing the newspaper headline "Congress Subpoenas Documents,"¹⁴⁶ nor do they want to be publicly humiliated before an acrimonious legislative hearing. When an agency official is called to testify, committee members are put in a position of some strength over that individual. If a dispute over information access is going on at the time, the hearing is the committee's chance to put a great deal of political and personal pressure on the witness. The success of this technique has been attested to by committee staffers. The former general counsel to the Senate Select Committee on Intelligence, Britt Snider, commented that "the intelligence agencies withhold such information . . . at their own peril. I have found the prospect of being criticized by the Committees to be a very compelling motivation for most agencies. . . ."¹⁴⁷ Along the same lines, agencies seem particularly willing to work with Congress when the nomination of a high-

144. *Id.*

145. For general treatments of this issue, see Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 B.Y.U. L. REV. 17 (1995); Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197 (1992); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109 (1996).

146. Telephone Interview with Linda Gustitus, Staff Director and Chief Counsel, Senate Oversight Subcomm. of Government Management (Mar. 25, 1994).

147. Letter from L. Britt Snider, General Counsel to the Senate Select Committee on Intelligence to Peter M. Shane (July 10, 1990) (on file with author).

ranking agency official is held up, pending executive branch compliance with oversight requests. This is precisely what occurred with Clinton's choice for head of the Justice Department's Environment Section, Lois Schiffer, during Congress' investigation of environmental crimes enforcement.

The question of whether executive branch interests are served through such regularized compliance remains. The answer is a qualified yes. At the agency and departmental level, it is critically important to maintain good relations with legislative overseers. Consequently, it is rarely sensible to place abstract principles of separation of powers ahead of day-to-day working relationships.¹⁴⁸ As was the case with the legislative veto, Congress needs to delegate in order to reduce the costs of legislation; the Executive needs to accept conditions on delegated authority in order to facilitate Congress' willingness to transfer power through delegations. "Each branch is both a potential ally and adversary of the others, and is thus involved in . . . a 'bargaining' or 'mixed motive' game in which there is a mixture of mutual dependence and conflict, of partnership and competition."¹⁴⁹ These bargains, rather than formal divisions of authority, define power sharing among the branches.

III. CONCLUSION: SPECULATIONS ON THE BALANCED BUDGET AMENDMENT

"[T]he way we design our political institutions reveals much about how we wish to resolve our underlying value conflicts in society and which goals we embrace over time."¹⁵⁰ Without question, concerns of Congress' inability to control a deficit run amok figured prominently in the Item Veto Act's delegation of cancellation authority to the President. It is equally true, however, that the

148. Under the current regime, the threshold determination of whether an information request raises a "substantial claim of executive privilege" rests with those who have the least interest in asserting an executive privilege claim against congressional overseers: the department and agency heads. 13 OP. OFF. LEGAL COUNSEL 185 (1989). While presidential and Justice Department materials provide guidance as to what types of legislative requests are problematic, *id.*, there is little reason to think that agency heads will place these values ahead of maintaining good day-to-day relations with their congressional overseers.

149. McGinnis, *Constitutional Review*, *supra* note 136, at 299.

150. Michael Fitts, *Ways to Think About the Unitary Executive: A Comment on Approaches to Government Structure*, 15 CARDOZO L. REV. 323, 336 (1993); *see also* Lessig, *supra* note 14.

Item Veto Act is a bit of an empty shell, the contents of which will be filled through political gamesmanship. Although specifying that presidential cancellations reduce the federal budget deficit without harming the national interest,¹⁵¹ the Act neither requires presidential action nor limits legislative-executive horsetrading that may increase the national debt.¹⁵² That is, if Congress is truly committed to either reducing deficits or (heaven forbid) balancing the budget, it needs to do more than authorize presidential cancellations.

On this score, the failure of Congress and the President to rally behind the Balanced Budget Amendment is revealing.¹⁵³ While filled with loopholes,¹⁵⁴ the Balanced Budget Amendment is consequential in ways that the Item Veto Act is not. Most strikingly, "[t]he President would be duty bound to impound funds . . . and perhaps obligated to defend those programs of which he disapproves."¹⁵⁵

The President, for good reason, sees little political advantage in this potentially massive transfer of power. Unlike the Item Veto Act, where the President can both increase debt through horsetrading and limit his cancellations to programs which lack a meaningful political base, an enforceable Balanced Budget Amendment may well force the President to upset settled expectations by defunding entitlements and the like.¹⁵⁶ Rather than commit politi-

151. This specification may well satisfy the constitutional standard governing legislative delegations of policymaking, that is, an "intelligible principle" that sets decipherable boundaries. This standard is set forth in *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) and *Mistretta v. United States*, 488 U.S. 361, 372 (1989). For this reason, I think the district court's invocation of *Chadha* to strike down the Line Item Veto Act was misplaced. See *supra* note 8.

152. For example, nothing in the Act prevents the President from conditioning his approval of an item on Congress' funding one of his pet projects.

153. See Eric Pianin & Helen Dewar, *Budget Amendment Barely Loses in Senate*, WASH. POST, Mar. 5, 1997, at A1.

154. See *The Balanced Budget Amendment, Hearings Before the House Committee on the Budget*, 102d Cong., 2d Sess. 189-197 (1992) (statement by Louis Fisher) [hereinafter 102d Congress Hearings]; see also Devins, *supra* note 17, at 75-82 (discussing ways in which lawmakers can skirt the amendment's deficit reduction goals).

155. *Balanced Budget Amendment, Hearings Concerning H.J. Res. 1 before the House Judiciary Committee*, 105th Cong., 1st Sess. (1997) (statement of Cass R. Sunstein); see also 1994 *Senate Appropriations Committee Hearing* at 82 (statement of Charles Fried) (stating that the President could "argue with considerable plausibility" that he has a "duty" to impound). Not surprisingly, governors are more prone to use their item veto authority in states with balanced budget amendments. See 102d Congress Hearings, *supra* note 154 (statement of Louis Fisher).

156. Whether Congress would craft an enforceable Balanced Budget Amendment, of

cal suicide on a regular basis, the President would much prefer to embrace optimistic economic forecasts and put off hard budgetary choices until after the next election.¹⁵⁷

The Congress too has good reason to steer clear of a meaningful balanced budget amendment.¹⁵⁸ This fundamental change in the structure of government, while imposing significant political costs on the President, does not allow Congress to protect its interests through horsetrading and other techniques. That the amendment scores well with focus group participants is inadequate compensation for this wholesale transfer of budgetary power.¹⁵⁹ Put another way, there is little political gain in compulsory presidential impoundments of congressionally favored programs.

Absent fundamental change affecting either the way we elect public officials or their terms of office, it is unlikely that elected officials will impose the costs of a balanced budget (through severe program cuts or substantial tax increases) on the present generation.¹⁶⁰ Elected officials have little incentive to balance the budget. Hearings are filled with witnesses who benefit from congressional spending. Since the costs of spending are typically spread throughout the nation, few witnesses oppose spending. A 1990 study by James Payne found a 145 to 1 ratio of witnesses supporting proposed spending.¹⁶¹ While the incentives for spending are strong, there is no incentive to finance increased spending through tax hikes. Elected officials (who want to stay elected), therefore, "enjoy" appropriating money to benefit their constituents, but they do not 'enjoy' taxing them."¹⁶² Former chair of the House Budget

course, is another matter altogether.

157. See Clay Chandler & Eric Pianin, *A Strategy to Delay the Pain*, WASH. POST, Feb. 7, 1997, at A1; Clay Chandler and Eric Pianin, *President Won't Back CPI Panel*, WASH. POST., March 13, 1997, at A1. For this reason, as Mike Fitts sagely observed: "[T]he individuality, centrality, and visibility of the 'personal unitary president,' which is seen as an advantage in terms of collective choice and public debate, can be a disadvantage when it comes to conflict resolution and public assessment." Fitts, *supra* note 127, at 835.

158. Congress, however may pursue a Balanced Budget Amendment with gimmicks and loopholes. Such action would enable Congress to duck responsibility while appearing to act decisively. It also would reenforce the trend of Congress' divesting itself of some formal power in the name of reducing annual deficits.

159. See Editorial, *Constitutional Boondoggle*, WALL. ST. J., Feb. 4, 1997, at A18.

160. Don Elliot endorses the convening of a Constitutional Convention to examine such far reaching reform. See E. Donald Elliot, *Constitutional Conventions and the Deficit*, 1985 DUKE L. J. 1077, 1096-1110 (1985).

161. See James L. Payne, *The Congressional Brainwashing Machine*, 1990 PUBLIC INTEREST 4 (1990). When this finding was reported to congressional staffers, their reaction was surprise that the gap was not larger. See *id.*

162. Elliot, *supra* note 160, at 1091 (citing JAMES BUCHANAN & ROBERT WAGNER,

Committee James R. Jones (D-Okla.) summed it up this way: "There is a constituency for national defense. There is a constituency for every item of the domestic budget. There is a loud constituency for tax cuts. But there really is no constituency for a balanced budget."¹⁶³ That future generations will bear the brunt of this imbalance is a pill that most politicians are willing to swallow.¹⁶⁴

Unless and until elected government is willing to risk significant political capital in the name of intergenerational equity, superficial reform measures—like Gramm-Rudman and the Item Veto Act—will continue to rule the day. These initiatives, as this essay has shown, offer little hope of tackling the national debt. Rather, these measures do little more than shield political actors from facing up to the consequences of their budgetary policy.¹⁶⁵

Proposals to mandate a balanced budget assume that the habits and incentives of elected government will change. While some change is possible, the cataclysmic change necessary to balance the budget seems a pipe dream. Witness the Line Item Veto Act. While far from inconsequential, the Act will not result in deficit savings and will only marginally affect the balance of powers. Congress and the White House, moreover, continue to oppose a meaningful Balanced Budget Amendment because of the pain it will inflict to politically potent constituencies.¹⁶⁶ Finally, tax increases and significant entitlement cuts remain taboo. None of this is to suggest that government is uninterested in operating efficiently or eliminating costly, ineffective programs. It is to suggest, however, that (nearly fifteen years after Gramm-Rudman) fundamental budget reform is an idea whose time is yet to come. All of this, of course, may change in the not too distant future.¹⁶⁷ With that

DEMOCRACY IN DEFICIT: POLITICAL LEGACY OF LORD KEYNES 93-94 (1977)).

163. Richard Snelling, *The Deficit's Clear and Present Danger*, N.Y. TIMES, Mar. 3, 1985, (Magazine), at 48, 70.

164. See Elliot, *supra* note 160, at 1091-92 (discussing the works of public choice theorists James Buchanan and Richard Wagner).

165. On this point, see Lessig, *supra* note 14; ROBERT BORK, EPILOGUE - THE DECLINE OF PRESIDENTIAL POWER 58 ON PORK BARRELS AND PRINCIPLES (1988) ("[T]he political and constitutional questions surrounding" the item veto makes clear that this proposal "treat[s] symptoms rather than to cure causes."). Whether the national debt is a problem that merits such fundamental change is another question altogether. With that said, the hypocrisy of budget reform is highly problematic, for it dilutes the responsibility of government.

166. An item veto constitutional amendment would not present this problem.

167. For example, if the national debt continues its stratospheric rise, public pressure to

said, especially after the reelection of Bill Clinton, there is reason to think that the 1994 Republican takeover of Congress is not the "constitutional moment" that some thought it might be.¹⁶⁸ The more things change, the more they stay the same.

"balance the budget" may eventually propel fundamental constitutional change.

168. For a speculative argument that the 1994 election might constitute such a "moment," see Mark Tushnet, *Living in a Constitutional Moment*, 46 CASE W. RES. L. REV. 845 (1996).