COMMENTS

THE UNNECESSARY DEMISE OF THE LINE ITEM VETO ACT: THE CLINTON ADMINISTRATION’S COSTLY FAILURE TO SEEK ACKNOWLEDGMENT OF “NATIONAL SECURITY RESCISSION”

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All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.


INTRODUCTION

In Anglo-American jurisprudence, the law is shaped by a series of fact patterns. As Oliver Wendell Holmes wrote, "[t]he life of the law has not been logic: it has been experience." Thus, where a party seeks to change or clarify existing law, the importance of proceeding with a favorable set of facts cannot be overstated. Proceeding with an agreeable fact pattern is all the more important when bringing a case before the United States Supreme Court, since the holding arising from that one fact pattern will yield the law of the land.

This Comment argues that the Clinton Administration (the

1. See Village of Euclid v. Ambler Co., 272 U.S. 365, 397 (1926) (stating that the Supreme Court follows "a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted"); cf. Webster v. Reproductive Servs., 492 U.S. 490, 550 (1989) (Blackmun, J., concurring in part, dissenting in part) (1989) (stating that "careful distinctions reflect the process of constitutional adjudication itself which is often highly fact specific"); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 68 (1960) (quoting favorably the words of the English Judge Sir James Parke: "Our common law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents."); LOUIS FIXHER, CONSTITUTIONAL DIALOGUES 13 (1988) (commenting that "the Supreme Court moves with a series of half steps, disposing of the particular issue at hand while preparing for the next case").

2. THE COMMON LAW 1 (52d ed. 1923).

"Administration") made a grave error in constructing its defense of the Line Item Veto Act (the "Act"). The Administration would have been much better served by restricting any exercise of the Act's cancellation power to statutory provisions within the realm of national


In public discourse, the term "line item veto" has been spelled both with a hyphen and without. The author has followed the language of the bill and omitted the hyphen. Any hyphenated spelling by an original author has, of course, been left unchanged. It should be noted that the terms "line item veto" and "enhanced rescission" or "cancellation power" are not interchangeable. See infra note 35 and accompanying text (describing differences between true line item veto power and enhanced rescission).

The use of the term "line item veto" apparently began during the Civil War when Confederate President Jefferson Davis was granted line item veto power. The term itself, however, did not appear in the text of the Confederate Constitution:

The President may approve any appropriation and disapprove any other appropriation in the same bill. In such case he shall, in signing the bill, designate the appropriations disapproved; and shall return a copy of such appropriations, with his objections, to the House in which the bill shall have originated; and the same proceedings shall then be had as in case of other bills disapproved by the President.

CONFEDERATE CONST. art. I, § 7, cl. 2.

The power was granted to the Confederate President for similar reasons as it was granted to the U.S. President in 1996. In urging ratification of the Confederate Constitution, Robert H. Smith, the author of the Confederate veto provision, supported the measure by arguing:

There is hardly a more flagrant abuse of its [sic] power, by the Congress of the United States than the habitual practice of loading bills which are necessary for Governmental operations with reprehensible, not to say venal dispositions of the public money, and which only obtain favor by a system of combinations among members interested in similar abuses upon the treasury.


Line item veto power is not unique to this country. The first actual implementation of line item veto authority apparently occurred not in the United States but in Argentina. Article 66 of the 1853 Argentine Constitution granted that nation's President such power. See Jonathan M. Miller, The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith, 46 AM. U. L. REV. 1483, 1511 n.194 (1997). In France, the 1958 Constitution granted the President not only line item veto power, but also the ability to initiate legislation involving increases in taxation and expenditures. See Ara J. Balikian, Note, The New Russian Federation Constitution: A Legal Framework Adopted and Implemented in a Post-Soviet Era, 18 SUFFOLK TRANSNAT'L L. REV. 237, 251 (1995).

5. The terminology involved with the Act is of no small importance. The Act uses the term "cancel," which it defines as the power "to rescind" any dollar amount of discretionary budget authority or to prevent items of new direct spending or limited tax benefits from having "legal force or effect." See Line Item Veto Act § 1026(4).

The word "veto" purposely was not used in the Act. This was due in part to the argument raised by Assistant Attorney General Walter Dellinger. He cautioned the Senate against using the term "veto" on the theory that such language would more likely violate the Presentment Clause by implying that the President was vetoing a bill after it had already become law. See Brief for Appellee at 9, Raines v. Byrd, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 251423.

6. The term "provision" is used in this Comment to refer to what the Line Item Veto Act
security\textsuperscript{7} because that is where the President's constitutional authority is greatest.\textsuperscript{8} In so doing, the Administration would have ensured that the inevitable constitutional challenge would have been brought on the terms most favorable to the Executive branch. Instead, the Administration ceded the initiative to the injured parties. As expected,\textsuperscript{9} a number of parties challenged the Act in court, but no challenges were brought by those injured by national security-related cancellations.\textsuperscript{10} Instead, the latter parties wisely (or fortuitously) allowed others to challenge the Act. Thus, on June 25, 1998, the Supreme Court, in \textit{Clinton v. City of New York},\textsuperscript{11} struck down the Line Item Veto Act, ruling that the Act's provisions violated the proper constitutional lawmaking procedure as outlined in the Presentment Clause of Article I.\textsuperscript{12}

allows the President to cancel. Thus, in addition to statutory language, "provision" includes relevant legislative history. \textit{See} Line Item Veto Act §§ 1021(b)(1), 1026(7). "Provision" is used instead of "item" because the federal budget does not contain line items, \textit{see} Louis Fisher & Neal Devins, \textit{How Successfully Can the States' Item Veto be Transferred to the President}, 75 GEO. L.J. 159, 159 (1986), and because the term "item" is used in the Act only with respect to new direct spending. \textit{See} Line Item Veto Act § 1021(a)(2) \textit{(stating that President may cancel "any item of new direct spending")}.

\textsuperscript{7} By "national security," the author is referring to the President's military prerogatives as Commander in Chief and his foreign affairs powers as Chief Diplomat. Therefore, this Comment maintains that the President's constitutional national security prerogatives, coupled with the congressional delegation from the Line Item Veto Act, would have allowed the President to cancel provisions within the Foreign Operations, Export Financing and Related Programs Appropriations Act, Military Construction Appropriations Act, Department of Defense Appropriations Act, and the Department of State provisions within the Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act. \textit{See infra} note 411 (providing sample provisions that the President could have canceled to achieve a favorable test case).

\textsuperscript{8} \textit{See generally infra} Part IV.A.2.a (discussing the difference between domestic and national security lawmaking and the President's greater authority in the latter area).

\textsuperscript{9} \textit{See, e.g.,} Helen Dewar, \textit{President Keeps Line-Item Veto: Ruling Leaves Door Open to Future Constitutional Challenge}, WASH. POST, June 27, 1997, at A1 ("Lawmakers... predicted that, shortly after the veto is used, the court will be faced with a challenge that will lead to a ruling on the law's constitutionality.").

\textsuperscript{10} Throughout this Comment the term, "national security-related" refers to actions taken within the President's constitutional national security power which consist of his powers as Commander in Chief and Chief Diplomat. \textit{See supra} note 7 (describing bills subject to such power). For a definition of "National Security Rescission," \textit{see infra} note 14 and accompanying text.

\textsuperscript{11} \textit{See} 118 S. Ct. 2091 (1998).

\textsuperscript{12} \textit{See id.} at 2095. There are actually two Presentment Clauses in the U.S. Constitution. The first lies in Article I, Section 7, Clause 2, and the second in clause 3. Clause 2 refers specifically to bills, while Clause 3, termed the "Residual" or "Orders" Presentment Clause, refers to orders, resolutions or votes. \textit{For convenience and to comport with standard usage, the two Clauses, with the exception of this footnote, will be referred to in the singular as the Presentment Clause. The first Presentment Clause states:}

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

U.S. CONST. art. I, § 7, cl. 2.

The "Residual" or "Orders" Presentment Clause states:

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

U.S. CONST. art. I, § 7, cl. 3.

The "Residual" or "Orders" Presentment Clause was added so that Congress could not evade presentment by calling a bill by another name. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 408-09 (Gaillard Hunt & James Brown Scott eds., 1920) (describing Madison's advocacy and the subsequent adoption of the Orders Presentment Clause). The specificity of the Presentment Clause is striking compared to other constitutional provisions. Hence, the absence of specific line item veto authority would seem to reflect that the Framers did not consider such authority within their conception of veto power. See Charles J. Cooper, The Line-Item Veto: The Framers' Intentions, in NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 31 (1988) [hereinafter PORK BARRELS AND PRINCIPLES].

The veto power first appeared in the constitution of the early Roman Republic. See RICHARD A. WATSON, PRESIDENTIAL VETOES & PUBLIC POLICY 2 (1993) (dating the prerogative from 509 B.C.). The word "veto" in fact comes from the Latin term "vetare" meaning "to forbid or prohibit." See OXFORD LATIN DICTIONARY 2050-51 (1983). Thus, "veto" means "I forbid." Id. The Roman Constitution provided that the Executive consist of two men of the patrician class called consuls. See WATSON, supra, at 2. Each official was granted a veto (or "intercessio") over the acts of the other consul. See id. In time, the plebeian class also gained a measure of representation in the form of tribunes. See id. at 3. The tribunes, who also fulfilled executive functions, were also granted veto power over the actions of the consuls. See id. The Roman veto thus involved executive officials blocking the actions of other executive officials and not measures passed by a legislature. See id. Such a development would not occur until the early sixteenth-century. See id. at 4-5.

In England, the veto evolved out of the conflict between the King and Parliament over the lawmaking prerogative. See id. at 4. Throughout the medieval period, both branches possessed positive lawmaking powers. See id. During this period, the sovereign could both make and unmake laws irrespective of the consent of Parliament. See EDWARD C. MASON, THE VETO POWER 13 (1967).

During the reign of Henry VI (1422-61 and 1470-71), however, the ability of the King to effect unilateral changes in the law began to erode. See id. at 15 n.1. Eventually, the monarch was forced to accept or reject the whole of a petition of the House of Commons. See id. By the beginning of the sixteenth century, this custom had become entrenched, virtually stripping the King of his positive lawmaking powers. See id. Nonetheless, the King's veto power was absolute in that it could not be overturned by a vote of Parliament. See ROBERT J. SPITZER, THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY 4 (1988).

Although the frequency of the monarch's veto varied over the next century and a half, with the establishment of the supremacy of the Commons after the 1688-89 Glorious Revolution, the use of the royal veto was called into serious question. See id. at 15-17. Nearly two decades later in 1707, Queen Anne withheld her assent from a Scottish militia bill, an action which would prove to be the last veto issued by a British monarch. See WATSON, supra, at 5.

The veto was imported to the New World by English colonists. While under English rule, the governor in each colony could veto bills passed by the legislature. See MASON, supra, at 17.
This Comment argues that by putting its "best foot forward"—by canceling provisions solely within the national security realm—the

Moreover, in all but three colonies, the King could also prevent a bill from becoming law even though it had the governor's assent. See id. at 17. See generally SITZER, supra, at 1-24 (providing a history of the veto in Europe and its adoption in the United States). See also WATSON, supra, at 25-70 (describing the development of presidential veto power in America).

The use of the royal veto over colonial laws drew the ire of the American Colonists. The Declaration of Independence condemned King George III for his alleged abuse of that prerogative:

He has refused his Assent to Laws, the most wholesome and necessary for the public good. He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

THE DECLARATION OF INDEPENDENCE, paras. 3, 4 (U.S. 1776).

The Articles of Confederation did not provide for an independent executive branch, so no veto provision existed in the nation's initial federal governing document. See ART. OF CONFEDERATION.

The term "veto" was eschewed by the Framers due to the monarchical connotations of the word at the time. See TERRY EASTLAND, ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY 65 (1992). Instead, euphemistic terms such as "negative," "qualified negative," "revisionary check," and "revisionary power" were used during the period to describe the power. See J. Gregory Sidak & Thomas A. Smith, Four Faces of the Item Veto, 84 NW. U. L. REV. 437, 441 (1990). Such terms were at the heart of the scholarly debate over the intent of the Framers and if line item power inhered under Article I, Sections 7 and 8. See infra note 17 (providing a list of articles and discussion of arguments in favor of inherent line item veto power).

Compared to issues such as the structure of the legislative and executive branches, the veto power elicited comparatively little debate during the Ratification Debate over the Constitution. The concept itself appears only four times in the Federalist Papers. See THE FEDERALIST No. 51, at 263 (James Madison), NOS. 66, at 335 (Alexander Hamilton), 69, at 349 (Hamilton), 73, at 372-76 (Hamilton) (Garry Wills ed., 1982). Likewise, veto power is hardly discussed during the debates over ratification of the Constitution. See 1 THE DEBATE ON THE CONSTITUTION 99, 109, 196, 198, 635, 825 (Bernard Bailyn ed., 1990) (providing the limited examples of discussion of veto power during the Ratification Debate); 2 THE DEBATE ON THE CONSTITUTION 165 (Bernard Bailyn ed., 1990) (same).

The discussion of the President's veto power took place on June 4, June 6, July 21, August 15, and September 12, 1787. See PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 389-97 (1966). Debate focused on whether the Executive veto should be qualified or absolute. Executive action of this sort could not be overturned by the legislature. Although defended ably by Alexander Hamilton and James Wilson, this proposal was quickly disregarded. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 98-104 (Max Farrand ed., 1937). The Framers, therefore, agreed upon a qualified veto without much dissent. See id. The only subsequent debate was over what fraction of the legislature should be able to override the veto. See id.

The veto power remained fairly static throughout the various constitutional drafts. See THE VIRGINIA PLAN § 8 (May 29, 1787), in CLINTON ROSSITER, 1787: THE GRAND CONVENTION 362 (1987) (proposing a council of revision consisting of Executive and member of the National Judiciary to examine every act of the National Legislature before it became law); THE REPORT OF THE COMM. OF THE WHOLE § 10 (June 13, 1787), in ROSSITER, supra, at 364, 365 (proposing that the Executive could negative any act unless two-thirds of each branch voted to overturn it); THE NEW JERSEY PLAN (June 15, 1787), in ROSSITER, supra, at 367-69 (making no provision for executive negative); RESOLUTIONS REFERRED TO THE COMM. OF DETAIL ¶ 16 (July 26, 1787), in ROSSITER, supra, at 372 (granting Executive power to negative an act unless two thirds of each branch later overturn veto); THE CONST. AS REPORTED BY THE COMM. OF DETAIL, art. VI, § 13 (Aug. 6, 1787), in ROSSITER, supra, at 377-78 (granting Executive power to negative any act pending reconsideration of bill by the National Legislature and a two thirds vote in each house).
Clinton administration would have set the stage for a favorable test case.\textsuperscript{15} Such a test case would likely have acknowledged the existence of "National Security Rescission":\textsuperscript{14} a narrow statutory construction limiting the area of presidential cancellation power to within the field of national security. Such a result would have been the best possible outcome for the Administration and would have assured that the President maintained cancellation authority over a sixth of the federal budget.\textsuperscript{15}

I. BACKGROUND

The constitutionality of a federal line item veto, with its many possible manifestations,\textsuperscript{16} has not suffered from inattention in academic

\begin{enumerate}
  \item Test cases are often pursued because the Supreme Court does not render Advisory Opinions. \textit{See Letter from the Justices to President Washington} (Aug. 8, 1793), in RICHARD H. FALLON, JR., FEDERAL COURTS AND THE FEDERAL SYSTEM 92-93 (4th ed. 1996) (providing the letter which established the basis for the prohibition against advisory opinions).
  \item The term "National Security Rescission" is the author's own.
  \item \textit{See Robert C. Byrd, The Control of the Purse and the Line Item Veto Act, 35 HARV. J. ON LEGIS. 297, 315 (1998) (stating that the defense budget alone accounts for approximately one sixth of the annual federal budget).}
  \item These include "separate enrollment," "expedited rescission," the "partial item veto," and the "amendatory veto." Separate enrollment is the version of the Act that was initially passed by the Senate. This measure would have required each appropriation and entitlement bill to be unbundled and separately enrolled as hundreds or thousands of new bills, which the President could then sign or veto individually. \textit{See 141 CONG. REC. S4,075-76 (daily ed. Mar. 16, 1995) (statement of Sen. McCain) (describing the procedure involved with separate enrollment). In the wake of the City of New York decision, this proposal has been resuscitated by advocates of the line item veto. \textit{See infra note 21} (detailing efforts in both the House and the Senate to pass different versions of line item veto legislation).
  \item During the 104th Congress, the other main alternative to enhanced rescission was "expedited rescission." S. 14 in the 104th Congress is an example of this. \textit{See S. REP. NO. 104-9, supra note 4, at 6. This measure would have treated the President's actions as recommendations, assuring a prompt congressional vote on the proposals. \textit{See id. The district court in \textit{Byrd v. Raines} stated in dictum that such a mechanism might be a constitutional alternative to enhanced rescission: "The expedited rescission model favored by many Members of the 104th Congress would retain the President's role as a recommender of rescissions . . . ." 956 F. Supp. 25,38 (D.D.C. 1997), \textit{vacated}, 117 S. Ct. 2312 (1997).}
  \item \textit{Another plan is the "partial item veto" or "reduction only veto," which grants the Executive the most power. Here, the Executive not only has the option of eliminating spending completely, but he can reduce the appropriation to whatever level he wishes. \textit{See Abascal & Kramer, supra note 4, at 1564 (discussing the mechanics of the "partial item veto"). Eleven governors have this power. \textit{See Diane-Michele Krasnow, The Imbalance of Power and the Presidential Veto: A Case for the Item Veto, 14 HARV. J.L. & PUB. POL'y 583, 613 n.101 (1991).}}
  \item \textit{With the Line Item Veto Act, the President had only the power to cancel entire measures. For example, if Congress wished to appropriate funds for 16 airplanes and the President only wished 12, he could not have vetoed four of them. \textit{See William M. Welch, Power of the Pen Taken to Another Level, USA TODAY, Jan. 3, 1997, at 6A. In this limited sense, the President's cancellation power is still an "all-or-nothing" proposition. Yet another form of line item veto is the "amendatory veto." This power allows governors to condition approval of enacted bills on the legislature adopting their suggested changes. Beginning with Alabama in 1901, seven states have adopted this form of line item veto power. \textit{See Fisher & Devins, supra note 6, at 166. For additional proposals, see Walter F. Brown, Jr., Comment, Where's the Pork? Restoring Bal-}
circles. Thus, this Comment will not retread upon this well-worn

ance with a Line-Item Veto, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 259, 280-84 (1985) (drawing upon state experience and proposing a line item veto amendment); Nancy J. Townsend, Comment, Single Subject Restrictions as an Alternative to the Line-Item Veto, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 250-31 (1985) (arguing for a single subject amendment in place of line item veto amendment); see also J. Gregory Sidak, The Line-Item Veto Amendment, 80 CORNELL L. REV. 1498, 1498 (1995) (arguing in favor of a line item veto amendment); Sidak & Smith, supra note 12, at 437, 445-60 (discussing four possible variations of line item veto). See generally AMERICAN ENTER. INST. FOR PUB. POLICY RESEARCH, PROPOSALS FOR LINE-ITEM VETO AUTHORITY (1984) (providing line item veto proposals).

17. This Comment will avoid rehashing arguments concerning the Act itself or the line item veto as an abstract policy proposal.

There are a host of articles that address the Act. For the most thorough treatment of the constitutionality of the Act, see Thomas O. Sargentich, The Future of the Item Veto, 83 IOWA L. REV. 79, 85 (1997) (arguing that the Act violates the Presentment Clause and that the underlying policy rationales are unpersuasive); Michael J. Gerhardt, The Bottom Line on the Line-Item Veto Act of 1996, 6 CORNELL J.L. & PUB. POL'Y 233, 237-42 (1997) (arguing that the Line Item Veto Act is unconstitutional on Presentment and nondelegation grounds and also that the Act encumbers the President’s veto power); see also Catherine M. Lee, Note, The Constitutionality of the Line Item Veto Act of 1996: Three Potential Sources for Presidential Line Item Veto Power, 25 HASTINGS CONST. L.Q. 119, 157 (1997) (arguing that the Act separates separation of powers either through the nondelegation doctrine or a violation of Article I). Two authors argued that the Act would be upheld. See Gordon T. Butler, The Line Item Veto and the Tax Legislative Process: A Futile Effort at Deficit Reduction, But a Step Toward Tax Integrity, 49 HASTINGS L.J. 1, 105-04 (1997) (predicting that the Act will be upheld and that it will have a positive effect on the perceived fairness of the tax system); Michael G. Locklar, Comment, Is the 1996 Line-Item Veto Constitutional?, 34 HOUS. L. REV. 1161, 1163 (1997) (arguing that the Act satisfies bicameralism, Presentment, does not violate separation of powers, and will be upheld by the Supreme Court).

A host of other articles focus on narrower constitutional issues surrounding the Act. See Michael B. Rappaport, Veto Burdens and the Line Item Veto Act, 91 NW. U. L. REV. 771, 773 (1997) (arguing that the “veto burden” in the Act renders it unconstitutional); Robert Destro, Whom do you Trust? Judicial Independence, the Power of the Purse & the Line Item Veto, 44 FED. LAW. 26, 28 (1997) (expressing concern that the Act will threaten the independence of the Judiciary). Other articles have focused more on the policy ramifications of the Act. See Byrd, supra note 15, at 299-300 (contending that the Act is ineffective in reducing the deficit and gives away too much power to the President); Matthew C. Bernstein, The Emperor Has No Clothes: The Line Item Veto Act of 1996 Exposed, 16 ST. LOUIS U. PUB. L. REV. 85, 89 (1996) (contending that the Act will not affect the balance of political power and will do little to facilitate deficit reduction); Neal E. Devins, In Search of the Lost Chord: Reflections on the 1996 Item Veto Act, 47 CASE W. RES. L. REV. 1605, 1608 (1997) (arguing that the Act will not result in deficit savings and only marginally affect the political balance of power); Lawrence Lessig, Lessons from a Line Item Veto Law, 47 CASE W. RES. L. REV. 1659, 1659 (1997) (arguing that the Act will not be upheld and that an amendment involving both line item veto and balanced budget provisions should be adopted instead).

The line item veto as a concept has been approached from a number of different angles, including discussion regarding the intent of the Framers, the existence of an inherent line item veto, the practical and policy ramifications of a line item veto, and the experience of the states with the line item veto.

For the intent of the Framers, see generally PORK BARRELS AND PRINCIPLES, supra note 12 (assembling a distinguished array of scholars who primarily discuss the intent of the Framers); Sidak & Smith, supra note 12, at 441-45 (arguing that ambiguity of Framers’ words indicates there are four line item veto possibilities). But cf. Paul R. Q. Wollfon, Note, Is a Presidential Item Veto Constitutional?, 96 YALE L.J. 838, 839 (1987) (contending that colonial experience with riders and nongermane amendments on money bills indicates that the Framers were familiar with such practices and purposely decided not to provide for line item veto power).

For a discussion on the existence of an inherent line item veto, see L. Gordon Grovit, The Line-Item Veto: The Best Response When Congress Passes One Spending "Bill" a Year, 18 PEPP. L. REV. 43, 43-44 (1990) (asserting that due to rampant abuse of Presentment by Congress, inherent
line item veto is the constitutionally appropriate response); Krasnow, supra note 16, at 583 (arguing that inherent line item veto exists in Constitution); cf. Michael D. Schragemann, Note, The Implicitly Constitutional Item Veto, 19 OKLA. CITY U. L. REV. 161, 161-62 (1994) (arguing that implicit line item veto test case is worthwhile); Sidak & Smith, supra note 12, at 59 (asserting that President Bush should have established test case for inherent line item veto). But see EASTLAND, supra note 12, at 76 (denying existence of inherent line item veto); JOSEPH E. KALLENBACH, THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP 356 (1966) (concluding that in exercising veto power a President "must go all the way in one direction or the other"); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 266 (2d ed. 1988) (concluding that "the constitutionality of a line-item veto is dubious"); Michael B. Rappaport, The President's Veto and the Constitution, 87 NW. U. L. REV. 735, 738 (1993) (contending that President does not have a selective veto nor the ability to approve bills without intent to enforce them); [hereinafter, Rappaport, President's Veto]; Robert J. Spitzer, The Constitutionality of the Presidential Line-Item Veto, 112 POL. SCI. Q. 261, 280-83 (1997) (arguing against inherent line item power).

Generally, advocates of inherent line item veto power contend that use of this implicit power would have restored equilibrium between the branches. They contend that omnibus bills with riders and nongermane amendments have distorted the Framers conception of a "bill." See Sidak & Smith, supra note 12, at 467-68. But see Doe v. Mathews, 420 F. Supp. 865, 868 (D.N.J. 1976) (opining that "[t]he Constitution of the United States does not require the Congress to limit each Bill to one object, or to state that object in its title"); Krasnow, supra note 16, at 606 (stating that practice of attaching riders to bills began in 1667 in England and was familiar to Framers); Rappaport, President's Veto, supra, at 744 n.23 (quoting English Lord Chancellor Finch in 1678, as stating that "tacking . . . takes away the King's negative voice in a manner, and forces him to take all or none; when sometimes one part of the Bill may be as dangerous for the kingdom, as the other is necessary"). Others contend that because line item veto power was exercised at the time of the Framers, the Framers included the prerogative in the veto power. See Forrest McDonald, The Framers' Conception of the Veto, in PORK BARRELS AND PRINCIPLES, supra note 12, at 1-7.

Even before City of New York, almost all arguments in favor of inherent line item veto power were deeply flawed, usually for one of five reasons. First, they dwelt on the Framers' intent to the complete exclusion of the case law. In particular, they failed to address I.N.S. v. Chadha. See 462 U.S. 919, 954 (1983) (holding that repeal as well as enactment must strictly follow the requirements of Presentment).

Second, advocates of inherent line item veto power overlooked adverse material from the time of the Framers. For example, Blackstone's view of veto power does not comport with what today would be considered inherent line item veto power. Blackstone stated that the King's role in legislation

consists in the power of rejecting, rather [sic] than resolving; this being sufficient to answer the end proposed. For we may apply to the royal negative . . . what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of doing wrong, but merely of preventing wrong from being done. The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses.

1 WILLIAM BLACKSTONE, COMMENTARIES *150 (1765); see also 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 473 (Jonathan Elliott ed., 1836), cited in Brief for Appellee at 31, Clinton v. City of New York, 118 S. Ct. 2091 (1998) (No. 97-1374), available in 1998 WL 263890 (quoting Framers' approval of the bill, when it is sent, he shall sign it, but if not, he shall return it").

Third, proponents of this power failed to overcome the fact that no President has ever claimed such a power, let alone used it. Two presidents have flatly denied the existence of inherent line item veto power and both men command unique deference. President Washington believed that the President's veto power did not include the ability to excise certain portions of a bill: "From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto." 33 WRITINGS OF GEORGE WASHINGTON 96 (John C. Fitzpatrick ed., 1940). Washington's opinion, both as the first President and especially as a Framer, carries special weight. See Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 559, 621 (1842) (concluding that "contemporaneous exposition of the [Constitution], by those who were its immediate framers" bolsters long acquiescence in construction).
President Taft also argued against the existence of inherent line item veto power. "[The President] has no power to veto parts of the bill and allow the rest to become a law. He must accept it or reject it . . ." William Howard Taft, The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations 11 (1916). In light of his later position as Chief Justice, President Taft's opinion also demands particular respect. Cf. Cooper, in Pork Barrels and Principles, supra note 12, at 44-45 (discussing President Hayes' vetoing of five different appropriations bills because they had the same rider in them).

Moreover, despite the urging of many commentators, neither Presidents Reagan, Bush nor Clinton (all line item veto advocates) ever attempted to exercise the purported power of inherent line item veto authority. See J. Gregory Sidak & Thomas A. Smith, Why Did President Bush Repudiate the Inherent Line Item Veto?, 9 J.L. & POL'Y 39, 59 (1992); cf. Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong. 236 (1971) (testimony of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Department of Justice) [hereinafter 1971 Hearings] (discussing existence of inherent line item veto: "Certainly, if [the President] had an item veto power, I suspect impoundment would not be the issue that it is").

Fourth, the argument in favor of inherent line item veto power suffers from logical inconsistencies. See Rappaport, President's Veto, supra, at 742 (arguing that if the President has inherent line item veto, then both houses of Congress should logically possess the power as well).

Finally, proponents of inherent line item veto power fail to recognize that most state courts have not accepted inherent line item veto authority for governors. See Krasnow, supra note 16, at 613 n.102.

Other scholars have focused on the practical application or policy ramifications of the line item veto. For a discussion of the implementation or policy ramifications of the line item veto, see Louis Fisher, The Constitution Between Friends 94-95 (1978) (providing policy arguments against line item veto); Calvin Bellamy, Item Veto: Shield Against Deficits or Weapon of Presidential Power?, 22 VAL. U. L. REV. 557, 591 (1988) (drawing upon the state experience and arguing that results from federal line item veto are not likely to reduce spending and concluding that political leadership is the solution); Alan J. Dixon, The Case for the Line-Item Veto, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207, 208 (1985) (arguing in favor of a line item veto amendment with a majority override provision); Mickey Edwards, The Case Against the Line-Item Veto, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 191, 191 (1985) (arguing against line item veto); John H. Robinson, Ethics and the Line-Item Veto, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 157, 157 (1985) (examining the ethical issues raised by the line item veto); L. Peter Schultz, An Item Veto: A Constitutional and Political Irrelevancy, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 177, 190 (1985) (arguing in favor of limited use of impoundment); V.L.W., The Item Veto in the American Constitutional System, 25 GEO. L.J. 106, 107 (1936) (discussing legislative history of line item veto principal and its potential pros and cons); Brown, supra note 16 (drawing upon state experience and proposing line item veto amendment). See generally Glen O. Robinson, Public Choice Speculations on the Item Veto, 74 VA. L. REV. 403, 407 (1988) (examining the political dynamics of the line item veto); Maxwell L. Stearns, The Public Choice Case Against the Item Veto, 49 WASH. & LEE L. REV. 385, 436 (1992) (contending through use of "public choice" theory that the line item veto is apt to provide President with greater legislative power than control wasteful spending); Aaron Wildavsky, Item Veto Without a Global Spending Limit: Locking the Treasury After the Dollars Have Fled, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 165-66 (1985) (arguing that a line item veto is inadequate to reduce deficit spending and that a global limit is needed instead); Comment, Separation of Powers: Congressional Riders and the Veto Power, 6 Mich. J.L. Reform 735, 758 (1973) (arguing that an increase in veto power is unnecessary); Townsend, supra note 16 (arguing for a single subject amendment in place of a line item veto amendment).

path. Issues such as standing and ripeness, and the Act's political and policy ramifications have been addressed elsewhere and are outside the scope of this piece. Instead, this Comment concentrates on the legitimacy of presidential cancellations within the sphere of national security, and as such, charts a different course by arguing that such presidential action was on firmer constitutional footing than other presidential cancellations. This Comment further con-


There are also numerous articles discussing the experience of individual states with the line item veto. *See, e.g.*, Brent R. Appel, *Item Veto Litigation in Iowa: Marking the Boundaries Between Legislative and Executive Power*, 41 DRAKE L. REV. 1, 34 (1992) (arguing that state supreme court has struck down the most sweeping executive interpretations of the veto and has allowed legislature leeway to add conditions to spending provisions); Daniel S. Strouse, *The Structure of Appropriations Legislation and the Governor's Item Veto Power: The Arizona Experience*, 36 ARIZ. L. REV. 113, 116 (1994) (arguing that governors have misapplied and courts have misinterpreted item veto power to the benefit of the executive branch); Mary E. Burke, Comment, *The Wisconsin Partial Veto: Past, Present and Future*, 1989 Wis. L. REV. 1395, 1398 (arguing that the partial veto power approved by the state supreme court conflicts with separation of powers concerns and that such a power should be better defined); Stephen Masciocchi, Comment, *The Item Veto Power in Washington*, 64 WASH. L. REV. 891, 891 (1989) (examining history of item veto power in Washington and proposing reforms to the power).

For a further list of line item veto articles, see LARRY D. BENSON, *THE PRESIDENTIAL LINE-ITEM VETO: A BIBLIOGRAPHY* (1989) (providing comprehensive, if dated, bibliography on the subject).

18. The first two challenges brought against the Line Item Veto Act were dismissed for lack of standing. *See Raines v. Byrd*, 117 S. Ct. 2312, 2322 (1997) (holding that the appellees' alleged injuries were "insufficiently personal and concrete to be granted standing" and "the institutional injury they allege is wholly abstract and widely dispersed"); National Treasury Employees Union v. United States, 101 F.3d 1423, 1425 (D.C. Cir. 1996) (holding that union's alleged injury was "neither sufficiently concrete nor imminent to create a justiciable controversy").

19. *See supra* note 17 for articles discussing policy and political aspects of the Act. During its year and a half in existence, enhanced rescission authority had yet to become the political stuff of Caesars as predicted by many of the Act's opponents. See Neil A. Lewis, *Byrd's Eloquent Voice Continues to Fight to Honor Tradition in the Senate*, N.Y. TIMES, Nov. 29, 1997, at A1 ("We handed to the President just as the Roman Senate handed to Caesar and to Sulla the control over the purse."). Even with enhanced rescission power, however, two of the President's highly publicized appointees, Bill Weld for Ambassador of Mexico and Bill Lann Lee for Assistant Attorney General for Civil Rights, were not confirmed. *See Walter Shapiro, "Acting" is Now All the Confirmation Process Can Muster*, USA TODAY, Dec. 17, 1997, at 8A (describing President Clinton's failure to get his appointees approved). Moreover, enhanced rescission may have worked to the President's detriment in lobbying for Fast Track trade authority. For example, Representative Tillie Fowler commented upon Clinton's priority of fast-track legislation: "I was leaning for it, now I'm leaning against it. I support fast-track, but I would not want to give it to this President, based on how he's using his [enhanced rescission] authority." Julie Eilperin, *Life with the Line-Item: Orton Prepares Legal Challenge as Clinton Strikes Again*, ROLL CALL, Oct. 9, 1997, at 11.

20. By the same token, it has also been argued that allowing the President to cancel tax provisions would have been on the weakest constitutional footing. Senator McCain stated: "I would not veto the tax portions of the bill because those are constitutionally the weakest aspect of the line-item veto authority." Peter Baker, *Clinton Checks Tax Plan for Possible Use of Line-Item Veto*, WASH. POST, Aug. 2, 1997, at A1. The decision in *Skinner v. Mid-America Pipeline Co.*, how-
tends that a new act, a National Security Line Item Veto Act, if passed, might still pass constitutional muster. In a broader sense, this Comment strives to contribute to existing scholarship on the law of presidential power by discussing and providing a model demonstrating the difference between the President's constitutional powers in the national security realm and those in domestic affairs.\textsuperscript{21} Although White House Press Secretary Michael McCurry\textsuperscript{22} and Senator John McCain\textsuperscript{23} have suggested in general terms that national security-related cancellations might have been less vulnerable to constitutional challenge, their contentions were never advanced in any detail. This Comment fleshes out the particulars behind these vague assertions of presidential power.

As such, this piece consists of six parts. While the remainder of the current section provides background information on the Act's provisions, Part II discusses the prior case law on the Presentment Clause. Part III discusses the recent \textit{City of New York} decision. The section concludes that the \textit{City of New York} case was correctly decided and that no one in the Administration should have been surprised by the case's outcome. Part IV discusses the case law concerning the President's constitutional authority in national security through both his
role as Commander in Chief\textsuperscript{25} and as Chief Diplomat.\textsuperscript{26} Part IV concludes that the President's authority in national security affairs is significantly greater than in domestic affairs and that it includes the unilateral power to repeal national security law. When the President's powers are bolstered by Congress' broad delegation powers in the national security arena, and further augmented by the venerable custom of national security-related impoundment,\textsuperscript{27} his powers are virtually insuperable. The breadth of this combination of presidential and congressional power would have permitted the President to cancel national security-related provisions through the Line Item Veto Act, in effect, granting the President National Security Rescission power. Part V counters potential arguments against recognition of National Security Rescission, including the potential constitutional dilemma posed by legitimization of such a power. This section advocates a balancing test to weigh the competing constitutional requirements of the Presentment Clause on one hand, and the constitutional clauses involving the President's national security power and Congress' ability to delegate on the other. Part V concludes that the President should indeed retain cancellation authority in this area primarily due to the deference granted national security considerations. Finally, Part VI provides recommendations regarding statutory construction. The Comment concludes with suggestions for future legislative proposals and suggests the possibility of a National Security Line Item Veto Act.

\textbf{A. The Line Item Veto Act}

1. Background

Upon signing into law the Line Item Veto Act, President Clinton became the beneficiary of a prerogative his predecessors in the Oval Office had long coveted but never before enjoyed.\textsuperscript{28} The Act granted

\textsuperscript{25} See U.S. CONST. art. II, § 2, cl. 2 (granting the President "Commander in Chief" powers).

\textsuperscript{26} See CLINTON ROSSITER, THE AMERICAN PRESIDENCY 25-28 (2d ed. 1960) (describing the President's foreign affairs power as making him the nation's "Chief Diplomat").

\textsuperscript{27} The term "national security-related impoundment" refers to impoundments which generally occurred before the ICA and that were justified on national security grounds. See infra Part IV.B.2 (discussing impoundment based on President's authority in national security realm).

\textsuperscript{28} Before the adoption of the Line Item Veto Act, presidents had tried for over 120 years to acquire this discretionary power over individual spending provisions. Since the Civil War, eleven presidents had publicly stated their support for the line item veto. They include Presidents Grant, Hayes, Arthur, Franklin Roosevelt, Truman, Eisenhower, Nixon, Ford, Reagan, Bush and Clinton. See S. REP. NO. 104-9, at 5 (1995). Two modern presidents have not favored line item veto power: Presidents Taft and Carter. See Gerhardt, supra note 17, at 233, 235
the President the power to cancel what he deemed to be wasteful and parochial tax and spending provisions within legislation. The

(1997).

The movement in favor of the line item veto began after the Civil War. Incorporated into the Confederate Constitution, the line item veto was never used by President Jefferson Davis. See Briffault, State Separation of Powers, supra note 17, at 86 n.8. States such as Georgia and Texas, however, quickly adopted the idea following the Civil War. See id. By 1916, three quarters of the 48 states had granted their governors line item veto authority. See id. at 87 n.9. Today, 43 states have the line item veto. See Bellamy, supra note 17, at 559 (providing chart displaying types of line item veto power at the state level). The only states without such power are Indiana, Maine, New Hampshire, New Jersey, North Carolina, Rhode Island, and Vermont. North Carolina does not provide its governor with any form of veto. Only one state has been accepted into the union since the Civil War without granting its governor line item veto power, see Krasnow, supra note 16, at 613 n.101, and no state has ever repealed such a provision. See Briffault, State Separation of Powers, supra note 17, at 87. Congress has also legislated line item veto power for the governors of past and present American territories including the Philippines, Alaska, Hawaii, Puerto Rico, and the Virgin Islands. See Thirteenth Guam Legislature v. Bordallo, 450 F. Supp. 405, 410 (D. Guam 1977), aff'd, 588 F.2d 265 (9th Cir. 1978).

At the federal level, President Grant, in 1873, suggested that Congress propose a line item veto amendment to the Constitution. The amendment would have "authorize[d] the executive branch to approve of so much of any measure passing the two Houses of Congress as his judgment may dictate, without approving the whole, the disapproved portion or portions to be subjected to the same rules as now." See Cooper, in PORK BARRELS AND PRINCIPLES, supra note 12, at 29, 44 (quoting MESSAGES AND PAPERS OF THE PRESIDENTS 242 (James V. Richardson ed., 1898)).

In the next century following President Grant's proposed amendment, 157 legislative proposals were formally introduced to endow the President with line item veto power. See Abascal & Kramer, supra note 4, at 1549, 1566. The first was introduced in the House of Representatives in 1876, see H.R. REP. No. 104-11, pt. 1, at 4 (1995), by Representative Charles James Faulkner of West Virginia. See ROBERT C. BYRD, THE SENATE OF THE ROMAN REPUBLIC 15 (1995) (describing Representative Faulkner's role as first federal legislator to introduce line item veto legislation).

The more recent debate on the line item veto was sparked by President Reagan, who had enjoyed line item veto power as Governor of California. On January 25, 1984, in his third State of the Union Address, President Reagan called for a constitutional amendment granting the Executive that same power. In May of that year, the Senate came within a single vote of adding a line-item veto to the fiscal deficit-reduction plan. See SPITZER, supra note 12, at 121-42 (providing a thorough treatment of the 1980's line item veto debate).

By the early 1980's, mounting concern over the size of the federal budget deficit fueled the push for the line item veto. It was included in both the Republican and Democratic platforms in 1988. See Ernest B. Huetter, Preface to PORK BARRELS AND PRINCIPLES, supra note 12, at i.

Granting the President line item veto power also became a plank in the House Republican's "Contract with America" in 1994. Andrew Taylor, History of Line-Item Veto Effort, CONG. Q. WEEKLY, R., Apr. 12, 1997, at 834. After achieving majorities in both houses in the 104th Congress, the Republicans were able to get a line item veto bill out of Congress and to the President. See id. On February 6, 1995, Ronald Reagan's 84th birthday, the House with relative ease, passed a legislative line item veto bill as a tribute to the former President. See id.

Senate Republicans, on the other hand, had a more difficult time arriving at a solution. See id. On March 23, 1995, the Senate passed a much different line item veto bill consisting of "separate enrollment." See id. By the following spring, with the presidential race heating up, Senator Bob Dole was able to goad Republican Senate conferees into relenting on separate enrollment and agreeing to enhanced rescission power, thus giving the bill its present form. See id. For a comprehensive history of the Act, see Amicus Brief for Henry Waxman at 2-17, Clinton v. City of New York, 118 S. Ct. 2091 (No. 97-1974), available in 1998 WL 283208.

29. These tax and spending provisions are commonly termed "pork." The term has its origins in the nineteenth century when pork was packaged in barrels and hungry farm hands would reach into the barrel for slabs of salt pork. See MARTIN L. GROSS, THE GOVERNMENT RACKET 179 (1992). Eventually the term was incorporated into the political lexicon to mean
power, known as "enhanced rescission authority," was a type of impoundment. As it is generally understood, impoundment occurs "whenever the President spends less than Congress appropriates for a given period." By formally nullifying existing tax or spending provi-


31. This is illustrated by the fact that enhanced rescission is an amendment to the Impoundment Control Act. See Line Item Veto Act § 2.

For myriad of reasons, non-statutory impoundment prior to the ICA was a far more expansive power than enhanced rescission. Whereas enhanced rescission had to take place within five days of enactment, impoundment could occur any time giving the President more discretion concerning when to use his power. Unlike enhanced rescission, which had a procedural mechanism for override, impoundment was akin to an absolute veto—a proposition completely at odds with the intent of the Framers. See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 12, at 98-104 (demonstrating from speeches the Framers' rejection of absolute veto). Moreover, enhanced rescission, once exercised, could not have been undone by the President unless Congress passed a new act. This was not so with impoundment where a President could release the funds whenever he pleased.

Presidents before 1974 also impounded funds on statutory bases. For example, Title VI of the Civil Rights Act of 1964 directed the President to withhold funds from entities practicing unlawful discrimination. See Joint Hearings Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. Government Operations and the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 93d Cong. 368 (1973) [hereinafter 1973 Hearings]; see generally Robert E. Goostree, The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-in-Aid to Segregated Activities, 11 AM. U. L. REV. 32, 34-37 (1962) (discussing limited statutory authority up to that time for presidential impoundment).

32. See Louis Fisher, Funds Impounded by the President: the Constitutional Issue, 38 GEO. WASH. L. REV. 124, 124 (1969) [hereinafter Fisher, Funds Impounded by the President]. For the purposes of this Comment, impoundment will be defined using Dr. Fisher's terminology. This definition has been adopted by other authorities in this field. See WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 79 (1994) (adopting Dr. Fisher's definition).

Other authorities have defined impoundment in a similarly broad manner which would tend to incorporate "enhanced rescission" within its definition. The U.S. General Accounting Office defines impoundment as "an action or inaction by an officer or employee of the United States that precludes the obligation or expenditure of budget authority provided by Congress." See PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 63 (2d 1991), quoted in BANKS & RAVEN-HANSEN, supra, at 212 n.109.

Deputy Attorney General Joseph Sneed defined it as "not spending money." 1973 Hearings, supra note 31, at 98; see also Nile Stanton, History and Practice of Executive Impoundment of Appropriated Funds, 55 NEB. L. REV. 1, 3 n.14 (1974) (paraphrasing Sen. Ervin's definition of impoundment as referring to "reserving, withholding, delaying, freezing, or sequestering appropriations funds or deferring the allocation of funds"); cf. Byrd v. Raines, 956 F. Supp. at 36-37 ("Cancellation under the [Line Item Veto] Act is simply not the same thing as impoundment, or any other suspension of a statutory provision."). The district court further stated that "[i]nstead, cancellation is equivalent to repeal ... [w]hereas delegated authority to impound is exercised from time to time, in light of changed circumstances or shifting executive (or legislative) priorities ..." Id. Senator Roth raised another issue about categorizing enhanced rescission as impoundment. See 142 CONG. REC. S2968 (daily ed. Mar. 27, 1996) ("My concern with this legislation [the Line Item Veto Act] is that I have never heard of impounding a tax cut.")

As can be seen from these varying definitions, impoundment remains an elusive term to define. See Note, The Likely Law of Executive Impoundment, 59 IOWA L. REV. 50, 60 n.72 (1973) (providing a trenchant discussion of the difficulties in defining past impoundments). Due to
sions, enhanced rescission effected deficit reduction. The title "Line Item Veto Act" was actually a misnomer. Enhanced rescission authority did not constitute true line item veto power. Instead, the Act constituted an enlargement of the statutory rescission powers delegated to the President under the Congressional Budget and Impoundment Control Act of 1974 ("ICA"). The ICA effectively limited the President's role in rescission to recommendations, leaving the onus on Congress to act affirmatively to effect spending reductions. Had the 1996 Act provided true line item veto power, the problems involved with defining impoundment, it has been asserted that every president from the time of Washington has impounded funds. See Stanton, supra, at 5. Dr. Louis Fisher, the foremost authority in this field, wrote, "no one can say precisely what impoundment is." Louis Fisher, Impoundment of Funds: Uses and Abuses, 23 Buff L. Rev. 141, 144 (1973).


33. See Line Item Veto Act § 1026(4).
34. See id. § 1024 (describing deficit reduction mechanism); see also S. Rep. No. 104-13, at 8 (1995) (describing "lockbox" mechanism).
35. The Act is a misnomer for another reason. Unlike state budgets, the federal budget does not have line items. See Fisher & Devins, supra note 6, at 185-88. The Line Item Veto Act also allows the President to cancel provisions in the legislative history of spending bills. See Line Item Veto Act § 1021(b)(1).
36. There are several other differences between the state and federal levels. State constitutions are generally more partial toward executive power than the U.S. Constitution. See Fisher & Devins, supra note 6, at 159. Consequently, governors have traditionally played a much more active role in the state budget process than have Presidents at the federal level. See id. The minutiae in a state budget would be difficult to replicate at the federal level due to the daunting size of the federal budget. See id. In addition, state governors have been granted line item veto power by state constitutions not by statute. See Briffault, State Separation of Powers, supra note 17, at 86-87.
38. During its existence, the Line Item Veto Act reversed this burden, forcing Congress to act affirmatively to have the funds spent or the tax measures reimple-
39. The ICA placed limitations on presidential impoundment, allowing the President the powers of rescission and deferral. See 2 U.S.C. §§ 683-684 (1994). Deferral is an action taken by the President to withhold temporarily or delay the obligation or expenditure of budget authority. See id. § 682(1). The President must report a deferral to Congress and the Comptroller General in a deferral message. The deferral may not extend beyond the end of the fiscal year in which the message is transmitted to Congress. See id. § 684(a).
40. Rescission, on the other hand, is an action taken by the President and Congress that cancels previously appropriated budget authority. See id. § 682(3). The Impoundment Control Act required that the President propose a rescission by transmitting a special message to Congress,
the President, upon Presentment, would have been able to cancel any portion of a bill not to his liking and then sign the rest of the bill into law. The canceled provisions would then have been returned to Congress for reconsideration. Instead, as will be discussed in more detail below, with enhanced rescission power, when the President signed a bill into law, he then had five days (excluding Sundays) within which to cancel any provisions and return them to Congress. Thus, there was a temporal distinction between the two measures.

2. The provisions of the Line Item Veto Act

The Line Item Veto Act granted the President conditional authority to cancel certain spending and revenue provisions within five days following Presentment. These provisions, which included any dollar amount of discretionary budget authority, any item of new direct spending, and any dollar amount of discretionary budget authority, which the latter body had 45 days to act. See id. § 683(b).

The Line Item Veto Act is the latest in a long line of budget measures passed by Congress which have affected, to varying degrees, the President's influence over the budget. See LOUIS FISHER, PRESIDENTIAL SPENDING POWER 9-58 (1975) (describing the waxing and waning of congressionally authorized presidential spending discretion from 1789 to 1975).

38. Presentment refers to when the President is presented with a bill. See U.S. CONST. art. I, §§ 7, 8.

39. See, e.g., CONFEDERATE CONST., art. I, § 7, cl. 2 (stating that the disapproved appropriations would then be returned to the House where the bill originated).

40. See infra notes 51-57 and accompanying text (describing procedure followed in the execution of enhanced rescission).

41. See Line Item Veto Act, Pub. L. No. 104-130, § 1021(a)(3)(B), 1996 U.S.C.C.A.N. (110 Stat.) 1200 (1996) (to be codified at 2 U.S.C. § 691(a)(3)(B)). Before the Line Item Veto Act, the President had four options open to him upon receiving a bill: (1) sign the bill into law; (2) veto it and return the entire measure to Congress; (3) allow the measure to become law without signing it by failing to return it within ten working days; or (4) in the only way a President may exercise an absolute veto, choose not to sign a bill when Congress is adjourned, thus preventing the bill's return. See Stearns, supra note 17, at 391 n.36.

42. The legal significance of this temporal distinction was much disputed. Advocates of the Act maintained that this temporal distinction should have enabled it to pass constitutional muster. See Brief for Appellant at 34-35, Clinton v. City of New York, 118 S. Ct. 2091 (No. 97-1374) (1998), available in 1998 WL 263832. It was argued that the Act satisfied Presentment because the President first had to sign the bill. The cancellations would then occur afterwards and would be governed by the permissive nondelegation doctrine. See City of New York v. Clinton, 118 S. Ct. 2091, 2115-16 (Scalia, J., concurring in part and dissenting in part). Opponents maintained that such a provision was merely cosmetic and had no bearing on the Act's constitutional status. See Brief for Appellee at 28-31, Clinton v. City of New York, 118 S. Ct. 2091 (No. 97-1374), available in 1998 WL 263830; U.S. Term Limits v. Thornton, 514 U.S. 779, 831 (1995) (stating that "the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded"); id. at 829 (stating that a party may not do indirectly what the Constitution prohibits from being done directly).

43. See Line Item Veto Act § 1021(a)(3)(B).

44. See id. § 1022(b)(1)(A). Discretionary spending, in general, comprises budget outlays controllable through the appropriations process. See id. § 1026(7) (defining dollar amount of discretionary budget authority). Discretionary spending typically accounts for approximately one third of the annual federal budget. See ALLEN SCHICK, THE FEDERAL BUDGET 7 (1995). Approximately half of this discretionary spending, or one sixth of the federal budget, is made up of military expenditures. See Byrd, supra note 15, at 315. For purposes of the Act, discretionary budget authority include dollar amounts provided in appropriations laws and any ancil-
spending,\textsuperscript{45} and certain limited tax benefits,\textsuperscript{46} were to have conditional legal validity for five days following Presentment.\textsuperscript{47} During this period the President could cancel any of these provisions. By canceling discretionary budget authority, the President "rescind[ed]" the provision.\textsuperscript{49} With respect to cancellations of new direct spending or limited tax benefits, the President rendered them without "legal force or effect."\textsuperscript{49} The funds saved through the cancellations were then channeled toward deficit reduction through what is known as a "lockbox" procedure.\textsuperscript{50}

To invoke enhance rescission, the President first needed to determine that such action would have lowered the federal budget deficit,\textsuperscript{51} not hindered vital government functions,\textsuperscript{52} and not adversely af-

\begin{footnotes}
\item[	extsuperscript{45}] See Line Item Veto Act § 1026(7)(A)(ii). Therefore, because the federal budget does not have line items, legislative history, as well as the statutory provisions, were subject to the President's cancellation power. See id. §§ 1021(b)(1), 1026(7).
\item[	extsuperscript{46}] See Line Item Veto Act § 1021(a)(2). In general, direct spending comprises entitlement authority, the Food Stamp Program, and budget authority provided by laws other than appropriations acts. See id. § 1026(5). For the purposes of the Act, new direct spending comprised entitlement payments to individuals or to state or local governments. See id.
\item[	extsuperscript{47}] See id. § 1021(a)(3). Limited tax benefits were provisions that effected a revenue loss and which applied (1) if the benefit accrued to 100 or fewer beneficiaries in a fiscal year, or (2) if they provided temporary or permanent transitional relief for 10 or fewer beneficiaries from a change in the Internal Revenue Code of 1986. See id. § 1026(9). The determinations were made by the Joint Committee on Taxation. The Committee was authorized to locate such benefits in bills and joint resolutions. Both bills and joint resolutions, however, were allowed to exempt provisions. See id. § 1027.
\item[	extsuperscript{48}] During this past session, lawmakers had already begun seeking ways to exempt spending provisions from cancellation. See Guy Gugliotta & Eric Pianin, Line-Item Veto Tips Traditional Balance of Power; Capital Hill Plots Strategy to Counter President's Pen, WASH. POST, Oct. 24, 1997, at A1 (discussing implementation of legislative mechanism to immunize certain items); see also Guy Gugliotta, Stuffing Pork in the Budget; Lawmakers Learn to Hide Pet Projects, NEWSDAY, Oct. 20, 1997, at A19 (discussing ambiguity in appropriations language protecting pet projects).
\item[	extsuperscript{49}] See H.R. CONF. REP. No. 104-491, at 16 (1996).
\item[	extsuperscript{50}] See Line Item Veto Act § 1026(4)(A).
\item[	extsuperscript{51}] See id. § 1026(4)(B).
\item[	extsuperscript{52}] See H.R. CONF. REP. No. 104-491, at 23 (1996) (describing the provision that ensured that funds saved from cancellation go toward deficit reduction and not toward other programs). Much like the temporal distinction between true line item veto power and enhanced rescission, proponents of the Act argued that the "lockbox" procedure was central to the Act's constitutionality. See Transcript at 5, Clinton v. City of New York, 118 S. Ct. 2091 (No. 97-1374), available in 1998 WL 210557, 10 (quoting the Solicitor General defending the Act in part through the "lockbox" provision). Because the mechanism channels canceled funds toward deficit reduction, it was argued that the canceled provisions were still legally valid, they had just been redistributed at the discretion of the President. Essentially, this argument is a "shell game." First, if the money were merely canceled and not thrown into the "lockbox," then the funds would never have left the Treasury in the first place, the deficit would have been reduced accordingly. Only if the President affirmatively reprogrammed such funds would they not have gone toward deficit reduction. Second, statutory definitions such as "without legal effect" and "rescind" are difficult to construe as meaning anything other than repeal. See Sargentich, supra note 17, at 113 n.149 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1930 (1976) which defines "rescind" as "to do away with: take away" or "to take back: annul, cancel . . . or to vacate or make void" as in "repeal").
\item[	extsuperscript{51}] See Line Item Veto Act § 1021(a)(3)(A)(i).
\end{footnotes}
fected the national interest. Upon congressional receipt of a “special message” from the President outlining these determinations, the cancellations took effect. To restore the canceled funding, Congress needed to pass a disapproval bill by a regular majority vote within 30 days of receipt of the President’s special message. If he wished, the President then had the option to veto the disapproval bill through conventional means. The President’s veto was then subject to congressional override by a two-thirds vote of both houses.

II. CASE LAW ON THE PRESENTMENT CLAUSE

Given existing Presentment case law, the Administration should have recognized that the government would face great difficulty in defending any legal challenge to the Act. The I.N.S. v. Chadha and Byrd v. Raines decisions involving the lawmaking clause were both sweeping and unyielding in their nature. Having the benefit of both decisions, the Administration should have recognized that the Act

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52. See id. § 1021(a)(3)(A)(ii).
54. See id. § 1023(a).
55. See Line Item Veto Act § 1025(b)(1).
57. See U.S. CONST. art. I, § 7, cl. 2, 3. Three states have line item vetoes with a two-thirds override provision. See Petrilla, supra note 17, at 508 n.46. Four states use a three-fifths majority. See id.
58. See Clinton v. City of New York, 118 S. Ct. 2091, 2110 (1998) (Kennedy J., concurring). Justice Kennedy’s concurrence hinted at the obvious problem involved in getting around the Chadha Presentment Clause analysis: “The citizen has a vital interest in the regularity of the exercise of governmental power. If this point was not clear before Chadha, it should have been so afterwards.” Id.
was constitutionally imperiled and should have set up a test case using its strongest fact pattern: a cancellation involving the President's national security power.

A. I.N.S. v. Chadha

The preeminent case concerning the Presentment Clause is I.N.S. v. Chadha.\textsuperscript{61} Chadha involved an alien whose suspension of deportation was annulled by a legislative veto.\textsuperscript{62} The Supreme Court held that the oft-used legislative veto violated the Presentment Clause.\textsuperscript{63}

The Court in sweeping language held that strict adherence to correct lawmaking procedure was essential to constitutional governance: \textsuperscript{64} "Art. I, § 1, [cl.] 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."\textsuperscript{65} Central to proper lawmaking procedure is that both the bicameralism and Presentment requirements must be satisfied: "[T]he Constitution's prescription for legislative action [is] passage by a majority of both Houses and presentment to the President."\textsuperscript{66} The Court emphasized that "[t]he legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority."\textsuperscript{67} More importantly for the future of the Line Item Veto Act, the Court made clear that the requirements of Presentment were not limited merely to a law's passage. The Court stated that "repeal of statutes, no less than enactment, must conform with Art. \footnotetext{61}{462 U.S. 919 (1983).}

\begin{itemize}
  \item Other Supreme Court cases involving Presentment include United States v. Will, 449 U.S. 200, 225 n.29 (1980) (contending that when the President signs a bill his signature marks the "precise time the statute became law"); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 454 (1899) (holding that once the President signs a bill, the bill becomes law from that moment); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 379 (1798).

  \item In Youngstown Sheet & Tube Co. v. Sawyer, the Supreme Court addressed the lawmaking function, but not Presentment per se. 343 U.S. 579 (1952). In stark, if less than accurate, language, the Supreme Court stated:
  \begin{quote}
    In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.
  \end{quote}

  \item See Chadha, 462 U.S. at 926-28.

  \item See id. at 956-57.

  \item See id. at 957.

  \item Id. at 951.

  \item Id. at 958.

  \item Id. at 958 n.22.
\end{itemize}
Therefore, with Chadha casting its broad shadow over any application of enhanced rescission, the White House should have recognized that any use of such power would have involved an uphill legal battle.69

B. Byrd v. Raines

Immediately upon the Act taking effect,70 a group of lawmakers led by Senator Robert C. Byrd,71 mounted a legal challenge in a suit brought against the Secretary of the Treasury72 and the Director of the Office of Management and Budget.73 In the resulting case, Byrd v.  

68. See id. at 954.
69. See City of New York, 118 S. Ct. at 2110 (quoting Justice Kennedy’s dicta stating that the citizen’s interest in the regular exercise of government power should have been clear after Chadha); cf. Sargentich, supra note 17, at 101-02 (discussing and dismissing possible distinctions between the Chadha case and application of the Line Item Veto Act).
70. The challenge was filed on January 1, 1997, the effective date of the Act. See Line Item Veto Act, Pub. L. No. 104-130, § 5(2), 1996 U.S.C.C.A.N. (110 Stat.) 1200 (1996). The reason for this delayed implementation was that Republicans were hesitant to give a Democratic President such power. Instead, hopeful of a Republican presidential victory in the general election, Hill Republicans delayed implementation of the Line Item Veto Act until January 1, 1997. See Andrew Taylor, Judge Voids Line-Item Veto Law; Backers Look to High Court, CONG. Q. WKLY. R., April 12, 1997, at 837. In fact, due to a compromise in the Senate, the Act was only a temporary measure. See id. It would have sunset on January 1, 2005. See Line Item Veto Act § 5(2).
71. Not for nothing has Senator Byrd been termed the “foremost opponent of the line item veto.” See Court Erases Line Item Veto, President Loses Broad Authority in 6-3 Decision, THE COMMERCIAL APPEAL, June 26, 1998, at A1. He authored a book paralleling the abdication of the power of the purse by the Roman Senate to the recent congressional attempts to provide the President with some form of line item veto power. SeeByrd, supra note 28, at 162-64.

In addition to Byrd, a Democrat from West Virginia, the other plaintiff-appellees were Senator Carl Levin (D-Mich.), Senator Daniel Patrick Moynihan (D-N.Y.), and former Senator Mark Hatfield (R-Or.). Senator Moynihan also joined the City of New York’s suit challenging the Act’s constitutionality. See City of New York v. Clinton, No. 97-2393 (D.D.C. filed Oct. 16, 1997). Congressmen David Skaggs (D-Colo.) and Henry Waxman (D-Cal.) were also plaintiff-appellees in the Byrd case.

The plaintiff-appellee action was opposed by the leadership of both houses. The House Bipartisan Legal Advisory Group, comprising the Speaker of the House, the Majority Leader, the Minority Leader, the Majority Whip and the Minority Whip, and the Senate filed a joint brief as amici curiae with the Supreme Court. Both argued that the district court decision should be overturned on the merits. See Amicus Brief for The House Bipartisan Legal Advisory Group, Raines v. Byrd, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 251409.

The Act was also challenged by the National Treasury Employees Union on the day the Act was signed into law. This case was dismissed for lack of standing. See National Treasury Employees Union v. United States, 929 F. Supp. 484, 485 (D.D.C.) (holding that union’s alleged injury was “neither sufficiently concrete nor imminent to create a justiciable controversy”), aff’d, 101 F. 3d 1423, 1425 (D.C. Cir. 1996). The organization filed another suit once the Act was implemented but the case was settled on statutory grounds. See National Treasury Employees Union v. United States, Civ. No. 97-2399 (D.D.C. 1996).

72. Robert Rubin, the Secretary of the Treasury, was responsible for implementing the cancellations of limited tax benefits. See Byrd v. Raines, 956 F. Supp. 25, 27 (D.D.C. 1997).
73. Franklin D. Raines, the Director of the Office of Management and Budget, was charged with implementing the cancellations of discretionary budget authority and direct spending. See id. at 27.
the District Court for the District of Columbia overturned the Act. The court held that the Act offended the Presentment Clause and represented an unconstitutional delegation of legislative power. Scarcely two months later, however, the Supreme Court vacated the lower court’s decision, ruling the appellants lacked standing.

The central issue in Byrd, the district court reasoned, was whether the Act was simply a lawful enhancement of presidential discretion, or a dramatic illegitimate transfer of legislative power to the executive branch. That is to say, the Act was either an expansion of the Executive’s historical impoundment powers, or a radical new prerogative which enabled the President effectively to repeal statutory law. The district court held that the Act granted the latter and was therefore unconstitutional. The court concluded that the Presentment’s bicameral requirement was fundamentally altered by granting the President powers outside of either approval or disapproval.

Where the President signs a bill but then purports to cancel parts of it, he exceeds his constitutional authority and prevents both Houses of Congress from participating in the exercise of lawmaking authority. The President’s cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent.

Not surprisingly, the reasoning in Byrd on the Presentment question remained faithful to Chadha.

Although not legally binding, the district court’s decision maintained persuasive authority even after the Supreme Court vacated its ruling. Moreover, it certainly called into question the future of en-
hanced rescission power. When coupled with Chadha, dicta from other federal courts of appeals, and a wide array of scholarly opinion, the constitutional survival of enhanced rescission appeared to be questionable indeed. Thus, the Clinton Administration should have been wary of making indiscriminate use of the cancellation power. As such, it should have limited its actions to where the President enjoys his greatest constitutional authority: national security.

III. CLINTON v. CITY OF NEW YORK

A. The Case's Origins

Before the President had even exercised his new authority, the Line Item Veto Act had already withstood two constitutional challenges in its brief lifetime. Perhaps these minor victories, though not on the merits, led to an unwarranted sense of confidence by the White House.

Whatever the Administration's motivations, what remained clear was that as soon as President Clinton exercised his new power another challenge would be mounted. The Balanced Budget Act of
1997, the Taxpayer Relief Act of 1997 and the thirteen annual appropriations bills afforded President Clinton a host of opportunities to exercise the new prerogative, which he seized with alacrity. All told, President Clinton canceled eighty-two provisions in the 1998 spending bills, saving the Federal Government an estimated $937

95. For each fiscal year, Congress passes 13 appropriations bills which comprise the Federal Government's discretionary spending. See SCHICK, supra note 44, at 45. Typically, Congress will first authorize funds to be spent in a separate authorization bill before it appropriates monies. See id. at 44. The authorization bills are considered by authorizing committees instead of appropriations committees. See id. at 44-45. To use defense spending as an example, the House Committee on National Security and the Senate Committee on Armed Services theoretically must first agree to an authorization bill that will be passed into law. Then the House Appropriations Subcommittee on National Security and Military Construction and the Senate Appropriations Subcommittee on Defense and on Military Construction will pass their appropriations bills.
97. By "1998 spending bills," the author is referring in general terms to the reconciliation
million from 1998 to 2002. Although thirty-eight cancellations were

package and the thirteen appropriation bills. See supra notes 93-95 (describing the bills).

See Line Item Veto After One Year: Hearings Before the Subcomm. on Legislative and Budget Process of the House Comm. on Rules, 105th Cong. (1998) (statement of June E. O'Neill, Director, Congressional Budget Office), quoted in Byrd, supra note 15, at 322 n.95. The updated figures represent reduced estimates of the Act's savings. See Line-Item Veto Scorecard: $1.9 Billion Over 5 Years, WASH. POST, Dec. 4, 1997, at A21 (estimating savings from the Act amounting to $1.9 billion from 1998-2002). The revised amount saved from enhanced rescission constituted 1/100th of 1% of the $9 trillion the Federal Government was projected to spend over those five years. See id. After taking into account the 38 cancellations that were passed over the President's veto, the amount of funds saved drops to $569 million over five years. See id. As a presidential candidate, Governor Clinton asserted that a line item veto would allow him to reduce federal spending by $9.8 billion over four years. See S. REP. NO. 104-9, at 5 (1995). It remains unclear what impact the City of New York decision will have on the other canceled provisions. See, e.g., Stephen Barr, Fingers Crossed, 2 Localities Hope Decision Unites Funds, WASH. POST, June 26, 1998, at A19 (discussing the uncertainty surrounding other canceled projects after the City of New York decision).

The cancellations by President Clinton aroused a variety of responses. Congressmen from affected districts criticized the President for politicizing the use of the line item veto and for canceling worthwhile projects. House Appropriations Committee Chairman Bob Livingston sent a letter to President Clinton terming the President's use of the veto power "a raw exercise of power" intended to "threaten, intimidate or exert revenge on wayward legislators." See Eric Pianin, Line-Item Veto Doesn't Cut Tensions; Hill Republicans, Democrats Warn Clinton of Reprisals for Deletions, WASH. POST, Oct. 9, 1997, at A10.

In fact, once members of Congress felt the sting of enhanced rescission power, many former supporters of enhanced rescission authority began to have second thoughts. House Appropriations Committee member Representative Jose E. Serrano (D-N.Y.), who himself opposed the measure, stated, "I've never seen a vote taken where more people wanted their vote back." See Gugliotta & Pianin, supra note 46, at A1. Senator Bennett was upfront about his volte-face. "I was a proponent. I campaigned for it vigorously. But when I saw the way President Clinton abused the line-item veto, I ate crow publicly." Lyle Denniston & Jonathan Weisman, Line-item Veto Voided by Justices, BALT. SUN, June 26, 1998, at A1.

There were even calls by some congressmen to repeal the measure entirely. See Eric Pianin & Bradley Graham, Clinton Line-Item Vetoes Marred—He Got Some Bad Info, WASH. POST, Oct. 10, 1997, at A7. Other lawmakers simply expressed relief that so little was canceled. Representative C.W. Bill Young (R-Fla.), Chairman of the House Appropriations Subcommittee on National Security, announced, "[w]hile we supported funding for those items he did veto, I'm pleased that there were so few items which the President has chosen to single out." Eric Pianin & Bradley Graham, Clinton Tempers Line-Item Approach; $144 Million Worth of Programs Cut From $248 billion Defense Bill, WASH. POST, Oct. 15, 1997, at A4 (hereinafter Pianin & Graham, Clinton Tempers).

The actual implementation of the Line Item Veto Act was also roundly criticized. The five day deadline made it difficult for the White House to receive accurate information on prospective cancellations. As a result, the exercise of enhanced rescission power caused no small embarrassment to the President. See Eric Pianin, Line-Item Veto Snags Olympic Village Plan, WASH. POST, Oct. 8, 1997, at A19 [hereinafter Pianin, Snags]; see also Eric Pianin & Bradley Graham, Pentagon Data Faulty on Some Vetoed Projects, WASH. POST, Oct. 10, 1997, at A1 (discussing incorrect information relayed to the White House by Defense Department).

At the same time, the President was criticized by Republican "deficit hawks" and other commentators for not cutting spending drastically enough. The largest domestic spending measure—the $80 billion health, education, welfare and labor appropriations bill—was left untouched by President Clinton. One of the chief proponents of the Line Item Veto Act, Senator McCain stated, "[w]e gave it [line item veto power] to him. We expected him to use it." Pianin, Snags, supra, at A19.
made in the Military Construction Appropriations Bill and fourteen in the Department of Defense Appropriations Bill, more than a third of the cancellations were not national security-related.

As expected, the execution of the President's new power immediately prompted new suits challenging the legitimacy of the Act. The resulting *Clinton v. City of New York* case involved two consolidated challenges to the Act: one by several parties led by the City of New York and two hospital associations, and the other by Snake River Potato Growers, Inc. The City of New York's challenge concerned the cancellation of a favorable provision whereby the city received a waiver of funds it owed the Department of Health and Human Services. The Snake River Potato Growers brought suit concerning cancellation of a tax benefit involving the sale of a sugar beet processing plant.

1. The district court decision

The Act's second appearance before the district court proved no more successful than its first. Almost a year after the district court's decision in *Byrd*, the court, in *City of New York v. Clinton*, struck down the Line Item Veto Act on largely similar grounds. As before, the court held that the Act violated the Presentment Clause. Unlike the *Byrd* decision, however, the court did not discuss the non-delegation doctrine. Instead, the court held that the Act upset the

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During its brief existence, the Line Item Veto Act indeed changed the way Washington worked, although perhaps not in the manner its proponents had anticipated. See Richard S. Dunham, *Power to the President—Courtesy of the GOP*, Bus. Wk., Oct. 20, 1997, at 51 (quoting a Hill budget veteran as saying, "[y]ou can’t cut your deals with the departments anymore and expect it to be a done deal"); David E. Rosenbaum, *A New Kind of Veto Brings a New Way of Doing Business*, N.Y. Times, Oct. 22, 1997, at A20 (describing new lobbying techniques which began to include petitioning the White House as well as Congress).

99. On October 6, 1997, 38 provisions were canceled from the $9.2 billion Military Construction Appropriations Act. It was estimated these cancellations would have saved $237 million from Fiscal Year 1998 to 2002. See Cancellation Nos. 97-4 to 97-41, 62 Fed. Reg. 52,452-69 (1997). Congress did not, however, humbly submit to the President’s actions. See supra note 56 (discussing congressional passage of disapproval bill and its subsequent override of President Clinton’s veto of the bill).


105. See id. at 169.
doctrine of separation of powers.\textsuperscript{106} Despite the two ominous hold-

\textsuperscript{106} See \textit{id.} The structure of the U.S. Constitution is premised upon the theory of Separation of Powers. Although the term itself is not used in the Constitution, the explicit grants of power in the first three articles undergird the structure of the Federal Government. See 
Buckley v. Valeo, 424 U.S. 1, 124 (1976) (stating that Separation of Powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted"); Martin H. Redish, \textit{The Constitution as Political Structure} 101 (1995) (arguing that Separation of Powers is textually explicit from grants of power in first three articles); cf. John E. Nowak & Ronald D. Rotunda, \textit{Constitutional Law} \textsection 3.5, at 129 (4th ed. 1991) (stating that early state constitutions such as Massachusetts explicitly used the term "Separation of Powers").

Separation of Powers jurisprudence reflects the fluidity of the doctrine as a governing principle. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). This fluidity in part reflects the difficulty inherent in determining to what degree of intrusion into another branch's prerogatives is allowable. James Madison asserted that the doctrine of Separation of Powers does not require that the legislative, executive and judiciary departments should be wholly unconnected . . . . It is [however] agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly [sic] administered by either of the other departments. The Federalist No. 48, at 250 (James Madison) (Garry Wills ed., 1982).

There is also the difficulty of delineating which functions fall into which branch's purview. See Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) (contending that "[t]he great ordinances of the Constitution do not establish and divide [into] fields of black and white"); Wayman v. Southhard, 23 U.S. (10 Wheat.) 1, 46 (1825) (holding that "[t]he maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily"); cf. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (providing another perspective on separation of powers theory).

The doctrine of Separation of Powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Id.; cf. Edward S. Corwin & Louis W. Koenig, \textit{The Presidency Today} 8 (1956) (describing Separation of Powers as: "First that the three functions of government are reciprocally limiting; secondly, that each department should be able to defend its characteristic function from intrusion by either of the other departments; thirdly, that none of the departments may abdicate its powers to either of the others"); Richard E. Neustadt, \textit{Presidential Power and the Modern Presidents} 29 (1990) (contending that the Convention "created a government of separated institutions sharing powers").

Separation of Powers theory stems from the ancient notion of mixed government. Although mixed government was class-based, with each class having representation, its primary object—the prevention of tyranny—was the same as Separation of Powers. It was not, however, until the English Civil War that the idea of separate government structures began to emerge. Inchoate Separation of Powers theory can be seen in the works of Marchamont Nedham, George Lawson, and John Locke. See Redish, supra, at 102-05 (discussing the origin of Separation of Powers). It was not until Montesquieu, however, that the concept of a separate judicial branch truly emerged, thus bringing the doctrine into modern, recognizable form. See Baron de Montesquieu, \textit{The Spirit of the Laws} 156-57, 162, 164-67 (Anne Cohler et al. eds., Cambridge Univ. Press 1994) (1748) (outlining modern framework for political division of powers: three branches of government not hermetically separate, but overlapping); cf. The Federalist No. 51, supra note 12, at 262-63 (Madison) (illustrating Framers reliance upon Montesquieu and Separation of Powers).

For a thorough treatment of the history of Separation of Powers theory, see M.J.C. Vile,
ings at the district court level, the Administration chose to press on, appealing the decision to the Supreme Court.

B. The Supreme Court Decision

The Supreme Court, in a 6-3 decision, upheld the district court's decision that the Act was unconstitutional. Justice Stevens' majority opinion, however, was more restrained than the two prior district court opinions. Whereas the Byrd decision had struck down the Act on both Presentment and nondelegation grounds, and the City of New York district court case had decided the matter on Presentment and Separation of Powers grounds, Justice Stevens' opinion ruled only on the issue of the Presentment Clause. The Court's opinion discussed neither the nondelegation nor separation of powers questions.

1. The Line Item Veto Act's Violation of the Presentment Clause

The Court held that "the cancellation procedures set forth in the Act violate the Presentment Clause, Art. I, § 7, cl. 2, of the Constitution.

CONSTITUTIONALISM AND THE SEPARATION OF POWERS 21-97 (1967). For further discussion on Separation of Powers, see THE OXFORD COMPANION TO THE SUPREME COURT 774-79 (Kermit L. Hall ed., 1992) (providing further background and critiquing Separation of Powers as a framework for government); REDISH, supra, at 102 (discussing different schools of thought concerning Separation of Powers).

107. Joining Justice Stevens in the majority were Chief Justice Rehnquist, Justice Kennedy who wrote a concurrence, Justice Souter, Justice Thomas, and Justice Ginsburg. Justice Scalia, who was joined by Justice O'Connor, wrote a concurring and dissenting opinion, and Justice Breyer authored a separate dissent, though joining in part with Justice Scalia's opinion.


111. See City of New York v. Clinton, 118 S. Ct. at 2107-08.

112. See id. The Court made clear its intention to rule only on the Presentment issue: [A]lthough appellees challenge the validity of the Act on alternative grounds, the only issue we address concerns the "finely wrought" procedure commanded by the Constitution. . . . [W]e find it unnecessary to consider the District Court's alternative holding that the Act "impermissibly disrupts the balance of powers among the three branches of government."

Id.

Other arguments not discussed in the district court had been advanced against the Act by amici curiae. These contentions were not discussed in the Supreme Court opinion either. See Amicus Brief for Association of the Bar of the City of New York at 2, Clinton v. City of New York, 118 S. Ct. 2091 (No. 97-1374), available in 1998 WL 283210 (arguing that the Act violated the Rules Clause); see id. at 8 (contending that Presentment Clause violated by impermissibly extending the time period for presidential consideration of a bill and by not having the President's objections published in the journal of the house originating the bill but instead having his objections published in the Federal Register). Another argument could have been made that the Presentment Clause was violated by allowing the President to cancel non-legislative measures such as legislative history. See Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("Committee reports . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.").
Relying on *Chadha* the Court reasoned that because cancellations pursuant to the Act prevented the targeted provisions from "having legal force or effect," then "[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each." In so deciding, the Court noted three distinctions between the President's veto power and the Act's cancellation power. First, the Court noted the temporal distinction between the cancellation and veto. Second, the Court noted that whereas the veto involved rejection of an entire bill, cancellation involved rejection of only part of a bill. Third, the Court noted that while the Constitution explicitly authorizes the President to play a role in the legislative process, it is silent as to the President unilaterally repealing or amending statutes. The Court elaborated on the final point by concluding that this constitutional silence regarding cancellation power should not have been interpreted in the President's favor.

Citing *Chadha*, the Court stated that "[f]amiliar historical materials provide abundant support for the conclusion that the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'"

The Court also dismissed the Government's argument that the cancellations did not "repeal" the canceled provisions because of the "lockbox" provisions of the Act. The Government argued that through this mechanism, canceled provisions "retain real, legal budgetary effect" insofar as the "lockbox" prevented the two political branches from spending the savings effected by the cancellation. The court dismissed this legerdemain, reasoning that while the provision may still retain its "budgetary effect," the provisions are still

113. See *City of New York*, 118 S. Ct. at 2095.
115. See *City of New York*, 118 S. Ct. at 2103.
116. See id. See supra note 42 (discussing the significance of the temporal distinction).
117. See *City of New York*, 118 S. Ct. at 2103.
118. See id.
119. See id.
120. Id. at 2103-04 (citations omitted).
121. The "lockbox" mechanism ensured that savings stemming from cancellations were used to reduce the deficit and not to offset deficit increases resulting from other laws. See *Line Item Veto Act* § 1024, Pub. L. No. 104-150, 1996 U.S.C.C.A.N. (110 Stat.) 1202 (1996) (to be codified at 2 U.S.C. § 691) (describing the mechanism); *see also* H.R. CONF. REP. No. 104-491, at 25-24 (1996) (terming the provision as a "lockbox" and describing its function). For a critique of the government "lockbox" argument, see supra note 50.
"entirely inoperative as to the appellees."\textsuperscript{123} In addition, the Court distinguished between the President’s power to cancel provisions and his power to decline to spend appropriated funds pursuant to congressional delegation.\textsuperscript{124}

The critical difference between this statute [Line Item Veto Act] and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act’s predecessors could even arguably have been construed to authorize such a change.\textsuperscript{125}

The Court also dismissed the final plank of the Government’s argument—an argument which relied upon the \textit{Field v. Clark} decision.\textsuperscript{126} The \textit{Field} case involved importers who mounted a constitutional challenge to a section of the Tariff Act of 1890 that authorized the President to “suspend” the Act’s provisions if he determined that other nations were imposing “reciprocally unequal and unreasonable” tariffs on certain commodities.\textsuperscript{127} The Government emphasized that a number of statutes cited in \textit{Field} had given the President the power effectively to nullify laws.\textsuperscript{128} The Government argued that the Line Item Veto Act’s cancellations consisted of similar discretionary grants of authority and that in essence the authority to cancel provisions consisted of the power to “decline to spend” certain funds.\textsuperscript{129}

The Court, however, distinguished between the facts of \textit{Field} and the facts of \textit{City of New York} in three ways. First, the Court reasoned that the use of the suspension power in \textit{Field} was contingent upon conditions not in existence at the time of the Tariff Act’s passage.\textsuperscript{130} Second, the Tariff Act stated if the President made a determination

\textsuperscript{123.} \textit{See id.}
\textsuperscript{124.} \textit{See id. at 2107.}
\textsuperscript{125.} \textit{Id.}
\textsuperscript{126.} 143 U.S. 649 (1892).
\textsuperscript{127.} Since this case did not directly implicate the Presentment Clause, it is not discussed in Part II. \textit{See id. at 680.}
\textsuperscript{128.} \textit{See City of New York}, 118 S. Ct. at 2106 (discussing a series of nineteenth-century laws cited in \textit{Field} that delegated to the President the power to suspend or cancel statutory law). A number of statutes were cited in \textit{Field} to support the President’s power to nullify laws. \textit{See Act of May 31, 1830}, ch. 219, § 2, 4 Stat. 425; \textit{Act of May 24, 1828}, ch. 111, § 4, 4 Stat. 308 (stating that upon his determination, the President may terminate duties against Prussia); \textit{Act of Mar. 6, 1866}, ch. 12, § 2, 14 Stat. 4 (permitting the President to “declare the provisions of this act to be inoperative” and granting him the power to lift import restrictions on foreign cattle and hides upon a demonstration that such importation would not imperil American cattle); \textit{Act of Jan. 7, 1824}, ch. 4, § 4, 4 Stat. 3 (providing that upon a finding by the President, he may “suspend[] and discontinue[]” duties on tonnage and imposts on foreign vessels); \textit{Act of Mar. 3, 1815}, ch. 77, 3 Stat. 224 (providing that duties “are hereby repealed” and that “[s]uch repeal . . . [shall] take effect . . . whenever the President makes the necessary determination”).
\textsuperscript{129.} \textit{See City of New York}, 118 S. Ct. at 2105.
\textsuperscript{130.} \textit{See id.}
that the contingency had arisen, he was required to act. 131 Third, the Court reasoned that with the Tariff Act, the President was acting in accord with the wishes of Congress, while with enhanced rescission power he was acting against it. 132

2. The Court's dicta concerning foreign affairs power

The Court then made a fourth and crucial distinction between the Field case and the City of New York case. The Court declared that the statutes cited in Field were inapplicable to the City of New York case because they had involved the President's foreign affairs power and had provided contingent instructions to the President. Citing United States v. Curtiss-Wright, 133 the Court stated that,

[t]he cited statutes [in Field] all relate to foreign trade, and this Court has recognized that in the foreign affairs arena, the President has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries."

The Court further noted that "in the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, ... to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." 134

The Court thus reaffirmed the distinction that exists between the President's powers in national security and his powers in domestic affairs and reflected the error made by the Clinton Administration in not defending the Act through the President's national security power. While dwelling on the Court's dicta may at first seem an unfair exercise involving the benefit of hindsight, such a distinction should have come as no surprise to the Clinton Administration. Indeed, as Michael McCurry indicated, the White House itself was con-

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131. See id.
132. See id. at 2106. As will be discussed below, the Court's reasoning on this third point was misplaced. See infra notes 176-79 and accompanying text.
133. 299 U.S. 304, 320 (1936). See infra Part IV.A.2.a (discussing the importance of Curtiss-Wright).
134. See City of New York, 118 S. Ct. at 2106 (citation omitted).
135. Field v. Clark, 143 U.S. 649, 691 (1892). The Court also added:

More important, when enacting the statutes discussed in Field, Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President. The Line Item Veto Act authorizes the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7.

City of New York, 118 S. Ct. at 2106.
considering cancellations based solely on the President’s national security power.\textsuperscript{136} As will be discussed below, the Supreme Court’s dicta distinguishing between the President’s domestic and national security power reflects not only existing national security case law, but also the two century-old practice of national security-related impoundment.

IV. THE LOST OPPORTUNITY OF NATIONAL SECURITY RESCISSION

To elaborate on the \textit{City of New York} decision’s dicta, the best hope for the President’s retention of enhanced rescission authority would have been through exercise of his prerogatives in the realm of national security.\textsuperscript{137} The Supreme Court has held on numerous occasions that the Constitution affords the President the widest latitude in this area; latitude so wide that it encompasses both the unilateral promulgation and repeal of laws.\textsuperscript{138} Moreover, through long-standing custom, the President has used his powers within the national security sphere to reduce spending within this area.\textsuperscript{139} Thus, from national security case law and from past practice, it appears likely that the Court would have acknowledged National Security Rescission.

The President’s national security power stems from three express grants of constitutional authority. Principal among these grants is the President’s role as Commander in Chief.\textsuperscript{140} The President also draws additional national security power from his prerogatives in foreign affairs,\textsuperscript{141} derived from both the Vesting Clause and the Treaty/Appointments Clause.\textsuperscript{142} The former clause provides that “[t]he executive Power shall be vested in a President of the United States,”\textsuperscript{143} the latter that the President “shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advise and Consent of the Senate, shall appoint Ambas-

\begin{itemize}
  \item \textsuperscript{136} See supra note 22 (quoting Mike McCurry’s statement about White House consideration of canceling provisions within the President’s power as Commander in Chief).
  \item \textsuperscript{137} See RESOLVED: THAT THE COMMANDER-IN-CHIEF POWER OF THE UNITED STATES PRESIDENT SHOULD BE SUBSTANTIALLY CURTAiled, H.R. DOC. NO. 103-17 (1993) (providing a bibliography discussing the President’s far-ranging national security powers).
  \item \textsuperscript{138} See infra Part IV.A.1 (discussing \textit{Youngstown Sheet & Tube Co. v. Sawyer} and presidential power in national security).
  \item \textsuperscript{139} See infra Part IV.B (examining the long history of national security-related impoundment).
  \item \textsuperscript{140} U.S. CONsT. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States.”).
  \item \textsuperscript{141} The distinction between the Commander in Chief power and foreign affairs power is that the former encompasses military power, the latter, diplomatic power.
  \item \textsuperscript{142} See U.S. CONsT. art. II, § 1, cl. 1, 2.
  \item \textsuperscript{143} U.S. CONsT. art. II, § 1, cl. 1.
\end{itemize}
sadors, other public Ministers and Consuls." Hence, by denying the President the power to reduce national security-related spending, the courts would have likely been intruding upon the President’s constitutional prerogatives and concomitantly the doctrine of separation of powers.

The Constitution, of course, also grants Congress significant national security powers of its own, including the power both to finance and to declare war. Yet, at the same time, the Court has acknowledged that in national security affairs Congress may, indeed must, delegate extraordinary amounts of power to the Executive. Chief Justice Hughes remarked,

It is . . . to be observed that the power exercised by the President in time of war is greatly augmented outside of his functions as Commander-in-Chief through legislation of Congress increasing his administrative authority. . . . We thus . . . find . . . a vast increase of administrative authority through legislative action springing from the necessities of war.

Thus, although congressional ability to delegate authority to the executive branch in the domestic arena has proved to be impressive, in national security matters, such delegations take on breathtaking proportions.

As will be discussed below, the near invulnerability that surrounds

144. U.S. Const. art. II, § 2, cl. 2.
145. Congress shall have the power:
   To declare War . . . [t]o raise and support Armies . . . [and] [t]o provide and maintain a Navy; [t]o make Rules for the Government and Regulation of the land and naval Forces; [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [t]o provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States . . . [and] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by th[e] Constitution . . .
   U.S. Const. art. I, § 8, cls. 11-18.
146. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("[C]ongressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.").
147. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 39 (1964) (quoting Chief Justice Hughes).
148. Only two cases have ever been struck down on nondelegation grounds. See Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (holding that the "Live Poultry Code" represented an unconstitutional delegation of authority to the President); Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935) (holding that section 9(c) of the National Industrial Recovery Act violated the nondelegation doctrine).
149. See Curtiss-Wright, 299 U.S. at 320 (holding that "in the maintenance of our international relations . . . congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 111 (1972) (observing that congressional authority to delegate in foreign affairs is virtually without limit).
unilateral actions taken by the President in the realm of national security may extend far enough to protect cancellations within this area. When the President's actions are bolstered by a congressional delegation, the constitutionality of these cancellations appears assured. As a result, relevant case law, when coupled with the long-accepted practice of national security-related impoundment, would have pointed toward the existence of National Security Rescission.

A. The Case Law on Presidential Power Supports the Existence of National Security Rescission Power

1. Youngstown Sheet & Tube Co. v. Sawyer and the constitutional framework for exercises of presidential power

The foremost case in delineating presidential power is Youngstown Sheet & Tube Co. v. Sawyer. In Youngstown, the Supreme Court ruled on the constitutionality of President Truman's seizure of privately owned steel mills during the Korean War. Despite the fact that President Truman acted to avert an industry-wide strike, which he believed would hamper the war effort, the Court held that the seizure was an unconstitutional usurpation of legislative power because the President exceeded his authority under the Taft-Hartley Act.

In his concurrence, Justice Jackson outlined the contours of presidential authority. He described three different scenarios in which the President exercises power, contending that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Justice Jackson's model, which has been accepted in subsequent decisions, provides a useful

150. 343 U.S. 579 (1952).
151. See id. at 582. President Truman actually ordered the Secretary of Commerce, Charles Sawyer, to seize the steel mills. See id. at 583.
152. See id.
153. Neither the statute nor the legislative history demonstrated congressional intent to grant the President the power to act unilaterally in this regard. See id. at 585-86.
154. See id. at 634 (Jackson, J., concurring). Over time, Justice Jackson's concurrence has become the controlling authority for the case. For a discussion of the prominence of Justice Jackson's opinion, see Thomas E. Baker, Youngstown Sheet & Tube Co. v. Sawyer, in OXFORD COMPANION, supra note 106, at 951.
155. See Youngstown, 343 U.S. at 635 (Jackson, J., concurring). But see REDISH, supra note 106, at 121-23 (rejecting Justice Jackson's "cumulative effects" test and instead calls for a "pragmatic formalist" model of Separation of Power).
156. See Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (endorsing Justice Jackson's model with minor caveat that "executive action ... falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition"). For yet another categorization of presidential power, see Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. CHI. L. REV. 123, 190-93 (1994) (discussing five categories of presidential power).
framework for inquiry into the constitutionality of National Security Rescission.

The first scenario arises when the President acts in concert with an express or implied grant of authority from Congress. Here, Justice Jackson contended, presidential power is "at its maximum." This concentration of power includes "all that [the President] possesses in his own right plus all the power that Congress can delegate." If the President's actions are unconstitutional in this situation, "it usually means that the Federal Government as an undivided whole lacks power." Executive action in this manner, Jackson stated, "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." The jurisprudence surrounding the nondelegation doctrine finds such exercises of presidential power virtually unassailable, thus reinforcing Justice Jackson's reasoning.

The second scenario arises when the President takes action in an area where Congress has neither granted nor denied him authority. Presidential actions in this situation, Justice Jackson reasoned, were the most constitutionally ambiguous. "[T]here is a zone of twilight in which the President and Congress may have concurrent authority, or in which its distribution is uncertain." In such circumstances, Justice Jackson concluded that practical considerations would likely outweigh any legal theories in determining the legitimacy of the President's actions. Many presidential actions in national security affairs fall into this crepuscular category. They include many Executive Agreements, the unilateral abrogation of treaties, and many national security-related impoundments.

The third situation occurs when the President acts in opposition to the express or implied wishes of Congress. Here the President's power is weakest, because the President is relying "only upon his own

157. See Youngstown, 343 U.S. 579, 635 (Jackson, J., concurring).
158. Id.
159. Id.
160. Id. at 636-37.
161. Id. at 637.
162. Only two cases in Supreme Court history have overturned statutes as excessive delegations. See supra note 148.
163. Youngstown, 343 U.S. at 635 (Jackson, J., concurring).
164. See id.
165. See infra Part IV.A.4 (discussing the President's ability to act unilaterally in national security area).
166. See id. (discussing the President's power to repeal treaties unilaterally).
167. See infra note 206 (commenting on the deference owed to the President's impoundment of national security-related funds).
constitutional powers minus any constitutional powers of Congress over the matter.\textsuperscript{168} Justice Jackson concluded that President Truman, by ignoring the legislative intent of the Taft-Hartley Act, acted within this third category, and hence, exceeded his authority.\textsuperscript{169}

While defining the limits of presidential powers, Justice Jackson was careful, however, not to hamper the President’s authority as Commander in Chief.\textsuperscript{170} He did not want to “circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief.”\textsuperscript{171} Instead, Justice Jackson wanted “to indulge the widest . . . interpretation to sustain [the President’s] exclusive function to command the instruments of national force . . . when turned against the outside world for the security of our society.”\textsuperscript{172}

At the same time, he acknowledged Congress’ responsibility for making appropriations for national security. Justice Jackson added:

> The Constitution expressly placed in Congress power “to raise and support armies” and “to provide and maintain a Navy.” This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation may determine in what manner and by what means they shall be spent for military and naval procurement.\textsuperscript{173}

Thus, according to Justice Jackson’s determination—that Congress “may determine in what manner and by what means” military spending may be carried out—it would certainly seem that Congress could delegate such authority to the President. Such a conclusion would have been in keeping with the view of Alexander Hamilton who stated:

> The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public monies, in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operation of war; these and other matters [fall within the purview of the executive branch].\textsuperscript{174}

The President’s exercise of cancellation power pursuant to the Line Item Veto Act, therefore, raises the question: Where along the Youngstown continuum does executive action lie? If it is within the

\textsuperscript{168} Youngstown, 343 U.S. at 697 (Jackson, J., concurring).
\textsuperscript{169} See id. at 586-87 (discussing the lack of constitutional support for the President’s actions).
\textsuperscript{170} See id. at 645 (stating that the Youngstown decision should not be used to limit the proper actions of the President as Commander in Chief).
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 643.
\textsuperscript{174} The Federalist No. 72, at 366 (Alexander Hamilton) (Garry Wills ed., 1982).
first category, the President’s actions are at their height and presumed to be valid; if within the second category, the action is constitutionally suspect; and if within the third category, the presidential exercise of power is difficult to uphold.

Following Justice Jackson’s *Youngstown* model, a president exercising enhanced rescission power would appear to be acting within the first category, because Congress expressly granted the President such power through the Line Item Veto Act. According to Justice Jackson’s formula, the Line Item Veto Act would have been presumptively constitutional.\footnote{See *Youngstown*, 343 U.S. at 636-37 (noting that presidential action pursuant to congressional mandate is only unconstitutional if the entire government lacks the authority to act).} Although federal legislation is frequently struck down as unconstitutional, such legislation almost exclusively involves domestic legislation within Justice Jackson’s first scenario. As will be discussed in Part IV.B, and displayed in Figure 1, an important difference exists in Justice Jackson’s model when the action involves national security power.

Nevertheless, the Supreme Court found that the President’s exercise of enhanced rescission authority was against the will of Congress,\footnote{See *Clinton v. City of New York*, 118 S. Ct. 2091, 2106 (1998).} which would have placed such action within Justice Jackson’s third category. By canceling congressionally approved spending provisions, the Court held the President was contravening the intent of the legislature by not spending the funds that Congress appropriated.\footnote{See id.} The Supreme Court’s logic rings hollow, however, since Congress devised the Line Item Veto Act specifically as a mechanism to grant the President such power.\footnote{See *H.R. Rep. No. 104-11*, pt. 2, at 8 (1995) (stating that the purpose of the enhanced rescission is to “check congressional raids on the Treasury”); *S. Rep. No. 104-13*, at 2 (1995) (stating that “[t]he purpose of enhanced rescission is to confront the serious problem of pork barrel spending”).} The Act was formulated to supersede and control Congress’ immediate appetite for spending.\footnote{See *H.R. Rep. No. 104-11*, pt. 2, at 7 (discussing the Line Item Veto Act in context of efforts to control congressional spending). Even if the Supreme Court were correct that the President was acting against the will of Congress, the President’s cancellations would still be roughly on par with the national security-related impoundment that occurred before the ICA. See *Part IV.B.*} Therefore, the Court’s opinion in this respect is unpersuasive.

By applying Justice Jackson’s constitutional calculus\footnote{See *Youngstown*, 343 U.S. at 636-37 (creating a tripartite model for presidential power with the highest presumption of constitutionality assigned to instances where Congress and the President act in tandem).} and by acting pursuant to an express grant of authority from Congress, the President should indeed have had the power to cancel national security-
related spending provisions. As the next section illustrates, when the President acts in concert with Congress in the field of national security affairs, he calls forth not only his own considerable authority in that field, but adds to that the full authority of Congress. The total that results from this process of addition would likely have been constitutionally irresistible.

2. The Line Item Veto Act under Justice Jackson’s first scenario: The President, acting pursuant to a congressional authorization in national security affairs, has virtually unlimited discretion

a. United States v. Curtiss-Wright and its progeny

The United States Supreme Court has repeatedly held that legislation affecting national security must give the President more discretion than he receives in domestic affairs. The seminal case in this regard is United States v. Curtiss-Wright. In this case, a corporation was

181. See infra Part IV.A.2 (discussing case law upholding the extraordinary nature of congressional delegations to the President in national security affairs).

182. 299 U.S. 304, 320 (1936) (concluding that the President must have greater freedom to operate in the area of national security). Although criticized as bad history and as overly sweeping in its holding, see Harold G. Maier, Curtiss-Wright Export Corp., in OXFORD COMPANION, supra note 106, at 212 (discussing scholarly refutation of Justice Sutherland’s “springing sovereignty” analysis which undergirds the opinion), and for the fact that the many of the more relied-upon parts of the opinion consist of mere dicta, see 1971 Hearings, supra note 17, at 248-49 (quoting Professor Arthur Miller who criticized over-reliance on the opinion since much of the opinion comprised dicta), Curtiss-Wright is very much the law of the land. See infra (describing subsequent cases relying upon Curtiss-Wright).

Its reasoning has been reaffirmed on numerous occasions and in terms no less sweeping. In Lichter v. United States, 334 U.S. 742 (1948), the constitutionality of the Renegotiation Act was challenged. See id. at 742. The Act, passed during World War II, was designed to allow the War Department to renegotiate contracts it made with private individuals to prevent incidents of profiteering. See id. at 746 (discussing the Act’s attempts to recover excessive profits). The purpose of this delegation was similar to the current delegation in the Line Item Veto Act; both granted the Executive the power to reduce government outlays. In Lichter, the Court upheld this broad delegation of authority to the Executive using terms reminiscent of Curtiss-Wright.

A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes. This power is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress. Id. at 778-79 (emphasis added).

Almost twenty years later, the Supreme Court again affirmed the broad approach to delegation established in Curtiss-Wright. In Zemel v. Rusk, the Court upheld the Secretary of State’s refusal to validate passports for travel to Cuba under the Passport Act of 1926. See 381 U.S. 1, 4 (1965). The petitioner challenged the Passport Act for being indefinite in scope. See id. at 6. The Court, however, disagreed: “Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.” Id. at 17.

More recent cases involving the President’s national security powers and congressional delegations have only reinforced the Curtiss-Wright holding. See Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993) (citing Curtiss-Wright and stating: “Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presump-
indicted for violating a congressionally authorized presidential embargo imposed on the Chaco Region of South America.  The company contended that the congressional delegation to the Executive through joint resolution was excessive, amounting to an unfettered grant of discretion to the President. The Court resoundingly rejected that argument.

In a 7-1 decision announced by Justice Sutherland, the Court held unambiguously that the executive branch is supreme in the realm of national security. The Court posited that the President must be sufficiently free from congressional constraint to conduct successfully his duties in this area. "In the maintenance of our international relations ... congressional legislation ... must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."

The Court also distinguished between the different bases for exercises of presidential power in foreign and domestic affairs. "The federal power over external affairs in origin and essential character is different from that over internal affairs." The Court maintained that, the President is sui generis in national security affairs, stating that "In this vast external realm ... the President alone has the power to speak or listen as a representative of the nation."

Justice Sutherland buttressed his opinion by quoting the words of then-Congressman John Marshall, himself no great friend of execu-

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183. See Haig, 453 U.S. at 304.
184. See id. at 315.
185. The fact that the decision was nearly unanimous was not lost upon William H. Rehnquist when he served as Assistant Attorney General. In an exchange with Professor Arthur S. Miller before the Senate Judiciary Subcommittee on Separation of Powers, Rehnquist defended the legitimacy of the Curtiss-Wright opinion with reference to the near unanimity of the opinion and to the prominence of the justices in the majority. See 1971 Hearings, supra note 17, at 249. He bolstered his argument by stating that Justices Brandeis and Cardozo joined in the opinion. See id. He could just as easily have added Chief Justice Evans. Justice McReynolds was the lone dissenter in the case. See Curtiss-Wright, 299 U.S. at 393 (McReynolds, J., dissenting). Justice Stone did not participate due to illness. See 299 U.S. at iii.
186. See Curtiss-Wright, 299 U.S. at 320 (discussing the superior access to information available to the President concerning relations with other nations).
187. Id.
188. Id. at 319 (discussing the differences in character and origin between external and internal affairs).
189. Id.
tive power. In a speech delivered less than a year before his elevation to Chief Justice, Marshall stated: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

Finally, the Court stated in dictum that in national security affairs, the President's power allowed him to act even without congressional authorization, or within Justice Jackson's so-called "zone of twilight." The Court concluded therefore that the President's power in international affairs did not depend upon Congressional action for its validity.

The Curtiss-Wright case reflects the deference the Court has uniformly granted the Executive in the field of national security. Furthermore, consistent with Justice Jackson's framework, the Court's
deference was derived in part from the express congressional authorization of executive action\textsuperscript{198}—thus placing the President's action within Justice Jackson's first category. Considering the Court's general skepticism at that time toward congressional delegations of power, the \textit{Curtiss-Wright} holding is all the more striking.\textsuperscript{199}

The same circumstances would have likely converged in the context of a National Security Rescission: The President, with the explicit support of Congress, wielded his national security power to reduce national security-related spending. Moreover, in one sense National Security Rescission would have been even more supportable than President Roosevelt's actions in \textit{Curtiss-Wright}, because the President's cancellations through the Line Item Veto Act would have been executed pursuant to a statutory grant of power, whereas in \textit{Curtiss-Wright}, President Roosevelt's actions were authorized only by a congressional joint resolution.

\textit{Curtiss-Wright}'s distinction between external and internal affairs reflects the difference that exists between national security and domestic lawmaking. The Court in \textit{Curtiss-Wright} declared that differences between external and internal powers "are different, both in respect of their origin and their nature."\textsuperscript{200} This was the same conclusion drawn by the nation's first Chief Justice, John Jay. He determined that the law of domestic and national security affairs "w[ere] distinct."\textsuperscript{201} Chief Justice Jay reasoned that "the laws of the United States admit of being classed under three heads of descriptions. 1st. All treaties made under the authority of the United States. 2d. The laws of nations. 3dly. The constitution, and statutes of the United States."\textsuperscript{202} Many commentators have agreed with Chief Justice Jay, supporting the idea of a "dualist" legal system where domestic and international law each operate independently within their discrete

\textsuperscript{198}See \textit{Curtiss-Wright}, 299 U.S. at 325 (considering the joint resolution as a valid congressional delegation).

\textsuperscript{199}See NOWAK \& ROTUNDA, supra note 106, § 6.2, at 206 (noting the contemporary Court's hostility to congressional delegations of power in the domestic arena). Just the year before, the Court had struck down two acts as unconstitutional delegations of congressional powers—the only two struck down on these grounds in Supreme Court history. See supra note 149.

\textsuperscript{200}299 U.S. at 315; see also id. at 321 (discussing the "marked difference between foreign affairs and domestic affairs").

\textsuperscript{201}Trial of Gideon Henfield (C.C.D. Pa. 1793) (charge to the grand jury by C.J. Jay), reprinted in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49, 52-53 (1849) [hereinafter Henfield Trial]. As the first Chief Justice and as an important figure in the Ratification Debate, Jay's words are given additional deference. See, e.g., Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) (stating that "[t]he construction upon the Constitution... by men who were contemporary with its formation... is of itself entitled to very great weight").

\textsuperscript{202}See Henfield Trial, supra note 201, at 52-53.
Accepting Justice Jackson’s tripartite, Youngstown framework and also the holding of Curtiss-Wright—that presidential actions involving national security are to be given more deference than those involving domestic affairs—one is led to the conclusion that two separate strains of presidential power exist, both of which have the Jacksonian tripartite structure. The first strain, as represented by the National Security Vector in Figure 1, involves national security power and displays a higher probability that presidential action will be constitutional. The second vector involves domestic affairs and generally involves a lower probability that presidential action will be constitutional. National Security Rescission, which would have involved a President acting pursuant to congressional authorization, likely would have lain on the National Security Vector and thus had a higher probability of constitutionality than would a domestic cancellation.

203. See STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 181 (1997) (discussing the “dualist” approach to domestic and national security law); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 83-84 (1993) (“The prevalent theoretical approach to the relationship between international and municipal law is . . . [the dualist model] . . . [which] views any national legal system and the international legal system as separate and discrete entities, each having the power to settle the effect any rule of law might have within it.”); Jonathan Turley, Dualistic Values in the Age of International Legisprudence, 44 HASTINGS L.J. 185, 189 (1993) (describing “conceptual division between national (or municipal) law and the law of nations (or international law”)]. These commentators have of course collapsed Chief Justice Jay’s first and second categories into a single “international law” category.

204. Many commentators reject the framework. See supra notes 155-56 (providing alternate models of presidential power). It has also been suggested that Justice Jackson’s model does not fully apply in the context of national security. See Goldwater v. Carter, 444 U.S. 996, 100-05 (1979) (Rehnquist, J., concurring) (stating that the Goldwater case is different from Youngstown in that the former was “entirely external” to the United States and fell within the foreign affairs category); HENKIN, supra note 149, at 341 n.11 (arguing that “Youngstown has not been considered a foreign affairs case” since a majority of justices did not consider it as such); cf. Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (endorsing Justice Jackson’s model in a case involving presidential foreign affairs power).

Justice Jackson in his opinion, however, did not limit his model solely to presidential actions within domestic affairs. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (“We may well begin by a somewhat oversimplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.”). In fact, when discussing his first scenario, where the President acts in accord with the will of Congress, Justice Jackson explicitly included a discussion of the national security case law. See Youngstown, 343 U.S. at 635-36 n.2 (stating that “[i]t is in this class [the first scenario] that we find the broadest recent statements of presidential power [Curtiss-Wright]”). In addition to Justice Jackson’s inclusion of national security affairs within his model, prominent commentators have done the same. See, e.g., HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION, SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 108 (1990) (stating that Justice Jackson’s “concurrence . . . powerfully reaffirmed the National Security Constitution”).

205. For an alternate analysis of the interplay between Youngstown and Curtiss-Wright, see Harold Hongju Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 YALE L.J. 1255, 1306 (1988) (arguing that federal courts in recent years have “all but dismantle[d] the Youngstown vision” in favor of an approach supported by Curtiss-Wright).
Figure 1
A Probabilistic Model of the President's Constitutional Power Based on Justice Jackson's Youngstown Framework and the Curtiss-Wright Holding

LEGEND

x axis: Presidential actions vis-à-vis Congress according to Justice Jackson's tripartite, Youngstown framework
y axis: Likelihood of presidential actions passing constitutional muster

1. President's actions pursuant to treaty obligations
2. President's actions pursuant to national security legislation
3. President's actions pursuant to joint resolution (see Curtiss-Wright)
4. President's actions pursuant to Line Item Veto Act as applied to national security related spending (National Security Rescission)
5. President's actions pursuant to unilateral executive agreement (see Pink)
6. President's actions pursuant to Line Item Veto Act in domestic arena
7. President's actions pursuant to unilateral action based solely on his inherent powers (see Youngstown)

This model displays the greater likelihood of constitutionality that accompanies presidential actions within the realm of national security. When the President acts as Commander in Chief or as Chief Diplomat, his actions fall along the National Security Vector and thus reflect his greater constitutional authority in this area. When the President does not act pursuant to his national security prerogatives, his actions fall along the Domestic Vector and the President's constitutional authority is diminished.

The Line Item Veto Act, as applied to national security spending (National Security Rescission), would have likely fallen on the National Security Vector and enjoyed a greater probability of being upheld by the courts.
b. The Curtiss-Wright holding may extend to include national security spending

Many commentators have suggested that the President's power in the national security realm may have legitimized national security-related impoundment that occurred before passage of the ICA. As

206. Numerous authorities in the field have made the distinction between national security-related impoundment and domestic impoundment. In perhaps the definitive book on the extent of the President's military power, *The Supreme Court and the Commander in Chief*, Professor Longaker observed:

Prior to the 1970s there was a fragile but real distinction between impoundment of appropriations for weapons systems and impoundment of other funds. . . . There was some force in the argument that the President's power as commander in chief gave him a special responsibility to utilize or not utilize funds based on his strategic estimates and to control the special pleading of the services and the cluster of interest groups around them.

*Clinton Rossiter & Richard P. Longaker, The Supreme Court and the Commander in Chief* 163-64 (expanded ed., 1976); see also James P. Pfefferer, *The President, the Budget, and Congress: Impoundment and the 1974 Budget Act* 70 (1979) ("The problem of impoundment in the area of national security and defense is . . . generally recognized to be a special case and will be treated as such.").

Two White House counsels concurred with this constitutional distinction. In a letter to a member of Congress dated August 12, 1955, and later cited in a memorandum to President Kennedy, the Special Counsel to President Eisenhower wrote:

It is true that in the past Presidents have declined to spend funds . . . but I have not found any instance of this that did not relate to funds appropriated for the national defense. . . . These national defense precedents, however, cannot, in my opinion, be used as precedents for withholding funds appropriated for a non-defense purpose.


The Counsel to President Kennedy agreed with the opinion of his predecessor. "Previous Presidents, in their roles as Commander-in-Chief, have 'impounded' Defense appropriations. Similar action in the civilian area is not customary and of doubtful legal basis." *1973 Hearings*, supra note 31, at 333.

President Nixon's Deputy Attorney General Joseph Sneed reached the same conclusion. "The President has substantial authority to control spending in the areas of defense and foreign relations . . . ." *Id.* at 368. Citing Curtiss-Wright, Sneed continued:

[I]t is clear that any [congressional mandate that funds be spent] is subject to at least two important qualifications. The President has substantial authority to control spending in the areas of national defense and foreign relations. Such authority flows from the President's constitutional role as Commander-in-Chief of the Armed Forces and from his relatively broad constitutional authority in foreign affairs. In those areas, congressional directives may intrude impermissibly into matters reserved by the Constitution to the President. It is noteworthy that Congress has never successfully challenged an impounding action in the foreign relations and national defense fields.

*Id.* (citations omitted).

Senator Edward Kennedy has also affirmed this distinction:

A reading of the Constitution does suggest one area where it can reasonably be argued that Presidential power—in this case power to impound funds—may flow directly from that document and not be dependent upon statutory authorities. That is the power of the President which can be implied from his constitutional role in foreign affairs and his designation as Commander in Chief. History indeed abounds with examples of impoundments by President's in these areas.

*Id.* at 333; cf. Kendall v. United States, 37 U.S. (12 Pet.) 522, 611 (1838) (stating that in the performance of "purely ministerial" acts ")to contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel
Assistant Attorney General William H. Rehnquist wrote a well-known memorandum where he concluded that although the President did not have a general constitutional power to impound funds, he likely did possess such a prerogative in national security affairs. Citing Curtiss-Wright, the future Chief Justice stated:

Of course, if a Congressional directive to spend were to interfere with the President’s authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander-in-Chief of the Armed Forces and his authority over foreign affairs... a situation would be presented very different from the one before us.

During the hearing, Rehnquist vigorously defended this distinction in exchanges with Senators and other witnesses. It would surely seem that if national security-related impoundments were treated as constitutionally more viable than other impoundments, national security-related cancellations should be treated no differently.

3. The Line Item Veto Act under Justice Jackson’s second scenario: The President’s national security power is viable absent congressional approval

The Supreme Court has followed Curtiss-Wright’s dictum that the...
President may act in the national security arena absent congressional approval, thus legitimizing actions that shade into Justice Jackson's second category, the "zone of twilight." In *Dames & Moore v. Regan*, the petitioner challenged the President's authority to nullify attachments and liens on Iranian assets and to suspend court claims concerning such assets. The action, which occurred in the wake of the Iranian Hostage Crisis, was taken pursuant to an Executive Agreement made between the United States and Iran.

While the Court held that the President had acted pursuant to the International Emergency Economic Powers Act to nullify the attachments, it could find no such legislative authority for the President's actions suspending the claims pending in American courts. The Court held that a failure by Congress specifically to delegate such authority to the President did not mean that Congress disapproved of the action. The Court declared, that "at least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President."

The Court emphasized the importance of informal accommodation between the two political branches in the conduct of national security:

[W]here, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute . . . [and] we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

The Court's reasoning, that foreign policy decisions are best left to the discretion of the President and Congress to work out amongst themselves, has long been echoed by constitutional scholars. For example, Professor Louis Koenig has written that, "the brevity and inexactness of constitutional language has left the allocation of

210. See United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936) (stating that the President's powers in international relations "do[] not require as a basis . . . an act of Congress")).

211. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (describing the power of the President when he acts absent congressional action).


213. See id.

214. See id.

215. See id.

216. See id. at 675.

217. See id. at 585-86.

218. See id. at 678.

219. Id. at 678-79.

220. Id. at 688.
[national security] power largely to political accommodation between the President and Congress.\textsuperscript{221}

Consequently, the Court in Dames \& Moore upheld the President's actions absent congressional approval, effectively placing it within Justice Jackson's second category. From Supreme Court precedent, it therefore follows that the President, whether acting with or without congressional approval, has exceptional discretion in national security affairs.\textsuperscript{222} In fact, as will be discussed further, when acting absent congressional authority, the President's national security power at times extends both to positive lawmaking and to unilateral repeal of existing law.\textsuperscript{223} Such presidential power in national security thus would appear to carve out an exception to Chadha's\textsuperscript{224} and City of New York's\textsuperscript{225} seemingly airtight holdings. Put simply, national security lawmaking has different lawmaking requirements.\textsuperscript{226} As a result, if the Chadha and City of New York decisions do not apply solely to domestic spending bills,\textsuperscript{227} then they at least apply in a different manner to national security spending, thus paving the way for recognition of National Security Rescission.

4. The Line Item Veto Act under Justice Jackson's third scenario: The President's national security power may allow him to act against the will of Congress

a. The President's power in national security includes the power of positive lawmaking

The Dames \& Moore decision reflects the legal acceptance given to Executive Agreements and other forms of unilateral national security lawmaking.\textsuperscript{228} Despite Justice Black's statement in Youngstown that

\textsuperscript{221} LOUIS W. KOENIG, THE CHIEF EXECUTIVE 42 (1964), quoted in John H. Stassen, Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations, 57 GEO. L.J. 1159, 1186 n.138 (1969); see also ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 237 (1973) (contending that "[p]residential impoundment... was controlled by the give-and-take of the political process").

\textsuperscript{222} Executive actions, even when violating individual rights, have been upheld by the Supreme Court. See infra note 394 (providing cases where the courts have upheld violations of individual rights in light of national security concerns).

\textsuperscript{223} See infra Part IV.B.


\textsuperscript{226} For example, national security lawmaking requirements often exclude the House of Representatives. For example, treaties that require a two thirds vote by the Senate can obligate the United States to spend funds despite the lack of House participation. See MOORE ET AL., supra note 192, at 795-96.

\textsuperscript{227} See Harold J. Krent, Delegation and its Discontents, Power Without Responsibility by David Schoenbrod, 94 COLUM. L. REV. 710, 736 (1994) (book review) ("The Article I checks of bicameralism and presentment apply only to rule-making by Congress itself.").

\textsuperscript{228} Presidential lawmaking takes many forms. The phenomenon includes inter alia Na-
"our Constitution ... refutes the idea that [the President] is to be a lawmaker," the fact is that the President is far from bereft of law-making power.\footnote{229}{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).}
Courts have held that the President may conclude Executive Agreements, which have the force of law, either with or without congressional approval. The major case in this area is United States v. Pink. The case involved a dispute over the validity of the 1933 Litvinov Assignment, whereby President Roosevelt recognized the U.S.S.R. The Court held invalid the state of New York’s refusal to recognize the Soviet Government and failure to enforce the Assignment. The Court cited Curtiss-Wright’s acknowledgment of the President as the “sole organ” in national security. It held that “[a] treaty is a ‘Law of the Land’ under the supremacy clause ... of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity.” Thus, unilateral presidential actions take precedence over contrary state law.

Some legal analysts argue that an executive agreement’s legal su-

During World War II, President Roosevelt unilaterally created a host of executive agencies. The legal basis for many such agencies consisted solely of his power as Commander in Chief. See Corwin, supra note 208, at 243. Included among these agencies was the National War Labor Board (“NWLB”) which addressed labor disputes during the war. Professor Corwin stated: “If any power can be said to be legislative in essence, it is surely [the creation of the NWLB].” Id. at 245.

President Roosevelt’s executive orders replaced several statutory regimes for regulating private employment. See LeRoy, supra, at 241. Without any statutory authority, President Roosevelt also established a minimum wartime workweek of forty-eight hours. See id. Meanwhile, the power to issue regulations to enforce the order was delegated to the Chairman of the War Manpower Commission by the President. See id. (citing Exec. Order No. 9301, 8 Fed. Reg. 1825 (1943)). President Roosevelt also promulgated an executive order authorizing the Secretary of the Navy to seize and operate General Cable Company’s plant in New Jersey. See Exec. Order No. 9220, 7 Fed. Reg. 6413 (1942). This action also occurred without citing any legislative authorization. See id.


231. See Nowak & Rotunda, supra note 106, § 6.9, at 221 (discussing executive agreements and acts of Congress). That is not to say that by using his national security power to make and unmake laws the President is basing his actions upon “Lockean prerogative.” See John Locke, Second Treatise of Government 198 (1993) (describing the power of the Executive “to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative”); cf. Arthur S. Miller, Presidential Power 200-28 (1977) (discussing extra-constitutional power of the President justified by raison d’etat). Likewise, neither are such powers in the national security area justified by the Rooseveltian “Stewardship” model of presidential power. See Theodore Roosevelt, An Autobiography 389 (1913) (asserting that the President has power “to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws”).

233. See id. at 211.
234. See id. at 230.
235. See id. at 229.
236. Id. at 230.
The Line Item Veto Act

Priority over state laws may extend even to primacy over contrary federal law. Professors John Nowak and Ronald Rotunda contend that the President's issuance of an Executive Agreement, if promulgated pursuant to his national security powers, should prevail over existing federal statutes. They argue that "an executive agreement should prevail over earlier Congressional enactments if the President is, in fact, entering into an agreement pursuant to his exclusive presidential authority in the field of foreign relations." Their conclusion could be interpreted as the President acting against the will of Congress, thereby validating foreign policy actions taken by the President within Justice Jackson's third category.

If this is indeed the case, then the President's creation of positive law would involve the unilateral repeal of legislation enacted through the Presentment Clause. As a result, while the President is limited by the Presentment Clause to either approval or disapproval of purely domestic legislation, this may not hold true concerning matters of national security.

b. The President's power in national security includes the power of repealing existing law

The effect of much Supreme Court precedent on the President's unilateral national security power has been to legitimize the "coordinate construction" given the Constitution by the political branches. The Court's refusal to decide Goldwater v. Carter on the merits allowed the President to abrogate an existing treaty. In

237. See NOWAK & ROTUNDA, supra note 106, § 6.9, at 227.
238. Id.
239. See FISHER, supra note 1, at 231 (stating that the doctrine of "coordinate construction" reflects the political branches' "authority and competence to engage in constitutional interpretation, not only before the courts decide but afterwards as well").
241. Prior to President Carter's renunciation of the treaty with Taiwan, Presidents had abrogated at least four treaties without congressional approval. See DICUS ET AL., supra note 203, at 193 (discussing categorization of treaty termination and positing that the President actually may have unilaterally abrogated as many as 13 treaties). Many commentators conclude that the questions such as unilateral treaty abrogation have already been resolved through the doctrine of coordinate construction. See FISHER, supra note 1, at 5-6 (contending that when courts refuse to rule on the merits of a case, the interpretation given the Constitution by the two political branches is the controlling interpretation).

Whether or not a President can amend a treaty without the "advice and consent" of the Senate is difficult to determine. The Reagan Administration, however, concluded that the Goldwater holding allowed the President to do just that. Much to the chagrin of the Senate, President Reagan unilaterally reinterpreted the Anti-Ballistic Missile Treaty with the U.S.S.R. See id. at 194 (discussing Reagan Administration's unilateral decision to reinterpret the ABM treaty to allow for the development and testing of the Strategic Defense Initiative). The Supreme Court arguably has upheld presidential reinterpretation of a treaty. See United States v. Alvarez-
Goldwater, several Senators sued for declaratory and injunctive relief against President Carter, who was planning to end the nation's mutual defense treaty with Taiwan. The Court held that the case was nonjusticiable because it involved the "authority of the President in the conduct of our country's foreign relations." This was because the Court reasoned, "the effect of this action, as far as we can tell is entirely external to the United States, and [falls] within the category of foreign affairs."

In effect, the decision gave the President a free hand to terminate existing treaties which had required not merely a majority vote in the Senate, as normal legislation would demand, but a supermajority of two thirds. Because treaties define legal relationships between the peoples of different nations and are recognized as the "law of the land"—essentially on par with that of statutes—the President is in effect unilaterally redefining the law. The President, therefore, has the power to unilaterally change the law despite prior congressional action to the contrary: an action that likely falls within Justice Jackson's third category.

In order to navigate between the Chadha and City of New York holdings, which conclude that the President cannot unilaterally repeal law, and the national security case law stemming from Curtiss-Wright, which indicates that indeed he can, the Chadha and City of New York holdings may have to be construed as referring only to domestic spending legislation. Such a conclusion would seem to affirm the existence of National Security Rescission since such a meas-


243. Id. at 1004-05.

244. See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) ("Our Constitution declares a treaty to be the law of the land. It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature, wherever it operates of itself, without the aid of any legislative provision.").


246. See Goldwater v. Carter, 617 F.2d 697, 703-04 (D.C. Cir. 1979) (concluding that the President may abrogate treaties absent congressional approval and stating that "[i]n the area of foreign relations ... the constitutional commitment of powers to the President is notably comprehensive.... [and that] the powers conferred upon the President by Article II are generalized in a manner that bespeaks no such limitation upon foreign affairs power"), vacated, 444 U.S. 996 (1979). Although the lower court case was remanded to consider the Political Question doctrine, the fact that the case was not decided on the merits, allowed it to retain persuasive authority. See, e.g., County of Los Angeles v. Davis, 440 U.S. 625, 646 n.10 (1978) (stating that cases vacated for lack of standing retain persuasive authority within the jurisdiction until the issue has been decided on the merits).

247. See Dycus ET AL., supra note 203, at 192 (discussing the incongruity between national security lawmaking and the Chadha holding).
ure likely empowers the President effectively to repeal statutory law.

It could be persuasively argued, however, that because appropriation bills must meet the strictures of Presentment as defined in Chadha and reaffirmed by Byrd and City of New York, then any alteration of a spending bill is proper only when those changes are themselves satisfied through Presentment. For two reasons, however, such a contention is arguable at best.

First, it should be noted that despite the allure of such a proposition, no such procedural symmetry exists with regard to treaty abrogation. As discussed above, in Goldwater, the Court essentially upheld the unilateral repeal of a treaty by the President. The Court reached its conclusion despite the fact that two thirds of the Senate are required for a treaty to become law. Essentially, the Court allowed national security law to be repealed without the law being presented to the Senate for its approval.

Second, a comparable withholding of funds has occurred throughout the nation's history in the form of national security-related impoundment. As shown below, the long history of impoundment provides the nexus between the expansive holdings on presidential national security power and the President exercising National Security Rescission power.

Past practice is especially important in national security where little case law exists and where there exists an overlap of constitutional authority. Then-Assistant Attorney General Rehnquist, during the aforementioned Senate hearing, confirmed that, in the absence of

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248. See Goldwater, 444 U.S. at 997 (allowing abrogation to stand by refusing to reach the merits of the case).

249. See id. (allowing the President's action to stand by considering the matter a Political Question).

250. This lack of symmetry also exists with respect to the appointment and dismissal of executive branch officials. These officials include such presidential appointments as cabinet secretaries and ambassadors. While the appointments require the "advice and consent" of the Senate, removal of such officials has no such requirement. See Randall H. Nelson, The Termination of Treaties and Executive Agreements by the United States: Theory and Practice, 42 MINN. L. REV. 879, 883 (1958) (discussing the case law on the subject and comparing the lack of symmetry in the removal power to that of treaty abrogation).

251. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 519, 634 (1952) (Jackson, J., concurring) (remarking that "[a] judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves").

252. See Corwin, supra note 208, at 171 (stating that "the Constitution considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy"); id. at 127 (stating that "there are ... fields in which ... congressional power and presidential prerogative merge into each other. One such field is that of foreign relations, ... another is that of expenditure"); cf. Neustadt, supra note 106, at 29 (stating that the Constitutional Convention "created a government of separated institutions sharing power").
case law, the past practice of the executive and legislative branches within the area of national security spending were controlling. "I think you pretty well have to go to the history [of impoundment] and the congressional and executive precedents, there just being no very helpful cases . . . ."\textsuperscript{253}

B. Historical Practice Illustrates that the President's National Security Power Extends to Effecting Spending Reductions

1. Custom adds a "gloss" of legitimacy to long-standing executive actions

The Supreme Court has consistently held that custom is highly relevant in determining whether the interplay between the two political branches passes constitutional muster.\textsuperscript{254} Custom in this man-

\textsuperscript{253} See 1971 Hearings, supra note 17, at 233 (testimony of William H. Rehnquist); Edward S. CORWIN, ESSAYS IN CONSTITUTIONAL LAW 263 (Robert G. McCloskey ed., 1957) (stating that "when two departments both operate upon the same subject matter . . . . [T]he question is what does the pertinent historical record show with regard to presidential action in the field of congressional power?").

\textsuperscript{254} See Rostker v. Goldberg, 453 U.S. 57, 66 (1981) (stating that interpretation of the Constitution by other branches is often controlling); Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (stating "long and continued practice raises presumption of congressional consent"); United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."); The Pocket Veto Case, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character [veto power]."); Myers v. United States, 272 U.S. 52, 119, 136 (1926) (acknowledging the importance of "acquiescence which was promptly accorded . . . [and] universally recognized"); Banks & Raven-Hansen, supra note 32, at 115 (stating that "custom is evidence of the political branches' joint interpretation of the President's constitutional or statutory authority"); Louis Fisher, President and Congress: Power and Policy 36 (1972) (quoting President Taft as stating "[s]o strong is the influence of custom that it seems almost to amend the Constitution"); cf Powell v. McCormack, 395 U.S. 486, 547 (1969) ("The relevancy of prior [practices] is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore the precedential value of these cases tends to increase in proportion to their proxim- ity to the Convention in 1787."); id. at 546-47 (stating that simply because "an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date"). But see J.N.S. v. Chadha, 462 U.S. 919, 959 (1983) (ruling legislative veto unconstitutional despite 50 years of practice); Abner J. Mikva & Michael F. Hertz, Impoundment of Funds—the Courts, the Congress and the President: a Constitutional Triangle, 69 Nw. U. L. Rev. 335, 345 (1974) (arguing that congressional acquiescence to impoundment in past grants it no le- gitimacy).

Although it is generally accepted that the Supreme Court is the final arbiter of the constitutional interpretation, see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is"), all three branches necessarily engage in such interpretation. See Fisher, supra note 1, at 233 (describing how the political branches are the exclusive interpreters of constitutional "political questions" and how executive-legislative customs are generally accepted by the courts). See gener- ally id. at 231-74 (providing a thorough discussion of "coordinate construction").

For commentary challenging the judicial monopoly on constitutional construction, see Tribe, supra note 17, at 34. Presidents Jefferson and Jackson believed that no law could "go into force unless all three branches agree that it is constitutional." Frank H. Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 910 (1990).
ner reflects the coordinate construction given the Constitution by the two branches. Justice Frankfurter, in his concurrence in *Youngstown*, described the role of custom as "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned ... may be treated as a gloss on 'executive power' vested in the President." Such a conclusion has a long progeny. For example, the Court in *Mistretta v. United States*, quoted Justice Frankfurter's concurrence in declaring that "traditional ways of conducting government ... give meaning" to the Constitution. Consequently, long-standing congressional deference to the President concerning the impoundment of national security-related funds has added a gloss of legitimacy to the practice.

As stated above, because enhanced rescission prevents funds from being expended, it is a subset of impoundment. When exercised within a national security context, enhanced rescission, is actually more constitutionally sound than pre-ICA impoundment. Whereas national security-related impoundment usually occurred without formal congressional approval, or in some cases with at least some measure of informal congressional disapproval, enhanced rescis-

255. 343 U.S. 579, 598 (1952).
256. Id. at 611 (Frankfurter, J., concurring).
257. See supra note 254 (providing long history of case law confirming the importance of traditional interpretations of powers between the two branches).

For a trenchant critique of interpreting congressional acquiescence to Executive action, see *Johnson v. Santa Clara*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (concluding that congressional inaction may result from any number of reasons: "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice").
259. Id. at 401.
260. The discussion below does not discuss the foreign affairs statutes cited in *Field* and in *City of New York*. Since Parts III.B.2 and 3 address these statutes as they relate to National Security Rescission, Part IV.B.1 will not discuss them further.
261. See supra note 32 (providing definition of impoundment in relation to enhanced rescission).

262. "Pre-ICA impoundment" refers to presidential impoundment occurring before the practice was restricted by the Impoundment Control Act of 1974. Although almost all notable pre-ICA impoundments involved a justification on national security grounds, there are notable instances where funds were impounded by the President based predominantly on another justification. See *FISHER*, supra note 37, at 176-77 (describing President Nixon's use of non-mandatory statutory language as a justification for impoundment); infra note 280 (discussing pre-ICA impoundment that was not justified on national security grounds).

264. See infra note 294 and accompanying text (providing examples of the disapproval congressional committees have displayed toward presidential impoundment). Moreover, the very fact that Congress passed the spending bills in the first place indicated that body's intent to have the funds spent. As a result, nearly all non-statutory impoundment before 1974 would appear to fall within Justice Jackson's third category. See Figure No. 1, supra p. 1516. It could be argued, however, that because Congress did not respond to these impoundments by reenacting the original spending bills, then Congress was acquiescing to the President's actions and,
sion power is specifically granted to the President by Congress through the Line Item Veto Act. Thus, as opposed to national security-related impoundment, which would have likely occurred within Justice Jackson's latter two categories, National Security Rescission power squarely fits within his first scenario. That such cancellations are carried out pursuant to the President's national security powers and lie along the National Security Vector would appear to render them all but inviolate. As a result, because the presidential practice of impounding national security-related funds has been legitimized through long standing practice, the lesser power of National Security Rescission should have been all the more constitutional.

2. The historical practice of presidential national security-related impoundment has the "gloss" of legitimacy

In the past, the majority of presidential impoundments have occurred in the field of national security or been justified as such. In either case, the two branches have typically resolved conflict of this sort through political accommodation rather than adjudication. Professor Arthur Schlesinger summed up pre-ICA impoundment well, observing that historically it "held a minor status in law and custom.

therefore, the President was acting within Justice Jackson's second scenario.

265. See S. REP. NO. 104-13, at 2 (1995); supra notes 175-79 (discussing the President acting pursuant to enhanced rescission as falling within Justice Jackson's first category).

266. See Figure No. 1, supra p. 1316. Examples of national security-related impoundment also fall along the National Security Vector under either Scenario 2 or 3. See supra note 264 for additional discussion about national security impoundment in relation to Justice Jackson's categorization of presidential action.

267. While enhanced rescission may appear at first blush to be the greater power, upon closer examination pre-ICA impoundment proves to be more formidable. With enhanced rescission, the President was empowered to reshape laws in a formal sense by irrevocably rendering statutory provisions legally invalid. In so doing, the President was bound to his decision. His action could only be overturned by passage of another separate statute. On the other hand, a President exercising non-statutory impoundment could effectively reshape laws to his liking and then change his mind at a later date. Moreover, unlike enhanced rescission, which created a process where Congress could overturn presidential action, impoundment was akin to an absolute veto since Congress could not overturn such an action. Finally, enhanced rescission is an all-or-nothing proposition. The President could cancel all of the funds involved in a provision or he could cancel none. With pre-statutory impoundment the President could reduce spending to any level he wanted.

Ultimately, the law in this regard elevates form over function. Whereas, the formal, statutorily delegated power of enhanced rescission has been struck down, the informal, undelegated, and more powerful vehicle of pre-statutory impoundment appears to have constitutional legitimacy. See Byrd, 956 F. Supp. at 29.

268. See Mikva & Hertz, supra note 254, at 336 (noting that presidential impoundments in the past received little objection due to their military nature).

269. See SCHLESINGER, supra note 221, at 235. Even Judge Thomas Jackson in Byrd acknowledged the different types of presidential impoundment. See Byrd, 956 F. Supp. at 29. In par-
Although President Washington was granted great leeway in allocating monies in 1789, 1790, and 1791, President Jefferson appears to be the first President to have actually impounded funds. In his first message to Congress in 1802, Jefferson announced that he would refuse to spend the money Congress had appropriated to build several fortifications. Jefferson deemed them wasteful and apparently not essential to national security, so he unilaterally acted to "suspend and slacken the expenditures." During that year, Jefferson, without congressional authorization, refused to spend the appropriated funds and Congress never reappropriated them. The following year, Jefferson deferred spending funds on fifteen gun-

Id. Judge Jackson’s language, therefore, distinguished between foreign and domestic impoundments while hinting at the latter’s legitimacy.

270. See Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95 (providing "lump sums" for among other things the civil list, the department of war and pensions for invalids).

271. See Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104 (providing "lump sums" for among other things the civil list, the department of war and pensions for invalids).

272. See Act of Feb. 11, 1791, ch. 6, 1 Stat. 190 (providing "lump sums" for among other things the civil list, the department of war and pensions for invalids).

273. See McDonald, supra note 17, at 6 (discussing Jefferson’s use of impoundment).

274. Id.

275. See id. Although he did not attend the Constitutional Convention, Jefferson was obviously a contemporary of the Framers. Despite serving as a Minister to France during the Convention, he was far from inactive in the debate over the Ratification of the Constitution. See JACK N. RAKOVE, ORIGINAL MEANINGS 176, 197 (1996) (discussing Madison’s interaction with Jefferson during the ratification of the Constitution).

The Supreme Court has held consistently that the construction given the Constitution by the Framers and their contemporaries, and subsequently followed, is highly persuasive in determining an act’s constitutionality. In Burrow-Giles Lithographie Co. v. Sarony, the Supreme Court held that “[t]he construction placed upon the Constitution ... by the men who were contemporary with its formation ... is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.” 111 U.S. 53, 57 (1884); see also J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 412 (1928) (declaring through Chief Justice Taft that “contemporaneous legislative exposition of the Constitution when the founders of our Government and the framers of our Government were actively participating in public affairs ... fixes the construction to be given to its provisions”); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 621 (1842) (concluding that “contemporaneous expositions of the Constitution,” by the Framers bolster long acquiescence in construction).

Because President Jefferson was an influential contemporary of the actual Framers, his impoundments should be granted the Framer’s “gloss.” See supra Part IV.B.1 (discussing the important role played by tradition in presidential-congressional relations). Even after the Impoundment Control Act, the President’s impoundment powers were not stripped from him. See infra notes 333-34 (discussing continued presidential impoundment after the ICA).

276. The term “defer” is used in generally the same sense as it is in the ICA. See 2 U.S.C. § 682(1) (defining deferral as “withholding or delaying the obligation or expenditure of budget authority ... provided for projects or activities”). Since President Jefferson eventually
boats. Although Congress had appropriated $50,000 for their construction, Jefferson withheld the funds in light of changed national security circumstances.

After a period of relative dormancy, non-statutory impoundment was resurrected in the months before the nation's entry into World War II. In January 1941, President Franklin D. Roosevelt announced he would decline to spend funds for public works since he felt they would detract from the war effort. Over the next three years, Roosevelt impounded nearly $500 million in public works spending.

As with President Jefferson's actions, President Roosevelt's impoundment of funds did not begin when the United States was officially at war, nor did his actions have significant statutory justification. Unlike his predecessor's impoundments, however, the actions taken by President Roosevelt went far beyond strict national security-related spending. He impounded funds for such domestic projects as the construction of roads, harbors and dams.
Following World War II, President Truman and Congress sparred over military spending. The major source of discord was the size of the Air Force. While Congress generally sided with Pentagon officials, believing that the nation’s defense capabilities should be increased, the administration opposed such measures. In 1948, Congress increased the President’s Air Force budget by $822 million, yet the spending was made contingent on the President’s finding that the sum was necessary to national defense. President Truman did not deem the spending to be imperative and he refused to spend the appropriated funds.

Congress proved less pliant the next year. While President Truman’s budget requested funding sufficient for the maintenance of a forty-eight group Air Force, the House believed a fifty-eight group to be necessary. An impasse in conference occurred when the Senate agreed with the President and proved reluctant to provide for the ten extra groups. An informal understanding between the President and Congress resolved the deadlock and the bill granted the Secretary of Defense the discretion to spend the extra funds if he wished. President Truman signed the bill only after announcing that he had placed the additional Air Force funds on reserve. These funds totaled $735 million and were never spent.

In 1949, Truman also impounded funds for construction of the fort, members of Congress quickly grew frustrated with his actions. In 1943, Senators Carl Hayden and Kenneth McKellar attempted to insert mandatory spending language into a section of the Rural Post Roads Act. See id. at 387-91 (reporting the legislative process the Senate used to enact impoundment language). Once the bill reached conference, however, the House members persuaded the Senate to drop the language. See Fisher, supra note 280, at 365. McKellar met with the same lack of success when he tried a similar tactic later that year. See id. Ultimately, Congress, as it had with President Jefferson, acquiesced to the impoundments. See id.
aircraft carrier, the *U.S.S. United States*. The initial estimate for the carrier’s construction was $189 million, however, others ranged as high as $500 million. For economic reasons and to quell interservice rivalry, Truman canceled construction of the carrier. He agreed, alternatively, to approve construction of a more modest carrier.

President Eisenhower carried on the Executive tradition of withholding funds for weapons systems he thought unnecessary. In 1956, he impounded $46.4 million targeted for Marine Corps personnel strength. That same year, the Department of Defense refused to spend appropriated funds for the construction of twenty superfort bombers. Two years later, it was the Army’s turn to feel the pinch of impoundment. The service sought $6 billion dollars to fund the Nike-Zeus antimissile system. The Army found opposition, however, in the Secretary of Defense, who concluded that more research was necessary before production should begin. Congress, however, thought otherwise and the following year appropriated $137 million for the initial Nike-Zeus procurement. Eisenhower in turn countered congressional action by impounding the funds pending results from further tests. In January, 1960, Eisenhower finally defused the conflict by announcing that the funds would be released for continued development but not for production.

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296. See id.
297. See id., at 368.
298. See id. Two other lesser known impoundments occurred during the Truman presidency. In 1950, the Department of Defense canceled the aircraft carrier Forrestal after funds had already been appropriated. *See Hearings on the National Military Establishment Bill for 1950 Before The Senate Comm. on Appropriations*, 81st Cong. 328 (1949) (testimony of Secretary of the Air Force). In addition, at the end of the Korean War, President Truman impounded funds earmarked for the construction of veterans hospitals. *See 1971 Hearings, supra note 17, at 287* (statement of Sen. Ervin).
299. *See 1971 Hearings, supra note 17, at 301* (memorandum of Mary Louise Ramsey, *Impoundment by the Executive Department of Funds Which Congress has Authorized it to Spend or Obligate*).
302. See id.
303. See id., at 368-69.
304. See id. at 369.
305. See id. Like Truman, Eisenhower also impounded funds for veterans. *See 1971 Hearings, supra note 17, at 389* (statement of Sen. Ervin) (referring to *Memorandum to the President: Authority to Reduce Expenditures*). In 1959, President Eisenhower signed a bill providing additional funds for housing loans for veterans. *See id.* An additional $100 million in funds for direct loans was added by Congress to the program. *See id.* The President noted that such loans were to be restricted to areas where private capital was not available, emphasizing that the Veterans Administration would “exercise maximum caution” in making such loans until an accurate determination of available private capital could be made. *See id.*
During that same year, Eisenhower impounded $37 million for increased Army moderniza-
President Kennedy followed the actions of his predecessors and became embroiled in an impoundment controversy of his own. In 1961, the Kennedy Administration requested $200 million for the B-70 strategic bomber (later named the RS-70 weapon system). Nevertheless, Congress went ahead and appropriated $380 million for the plane. Believing that intercontinental ballistic missile technology eliminated the need for new bombers, Kennedy refused to spend the additional $180 million.

Kennedy's refusal drew the ire of the powerful House Armed Services Committee Chairman Carl Vinson. In 1962, Vinson's committee drafted statutory language for fiscal 1963 which stated that "the Secretary of the Air Force, as an official of the executive branch, is directed, ordered, mandated, and required to utilize... $491 million... 'for an RS-70 weapon system'"—a full $320 million above the Administration's request. The Committee's use of the term "directed" caused much unease within the executive branch. President Kennedy responded in a letter that "the full powers and discretions [sic] essential to the faithful execution of [my] responsibilities as President and Commander in Chief" dictated that such language was unacceptable.

After the President's letter was sent, tension between the two branches was eased by a conciliatory meeting between the President and the Chairman. President Kennedy expressed to Vinson his view that the word "authorized" was unsuitable for an appropriations bill and requested its elimination. Vinson, who was also facing po-
political pressure from the House Appropriations Committee, agreed to the President's request.\footnote{316}

Like his predecessors, President Johnson impounded funds allotted for weapons systems, but he expanded the use impoundment to include domestic funds.\footnote{317} In 1965, the Navy requested that a third nuclear-powered guided missile ship, a DLGN, be constructed.\footnote{318} Although the Department of Defense declined the request, Congress nonetheless authorized $150.5 million to build the frigate.\footnote{319} The Department of Defense, at the behest of the President, took advantage of weak language in the authorizing statute\footnote{320} and refused to release the necessary funds for the Navy to begin construction.\footnote{321} Only after more than three years and significant strife between Congress and the President did President Johnson finally acquiesce and release the funds to build the ships.\footnote{322}

President Johnson's recasting of the impoundment would be taken even further by his successor.\footnote{323} Unlike previous Presidents, who used impoundment outside of the defense arena sparingly, President Nixon took the modest prerogative and pulled it far from its moorings. His administration asserted a constitutional power to impound any funds and the administration attempted to terminate programs through such action.\footnote{324} For instance, in 1973 alone, Nixon attempted to impound some $12 billion in appropriated funds.\footnote{325} Included in

\begin{footnotes}
\item[316] See Stassen, supra note 221, at 1166-67 (describing political situation at the time of the conflict); cf. Henkin, supra note 149, at 119 (discussing limits of congressional power to regulate executive activity through appropriations and stating that Presidents have disregarded riders with instructions for American delegations sent to international conferences).
\item[317] In 1966, the Johnson Administration reduced the available obligations for the highway trust fund and other programs for housing and urban development, health, education and welfare, agriculture and the interior. See 1973 Hearings, supra note 31, at 98 (testimony of Elmer B. Staats, Comptroller General of the United States).
\item[318] See Stassen, supra note 221, at 1169.
\item[319] See id. at 1170.
\item[320] See H.R. REP. NO. 89-1679, at 2 (1966), in Banks & Raven-Hansen, supra note 32, at 81 (stating that the authorizing statute required that "the contract for the construction of the ... frigate ... shall be entered into as soon as practicable unless the President fully advises the Congress that its construction is not in the national interest").
\item[321] See Stassen, supra note 221, at 1170.
\item[322] See id. at 1169-76.
\item[323] As President Roosevelt had done before him, President Johnson also impounded funds outside what generally would be thought of as the national security arena. In 1966, Johnson impounded $5.3 billion to reduce inflation prompted by military spending in Vietnam. The funds were earmarked for highways, housing, education, agriculture, health, and welfare. See Stephen Glazier, The Line-Item Veto: Provided in the Constitution and Traditionally Applied, in Pork Barrels and Principles, supra note 12, at 13. During the Johnson Administration, the color of impoundment began to change and assume a more expansive nature. See Stanton, supra note 92, at 27 (1974).
\item[324] See Fisher, supra note 37, at 176-77 (describing unprecedented scope of Nixon's impoundments in denying spending to programs).
\item[325] See Crovitz, supra note 309, at x.
\end{footnotes}
these funds were $6 billion of an $11 billion sewage treatment bill which Congress had passed over his veto.\textsuperscript{326} His actions prompted several lawsuits\textsuperscript{327} and ultimately the enactment of the ICA\textsuperscript{328} in 1974.\textsuperscript{329}

In virtually every instance of pre-ICA impoundment, the President withheld funds based at least in part on his national security powers. Even one as generally apprehensive about Executive aggrandizement as Professor Schlesinger asserted: "It could be contended... that military impoundment—Jefferson's in 1803, Roosevelt's in 1941 and thereafter, Truman's in 1949, Kennedy's refusal in 1961... even arguably Johnson's in 1967—fell within the legitimate powers of the Commander in Chief."\textsuperscript{330} In response to the President's actions, Congress usually acquiesced, albeit grudgingly, to his actions. Such acquiescence, as the case law demonstrates, has added a "gloss" to executive power.\textsuperscript{331}

Others have argued that the gloss encasing presidential impoundment was removed by the passage of the ICA since the act broke the continuity of the practice.\textsuperscript{332} This argument, however, is not as convincing as it may appear at first blush. The ICA, did not end presidential impoundment power, it merely brought it within statutory

\textsuperscript{326} See id.
\textsuperscript{329} See FISHER, supra note 37, at 177.
\textsuperscript{330} SCHLESINGER, supra note 221, at 236. Dr. Fisher has hinted at agreement with Professor Schlesinger's conclusion. See FISHER, supra note 254, at 127 ("In the area of defense procurement, in particular, the President could deny that Congress has the power to deprive him of his judgment and discretion in the administration of programs and in the management of funds."); supra note 206 (providing examples distinguishing between national security and other forms of pre-ICA impoundment); cf. Davis, supra note 307, at 60 (concluding that Congress has the power to require expenditure of funds for defense purposes, but that it does not have power over "unyielding" presidential opposition); Sally Weinraub, The Impoundment Question—An Overview, 40 BROOK. L. REV. 342, 360 (1973) (stating that "[a] conflict between Congress and the President on the issue of impoundments in the realm of foreign affairs would be difficult to resolve"). But see Stassen, supra note 221, at 1186 (arguing that because impounding is an effort to control the national economy, the President does not have the constitutional authority to disregard congressional will and impound funds for defense systems).

Assuming arguendo that impoundment based on the President's Commander in Chief powers is unconstitutional, the argument that the Line Item Veto Act would have granted the President such power would not be diminished since with National Security Rescission, the President is acting pursuant to congressional approval. See supra notes 175-79 (arguing that National Security Rescission falls within Justice Jackson's first category).

\textsuperscript{331} SeeYoungstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (stating that the long-standing practice, which has not been challenged by Congress, constitutes a "gloss" on the executive power afforded by the Constitution).
\textsuperscript{332} See BANKS & RAVEN-HANSEN, supra note 32, at 97 (contending that unilateral impoundment by the President was curtailed after the ICA).
bounds. To be sure, impoundment was circumscribed, but it was not terminated. The name of the act should provide some indication of this. The legislation was entitled the "Impoundment Control Act," not the "Impoundment Repeal Act." Moreover, since the ICA, Presidents have actually impounded more funds than before. Finally, the Line Item Veto Act amended the ICA and formally granted the President additional statutory impoundment powers in the form of enhanced rescission authority. To the extent that the ICA curtailed impoundment power, it was largely re-granted, albeit imperfectly, in the form of the Line Item Veto Act, thus restoring the gloss to its previous luster. As a result, the practice of impounding funds for national security reasons remains coated by a gloss of legitimacy.

This section has argued that since Curtiss-Wright, the Court has consistently ruled that the President may exercise Olympian powers in the national security realm. As demonstrated in Figure 1, the President's national security power, which is distinct from his domestic powers, carries with it a greater likelihood of constitutionality. Included in this national security power is the unilateral ability both to enact and repeal law. Accordingly, the combination of the Curtiss-Wright case law coupled with past practice of national security-related impoundment amounts to the equivalent of the President exercising National Security Rescission. Under the Line Item Veto Act, the President would have been exercising such power with the explicit approval of Congress, bolstering further the argument in favor of judicial recognition of National Security Rescission.

333. For instance, in 1990, President Bush, in accordance with ICA, announced the impoundment of $200 million for the Navy V-22 Osprey helicopter. See BANKS & RAVEN-HANSEN, supra note 32, at 84. Congress responded under the Act by pressuring the Department of Defense to spend the funds. See id. President Bush's action, though ultimately unsuccessful, nonetheless reflects impoundment's continued role in defense spending.

334. See FISHER, supra note 37, at 200 (observing that number of policy impoundments actually increased under President Ford); cf. LOUIS FISHER, THE POLITICS OF SHARED POWER 86 (1981) (describing the phenomenon of "quasi-impoundments," which occur when programs are purposely delayed due to the slow processing of applications, the frequent change of agency regulations, the rejection of applications for minor, technical shortcomings and other subtle forms of administrative obstruction).

335. The President's customary power of impounding funds also refutes another challenge to the legitimacy of national security-related impoundments: the argument that national security-related impoundments, and by extension, the National Security Rescission, could only be exercised during wartime. Such an argument is easily dismissed. As discussed above, none of the presidential impoundments of national security-related funds began while the nation was officially at war. While the President's powers are at their zenith during wartime, even during times of peace his national security powers have proved nothing short of formidable.


337. See supra Part IV.A.4 (discussing the President's unilateral power to enact and repeal law within the national security realm).
V. ARGUMENTS AGAINST NATIONAL SECURITY RESCISSION

A. The Four Arguments that the President's National Security Power Would Not Have Extended to Reducing National Security-Related Spending Are Unpersuasive

1. Decisions involving the expenditure of funds are not within the scope of the President's national security power

It could be argued that decisions involving the expenditure of funds lie outside the parameters of the President's national security power. Some have argued, for example, that the Framers intended the Commander in Chief's power to involve only substantive military matters. Under this view, the President's power would be limited strictly within these confines and he would have no responsibility for national security-related spending.

Such an interpretation of presidential powers falls short of the mark for three main reasons. First, such an interpretation runs directly counter to both precedent and practice. As the Curtiss-Wright line of cases has demonstrated, the President's national security power extends far beyond military details to include other weighty duties such as the nation's diplomacy. Furthermore, as discussed below, presidents from the time of Jefferson have refused to

338. See THE FEDERALIST No. 69, supra note 12, at 350 (Hamilton) (stating that the President's Commander in Chief powers "amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy"). While at first this passage may appear damning, the author, Alexander Hamilton was not a little disingenuous in his assessment of the President's powers. As the tenor of No. 69 betrays, at the time he was vigorously advocating adoption of the Constitution. In so doing, he was trying to allay fears of military dictatorship. See id. As such, Hamilton's true views on executive power were not fully displayed during the Ratification Debate. See, e.g. FORREST MCDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 207 (1994) (stating that concerning the Presidency, Hamilton "had more in mind [regarding executive power] than he set down on paper in 1788 .... [H]e viewed executive authority as being extensive.").

In another view, the words of the Framers actually reaffirm that the President should have significant discretion over national security spending. While the Framers were concerned about military dictatorship, they realized that the Commander in Chief needed discretion. From their experience with the Continental Congress during the Revolutionary War, and under the Articles of Confederation, the Framers were wary of leaving discretion in the hands of Congress. Thus, they purposely changed the constitutional language from "make war" to "declare war." See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., 1937); see also THE FEDERALIST No. 72, supra note 174, at 366 (Hamilton) (stating that "administration of government ... is limited to executive details, and falls ... within the province of the executive department").

339. See supra Part IV.A (discussing the expansive holdings in national security case law).

340. See supra Part IV.B (discussing history of presidential impoundment in national security realm).


342. See supra Part IV.B.
spend national security-related funds, thus granting such refusals a degree of legitimacy.\textsuperscript{345}

Second, in order to maintain control over his constitutional prerogatives, the President must have some discretion over how certain appropriated funds are spent. The expenditure of funds can never be divorced from political functions because meaningful action can never be taken without it. Alexander Hamilton recognized this fact when he stated, "[m]oney is with propriety considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions."\textsuperscript{344} This is as true in national security as it is in domestic policy. Thus, a persuasive argument could be made that to the extent the President is protecting his "essential function" as the "sole organ" of national security,\textsuperscript{345} even Congress may not interfere with his discretion to withhold such funds.\textsuperscript{346}

Justice Kennedy, in a concurring opinion in \textit{Public Citizen v. United States Department of Justice},\textsuperscript{347} appeared to support just such a contention. He wrote that Congress by statute cannot prevent the President "from accomplishing [his] constitutionally assigned functions" unless the degree of congressional intrusion on the President's powers is "justified by an overriding need to promote objectives within the constitutional authority of Congress."\textsuperscript{348} He continued by stating that "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate any intrusion by the legislative branch."\textsuperscript{349}

In a similar vein, William Rehnquist, again while serving as Assistant Attorney General, suggested that there existed substantive areas related to expenditure where Congress dare not intrude.\textsuperscript{350} He vol-

\begin{footnotes}
\item[343] See supra note 253 and accompanying text (discussing importance of custom in relations between the political branches).
\item[344] \textit{The Federalist} No. 30, at 143 (Alexander Hamilton) (Garry Wills ed., 1982).
\item[345] See Curtiss-Wright, 299 U.S. at 320.
\item[346] See J. Gregory Sidak, \textit{The President's Power of the Purse}, 1989 Duke L.J. 1162, 1183-84 (1989) (arguing that the President has an inherent right to fulfill his constitutional obligations irrespective of congressional appropriation).
\item[348] \textit{Id.} at 485.
\item[349] \textit{Id.} at 485.
\item[350] See 1971 Hearings, \textit{supra} note 17, at 246 (testimony of William H. Rehnquist, Assistant Attorney General); see also Freytag v. Commissioner, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part and concurring in judgment) (stating that if Congress passes laws that invade the executive domain, the President might have the power "to disregard them when they are unconstitutional"); Easterbrook, \textit{supra} note 254, at 905-06 (arguing that President should not enforce patently unconstitutional laws). Even Senator Byrd has agreed that there are limits to congressional appropriations power. See Byrd, \textit{supra} note 15, at 311 ("Congress cannot, for example, deny the President sufficient money to carry out his Article II duties [by, for example, stipulating that no money be expended by the Executive on receiving foreign ambassadors, in
unteered a hypothetical involving a congressional appropriation requiring American troops to wear blue uniforms against the wishes of

contravention of section 3").; see also RAOUl BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 509 (1974) (asserting that “the presidential oath to protect and defend the Constitution posits both a right and a duty to protect his own constitutional functions from congressional impairment”); FISHER, supra note 1, at 238 (citing Letter from Thomas Jefferson to Mrs. John Adams (July 22, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 42, 43-44 (Albert E. Bergh ed., 1905)) (discussing President Jefferson’s belief that if enacted laws were unconstitutional the President had a “duty to arrest its execution”).

The Counsel to Andrew Johnson during the impeachment proceedings stated:

If a law be declared by the Supreme Court unconstitutional he should not execute it. If the law be upon its very face in flat contradiction to plain express provisions of the Constitution, as if a law should forbid the President to grant a pardon in any case, or if a law should declare that he should not be Commander-in-Chief, or if a law should declare that he should take no part in the making of a treaty, I say the President... is bound to execute no such legislation...

CORWIN, supra note 208, at 65. But see DaCosta v. Nixon, 55 F.R.D. 145, 146 (1972) (“No executive statement denying efficacy to the legislation could have either validity or effect.”).

In the past, while ostensibly defending their constitutional prerogatives, presidents have in effect exercised “line item” veto power over non-spending bills. This has been done largely through presidential signing statements. See Judith A. Best, Budgetary Breakdown and the Vitation of the Veto, in THE FETTERED PRESIDENCY, 119, 129-25 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (comparing President Reagan’s exercise of a signing statement to President Roosevelt’s use of “quasi-line item veto” power); Crovitz, supra note 17, at 43, 44 (contending that President Bush effectively exercised line item veto power through his statement upon signing the Treasury, Postal Service and General Government Appropriations Act of 1990). Beginning with Andrew Jackson in 1830, several presidents have signed bills and subsequently restricted the breadth of the statute. See Christopher N. May, Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative, 21 HASTINGS CONST. L.Q. 865, 945 (1994). The House of Representatives concluded that Jackson’s statement amounted to an item veto. See id. at 945-46.

In 1842, President Tyler provided the House of Representatives with a statement of his views on a bill. See FISHER, supra note 17, at 90. A House select committee disagreed vigorously with what they termed to be a “defacement of the public records and archives.” See id. at 91.

In June 1860, Congress appropriated $500,000 to finish an Army Corps of Engineers project. See May, supra, at 949. The measure stated that the funds were “to be expended according to the plans and estimates of Captain Meigs and under his superintendence.” President Buchanan signed the bill but stated he would treat the provision requiring Captain Meigs’ supervision as only an expression of congressional “preference” and not as “intending to deprive the President of the power to order [Meigs] to any other army duty for the performance of which he might consider him better adapted.” See id. at 950. President Buchanan flouted the will of Congress by temporarily reassigning Captain Meigs. See id. at 951.

In signing a merchant marine bill in 1920, President Wilson ignored one section of the bill he found unconstitutional. See FISHER, supra note 17, at 92. Following the advice of the State Department he reasoned that the offending section would have caused a breach of American treaty responsibilities. See id. President Nixon likewise signed a military authorization bill in 1971, but he stated that the Mansfield Amendment accompanying it was “without binding force or effect.” See id. The next year a federal court took exception to his position. See DaCosta, 55 F.R.D. at 146 (“No executive statement denying efficacy to the legislation could have either validity or effect.”).

In 1979, Congress attempted to require the establishment of consular relations under circumstances with which President Carter disagreed. See FISHER, supra note 394, at 25. After signing the bill, Carter turned the mandate into a “recommendation.” See id.; see also May, supra, at 974 (stating that Presidents Ford, Carter and Reagan all at one point failed to comply with § 4(a)(1) of the War Powers Resolution); Kristy L. Carroll, Comment, Whose Statute is it Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes, 46 CATH. U. L. REV. 475, 489 n.83 (1997) (providing highlights of debate over President’s power to disregard unconstitutional laws).
the President. Under such circumstances, Rehnquist argued that the President could refuse to spend the appropriated funds since they unduly intrude upon the President's prerogatives as Commander in Chief.\textsuperscript{351}

Third, while the Constitution indicates that public funds may not be drawn to exceed appropriated limits, it is silent concerning the discretion to spend less. Article I simply reads that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."\textsuperscript{352} Thus, while the ceiling of appropriations is unequivocal, the floor is not. Rehnquist during his 1971 Senate testimony stated that "[y]ou do not have the same categorical direction at all in the Constitution as to whether the President must spend where Congress has appropriated. That is much more doubtful."\textsuperscript{353}

A constitutional ceiling is placed on expenditure because the concern of the Framers centered not around the Executive failing to meet appropriated spending limits, but exceeding them. This concern was inherited from England, where Parliament obtained exclusive domain over appropriations only after a protracted struggle with the King.\textsuperscript{354} Yet, despite the clear intent of the Framers that appropriations should not be made without legal sanction, the President frequently makes financial commitments without prior statutory approval.\textsuperscript{355} This tradition has carried on despite the Framers' profound unease at commitments being made unilaterally by the Executive.\textsuperscript{356} It would appear that this accepted practice is potentially more dangerous than failing to meet appropriated ceilings. Nonetheless, the unilateral obligation of funds by the President has gained some currency.\textsuperscript{357} Therefore, if the more serious practice of unilateral executive expenditure has been given some credence, the less serious practice of impoundment would certainly appear no less legitimate.

\textsuperscript{351} See 1971 Hearings, supra note 17, at 246. It would further reinforce the argument that in certain circumstances if a President is forced to preserve his national security prerogatives from congressional encroachment he may legitimately act within Justice Jackson's third category on the National Security Vector. See Figure No. 1, supra p. 1316.

\textsuperscript{352} U.S. CONST. art. III, § 9, cl. 7.

\textsuperscript{353} 1971 Hearings, supra note 17, at 243.

\textsuperscript{354} See BANKS & RAVEN-HANSEN, supra note 32, at 13-16 (describing struggle between the Stuart Kings and the English Parliament from 1603-49).

\textsuperscript{355} As of 1988, Presidents had sent troops or arms abroad 199 times. See Symposium, National Security and the Constitution: The Roles of Congress, the President and the Courts, 43 U. MIAMI L. REV. 17, 24 (1988). On 137 of these occasions (69% of the time) this was done without congressional appropriation. See id. For a thorough discussion of the executive branch unilaterally incurring budget obligations, see FISHER, supra note 37, at 229-56.

\textsuperscript{356} See BANKS & RAVEN-HANSEN, supra note 32, at 30-32 (discussing concern during the Ratification Debate over powers of the purse and sword uniting in the hands of the Executive).

\textsuperscript{357} See Symposium, supra note 355, at 24 (asserting a broad interpretation of the scope of presidential authority).
Due to the foregoing three reasons, the argument that the President's national security power does not extend to discretion over spending funds cannot withstand scrutiny. Relevant case law, the opinions of distinguished commentators, and past practice, coupled with the necessity of the President maintaining some control over his constitutional prerogatives, plus the practice of the Executive making commitments without prior appropriation, all militate against the notion that the President cannot exercise National Security Rescission power.

2. Decisions involving the expenditure of funds may not be delegated to the President

The argument could also be advanced that, notwithstanding the clear distinction made in *Curtiss-Wright* and its progeny between exercises of presidential power in foreign and domestic contexts, the Line Item Veto Act may not delegate such a power to the President. The argument is that the spending power is inherently a legislative function and that decisions involving the "Power of the Purse," even if in the national security field, cannot be delegated by Congress to the President. This argument is refuted on two counts. First, the nondelegation doctrine, which governs congressional delegations to the President, is a virtual nullity. Second, past practice indicates that Congress has long delegated far-ranging spending discretion to the President.

When Congress delegates authority to the President, all it need do is provide "intelligible principle[s]" to the Executive branch. Instructions as amorphous as supporting the "public interest" have been upheld by the Supreme Court in the past. Despite attempts to resurrect this somnolent doctrine, the nondelegation doctrine has lain dormant for over sixty years. In the case of the Line Item Veto Act, because the President was given three guidelines from Con-
gress, this standard appeared to have been met.

Furthermore, since the dawn of the Republic, Congress has delegated immense spending discretion to the President. The first appropriations bills were all "lump-sum appropriations" with "sum not exceeding" language as the only stipulation. In such bills, Congress merely granted the President a sum of funds and provided him with total discretion as to its allocation. For example, the first appropriation bill passed by the First Congress appropriated funds for four general categories of expenditure: $216,000 for the civil list, $137,000 for the War Department, $190,000 for the discharge of warrants issued by the previous Board of Treasury, and $96,000 for veterans' pensions. Such spending discretion is not only venerable, but it has received the imprimatur of the Supreme Court. "That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriations and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies."

For the above two reasons, Congress can indeed delegate discretion over spending to the Executive. The contention that decisions involving the expenditure of funds may not be extended to the President is, therefore, untenable.

3. Presidential cancellations of national security-related spending are indistinguishable from domestic spending, potentially leading to "Trojan-horse" rescission

An argument could be made that because national security-related spending has far-reaching domestic ramifications, the difference between the two areas is sufficiently blurred as to make them indistinguishable. Because of this ambiguity, the risk would be run that the definition of national security could be expanded insatiably by future presidents to include virtually any appropriated spending. The President could expand his cancellation powers through the "Trojan Horse" of National Security Rescission to include other purely domestic areas of spending—essentially gaining rescission power through indirect means. In supporting this argument, the example

364. See supra notes 53-55 and accompanying text.
365. See FISHER, supra note 37, at 60.
366. Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The second and third appropriations bills followed the same pattern of broad discretion. See Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104 (providing "lump sums" for among other things the civil list, the Department of War and pensions for invalids); Act of Feb. 11, 1791, ch. 6, 1 Stat. 190 (same).
of President Roosevelt could be offered. By using a liberal interpretation of his Commander in Chief powers, President Roosevelt impounded domestic spending involving the construction of roads, harbors and dams.\textsuperscript{368}

The statutory construction given National Security Rescission, however, would limit the President's rescission authority to the four national security-related spending bills.\textsuperscript{369} The spending provisions within these bills are statutorily defined as relating to certain topics and, therefore, are legally distinct from other areas of federal spending.\textsuperscript{370} Even if a spending bill were packaged with other bills into omnibus legislation, the various appropriations bills are still discrete within their own boundaries. Such statutory provisions could not be disregarded lightly.

4. \textit{The distinction between national security spending and domestic spending is artificial, because national security spending has far-reaching domestic ramifications.}

Finally, still others could argue that the construction of weapons systems and other national security-related construction occurs far from any theater of war. The construction takes place throughout the United States in sites that lie within congressional districts and that provide jobs for citizens. This argument, however, like its predecessors, while initially appealing, collapses underneath its own weight. Simply put, the geography of the national security spending is irrelevant. Parallel practices demonstrate that the President's Commander in Chief powers are not limited to beyond the water's edge, but often have application within the nation's borders.

For example, Congress has delegated to the President the power to close military bases. The Supreme Court refused to review such a delegation, effectively upholding the delegation.\textsuperscript{371} The responsibility for closing military bases is not far removed from the cancellation of weapons systems. Both actions have a major impact upon local communities, however, the responsibility for both actions are the President's national security powers pursuant to a congressional delegation.\textsuperscript{372} Other similar examples of national security power be-

\begin{itemize}
\item 368. See supra notes 280-84 and accompanying text (describing President Roosevelt's impoundment during World War II).
\item 369. See supra note 7.
\item 371. See Dalton v. Specter, 511 U.S. 462, 476 (1994) (holding that presidential decision on military base closure recommendations was not reviewable and that the President may "approv[e] or disapprov[e] the recommendations for whatever reason he sees fit").
\item 372. See id. at 464-65.
\end{itemize}
ing exercised within the borders of the United States would include the executive branch’s jurisdiction over military justice and national security secrets.\(^{374}\)

Moreover, the President is Commander in Chief of the armed forces at home and abroad. Presidents have used this power in domestic contexts to suppress rebellion,\(^{375}\) enforce the laws,\(^{376}\) and maintain the peace.\(^{377}\) Therefore, despite protestations to the contrary,\(^{378}\) the President’s national security powers serve important functions within the United States as well as abroad. The previous examples thus would tend to refute the notion that a delegation to reduce national security-related spending within the United States is somehow beyond the scope of presidential power.

After consideration of four of the major arguments against National Security Rescission, the argument in its favor is only reinforced.

**B. A Constitutional Dilemma**

Assuming arguendo, that the President’s decision to withhold national security-related spending should follow the requirements of Presentment as strictly interpreted by *Chadha*\(^{379}\) and upheld in *City of New York*,\(^{380}\) and there is strong argument to be made that it does not,\(^{381}\) the Constitution still favors the existence of National Security Rescission. Ultimately, if the Supreme Court concluded that the withholding of national-security-related spending must be carried out through the Presentment Clause, it would have faced a constitutional

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374. See Exec. Order No. 10,104(f), 15 C.F.R. 597 (1950) (involving a presidential definition of "defense installations" to include certain "commercial establishment[s]").

375. For example, President Washington used troops to put down the so-called "Whiskey Rebellion." See Sidney M. Milkis & Michael Nelson, *The American Presidency: Origins & Development* 84-86 (2d ed. 1994). Similarly, President Lincoln used troops to put down the Southern rebellion during the Civil War. See id. at 156-64.

376. For example, President Eisenhower called up federal airborne troops to enforce a court order desegregating Central High School in Little Rock, Arkansas. See 2 Michael Riccards, *The Ferocious Engine of Democracy* 250 (1995).

377. For example, President Johnson used airborne troops to keep the peace during the urban riots of the 1960's. W. Craig Bledsoe et al., *Chief Executive, in Congressional Quarterly, Powers of the Presidency* 70 (2d ed. 1997).

378. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 632 (1952) (Douglas, J., concurring) (stating that "our history and tradition rebel at the thought that the grant of military powers carries with it authority over civilian affairs").


381. See supra Part IV.A (contending that the Presentment Clause may not apply to national security lawmaking); *City of New York*, 118 S. Ct. at 2106 (discussing ability of Congress to delegate authority to the President to repeal laws within the field of foreign affairs).
quandary. The Line Item Veto Act, as seen through the prism of national security, could have been in violation of the Presentment Clause on one hand. Yet, on the other, the President's national security power and the limits of congressional delegable authority would have demanded great deference.\footnote{382}

To further complicate matters, both constitutional clauses involved have been interpreted broadly by the Supreme Court: the Presentment Clause in \textit{Chadha},\footnote{383} and the President's national security powers coupled with a congressional delegation in \textit{Curtiss-Wright}.\footnote{384} To overcome this impasse, the Court would have likely applied a balancing test. Application of this test would have been in accord with Supreme Court precedent and would have likely confirmed the existence of National Security Rescission.

\textbf{1. A balancing test would have likely been applied}

In cases involving a conflict between constitutional powers of governmental branches, the Court, if unable to decide the case on other grounds, has traditionally applied a balancing test.\footnote{386} In \textit{United States v. Nixon},\footnote{387} for example, the Court was faced with a conflict between the executive branch and the Judiciary. In this conflict, President Nixon claimed "executive privilege" over subpoenaed tapes and papers.\footnote{388} The President's claims of privilege were based on his ability to perform his executive duties, and were thus pitted against the Judiciary's need to preserve the integrity of the criminal justice system.\footnote{389} The Court reasoned that the balance it struck between these

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\item \textit{Chadha} (footnote 383).
\item \textit{Curtiss-Wright} (footnote 384).
\item Morrison v. Olson, 487 U.S. 654, 695-96 (1988) (weighing the extent to which the independent counsel reduces executive powers and concluding that the Act gives the President sufficient control and ability to carry out his constitutional duties); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (indicating that in assessing whether an act of Congress upsets the balance of powers, the Court must analyze degree to which the Act prevents President from carrying out his constitutional functions).
\item See supra note 385 and accompanying text (providing examples of cases in which the Supreme Court weighed the extent to which an act interferes with presidential constitutional powers). It is likely that this balancing test demonstrates why Justice Jackson's formula would not justify merely any exercise of enhanced rescission authority. Only through his national security powers may a president overcome the requirements of Presentment.
\item 418 U.S. 683 (1974).
\item See id. at 703.
\item See id. at 707 (stating that "legitimate needs of the judicial process may outweigh the presidential privilege"); id. at 711-12 (concluding that, in this case, the need for fair adjudication of a criminal proceeding outweighed presidential need for confidentiality).
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competing considerations must "preserve[] the essential functions of each branch." Accordingly, it held that relatively severe interference with the Judiciary involving the criminal justice system outweighed the relatively mild interference with the President's performance of his duties since the privileged information could be revealed in camera.

While, the *Nixon* case pitted the executive branch against the judicial branch, in the case of National Security Rescission, the two political branches had acted in concert, making the arguments against national security-related cancellations all the more formidable.

a. **Weighing the Constitution's national security powers against the requirements of the Presentment Clause**

Any balancing test must begin with the assumption that national security is the most important governmental interest. As the Court stated in *Haig v. Agee*, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Without a secure nation, none of the Constitution's political guarantees is assured. Consequently, national security has demanded deference from a host of constitutional clauses. As has been demonstrated, when the President and Congress act in accord in this area, their power is virtually without limit.

Furthermore, in no field is the importance of granting discretion

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390. *Id.*
391. See *id.* at 712-13.
392. *See id.*
395. *See supra* Part IV.A (discussing great deference given to the political branches in national security); Clinton v. City of New York, 118 S. Ct. 2091, 2106 (1998) (discussing examples of legislation affecting foreign affairs in which Congress delegated to the President the power effectively to repeal statutory law).
to the political branches more vital than in national security. It would seem logical that the power to alter national security spending bills as needed would be included in such discretion. For as Alexander Hamilton stated in Federalist No. 30, money allows the branches "to perform [their] most essential functions." If the President, as the "sole organ" of national security, cannot receive a delegation from Congress to effect national security-related spending reductions, his freedom of action has been greatly hampered. In particular, if the President is inhibited in his role as Commander in Chief, or as Chief Diplomat, then these all-important functions will not be fulfilled—constitutionally, there is no other branch that can pick up the "slack." As a result, since the political branches are charged with the Republic's national security to the virtual exclusion of the Judiciary, not granting them deference could place a significant obstacle in the way of the prompt execution of the nation's aims. Thus, there exists an immense burden for the interests of Presentment to overcome.

Although it is granted that the integrity of the lawmaking process is difficult to overstate, the exigencies of national security would likely have tipped the scales in favor of legitimizing National Security Rescission.

VI. RECOMMENDATIONS

The Supreme Court did not consider the legitimacy of national security-related cancellations because the City of New York case did not involve an exercise of national security power. Nevertheless, in dicta, it did allude to the potential for such a prerogative. Had the suit been based on a national security-related cancellation, the Supreme Court might well have ruled differently than it did. The requirements of the Presentment Clause and the political branches' national security powers can only be appropriately preserved by fashioning a narrow construction of the statute so that it would apply only to national security spending provisions—National Security Re-

396. THE FEDERALIST NO. 30, supra note 344, at 143 (Hamilton).
397. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (stating that President is the "sole organ" of the Federal Government in international relations).
398. See THE FEDERALIST NO. 30, supra note 344, at 143 (Hamilton) (discussing the central importance of funding to the performance of governmental duties).
399. Some would argue that in an area as important as national security it is all the more necessary for the requirements of Presentment to be strictly followed. As demonstrated above, see Part IV.A, however, national security law is frequently made and unmade outside the confines of Presentment. See supra note 394 (discussing how national security exacts deference from numerous constitutional clauses).
400. See City of New York, 118 S. Ct. at 2095 (involving a domestic spending cancellation).
401. See id. at 2106.
scission. In this manner, domestic legislation would be strictly held to the requirements of Presentment, while the distinct field of national security law would comply with precedent allowing for presidential cancellation.

Such an interpretation of the Line Item Veto Act would have followed three familiar canons of statutory interpretation. First, such an interpretation would have comported with the canon of construing statutes to avoid constitutional problems. By interpreting the Line Item Veto Act to encompass only National Security Rescission, the Court would have allowed the statute to avoid constitutional infirmity. *Sutherland's Statutes and Statutory Construction* states that a "court should construe legislative enactments to avoid constitutional difficulties if possible." *Sutherland* declares that "[w]hen possible, statutory provisions should be construed in such a way as to avoid unconstitutionality rather than simply void them on the basis of an interpretation which renders them constitutionally infirm." Moreover, such an alternate construction need only be "reasonable." In fact, courts have held that even "a strained construction is not only permissible, but desirable, if it is the only construction that will save constitutionality." Second, the Line Item Veto Act, as applied to national security-related spending, might also have benefited from the canon granting national security-related legislation a generous construction. "It is imperative that legislation providing for national defense and the conduct of war should be interpreted in ways that are most conducive to the achievement of its important objectives." Thus, to the extent that the Line Item Veto Act would have been used in the national security context, it would have likely been constructed liberally.

Third, such an interpretation would have followed the presumption against diminishing the President's traditional powers.

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402. See William N. Eskridge, Jr. & Philip P. Frickey, Legislation 675, 686-87 (2d ed. 1995). This canon has had such esteemed advocates as Justices Brandeis, Justice Cardozo, and Justice Frankfurter. See id. at 686.


404. See id. § 45.11, at 49 n.7 (quoting American Fed'n of Labor & Congress of Indus. Orgs. v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (en banc)).

405. See id. § 45.11, at 49 & n.15 (citing State v. Fischer, 443 A.2d 249 (N.J. Super. 1982)).

406. See id. at 49 n.16 (quoting In re Gifford, 688 F.2d 447 (7th Cir. 1982) and citing eight other federal cases).

407. See id. § 71.09, at 289 (discussing importance of generously construing statutes relating to national defense).

408. Id.

demonstrated above, one of the President's more venerable powers has been national security-related impoundment. Because presidential impoundment is one of the President's traditional powers, it would have likely fallen within this third canon. As a result, only by acknowledging National Security Rescission would a court have remained true to the President's traditional powers of national security-related impoundment.

To effect such a construction, the Administration should have canceled a measure from one of the four national security-related bills: the Department of Defense Appropriations Act, the Military Construction Appropriations Act, the Foreign Operations, Export Financing and Related Programs Appropriations Act and the Departments of Commerce, Justice, and State and Related Agencies Appropriations Act. By canceling national security spending provisions within these bills, the canons of statutory construction would have pointed toward recognition of National Security Rescission.

Were Congress to muster the political will, it could even pass a Na-

410. See supra Part IV.B.
411. Only the spending provisions affecting national security in these bills would be eligible for cancellation. The Department of Justice, for instance, would not be subject to cancellation simply because it is paired with the State Department for purposes of appropriation bills. For examples of provisions the President could have canceled, see Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 1997 U.S.C.C.A.N. (111 Stat.) 2440, 2499 (appropriating $14,549,000 for necessary expenses for an international fisheries commissions); id. (appropriating a grant of $8,000,000 for the Asia Foundation); id. at 2502 (appropriating a grant of $12,000,000 for Center for Cultural and Technical Interchange Between East and West in the State of Hawaii); id. at 2502 (appropriating a grant of $1,500,000 to the Florida education institution, known as the North/South Center); Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. No. 105-118, 1997 U.S.C.C.A.N. (111 Stat.) 2386, 2398 (appropriating $15,000,000 for a scholarship, bicomunal projects and other measures aimed at the reunification of Cyprus); id. at 2398 (appropriating $5,000,000 for the Western Hemisphere International Law Enforcement Academy); Department of Defense Appropriations Act of 1998, Pub. L. No. 105-56, 1997 U.S.C.C.A.N. (111 Stat.) 1203, 1216 (appropriating $4,000,000 for the development of coal-derived jet fuel technologies); id. at 1219 (appropriating $2,000,000 for the National Security Education Trust Fund); id. at 1242 (appropriating $13,000,000 for the Department of the Navy to Intrepid Sea-Air-Space Foundation for the refurbishment of the former U.S.S. Intrepid (CV 11)); Military Construction Appropriations Act of 1998, Pub. L. No. 105-45, H.R. CONF. REP. No. 105-247, at 25 (1997) (appropriating $9,900,000 for an atmospheric Air Dryer Facility at Arnold Air Force Base in Tennessee).

In making these selections the author focused on the legal considerations involved in a challenge, the substantive merit of the provision, and the political realities faced by the Clinton Administration. The author concentrated on provisions that fell explicitly within the President's fiscal domain. All the provisions fell under the statutory heading, "Funds Appropriated to the President." Moreover, all fell within what traditionally has been considered the President's role as Commander in Chief or Chief Diplomat.

Apart from the provisions that actually made it into law, the White House could have been proactive regarding a test case by negotiating in advance with advocates of the Line Item Veto Act in Congress. In this manner, a "dummy" provision could have been inserted into the bill with the intention of it being canceled by the President for purposes of a "test case."
tional Security Line Item Veto Act which could well pass constitutional muster. The Court's dicta in *City of New York* left the door ajar for such an act. 412 Such a bill would still empower the President to "trim the fat" of approximately one sixth of the federal budget, 413 while at the same time allowing him to augment his political power but this time on a more modest scale. Considering, however, the measure's unpopularity in Congress following the President's cancellations, 414 the emergence of a budget surplus, the weakened political state of the incumbent President, and a lack of Republican enthusiasm for reducing defense spending, it seems highly unlikely that Congress would grant the President such a modified version of enhanced rescission power.

**CONCLUSION**

The public discourse concerning the constitutionality of the Line Item Veto Act was marked in large part by a lack of nuanced public debate. 415 Commentators framed the legal question simply as whether or not the prerogative was constitutional. 416 Such a limited scope of debate may have satisfied partisan concerns, but it failed to appreciate the complexity arising from the Act's application. In so doing, the recent discourse surrounding the line item veto overlooked the varying levels of presidential authority, which fluctuate according to the action or inaction of Congress, 417 and according to the nature of presidential action, whether it be domestic or national security-related. 418 It is this very lack of appreciation for the varying

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412. See *Clinton v. City of New York*, 118 S. Ct. 2096, 2106 (1998) (distinguishing the Line Item Veto Act from prior acts that allowed the President effectively to cancel provisions that involved foreign affairs); cf. *infra* note 419 (discussing the likelihood that a line item veto bill with statutory language that used "decline to spend" or "withhold funds" language instead of the term "cancel" would be upheld).

413. See *Byrd*, *supra* note 15, at 315.

414. See *supra* note 98 (describing congressional reaction to the Act's implementation).

415. See, e.g., William Welch, *Line Item Veto: a Long Time in the Works*, USA TODAY, at A6 (quoting Senator Byrd terming the Act "a colossal mistake" and a "malformed monstrosity").

416. See *id*.

417. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636-38 (1952) (Jackson, J., concurring) (explaining the varying levels of presidential authority).

418. See Figure No. 1, *supra* p. 1316; *supra* Part IV.A (discussing differences between national security lawmaking and domestic lawmaking).
degrees of presidential authority that lies at the heart of the Clinton Administration's failure to administer enhanced rescission power in the manner most conducive to its preservation. As a result, the line item veto is gone, if not forever, at least for the foreseeable future.\footnote{In the wake of \textit{City of New York} other modified line item veto proposals were discussed. See Jan Crawford Greenburg, \textit{Court Voids Line-Item Veto Power: Lawmakers say They'll try Again}, CHI. TRIB., June 26, 1998, at I (discussing the attempts of Representatives Solomon and Goss to write an acceptable line item veto bill); Helen Dewar & Joan Biskupic, \textit{Line Item Veto Struck Down; Backers Push for Alternative}, WASH. POST, June 26, 1998, at A1 (discussing plans in the Senate led by Senators Coats and McCain to draft a new line item bill). Their efforts may prove to be in vain due to the lack of necessary political momentum for a new line item veto proposal. See Byrd, supra note 15, at 325-24 (commenting that the Congressional Budget Office forecasts a budgetary surplus for fiscal year 1998 of $8 billion and surpluses through 2003).

If the political momentum were to pick up again, perhaps even a new general line item veto act could be formulated to pass constitutional muster. To be viable, such a statute would have to use terminology such as "decline to spend" or "withhold funds" in place of the word "cancel." See \textit{City of New York}, 118 S. Ct. at 2118 (Scalia, J., concurring in part and dissenting in part) ("Had the Line Item Veto Act authorized the President to 'decline to spend' any item of spending . . . there is not the slightest doubt that authorization would have been constitutional."); cf. id. at 2108 (stating that "[i]f there is to be a new procedure in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution").

Certainly, a line item veto amendment to the Constitution was and is the optimal method of granting the Executive such power. See, e.g., CORWIN, supra note 208, at 284 (contending that item veto requires constitutional amendment). Even three years ago with the prevailing political winds at its back, line item veto amendments failed in both houses of Congress. See H.R.J. Res. 4, 104th Cong. (1995); H.R.J. Res. 6, 104th Cong. (1995); H.R.J. Res. 17, 104th Cong. (1995); S.J. Res. 2, 104th Cong. (1995); S.J. Res. 14, 104th Cong. (1995); S.J. Res. 15, 104th Cong. (1995); S.J. Res. 16, 104th Cong. (1995).}