



1-1-2012

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Recommended Citation

L. P. Schultz, *An Item Veto: A Constitutional and Political Irrelevancy*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 177 (1985).
Available at: <http://scholarship.law.nd.edu/ndjlepp/vol1/iss2/10>

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AN ITEM VETO: A CONSTITUTIONAL AND POLITICAL IRRELEVANCY

L. PETER SCHULTZ*

The practice of loading the budget with unnecessary spending—and then waiting until the eleventh hour to pass a Continuing Resolution on the assumption that it was safe from a Presidential veto—has gone on much too long. It is one of the principal reasons why the growth of Government spending is still not under control. Ronald Reagan¹

No doubt many Americans share the image created by the President's words quoted above. The quotation reflects the idea that because Congress knowingly appropriates money unnecessarily, it sometimes uses underhanded or devious means to work its will against the wishes of the people or at least against those of the President, and certainly against any sound fiscal judgment. This image is quite believable and in its own way is even comforting: believable because Congress has long been criticized for its alleged propensity to spend²; comforting because the image suggests that congressional spending, like other illegitimate practices, only thrives in a closet, and if brought out in the open or if an additional check were placed on Congress, all would be well. Under the public eye or under the control of a powerful and public-spirited overseer, the sin of congressional spending would wither or at least be reduced from a mortal sin to one of venial proportions.

Given this common perception of congressional spending practices, bulging budgets and deepening deficits, a line item veto, which would allow the President to veto particular items in appropriations bills, looks particularly appealing. Some think such a provision would allow the President to discipline Congress by revealing and excising congressional ap-

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1. President Ronald Reagan, Remarks to Reporters Announcing the Veto of H.J. Res. 357, 17 WEEKLY COMP. PRES. DOC. 1299 (Nov. 23, 1981).

2. See generally Palfy, *Giving the Budget Process Teeth*, 305 HERITAGE FOUND. BACKGROUNDER (1983).

propriations excesses.³ Its supporters offer two rationales for the line item veto. Some argue that with such a provision the President would be able to cut deeply into Congress' practice of spending to satisfy interests "back home," thus allowing for a degree of budgetary control and fiscal responsibility not achievable under the current constitutional arrangements.⁴ A line item veto is presented as the change necessary to enable the government to put its fiscal affairs in order and, ultimately at least, to balance the budget.⁵ Others argue that even if a line item veto provision is not sufficient of itself to ensure a balanced budget, it is nonetheless a useful tool in reforming the budget process and reducing unnecessary expense.⁶ Thus, from either perspective, a line item veto provision seems necessary and beneficial.

Before amending the Constitution, we should carefully scrutinize the proposed amendments. In this case, such scrutiny is especially necessary given the degree of public concern over current budgetary problems.⁷ First, we must ask whether and to what degree a line item veto addresses the causes of the current deficits. Whether a line item veto will allow or promote to any great extent a balanced budget depends upon the source(s) of the deficits, and upon whether those deficits can be charged to congressional profligacy. Sec-

3. *Hearings on An Item Veto Constitutional Amendment Before the Comm. on the Judiciary*, 98th Cong., 2d Sess. 9 (1984) (testimony of Sen. Dixon) [hereinafter cited as *Hearings*].

4. *Id.* at 11-13. See also Palffy, *Line Item Veto: Trimming the Pork*, 343 HERITAGE FOUND. BACKGROUNDER 5 (1984).

5. *Hearings*, *supra* note 3, at 8. See also Wall St. J., Sept. 22, 1983, at 30, col. 1, where it is asserted that the budget processes in many states "work . . . where the governor has line-item veto power," while the federal process is "about as whacky as something out of the 'Dukes of Hazzard'."

6. A line-item veto would be no fiscal panacea. It does not even address the primary federal spending problem — the spiraling growth of entitlements. Nor would it deal with many of the serious shortcomings of the congressional budget process. But by taking the handcuffs off the President in the appropriations process, the line-item veto would constitute an important first step toward fiscal responsibility.

Palffy, *Line-Item Veto: Trimming the Pork*, *supra*, note 4 at 10.

7. As is well known, concern over current budget deficits is widespread, comprehending both conservatives and liberals. Walter Mondale, e.g., pinned his campaign against President Reagan on his plan to balance the budget in the near future. This concern is also reflected by scholarly works on the federal budget and that process. Compare D. IPPOLITO, CONGRESSIONAL SPENDING (1981), with H. SHUMAN, POLITICS AND THE BUDGET: THE STRUGGLE BETWEEN THE PRESIDENT AND THE CONGRESS (1984).

ond, we ask what effect such an amendment would have on the constitutional relationship between the President and Congress, and whether these effects would be "politically" unhealthy. Finally, it is worthwhile to ask whether the unamended Constitution provides any alternatives with the advantages of a line item veto, but without the deleterious side-effects. We turn first to the alleged fiscal irresponsibility of Congress and whether a line item veto would offset this alleged profligacy.

II

Source proponents of the line item veto have argued that Congress' fiscal irresponsibility causes the budgetary problems.⁸ Under this analysis, congressional irresponsibility can be traced to the Constitution itself, specifically to the separation of powers between two distinct and independent departments of government.⁹ This separation prevents effective executive oversight and allows Congress to have its way regarding appropriations.¹⁰ Although the President possesses the veto power, Congress may appropriate non-essential items into useful legislation. Such appropriations force the President to veto an entire bill to nullify the non-essential, or to accept the non-essential for the sake of the essential. Most often the President signs the bill despite its objectionable items.¹¹ This analysis suggests that Congress has the President at a disadvantage with regard to appropriations, and this disadvantage can be traced directly to the separation of powers. Hence, it is necessary to modify the separation of powers to solve the problem of fiscal irresponsibility.¹²

8. *Hearings, supra* note 3, at 2 (testimony of Sen. Hatch).

9. U.S. CONST. art. I, §1 provides: "All legislative powers herein granted shall be vested in a Congress . . .," art. I, §8 defines Congress' spending and taxing power. The executive power is described in U.S. CONST. art. II.

10. Executive oversight of Congressional spending is authorized in U.S. CONST. art. I, §7, cl. 2 which provides: 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.

11. *Hearings, supra* note 3, at 2-3 (testimony of Sen. Hatch).

12. [U]nder current law, the President must approve or disapprove entire appropriations bills, [so] Congress is able to pass special interest and non-germane "riders" by incorporating them into major last-minute funding bills and resolutions. If the President

This institutional analysis of the budget problem is not new. The idea dates back at least to the late nineteenth and early twentieth century when the "progressives" and others began a somewhat concerted critique of the Constitution.¹³ One version of this critique held that the Constitution was an eighteenth century document, unsuitable by and large for the twentieth century because more government and less individual freedom was needed to assure that economic and social progress was widely shared. "More government" meant more trust of government and, therewith, a different kind of governmental arrangement than that embodied in the Constitution of 1787. The nation could no longer afford a government incapable of forming and implementing great plans. The nation was no longer suited to a government of separated powers, because such an arrangement rendered the government incapable of governing efficiently. The progressive critique of "pork barrel" legislation, Congress' alleged propensity to spend extravagant sums of money on non-essential programs, is part and parcel of the broad progressive critique of the separation of powers and, by implication, of the Constitution itself.¹⁴ Until the separation of powers is modified, giving the President more control over appropriations, fiscal irresponsibility in the form of congressional extravagance is "systemic." Constitutional change is mandatory given this understanding of the "budget problem."¹⁵

Although still accepted by some, the progressive critique of the constitutional order raises several questions: Is it accurate to argue that Congress can no more resist spending than

refuses to sign such "Christmas tree" bills, he often must shut down the government agencies covered by the legislation. Palffy, *Line-Item Veto: Trimming the Pork*, *supra* note 4 at 2.

"Increasingly, a President has the choice of either shutting down the government, or signing into law billions of dollars in spending he or she does not support." *Hearings*, *supra* note 3 at 3 (testimony of Sen. Dixon).

13. See, e.g., C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

14. See generally, R. HOFSTADTER, THE AGE OF REFORM, 173-213 (1959); THE PROGRESSIVE ERA: LIBERAL RENAISSANCE OR LIBERAL FAILURE? (A. Mann ed. 1963).

15. Although this institutional argument has a long history, it came into its own in the late nineteenth and early twentieth centuries with the rise of "progressivism." One of the best and certainly one of the most illuminating statements of progressivism is H. CROLY, THE PROMISE OF AMERICAN LIFE (1909). For a critique of the progressives, at least with regard to their thoughts on the presidency, see J. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT (1979).

an alcoholic can resist a drink? The progressive critique of the constitutional order suggests an affirmative answer.¹⁶ The longstanding conception of Congress as spendthrift seems to support this view.¹⁷ To test whether this conception is accurate, it is worth asking whether and to what degree Congress is profligate. At least one observer has suggested that the institutional arrangements under the Constitution *discourage* spending:

The [national political] system is one of checks and balances, and the Federal machinery for combatting and deflating departmental concepts of what is necessary is so extensive and at times so difficult of persuasion that unless departmental representatives proceed to present their viewpoint in a vigorous and tenacious manner, objectives which are essential . . . to the public welfare might . . . be submerged by some purely budgetary objective, or by the budgetary power, rather than served thereby. At this point the departmental budget officer proceeds on the principle that the government exists to serve the needs of a great people and not primarily for the purpose of creating a model budget system.¹⁸

Note the degree to which congressional committees are said to concern themselves with questions of economy or with purely budgetary questions. Rather than questioning whether the spending is necessary, most often the question asked is whether the proposed spending is within budgetary guidelines.¹⁹ According to those who suggest that institutional arrangements under the Constitution discourage spending, the effect of the system of "checks and balances" or the separation of powers is to deflate appropriations legislation.²⁰ The result is not surprising. One purpose of "checking and balancing" is to allow one office to check the operations of an-

16. Besides the better known and more general "Progressive" writings, such as H. CROLY, *THE PROMISE OF AMERICAN LIFE* (1971) and W. WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* (1981), one should consult also W. TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* (1925) for a critique of Congress based on its alleged inability to curb spending.

17. See, e.g., Palfy, *supra* note 2.

18. Jump, *Budgetary and Financial Administration in an Operating Department of the Federal Government*, 5, quoted in A. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS*, 18-19 (3d ed. 1979).

19. A. WILDAVSKY, *BUDGETING: A COMPARATIVE THEORY OF BUDGETARY PROCESS* 24-25 (1975).

20. *Id.* at 25

other with an eye to preventing unnecessary expenditures. It is not too surprising that congressional committees often cast themselves in the role of overseers who are concerned with rooting out extravagance and waste.²¹ Administrators are constantly requesting more money than they need, because they know that Congress will rarely meet their initial requests however reasonable they might appear to be.²²

Along similar lines, it is worth pointing out that COLA provisions (Cost of Living Adjustments) were adopted by Congress in part because they represented a way to meet enhanced economic requirements without having to negotiate through the various checks and balances that exist in the legislative process.²³ Congress' attempt to find a way of raising the salaries of Congressmen without negotiating through the normal legislative process²⁴ suggests that Congress finds it very difficult to spend money, even for legitimate purposes. In sum, it is questionable whether the institutional arrangements under the Constitution inflate or deflate appropriations legislation.

If the current deficits can not to be explained in institutional terms, how can they to be explained? Perhaps these deficits reflect more a political than an institutional problem. Rather than charging the current deficits to the Constitution generally, and to the separation of powers specifically, perhaps they should be charged to politics — to what public opinion and the prevailing "establishment" wisdom deem essential to the public good. The nation may have made certain public policy choices and have chosen to pursue a course of public conduct even though it is, to say the least, expensive. The "welfare state," as domestic policy has been called at least since the 1960's, is an expensive system to build and to maintain if it is to meet the needs of the disadvantaged Americans.²⁵ Despite this expense, however, evidence indi-

21. *Id.*

22. See Ornstein, *The Misers of Capitol Hill*, *The Washington Post*, Jan. 29, 1984, at D1, col. .

23. Cost of living adjustments for Social Security benefits are triggered by changes in the Consumer Price Index, as Computed by the Dep't. of Labor. 42 U.S.C. §415(i) (1982).

24. See the very able report entitled, "Constitutional Commission to Set the Compensation of Members of Congress," Report of the Committee on the Judiciary, United States Senate, 1984.

25. It is peculiarly American perhaps that the great expense involved in establishing and maintaining a welfare state has to be argued and demonstrated. Although this should have been clear from the outset, and may have been in some minds, one gets the impression from the current

cates that Americans continue to support the government's effort to meet the needs of those who are either temporarily or permanently disadvantaged.²⁶ Thus, politicians seek ways to minimize, reduce or control the costs of the welfare state, one of the most common ways being proposals for some kind of decentralization.²⁷

The widely perceived need to "modernize" the nation's defense system to offset growing obsolescence and the Soviet build-up of forces complicates these attempts to control the costs of domestic policy. The nation is discovering that an adequate national security system is also an expensive proposition. Various alternative policies including a nuclear freeze have been suggested in order to control or reduce the cost of national defense, but, for the near future at least, it seems necessary and beneficial on both the domestic and foreign fronts to spend a great deal of money to guarantee a decent life to all deserving Americans, and to ensure that the nation is as secure as possible from its foreign enemies.

When one examines the budget and the programs which have done the most to "bust the budget," it becomes clear

political debate that this expense represents a failure of the political system generally and of the budgetary system specifically. Consider, for example, the argument of the Grace Commission that by using different *methods* this great expense can be controlled, even eliminated. *The Report of the Grace Commission* (1984).

26. As typically reported, "payments for individuals," the largest part of "non-defense" spending, account for the huge growth in the federal budget outlays between 1952 and 1980, rising from under \$300 billion to about \$750 billion (in constant 1982 dollars). But this growth was hardly accidental or unintended, with the most visible "turning point" being 1965 and the advent of the "Great Society." See D. IPPOLITO, CONGRESSIONAL SPENDING 27 (1981). As has been recognized by almost everyone, there has been a change in priorities over the past twenty-five years from defense spending to social welfare spending. And it would be more than a little misleading to suggest that this change "just happened," i.e., was either unplanned or unnoticed. Therefore, it is also more than a little misleading to suggest that different institutional arrangements would have offset the alleged fiscal excesses which have resulted. Indeed, as indicated immediately above, one can argue that the institutional arrangements in existence have hindered fiscal excesses.

27. All of the last four Presidents — Nixon, Ford, Carter and Reagan — have proposed some kind of decentralization as a way of controlling the federal budget, the most comprehensive proposals coming from Presidents Nixon and Reagan. For a scholarly commentary reflecting the appeal of decentralization as a budgetary tool, see INSTITUTE OF CONTEMPORARY STUDIES, AMERICAN FEDERALISM: A NEW PARTNERSHIP FOR THE REPUBLIC (1982) and especially the article therein by Albert J. Davis, "Fiscal Effects of the New Federalism."

that the current deficits have not been created surreptitiously or via "back door" spending.²⁸ The most expensive programs, Medicare and Social Security, are high priority programs created with extensive scrutiny and debate. These programs are continued openly, which is to say "politically," despite the huge expense they entail. This nation remains steadfast in its commitment to these essential parts of a decent, humane or liberal democracy and, as such, will not jettison them merely because they have become expensive.

The current debate between the liberals and conservatives reflects the political character of the current deficits. Both liberals and conservatives trade charges of "fiscal irresponsibility," but it is not too difficult to see that neither persuasion is willing to sacrifice what it deems essential to the nation's welfare or security for the sake of a balanced budget. The charge of "fiscal irresponsibility" often serves to mask the real issue dividing liberals and conservatives: For what purposes should the nation go into debt? "Fiscal irresponsibility" means spending money unnecessarily, but determining what is "necessary" is to a large extent a political question.²⁹

The nation will have to make certain difficult *political* decisions before it can hope to solve its current budgetary problems. However extensive or novel they might be, institutional changes cannot of themselves solve the deficit problem. Consider the fate of the Budget and Impoundment Control Act of 1974,³⁰ which virtually everyone recognized as a remarkable adaptation of previous congressional practices. The Act established a procedure to allow Congress to determine the priorities of the nation and to encourage Congress to exercise fiscal restraint through centralization of authority in budget committees.³¹ Fiscal restraint did not follow from this Act, leading most commentators to argue that Congress is

28. HOUSE COMM. ON THE BUDGET, 98TH CONG., 2d Sess., THE LINE-ITEM VETO: AN APPRAISAL (1984). See also, Ornstein, *supra* note 22.

29. The size and shape of the budget is a matter of serious contention in our political life. Presidents, political parties, administrators, Congressmen, interest groups, and interested citizens vie with each other to have their preferences recorded in the budget. The victories and defeats, the compromises and bargains, the realms of agreement and spheres of conflict in regard to the role of the national government in our society all appear in the budget. In the most integral sense the budget lies at the heart of the political process.

A. WILDAVSKY, *supra* note 18 at 4-5.

30. 2 U.S.C. §681 (1982).

31. See D. IPPOLITO, *supra* note 26, at 34.

congenitally unable to control spending and, therefore, unable to control the budget.³²

It could well be that the Budget Act failed, however, because it tried to solve institutionally what can only be solved politically. The 1974 Act failed, or fiscal restraint failed to materialize under that Act, because it was based on the assumption that congressional fiscal extravagance is more an institutional than a political phenomenon.³³ Centralized control by itself cannot solve the current deficit crisis, whether that control be centralized in Congress or the White House. The proposed line item veto suffers from the same misdirection as the 1974 Budget Act: it attempts to do institutionally what is best done politically. From this perspective, a line item veto alone can do very little to advance the cause of a balanced budget. Fiscal responsibility will follow from political choices, not from making institutional adaptations.

Americans have a peculiar propensity toward, and even an admirable capacity for, institutional change. When a problem arises, we tend to want to solve it institutionally. One response to the Vietnam War was the War Powers Act which attempted to clarify or to change the relationship between the President and Congress with regard to the use of force overseas.³⁴ Its supporters hoped this legislation would prevent a recurrence of what was deemed an unnecessary and/or unwise military involvement in a foreign country.³⁵ As noted above, the Budget and Impoundment Control Act of 1974 was part of an attempt to clarify or to redefine the relationship between the President and Congress and to retrofit Congress' own budget process to solve fiscal problems.³⁶ Most recently, a line item veto amendment has been touted as the latest institutional change which will help solve the nation's fiscal or deficit problem.³⁷ If, however, the deficit problem is a political phenomenon, then a line item veto, or any other institutional reform itself, will not go very far at all toward solving the problem of fiscal irresponsibility. Insofar as there is a solution, it lies more in political change than in institutional change. For the larger practical purposes, a line item veto amendment is irrelevant.

32. Among numerous studies, one of the best is D. IPPOLITO, *supra* note 26.

33. L. FISHER, *THE CONSTITUTION BETWEEN FRIENDS* 92 (1978).

34. 50 U.S.C. §1541 (1976).

35. *Id.*

36. 50 U.S.C. §1541, *supra* note 34.

37. Wall St. J., *supra* note 5.

III

The argument sketched above does not completely settle the dispute over the proposed line item veto amendment, because one might argue that whatever the general shortcomings of an item veto, it would be a useful tool to give to the President for the sake of budgetary restraint. Although not at the heart of the budgetary problem, the phenomenon described by President Reagan is real. The President must either veto an entire bill to nullify some objectionable items, or sign the measure and contribute to the apparently ever-increasing deficit.³⁸ An item veto, while not sufficient by itself to guarantee fiscal responsibility, would be a noticeable improvement in the federal budgetary process.³⁹

The strength of this argument is that it recognizes the major limitation of a line item veto, that it is in itself insufficient to meet the problem of "fiscal irresponsibility." Its weakness is that it fails to take into account some of the undesirable side-effects of such a veto power and fails to appreciate the existence of the impoundment power, a more promising alternative under the original constitutional distribution of power.⁴⁰

First, regarding the side-effects of such a reform, it is not at all clear that granting the President a line item veto would encourage congressional responsibility or fiscal restraint. Under the existing constitutional arrangement, both Congress and the President must consider the implications of attempts to "pack" appropriations legislation with programs or projects of marginal importance.⁴¹ The President can and does make clear his objections to proposed legislation, often even indicating his intention to veto legislation which does not meet his expectations in detail.⁴² And, contrary to common opinion, such a promise is carried out with some regularity by the President despite the costs involved.⁴³ With a line item veto Congress could act even more irresponsibly than it does at present, packing appropriations bills with questionable items, forcing the President to cut or reduce particular items as he sees fit. Then a congressman could tell

38. See Reagan, *supra* note 1.

39. See especially Palffy, *supra* note 2.

40. See L. FISHER, *supra* note 33.

41. One objectionable provision can delay passage of the entire bill.

42. L. FISHER, *supra* note 33, at 90.

43. President Reagan, for example, exercised his veto power 40 times, as of April 13, 1985.

his constituents that he had promoted a certain project, only to have it vetoed by the President. Indirectly or unintentionally, then, a line item veto might serve to increase rather than decrease the potential for congressional irresponsibility.

Second, a line item veto has significant implications for the balance of power between the President and Congress.⁴⁴ In the typical scenario for use of the item veto, the President reacts to clearly unessential appropriations, but it is not difficult to imagine a President using his new veto power in an "offensive" rather than "defensive" manner. That is, a President would be far more able to bring "recalcitrant" congressmen into line by threatening to veto certain appropriations of particular interest to them and their constituents. With a line item veto presidential government, meaning the clear predominance of the President in determining policy, might become a reality with constitutional underpinnings.

This possibility has been recognized by some of the line item veto's supporters. For example, one of the most puzzling aspects of Senator Alan Dixon's constitutional amendment is that it would allow a simple majority of either house of Congress to override the President's item veto.⁴⁵ This provision is puzzling, because if the crux of the problem is congressional fiscal irresponsibility, it is difficult to understand how such a veto would check Congress. Senator Dixon argues that his proposal is "well-balanced" in this regard: "It will help restrain spending without upsetting the careful set of checks and balances among the three branches now contained in our Constitution."⁴⁶ Perhaps Senator Dixon's description is correct, but if so then balance is the fatal flaw of his proposed amendment. As President Ford discovered when acting under the impoundment provisions of the 1974 Budget Act, Congress will not tolerate fiscal discipline, especially when only a simple majority is needed to avoid it.⁴⁷ It is the requirement of an extraordinary majority that gives the President's veto power meaning, that makes it more than "advisory." A line item veto as proposed by Senator Dixon is merely advisory.

44. *Hearings*, *supra* note 3, at 5.

45. 129 CONG. REC. S836-7 (daily ed. Feb. 1, 1983) (statement of Sen. Dixon).

46. *Id.* at S837.

47. D. IPPOLITO, *supra* note 26, at 154.

IV

This brings to the fore the final issue to be considered here, that of impoundment.⁴⁸ An item veto is unnecessary, because under the original distribution of power made by the Constitution the President may legitimately impound funds.⁴⁹ This practice is preferable to an item veto. There are good reasons for thinking that this practice is arguably constitutional.⁵⁰

The starting point is to recognize that while the separation of powers in the Constitution is intended to achieve a balanced government, this balance is tilted in favor of an independent executive.⁵¹ Independence requires both separateness (a separate mode of election, for example⁵²) and broad powers derived from the Constitution rather than from the legislature.⁵³ An independent executive is by and large indistinguishable from a powerful executive, one able to act unilaterally for the public good. This concept some of the Framers of the Constitution strove, successfully I think, to embed in that document.⁵⁴

An independent or powerful executive does not mean an *all-powerful* executive, one which was intended to displace the legislature and assume its prerogatives. The Framers were keenly aware of the strengths as well as the limitations of legislative bodies. They were aware of what legislatures could do well (deliberate),⁵⁵ of what they could not do well (promote and maintain unity),⁵⁶ and of what they could not do at all (act with secrecy and dispatch).⁵⁷ While the President's powers are broad, they are best understood as intended not so much to displace as to supplement the legisla-

48. Louis Fisher describes four types of impoundment in L. FISHER, *PRESIDENTIAL SPENDING POWER* 148 (1975).

49. For a contrary view of how Congress controls spending, and therefore, budget policy, see D. IPPOLITO, *supra* note 26 at 37.

50. I don't intend this argument to be a definitive defense of the constitutionality of impoundment, but merely to indicate a few factors which suggest its validity.

51. The best secondary source supporting this argument is C. THACH, *THE CREATION OF THE PRESIDENCY, 1775-1789* (1969) and the introduction by Herbert J. Storing. The best primary source remains *THE FEDERALIST* Nos. 69-77 (A. Hamilton).

52. U.S. CONST. art. II, §1.

53. See generally, U.S. CONST. art. II.

54. *Id.* at 52.

55. *The Federalist Papers*, Nos. 10, 60-64.

56. *Id.*, Nos. 10, 51, 67, 68.

57. *Id.*, Nos. 67, 70.

tive powers.⁵⁸ Hence, it is permissible to speak of a government under the Constitution as one of broad and comprehensive powers.

The argument is that the Constitution grants the President broad powers meant to supplement those granted the legislature in a way that makes those powers whole or complete.⁵⁹ It is commonly granted that Congress appropriates and the executive spends. Interpreting this distribution of power in light of the above, it may be argued that the spending power should be deemed to be subject to the presidential power to impound or refusal to spend. Hence, impoundment is arguably one of the President's implied powers.⁶⁰

Assuming that it is constitutional, why is impoundment superior to an item veto? First, because the department most in need of restraint cannot easily override the President's decision not to spend.⁶¹ In fact, constitutionally speaking, Congress has little recourse when the President impounds.⁶² Politically speaking, however, the relationship is different. In the political arena, Congress has the power to affect the President's decisions and the public's perceptions of those decisions. If the first part of this essay is correct — that budget battles are political battles — then the political arena is pre-

58. One example must suffice here. The Congress' powers regarding foreign affairs are "literary" or "declarative," while the president's powers are "demonstrative." Congress is given the power to *declare* war and to grant *letters* of marque and reprisal. The president, on the other hand, *commands* the nation's armed forces, i.e., *makes* war, and also *makes* treaties supported by the Senate. This distribution of power reflects the Framers' conviction that while legislative bodies are best at *deliberating*, executives and especially unitary executives are best at *acting*. Hence, when the nation finds it necessary to act, the president is its foremost officer. Preferably, action should be taken with or preceded by deliberation, but this is not always possible.

59. See U.S. CONST. art. II, §2, art. I, §7.

60. President Ford used impoundments regularly in his battle with Congress. D. IPPOLITO, *supra* note 26, at 153-57.

61. Before the passage of the Budget and Impoundment Control Act, Congress found it very difficult to check the President when he impounded funds. In fact, President Nixon's use of the impoundment power, which most agree was very ambitious, was virtually unchecked by Congress alone. It was only with the aid of the courts that Congress was able to check Nixon. Cf., *Train v. City of New York*, 420 U.S. 35 (1975).

62. This fact has been reinforced by the Supreme Court's decision and opinion in *Immigration and Naturalization Service v. Chadha*, 103 S.Ct. 2764 (1983). It would appear that this decision renders the impoundment control provisions of the Budget Act of 1974 unconstitutional. Of course, this does not mean that Congress is without any constitutional means of controlling impoundments.

cisely where the issue should be decided.

Second, impoundment is superior to an item veto because its limitations are "built in." Impoundment is not explicitly granted to the President by the Constitution. However sound the impoundment power is, it is a power that rests on inference and implication.⁶³ Further, impoundment smacks of prerogative or the power to defy the law, and, therefore, it should be used sparingly by presidents, perhaps only when its use is deemed essential to advance the public interest.⁶⁴ As Hamilton points out in the *The Federalist Papers*, a qualified veto will be used more readily than an absolute one, because the latter offends the sensibilities of republican citizens.⁶⁵ Impoundment, then, is at once more effectual than an item veto and less likely to be abused by the president.

V

Impoundment is not endorsed here because it is thought that such a power would be sufficient in itself to achieve what is being called today "fiscal responsibility" or a balanced budget. As suggested, impoundment should be used selectively to stop only the most flagrant instances of fiscal irresponsibility. If this argument is taken to imply that the Constitution and its distribution of power cannot ensure "fiscal responsibility," so be it. The point is that *no* constitution or constitutional distribution of power is in itself sufficient to such a purpose. This alleged "incapacity" is not a *constitutional* defect, because a constitution, especially the American Constitution, is meant to structure not supplant politics. Or, put differently, whatever the virtues of constitutional government, such government was not intended and should not be understood to render *self-government* unnecessary.

63. See generally, L. FISHER, *supra* note 33. For the Supreme Court's "response," see *Train v. City of New York*, 420 U.S. 35 (1975).

64. G. EDWARDS, *PRESIDENTIAL INFLUENCE IN CONGRESS* 20 (1980).

65. *THE FEDERALIST*, No. 73, at 444 (A. Hamilton) (C. Rossiter ed. 1961).