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The Line-Item Veto: The Best Response When Congress Passes One Spending “Bill” a Year

L. Gordon Crovitz*

There has never been a prop used in a State of the Union address quite like the one President Ronald Reagan used in 1988. He pointed to a stack of paper several inches thick. The stack was the year's Continuing Resolution, a method of putting all government funds into one giant budget bill that the President must either sign or veto and close down the government. President Reagan threatened never to sign another such behemoth. Under the 1974 Budget and Impoundment Control Act,¹ Congress is supposed to pass thirteen separate appropriations bills. It is no coincidence that Congress has repeatedly failed to meet its own legal requirements, that the same law purported to end the presidential impoundment power, and that the federal budget deficit has exploded since the 1974 budget “reform.”

This paper attempts to set out one possible constitutional response by the President to the current practice of presenting the entire budget of the United States in one piece of legislation usually described as a Continuing Resolution. By adopting this procedure of an all-in-one budget “bill,” Congress has effectively vitiated the veto power guaranteed by the presentment clause² by creating a Hobson's choice of signing for all spending or vetoing all spending. This article argues for the exercise of the inherent line-item veto in these circum-

* L. Gordon Crovitz is assistant editor of the editorial page of *The Wall Street Journal*, where his *Rule of Law* column appears weekly. He is the co-editor of *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* (American Enterprise Institute 1989). He received his bachelor's degree from the University of Chicago, a law degree from Wadham College, Oxford, and a J.D. from Yale Law School.

1. Congressional Budget and Independent Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 681-688 (1982)).

2. U.S. CONST. art. I, § 7, cl. 2.

stances as a proportionate response to an abuse of the presentment clause by Congress. Indeed, although the action has attracted little attention, President George Bush, in November 1989, exercised the line-item veto through a signing statement. As described below, it is significant that no one has challenged his legal right to do so.

I. THE GLAZIER THESIS

I'd like to test [the line-item veto] the way it is. I can't quite find the right case. I'm sure you're familiar with the theory that the President has that inherent power, and if I found the proper, narrowly-defined case, I'd like to try that and let the courts decide whether it's there.

-President George Bush.³

The theory that President Bush has embraced was first publicly presented by Stephen Glazier,⁴ in an article published by *The Wall Street Journal*. This and several subsequent articles⁵ set out a new view of the interplay between the constitutional powers of the legislative and executive branches of government in the handling of the federal budget. The issue is important because of the continuing debate over the federal deficit, which has grown inexorably since Congress adopted, over the veto of President Richard Nixon, the Budget and Impoundment Control Act of 1974, which purported to deprive the President of the power to impound funds.⁶

The argument for a line-item veto requires a close analysis of how a legislative provision first becomes a bill and then becomes a law. This process is more complex than commonly thought. Two constitutional clauses govern the question. The first is Article I, § 7, Clause 2, which states in relevant part, "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States" for his signature or veto.⁷ The Glazier thesis relies on the next clause which

3. Interview of President George Bush with Knight-Ridder News Service, White House, (July 25, 1989)(on file with White House Office of Press Secretary).

4. Stephen Glazier is an attorney now practicing in Washington, D.C.

5. *Reagan Already Has Line-Item Veto*, Wall St. J., Dec. 4, 1987, at A14, col. 4; see Glazier, *Line-Item Veto Hides Under an Alias*, Wall St. J., Mar. 18, 1988, at A26, col. 4; Glazier, *A Plank Bush Should Stand On*, Wall St. J., Feb. 12, 1988, at A14, col. 4. Editors at The Wall Street Journal, including this writer, were at first skeptical that there could be an inherent power in the President to exercise a line-item veto. No President had claimed such a power before, and several Presidents had campaigned for a statute or constitutional amendment to grant a line-item veto. Mr. Glazier's thesis was original enough to be published and persuasive enough to be a magnet for constitutional analysis. See, e.g., NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO (1988) [hereinafter PORK BARRELS].

6. "[I]mpoundment occurs whenever the President spends less than Congress appropriates for a given period." Fisher, *Funds Impounded by the President. The Constitutional Issue*, 38 GEO. WASH. L. REV. 124, 124 (1969).

7. U.S. CONST. art. I, § 7, cl. 2.

begins: "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"⁸

This is curious language indeed. Clause 2 refers simply to the requirement that "every bill" be presented to the President. Clause 3 was clearly an effort by the Founders to prevent Congress from eviscerating the President's veto power by using legislative legerdemain to evade presentment altogether, or to describe legislation as a "bill" that is in fact a bundling of many bills as a way to increase congressional leverage over the President to avoid a veto. Under this reading of Clause 3, the phrase "Every Order, Resolution, or Vote" was intended to encompass every then-recognized stratagem for undermining the presentment procedure.

There is strong evidence from the constitutional debate that the Founders intended Clause 3 as a defense of the presentment clause that a President could invoke to maintain the intended separation of powers. On August 15, 1787, James Madison suggested to the Constitutional Convention that Clause 2 alone was inadequate to limit Congress. Madison argued, "If the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes, & c"⁹ He proposed that "or resolve" be added to Clause 2 after "bill," to make the reference to "Every bill or resolve." The use of "& c" indicates that Madison was hoping to find some term of art that would cover any possible legislative technique to avoid calling a bill a "bill."

The reports of the Constitutional Convention indicate that "after a short and rather confused conversation on the subject,"¹⁰ Madison's proposal was defeated. The next day, however, Edward Jennings Randolph offered an alternative provision. His proposal was accepted and became Clause 3, with its reference to "Every Order, Resolution or Vote," which would be subject to presidential veto just as would a "bill" under Clause 2.¹¹ As Stephen Glazier concluded,

In contemplating a bicameral legislature that could act only by majority vote of each house, Randolph had found the broadest possible formula in the language of the day to describe the "etceteras" of "form and name," as yet not invented or described, that Madison feared. It only remained for future Con-

8. U.S. CONST. art. 1, § 7, cl. 3.

9. J. MADISON, JOURNAL AT THE CONSTITUTIONAL CONVENTION, 536-37 (1893) (emphasis in original).

10. *Id.* at 537.

11. *Id.*

gresses to invent it and name it, in order for the President to be able to veto it."¹²

By clarifying the reference in Clause 2 to "bill," it seems likely that the Founders anticipated congressional efforts to evade the risk of a veto in either of two ways. One would be for Congress to label a provision something other than a "bill" in order to avoid presentment at all. The other would be to create a "bill" that in fact contained many more items than it would in the natural scheme of statutory drafting, that is, than it would but for the effort to avoid constitutional presentment. Under this second method, Congress could use bundling of some kind to present the President with a series of bills masquerading as one.

Indeed, the question of who decides what "bill" means goes to the core of the issue. The closely related question of whether the President may veto non-germane riders raises the question of whether the President can unbundle legislation for presentment purposes. For example, if Congress announces that it has presented all of its legislative business in a single "bill" at the end of each session, does a President have to treat this as a single "bill" for veto purposes? Is it closer to the intent of the Founders for a President to swallow all of the legislative pronouncements of a session in one decision to sign or veto, or for him to sign parts and veto other parts? Under any theory of accountable government, it seems clear that, when necessary, the President should break down legislation in such a way as to reflect the Founders' concern for "Every Order, Resolution or Vote."

There is some evidence from the Founders that a President should exercise a veto which is proportionate to the legislation presented to him. In *The Federalist*, Hamilton made an argument about the veto power that makes sense only with a flexible veto, one that could include a line-item veto. Hamilton worried that the risk was that a President would exercise the veto less frequently than he should rather than too often. The wording of Hamilton's argument is significant: "It is evident that there would be greater danger of his not using his power when necessary, than of his using it too often or too much."¹³ Using a veto too often can be understood under the current interpretation of the extent of a possible veto; "too often" might mean, for example, vetoing half of all bills. But what can "too much" mean? It seems likely that this refers to using the veto power not too much in the sense of vetoing too many bills, but instead refers to us-

12. Glazier, *The Line-Item Veto: Provided in the Constitution and Traditionally Applied*, in PORK BARRELS, *supra* note 5, at 9-10.

13. THE FEDERALIST NO. 73, at 497 (A. Hamilton) (J. Cooke ed. 1961). I am indebted for the observation of the Hamilton quotation and the reading of its meaning to Don Mark North, *The Item Veto: Has It Been There All Along?* (August 24, 1990) (paper on file, Pepperdine University Law Review).

ing the veto too much within a single bill—such as, for example, vetoing half of the provisions of a single bill. This excess, of course, would only be possible if Presidents can veto parts of a “bill,” such as by use of a line-item veto.

There is good historical evidence that the veto power of the Constitution as understood by its Eighteenth Century drafters and ratifiers includes what we now call a line-item veto. Professor Forrest McDonald has noted that the body that reviewed legislation passed by the colonies between 1696 and 1776, which was created by His Majesty’s Privy Council and called the Board of Trade, routinely exercised a line-item veto.¹⁴ “During the course of that eighty-year period the Board reviewed 8,563 pieces of legislation,” Professor McDonald has reported.¹⁵ “The members made it clear almost from the beginning, in 1702, that the veto that they were exercising in the name of the Crown was a selective veto, a line-item veto.”¹⁶ Professor McDonald wrote that the Board of Trade vetoed all or part of 469 pieces of legislation during that period.¹⁷

Professor McDonald wrote that after the colonial experience, the states followed a system under which “appropriations were always permissive, not mandatory.”¹⁸ That is, the legislature voted a sum and the governor could spend up to that amount at his discretion—he could spend less but not more. This is the earliest version of the impoundment power discussed below, which is closely related to the line-item veto. Professor McDonald reported that “Anti-Federalist tracts against the Constitution objected to the Constitution, among other reasons, because Article I, § 7, Clause 3 made too strong a line-item veto in the hands of the President.”¹⁹

Secretary of the Treasury Alexander Hamilton and President George Washington continued to take the position that appropriations were permissive and not mandatory, and shifted funding around fairly freely. President Thomas Jefferson refused to spend \$50,000 appropriated by Congress for gunboats. The expectation that we would have a war with Spain dampened while Congress was in recess, but this amounted to a line-item, absolute veto—an impound-

14. McDonald, *The Framers’ Conception of the Veto Power*, in PORK BARRELS, *supra* note 5, at 2.

15. *Id.*

16. *Id.*

17. *Id.* at 2.

18. *Id.* at 3.

19. *Id.* at 5.

ment.²⁰ It is important to remember, however, that the question of the line-item veto of spending by a President would not have been a pressing issue in the first 150 years or so of the Republic. As Professor McDonald noted, it was in the states that real spending occurred.²¹ In 1900, for example, state and local expenditures were ten times the amount of federal spending.²² In this context, it is instructive to recall that the governors in some forty-six states clearly have the power under state constitutions or by legislation to exercise the line-item veto.

Another way of looking at the constitutional provisions is to ask what the word "bill" means. Even before the Glazier thesis, Professor William Clineburg argued that the common assumption that the presentment clause requires the President to choose to sign or veto a "bill" may be incorrect:

[T]his view rests on the assumed premise that any legislative instrument passed by the Congress is a "Bill" *if so entitled*—whether it treats of one subject or of many, unrelated subjects. This assumption is, at best, a tenuous one, and such validity as can be ascribed to it must derive from the notion that a baseless assumption achieves a degree of invulnerability with age and repetition.²³

In the extreme case, consider the result if Congress can simply collect any number of bills into one "bill" and deliver it to the President. This seeming fantasy has in recent years approached reality. Indeed, in the budget context, this is precisely what Congress has done for the past several years. Instead of the required thirteen separate spending bills mandated by the 1974 budget bill, Congress has passed what it labels a "Continuing Resolution" that can include up to all the spending bills for the year. This was precisely the strategy Congress followed in the fall of 1990, when Continuing Resolutions were presented to President Bush. He had the choice either of "closing down the government," which he did over the Columbus Day weekend in October 1990,²⁴ or signing a mammoth spending bill in its entirety.

Yet the clear purpose of the addition of the otherwise otiose Clause 3 was to ensure the accountability that underpins our political system. If Congress can simply overwhelm the President and the public with a single spending provision once a year, responsibility for the budget begins to disappear. Indeed, in recent years the "budget bill"

20. *Id.*

21. *Id.* at 6.

22. *Id.*

23. Clineburg, *The Presidential Veto Power*, 18 S.C.L. REV. 732, 751 (1966) (emphasis added).

24. Statement on the Veto of a Resolution Providing Funding for Continued Government Operation, 26 WEEKLY COMP. PRES. DOC. 1532-33 (Oct. 5, 1990). President Bush proclaimed, "The hour of reckoning is at hand . . . Congress . . . must face up to the shutdown of government services . . . because we could not produce a budget." *Id.*

has in fact been a collection of pieces of paper collected in several cardboard boxes that not one congressman has read in its entirety before being called on to vote for the new budget. Likewise, it is a mockery of the ten-day veto period to imagine that the President, with all his officials, can seriously read the entire document before deciding whether to sign or veto the budget.

We have had several examples of the practical vitiation of the veto power. Once the 1989 budget was approved by Congress and signed by President Reagan, it was learned that the bill contained a patently unconstitutional provision aimed at breaking up a media company that was hostile to the author of the provision, Democratic Senator Kennedy. The provision had the clear and intended effect of forcing Rupert Murdoch to sell either his profitable television stations or his money-losing (and anti-Kennedy) Boston Herald and New York Post newspapers.²⁵ There eventually was litigation invalidating the provi-

25. Provisions inserted into massive budget bills are often only discovered by most congressmen, the executive branch and the public after the bills are passed and signed. The following editorial published by *The Wall Street Journal* in February 1988 describes one such provision, which was aimed at punishing a certain newspaper publisher for political reasons:

There is a lot of talk about Ronald Reagan's legacy of budget deficits, despite the fact that only Congress appropriates. The true legacy is the insight by the liberal leadership that Congress can destroy all presidential influence over the budget by obliterating his veto power. This is done by passing an all-in-one appropriations bill each year, "Continuing resolutions" that can't be vetoed without closing down the entire government.

Secret expenditures snuck into these resolutions, even the 20% pay hike for congressional staffers, do not embarrass leading congressmen. Far from it. We have found an official congressional boast over its budget tyranny. In a remarkable legal brief, lawyers for House Speaker Jim Wright asked a court to dismiss a lawsuit by Rupert Murdoch by proclaiming legislators as the new untouchables. They argue that there is nothing anyone can do to stop dead-of-night provisions that dish out pork or that use the budget process to attack Mr. Murdoch's New York Post and Boston Herald.

The attack on Mr. Murdoch, you will recall, came in the form of an appropriations rider prohibiting any Federal Communications Commission expenditure to extend any waivers of the cross-ownership rule "currently in effect." That affects only Mr. Murdoch, who on Saturday arranged a forced sale of the Post. His lawyers told the Federal Court of Appeals in Washington, D.C., that this violated several constitutional provisions, including equal protection, due process, the First Amendment, the rule against bills of attainder and the takings clause.

The most intriguing argument to us, though, was that the provision violates the presentment clause, which says that the President must have the opportunity to veto all legislation. "The appropriations process is used as a Trojan Horse to smuggle new substantive legislation into being," the Murdoch brief argued, "without providing the President a meaningful option to veto it." This is very similar to the argument made by our contributor Stephen Glazier that a President faced with a \$604 billion, all-in-one continuing resolution could legitimately assert a line-item veto and blue-pen offending provisions. The

sion, but the point is that in a massive, all-in-one budget all sorts of mischief becomes possible. There is little likelihood that a President or his staff would discover such a provision in the limited time before a President must choose between signing and vetoing.

Merely identifying a continuing abuse of the budget process by Congress, even an abuse that raises constitutional questions, does not alone answer the question of what response a President can or should make. However, once we see that a single spending bill violates the very purpose which Clause 3 was added to serve, the only question that remains is what constitutional powers the President can invoke to force Congress to cease this practice. It is here that invocation of the inherent line-item veto may seem an appropriate, measured, and proportional response to congressional evisceration of the President's powers under the presentment clause.

II. THE IMPOUNDMENT POWER

One alternative is the more radical step of exercising impoundments in violation of the 1974 law, arguing with good evidence that

White House has cited the Kennedy attack on Mr. Murdoch as an example of a line item it would have liked to veto.

There is some precedent for courts disciplining the political branches for usurping the other's legislative authority. There are cases against the aggressive use by Presidents of the pocket veto. Irony of ironies, Teddy Kennedy himself won one of these cases, when in 1974 the courts invalidated a pocket veto during an intrasession adjournment because one house had arranged a system to receive the veto message.

The Murdoch brief pointed out that the continuing resolution has precisely the same problem on the other side. "Just as the President is obliged to exercise the pocket-veto power in accordance with both its letter and spirit," the brief said, "so Congress is obliged to respect both the letter and spirit of the presentment clause."

To all this, the brief for Rep. Wright says simply that substituting last-minute continuing resolutions for separate budget bills has "been Congress' practice of late," and for that reason alone is perfectly proper. The brief asserted: "There can be little dispute over Congress' right to deal with appropriations as it decides," even if it nullifies the veto threat. Congress has become the son who kills his parents, then pleads for leniency on the grounds that he is an orphan.

Rep. Wright is lucky that the court probably won't have to reach this presentment-clause issue to rescue Mr. Murdoch. The judges could invalidate the Kennedy provision on a narrower ground. The Supreme Court has said that constitutionality of the crossover rules depends on FCC discretion to waive the rules when a newspaper otherwise could close. The Kennedy provision denies such discretion. Still, we wouldn't be surprised if the court had something to say about congressional budget power plays. Especially because, coincidentally, two of the three judges hearing this case are Laurence Silberman and Stephen Williams, who signed the recent opinion invalidating "independent counsels" for violating separation of powers.

Outside of the congressional leadership, patience is wearing thin on pork-barreling continuing resolutions. There are even congressmen who say they want to pass separate budget bills this year. We'll see. What seems more likely is that either a President or the courts or both someday will have to rescue the veto by forcing Congress to give up its arrogant ways.

Legislating Trojan Horses, Wall St. J., Feb. 22, 1988, at 20, col. 1.

impoundment is an inherent executive branch power that cannot be removed by statute. Instead, it has been argued that the failure of Presidents to invoke a line-item veto during a period when they routinely exercised the impoundment power is somehow evidence that there is no line-item veto power. One such criticism is in the form of an observation that apparently, until recently, no one thought the line-item veto existed. Charles Cooper, former Assistant Attorney General of the Office of Legal Counsel, has written that those who assert that there is an inherent line-item veto "are met first with the question: Why has no President in 200 years noticed this fact?"²⁶ The simplest answer is that until 1974, Presidents exercised a power far broader than a veto over spending: the impoundment power. At the very least, the fact that the impoundment power existed for nearly 200 years rebuts any negative inference that could be drawn from the fact that no President before George Bush asserted or exercised an inherent line-item veto.²⁷ Impoundment differs from the line-item veto in its absolute character. Unlike other vetoes, there is no opportunity for Congress to override an impoundment. There is no specific constitutional authority for impoundment, although it may be inherent in the executive power as it was understood at the time of the Founding; that is, appropriations were considered permissive but not mandatory. Whatever the justification for the impoundment power, its frequent use by Presidents until 1974 explains why no President was left with the choice of line-item vetoing a spending bill or facing omnibus appropriations that Congress took care to make inevitable under the then-current political circumstances.²⁸

In more recent years, every President, from Franklin D. Roosevelt through Richard Nixon, used the impoundment power to limit spending. President Roosevelt, for example, impounded \$500 million that had been appropriated for public works.²⁹ President John Kennedy cut spending by six percent through the impoundment power.³⁰ President Lyndon Johnson in 1966 alone impounded some five billion

26. Cooper, *The Line-Item Veto: The Framers' Intentions*, in PORK BARRELS, *supra* note 5, at 29.

27. Glazier, *Line-Item Veto Hides Under an Alias*, Wall St. J., March 18, 1988, at 26, col. 4. Presidents Washington and Adams exercised the impoundment power by "mak[ing] specific spending decisions." *Id.*

28. See Comment, *Addressing the Resurgences of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 695-98 (1988).

29. Crovitz, *Introduction*, in PORK BARRELS, *supra* note 5, at x.

30. *Id.*

dollars.³¹ It was when a politically weakened President Nixon attempted to impound twelve billion dollars in appropriated funds, including six billion dollars of an eleven billion dollar sewage treatment bill, that Congress passed the budget law in 1974, over his veto, that purported to take away the impoundment power.³²

III. THE LINE-ITEM VETO PASSES ITS TEST

There is even a case to be made that President Bush has already exercised the line-item veto. One provision in the Fiscal Year 1990 appropriations act purported to limit the activities of the Office of Management and Budget, an office that reports directly to the President. It included a rider that prohibited the President from spending any funds to apply a cost-benefit analysis to agricultural marketing orders.³³ J. Gregory Sidak has noted that this provision is in apparent violation of the recommendation clause,³⁴ under which the President shall make recommendations to Congress on matters of his choosing.³⁵

In his signing statement of November 3, 1989, President Bush exercised what appears to be a line-item veto. He wrote that the muzzling restrictions on the Office of Management and Budget "raise constitutional concerns because they impair my ability as President to supervise the executive branch."³⁶ President Bush wrote that he had the authority to order executive branch officials to "implement the provisions [of the appropriations rider] in a manner consistent with the Constitution."³⁷

Relying on *INS v. Chadha*,³⁸ President Bush also effectively line-item vetoed a legislative veto provision:

In addition, numerous provisions of H.R. 2989 purport to condition my authority, and the authority of affected executive branch officials, to use funds otherwise appropriated by the Act on the approval of various committees of the House of Representatives and the Senate. These provisions constitute legislative veto devices . . . Accordingly, I will treat them as having no legal force of effect in this or any other legislation in which they appear. I direct agencies confronted with these devices to consult with the Attorney General

31. Glazier, *Line-Item Veto Hides Under an Alias*, Wall St. J., March 18, 1988, at 26, col. 4.

32. Crovitz, *Introduction*, in PORK BARRELS, *supra* note 5, at x.

33. Treasury, Postal Service and General Government Appropriations Act of 1990, Pub. L. No. 101-136, § 1, 103 Stat. 783, 793 (1989).

34. U.S. CONST. art. III, § 3.

35. Sidak, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U.L. REV. 437, 458 (1990). See generally Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079 (1989).

36. Statement on Signing the Treasury, Postal Service and General Government Appropriations Act of 1990, 25 WEEKLY COMP. PRES. DOC. 1669, 1670 (Nov. 3, 1989).

37. *Id.*

38. 462 U.S. 919 (1983)(wherein the Supreme Court held that a legislative veto provision was unconstitutional).

to determine whether the grant of authority in question is severable from the unconstitutional condition.³⁹

President Bush included similar declarations in subsequent signing statements making clear that he would refuse to enforce certain provisions in a bill, yet enforce the remainder. Along with the legislative veto problem, for example, President Bush also vetoed parts of a State Department authorization bill stating that nine separate provisions unconstitutionally violated his foreign-policy powers under the Constitution.⁴⁰ These examples illustrate one kind of the line-item veto — where the President considers the provisions unconstitutional. It would be a different sort of line-item veto to reject a provision on the ground that it included unwise or foolish spending, but there is no obvious reason why a line-item veto could be asserted by a President for constitutional reasons and not for prudential ones.

IV. OTHER INHERENT EXECUTIVE BRANCH BUDGET AUTHORITY

The debate about the line-item veto cannot occur in a constitutional vacuum. Ultimately, the question is what political steps a President is willing to take in order to protect his constitutional powers and duties. In this respect, the mirror issue of the line-item veto in the context of spending is the President's own power of the purse to order funding that is not appropriated. To the degree that such a power exists and that Presidents have used such a power, there may be some lessons in the powers of a President to defend his ability to stop expenditures through a veto.

The appropriations clause of the Constitution states that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."⁴¹ This clause has been generally understood to establish a "sole power of the purse" by Congress through legislation. J. Gregory Sidak has noted, however, that "by Law" can include as sources of legal legitimacy not only legislation but also the "Constitution, . . . treaties, the common law and contract."⁴² Indeed, the Justice Department has taken the position that there are inherent constitutional powers in the executive branch to order or authorize the expenditure of funds even without prior congressional approval. President Abraham Lincoln's expenditures at the outbreak

39. 25 WEEKLY COMP. PRES. DOC., *supra* note 36, at 1670.

40. Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 26 WEEKLY COMP. PRES. DOC. 266-68 (Feb. 16, 1990).

41. U.S. CONST. art. I, § 9, cl. 7.

42. Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1167-68.

of the Civil War⁴³ are a well known example.

Attorney General Benjamin Civiletti, who served under President Jimmy Carter, wrote an opinion in 1981 for the Office of Legal Counsel, Department of Justice, that justifies many incidents of presidential authorization for funding. These include many occasions of presidential funding authorization during short periods of suspended budget authority when Congress temporarily failed to pass new budgets in time to replace old budget authority.⁴⁴ One justification is purely statutory. The Anti-Deficiency Act provides that “[a]n officer or employee of the United States . . . may not accept voluntary services for [the United States] or employ personal services exceeding that authorized by law, except for emergencies involving the safety of human life or the protection of property.”⁴⁵ The emergency exception for expenditures to protect life or property is a statutory authorization for presidential approval of spending that has not been specifically authorized by Congress.

There is a good case, however, that this statutory delegation to the President merely codifies an inherent constitutional power in the President. Attorney General Civiletti explained that the Anti-Deficiency Act “is not the only source of law or the only exercise of congressional power that must be weighed in determining whether the President has authority for an initiative that obligates funds in advance of appropriations.”⁴⁶ Instead, Mr. Civiletti wrote, “[t]he President’s obligational authority may be strengthened in connection with initiatives that are grounded in the peculiar institutional powers and competency of the President,” which might include, for example, “the conduct of foreign relations essential to national security.”⁴⁷ Thus, Mr. Civiletti concluded that the authorized “by Law” language of the appropriations clause would include “those obligations necessarily incident to presidential initiatives undertaken within his constitutional powers.”⁴⁸

If the President has inherent constitutional powers to order appropriations, this provides a check against possible congressional efforts to prohibit appropriations to pay for core executive branch functions.⁴⁹ Likewise, there may be an inherent power in the President that enables the executive branch to defeat congressional efforts to

43. *See id.*, at 1189-90.

44. Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. Off. Legal Counsel 1, 4-5 (1981) [hereinafter *Civiletti Memorandum*].

45. 31 U.S.C. § 1342 (1988).

46. *Civiletti Memorandum*, *supra* note 44, at 6.

47. *Id.* at 6-7.

48. *Id.* at 7.

49. Sidak, *supra* note 42, at 1193. One example is that Congress could not prohibit spending for a pen that the President would use to veto a bill.

usurp the other political branch's spending powers. The inherent line-item veto thus gains justification as analogous to the inherent power to authorize appropriations when necessary to protect the constitutional design of separated powers and duties.

V. CONCLUSION

The question of whether the President has an inherent line-item veto power has never been clearly determined by any court, although there have been dicta suggesting that no such power exists.⁵⁰ There is a good case that the power does exist. There is also a good case that the invocation of the line-item veto is a proportional response to the congressional practice of evading the presentment clause by offering last-minute, all-in-one spending bills that give the President the dubious choice of signing or closing down the government. Powers may exist in the text or the structure of the Constitution, but unexercised powers exist only in the abstract. A President has a duty to enforce the presentment clause as it was intended, which includes defending his veto power. Invocation and exercise of an inherent line-item veto may be the best, and perhaps only, way for a President to re-establish the political accountability that the Founders' Constitution intended each political branch to have for the federal budget and its deficits.

50. See, e.g., *Lear Singler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988)(line-item veto does not exist in federal constitution), *reh'g ordered*, 863 F.2d 693 (9th Cir. 1988), *withdrawn on other grounds*, 893 F.2d 205 (9th Cir. 1989) (per curiam).

